# VICTORIAN BAR NEWS

No. 143 AUTUMN 2008

## Re-opening of Court 4

WELCOMES AND FAREWELLS
OPENING OF THE LEGAL YEAR
BUILDING CASES – A NEW APPROACH
THE SECOND BITE OF THE CHERRY
WOMEN AT THE BAR
PIZER'S THIRD EDITION LAUNCHED
ESSOIGN CLUB CHRISTMAS PARTY
WIGS AND GOWNS REGATTA

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# VICTORIAN BAR NEWS

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Cover: The restored Court 4 in the Supreme Court, which re-opened on 7 April

Welcome: Justice James Judd

Welcome: Judge Katherine Bourke

Welcome: Judge Philip Misso

Farewell: Justice Alex Chernov

Opening of the Legal Year

New silks ceremonies

Raising the bar

Wigs and Gowns Regatta

Essoign Club Christmas Party

# Rights of victims

The 'cab rank rule' and the existence of Legal Aid – and in former times the role of the Public Solicitor – have ensured that persons charged with criminal offences have the opportunity of being legally represented. Often the result of such representation causes unhappiness to the victims or, in the case of alleged homicide, to the relatives of the deceased victim.

The unhappiness is caused sometimes by the acquittal of a person of whose guilt the jury has not been satisfied beyond reasonable doubt but, more commonly, by the imposition of a sentence which the victim (or the relatives of the victim) consider is inadequate.

The use of victim impact statements to aid in the sentencing process has become commonplace. The views of the victim or of the victim's relatives are commonly sought by the media after sentencing has occurred, and, sometimes, even after acquittal.

In some jurisdictions mandatory sentencing has been imposed to ensure that 'soft' judges will not be able to impose what the community may regard as inadequate sentences. Even in Victoria, which in this respect is not the most benighted jurisdiction in the country, there has been talk of setting standards which will ensure that the 'tariff' in respect of offences of violence is increased.

All of this agitation is concerned with, or stems from, a concern with the rights of victims. All members of the community have rights. Victims are members of the community and as such they do have rights. But those rights are not relevant to the sentencing process. In the sentencing

process it is the rights of the person being sentenced – having proper regard to the protection of the community – that are in issue.

Victims understandably want retribution and in few cases will they see the retribution imposed by the state as being adequate. However, the rights of victims do not include a right to retribution. When we come to sentencing we are dealing not with the rights of the victim, but with the rights of the person being sentenced. We are concerned with a decision which will deprive him or her of many of his or her rights.

To talk of the rights of criminals involves a misconception. There is no 'criminal class' to which specific rights or disabilities attach. All members of the community are potentially criminals. All members of the community have rights as such. To quote Robert Richter QC: 'It is nonsense for people to talk about the rights of criminals. Criminals have no rights. Citizens have rights.'

Those who talk about sentences being too lenient are persons who on the whole know little of prisons or of how they are run. More importantly they do not know – or worse still do not care – that prisons are not safe.

It is one thing to argue for increased periods of confinement, which consists merely of deprivation of liberty. It is another thing to argue for increased periods of confinement in conditions which provide no adequate safety against assault, rape and even murder.

Those who argue for increased prison sentences should consider how much money they want the state to spend on our prisons. If sentences are increased by, say 20%, it automatically increases the prison population by 20%. That requires an increase in prison accommodation, and should require an increase in prison staff, of 20%.

Our prisons are already inadequately staffed (or alternatively the quality of the staff is inadequate); they are unsafe – especially for the young and vulnerable.

Few of those who seek harsher penalties are aware of the dilemma that confronts the County Court Judge faced with the prospect of sentencing a young man or woman to prison. Judges know our prisons are not safe; that prison inmates who are young and vulnerable (and even those who are not so young) are liable to be raped by older and more vicious criminals who in every sense of the term cohabit with them in prison.

There have been many complaints about the dangers of unmanned railway stations and of railway trains without guards or

conductors. No one complains, however, of inadequate supervision of our prisons, even though they are much less safe than our unmanned railway stations.

It is hard to believe that a community can describe itself as civilised if it locks people up and then takes inadequate steps to ensure that the incarcerated are safe. Yet this is precisely our society today.

No sentence imposed in our courts reads 'I sentence you to eight years imprisonment, to a 15% chance of being seriously assaulted during those eight years, a 5% chance of being raped during those eight years and a 1% chance of being murdered during those years, in one of the State's prisons'. Perhaps the victims of crime would be happier if that reality were spelled out in the sentence.

There is insufficient money, manpower and concern available in respect of our prison system. We need to spend the money and supply the manpower to make them safe. If a sentencing judge knew that the offender was to be incarcerated in a place where the State could guarantee his or her safety, judges might then be less reluctant to impose immediate prison sentences and from this might flow a higher sentencing 'tariff'.

Our system is not perfect. Innocent people are convicted and sentenced to prison. In most cases it is not possible to identify which are the innocent. But clearly it does happen – and there are many well publicized examples. But they are only examples. It is hard enough to lose one's liberty for something one has not done. How much worse is it to be imprisoned in the inadequate safety of Victoria's prisons, even though they are not 'bad' by national or international standards.

It appears that no government is prepared to spend the money required to make prisons safe. How then can our community or our politicians complain that the judiciary impose 'inadequate' or 'soft' sentences. It is time for those who criticise the judiciary for lenient sentences to put their money where their mouths are.

## GAY WHALES

The word 'gay' in its popular sense today means something different from the true meaning of the word 'happy, joyful'.

The whales in the Southern Ocean have no cause to be gay at the moment. The Australian Government has protested; it has taken photos of what is described as 'indiscriminate killing' by the Japanese whaling fleet but it seems that the killing of whales in the Southern Ocean continues.

Surprisingly, although most Australians are opposed to the Japanese whaling, there has been no spontaneous reaction, such as there was in the case of French nuclear testing in the Pacific some years ago. There has been no boycott of Japanese products.

It may be that if such a spontaneous reaction were to develop, it might be followed in other countries. If so, this *might* have *some* effect on the determination of the Japanese to persist. Worth considering?

THE EDITORS

# 'Change is constant… change…is inevitable'

The full text of this passage from Benjamin Disraeli's Edinburgh speech after passage of the *Second Reform Act (1867)* is: 'In a progressive country, change is constant; and the great question is not whether you should resist change which is inevitable, but whether that change should be carried out in deference to the manners, the customs, the laws, the traditions of the people, or in deference to abstract principles and arbitrary and general doctrines'.

Allowing for the partisan political rhetoric in Disraeli's dichotomy between the national and the philosophical, there is contemporary resonance in the competition policy theories that underlie criticisms of the institutional framework of the independent Bars over the last more than 15 years.

Rooted in the firm foundation of the role and traditions of the independent Bar in the administration of justice, we have grown and developed through the various legislative changes in Victoria, from the *Legal Profession Practice Act 1891* (the Amalgamation Act) through, most recently, the *Legal Practice Act 1996* and the *Legal Profession Act 2004*.

Governments are driven by their perceptions of societal stresses and by what they judge to be economic and political imperatives.

The Bar brings to the process of reform our professional experience and expertise, our understanding of processes involved in the administration of justice, not only in the courts of law, but in the developing fields of alternative dispute resolution and their place as, not only alternatives, but also adjuncts to the processes in the courts.

I spoke in my last 'Cupboard' of the Bar Council 30 November 2007 report, *Reform of the Civil Justice System: A Major Opportunity to Improve Justice and Boost the Victorian Economy,* for which the Bar engaged McKinsey & Co as consultants ('the *Reform of the Civil Justice System* Report' or 'the Report'). That Report adds an economic perspective and analysis and rationale for reform in connection with the Civil Justice Review. I spoke also of the co-operative work of the Bar involving and engaging with the Legal Services Board, the Victoria Law Reform Commission, the Chief Justice and the Courts, the Law Institute and, of course, the Government.

In his Opening of the Law Term address this year, New South Wales Chief Justice Spigelman claimed pre-eminence for Sydney in commercial legal practice and dispute resolution: 'In this regard, Sydney is the only Australian city that can compete with Hong Kong, Singapore and Shanghai. If we try to spread the work around Australia, no one will get anything'.

The opportunity and vision for Victoria outlined in the *Reform of the Civil Justice System* Report does not depend on any sort of sympathetic spreading of commercial work around Australia.

The Report sees a key reason for the success of the Woolf reforms in England in significant changes in culture and practice across the whole profession, and that is what is needed here in Victoria from every member of this Bar, from every solicitor, and from our Judges, Masters, Judicial Registrars and Magistrates.

I have no doubt that Victoria has the resources and potential. We certainly have the foundations and tradition of excellence at the Bar, in the Courts, in the wider legal profession, and in the legal academy. In this latter regard, Professor Tim Lindsey, a practising member of this Bar, is Director of the Asian Law Centre and on the academic staff of the Centre for Corporate and Securities Law at the Melbourne Law School.

The Report focuses on reform of the Civil Justice System. The Bar continues to work with the Victorian Justice Statement Criminal Law Advisory Group on reforms in Criminal Law and Procedure – working now on the draft of a very substantial Criminal Procedure Bill.

An important part of the overall strategy for the Bar in relation to Criminal Law practice, and now also Family Law practice, is the seemingly intractable problem of Legal Aid funding.

A major update of the landmark 1997 Bar Council Review of Barristers' Fees Scales in Criminal Matters, prepared by Price Waterhouse Urwick, is near completion.

On 12 March, I wrote to the Commonwealth Attorney, Treasurer and Finance Minister on the February cuts by VLA to its Family Law funding – in particular, funding for Independent Children's Lawyers and for instructing solicitors attending court across the board in Family Law matters. That letter was copied to all Victorian Senators and Members of the House of Representatives. Senior Vice-Chairman Paul Lacava SC spoke on these matters at the media conference co-sponsored by the Bar with the Law Institute the next day.

Another area of change is in the establishment of national accreditation and practice standards in mediation. Based on the unanimous recommendation of the Bar Dispute Resolution Committee, the Bar Council has declared the Bar to be a Recognized Mediator Accreditation Body ('RMAB') under the National Mediator Accreditation System ('the National System') and accordingly is phasing out the Bar's independent Mediator Accreditation Scheme.

NADRAC, the National Alternative Dispute Resolution Advisory Committee, which advises the Commonwealth Government and Commonwealth Courts on Alternative Dispute Resolution, has been working towards a national system for many years. The Victorian Parliament Law Reform Committee has been working on an Inquiry into ADR and its regulation by Government in Victoria since its March 2007 reference on that subject.

The Law Council of Australia, on behalf of the Australian legal profession as a whole, and this Bar independently on our own behalf made submissions on the proposed National System. We also made substantial written and oral submissions to the Victorian Parliament Law Reform Committee opposing government regulation.

Despite a number of concerns with its form, by the end of last year it became clear the National System would proceed, and that the responsible course was to participate in that change and to work within it to address the outstanding issues.

The Honourable Justice Kellam of the Victorian Court of Appeal, as President of NADRAC, opened the meeting of the National Mediation Accreditation Committee on 5 March in Canberra – which Committee had been established by NADRAC.

The Bar has two representatives on that Committee. Other legal professional bodies on the Committee include the Law Council of Australia, the New South Wales Bar and New South Wales Law Society, the Queensland Bar and Queensland Law Society, the Law Societies of South Australia and Tasmania, and the Law Institute of Victoria – and the Federal Court of Australia is represented by its Principal Registrar.

The National Committee resolved that only RMABs fully functioning as such by 1 August 2008 would be eligible for seats at the next meeting of the National Committee in September.

The Bar's continuing participation on the National Committee, and on the National Committee working groups to be established by NADRAC, is important because that Committee is to review and develop the National System and to establish the National Mediator Accreditation Body that is to operate from 2010.

The National System will be the standard, in particular for court-connected mediation with its statutory immunity based, in Victoria, on the immunity of a Supreme Court Judge, long before then – and the Bar needs to accredit its mediators to that standard. It needs also to participate in shaping that system and the national regulation envisaged from 2010.

The dates fixed for the Bar's transition to the National System will meet the 1 August 2008 deadline, with accreditations under the Bar's independent system continuing only until 30 June 2008.

I thank Michael Heaton QC, who chairs the Bar Dispute Resolution Committee, and Danielle Huntersmith, Vice-Chair of the Committee, who chairs the Accreditation Sub-Committee for their extraordinary work in connection with the complexities and hard decisions involved – and, of course, the members of their Committee and Sub-Committee – in particular Henry Jolson QC who also attended the National Committee meeting in Canberra, and who chaired the recent CLE session to explain the changes and transition to the National System.

On 1 April, the new framework for Continuing Professional Development ('CPD') in the practice of law in Victoria comes into force. The current Bar Compulsory Continuing Legal Education Rules 2007 continue to regulate obligations for the 2007–08 CLE year and the declaration in practising certificate renewal applications due by 30 April.

The major shift is that there will now be three sets of CPD Rules – head rules of the Legal Services Board over the Rules of the Bar and Law Institute. The Board will delegate its functions under the head rules, which govern compliance, to the Bar and Law Institute.

I thank Jeremy Ruskin QC and the members of his CLE Committee. Ruskin QC met with policy officers of the Legal Services Board, explained the Bar Scheme to a meeting of the LSB Continuing Education Committee, and guided the Bar's contribution to the process of change which has preserved the integrity of the Bar Scheme, consistently with the shift to the national model of CPD.

I have mentioned some of Chief Justice Spigelman's remarks at the Opening of the Law Term in Sydney. It would be remiss not to mention the Opening of the Legal Year observances in Melbourne. The Victorian Branch of the International Commission of Jurists added a Community Ceremony at Queen's Hall, Parliament House to the rich variety of religious observances at St Paul's Cathedral, St Patrick's Cathedral, Temple Beth Israel and the Buddhist Observance – and, of course, the Victoria Law Foundation's Legal Laneway Breakfast.

Judges, magistrates, barristers, solicitors and members of the community support these observances, and the Bar is pleased to publish addresses from them in this edition of *Bar News*.

This was the last Opening of the Legal Year service for the Anglican Dean of Melbourne, the Very Reverend David Richardson, who was part of the revival of the ecumenical observance brought about by the efforts of Justices Nettle and Dodds-Streeton these last three years. Fittingly, heads of other churches attended, and the Most Reverend Bishop Peter Elliott, Auxilliary Bishop of the Roman Catholic Archdiocese of Melbourne, preached a powerful sermon on *Truth and the Law*.

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# Justice Statement II

Nearly four years ago I released the Justice Statement which provided a blueprint of the Government's program of reform for Victoria's justice system.

The Justice Statement outlines the various ways in which the legal system needs to be modernised and the rights of individuals protected. It provides a ten-year vision with a work agenda for the first four to five years.

We have achieved much but there is more to do. It is time to develop a new work program so the vision of the Justice Statement can be fully realised. I want to refresh the reform agenda with the aim of further developing new ways of doing things that will make our justice system more accessible and affordable.

Work has already begun on looking at new initiatives and ideas that build on the work of the first Statement.

The Justice Statement II will continue the themes of modernising justice and addressing disadvantage but will also introduce two sub-themes: reducing the cost of justice and creating a unified and engaged court system that will be more responsive to public needs and expectations.

One of the major initiatives I am keen to explore, as part of the Justice Statement II, is the development of alternative or complementary processes to the current adversarial system.

While the adversarial system of justice has generally served us well, in some cases it can lead to lengthy and costly court proceedings. In such a system, the problem-solving nature of justice is often lost to the theatrics of court melodrama,

with a fist-thumping and last-person-left-standing mentality.

As we enter a new era, where the public demand more accessible and affordable justice, the adversarial system is not necessarily the answer to all problems and we have to find new and innovative ways of doing things.

This is why an Alternative Dispute Resolution strategy, including justice-led mediation, is central to reducing the cost of justice and is at the heart of the Justice Statement II.

We aim to strengthen ADR in Victoria both in relation to courts-based mediation and community and business oriented ADR. There is no doubt in my mind that Victoria has not done all that it could to promote this effective form of dispute resolution and it will continue to be a very high priority.

We will also be looking at the reform of civil procedure in the courts. The Victorian Law Reform Commission is preparing a number of recommendations relating to cost management, discovery, pre-litigation processes, rules for class actions and ADR. We must turn our minds to the creation of an efficient and effective civil justice system in Victoria.

Under the Justice Statement II we will continue reforms to modernise our courts. It is my view we need to continue to work towards a unified court system – one that engages with the community and is responsive to legal needs without effecting impartiality and independence.

An important reform being considered is an overhaul of courts legislation. Currently legislation regarding the Supreme Court and the County Court is unclear and confusing, and while the Magistrates Court Act is much more comprehensive, it has become too unwieldy.

It is proposed to consolidate these Acts which would provide for each of the three jurisdictions but would have common provisions for common functions. It is important that we have a unified justice system, at the cornerstone of which is a single piece of courts legislation.

We are also considering mental health issues as they impact on the justice system. About one-third of defendants who enter the courts and corrections systems have some history of mental illness.

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*Supreme Court*

# Justice James Judd

Address by Peter Riordan SC, Chairman of the Victorian Bar Council on Wednesday 12 March 2008

I appear on behalf of the Victorian Bar to welcome your Honour's appointment to this Court.

The defining quality of a judge is surely that he or she cares deeply about justice. You do and have demonstrated – in 27 years practice at the Bar – qualities of integrity, calm, sound judgment, and a mastery of law, tactics and strategy in the most difficult and complex cases.

As Senior Counsel assisting the Commissioner, Sir Daryl Dawson, in the Longford Royal Commission – his Honour said that the efficiency and smooth running of that Commission was, in no small measure, due to your efforts.

His Honour commented particularly on your sensitive management of witnesses deeply affected and traumatised by the explosion.

Your late father was a Seventh Day Adventist Pastor in Papua New Guinea, so you began your schooling at the European school in Madang on the north-eastern coast of Papua New Guinea.

In your youth in Papua New Guinea, you learned skills that would hold you in good stead at the Bar, such as the art of fishing …With a stick of gelignite.

When the family returned to Australia, you completed your schooling at the Adventist school in Warburton, and at the Lilydale Academy.

You began the Law/Jurisprudence combined course at Monash, but lost your way in the wilderness of political science.

You completed just the Bachelor of Jurisprudence degree, and then headed off to South Australia.

For more than five years, you worked at what fell to hand in South Australia. For example, you worked as a builder's labourer – and you re-built Sturt's Cottage – the cottage, not of Charles Sturt the explorer, but of his young brother who rejoiced in the Christian names 'Evelyn Pitfield Shirley' – even in the 1800s that must surely have been a challenge.

Sturt's cottage is in Willunga, on the edge of the McLaren Valley.

More significantly for the future, you also worked at the Coriole Vineyards in McLaren Vale. Significant, of course, because of your own activity in growing grapes and olives on the Mornington Peninsula.

You re-enrolled at Monash in 1977. On fire to make up lost time, you completed the LLB in 18 months, working through vacations.

You served articles with Stephen Rosten who had his own firm in Sunshine.

Towards the end of your articles year, you married and began your long and continuing relationship with St Hilda's College within the University of Melbourne – beginning as a resident tutor, and later senior tutor.

Your continuing service to St Hilda's has been recognized in you being made a Fellow of the College in 1997, and being appointed to the Council of the College in October 2007.

Within a few months of admission to practice, you became associate to Mr Justice Alfred King of this Court.

In your 18 months with the Judge, you also completed a Master of Laws degree at the University of Melbourne.

You came to the Bar, and read with Dr

Peter Buchanan (now Justice Buchanan of the Court of Appeal).

You were in one of the very early Readers' Courses – the first was in March 1980, and you were in the March 1981 course, with Sue Kenny (now Justice Kenny), Felicity Foster (now Judge Hampel) and Kate McMillan (Now SC and former Bar Chairman).

You began at the Bar, like everyone else, taking whatever came.

Quite early in your time at the Bar, you were involved in a case which received attention on the front page of the *Truth* newspaper – not quite in the way a young barrister might choose. An offender having committed some offence of indecency had kindly given his name as James Judd,

barrister. You were informed of this when you received a visit in chambers from a couple of policemen who asked you to accompany them to the station.

It was all quickly sorted but it may have been then that you decided that crime was too vexing and you very soon established yourself as a commercial and revenue barrister.

In your time at the Bar, you have developed a close and productive association, with John Walker QC.

John Walker remembers very clearly your first meeting. He was doing a complicated tax fraud committal with Julian Burnside as his junior. You were opposed to him as junior to Ron Merkel QC.

There had been some submissions from your side – but nothing that worried Walker.

Came the luncheon adjournment, and Merkel advised the Court that he would not be back – that his junior would close.

John Walker smiled. He took his junior, Burnside, to a pleasant lunch, and told Burnside there was nothing much more to do – nothing to worry about.

A big mistake to underestimate Judd.

Walker and Burnside's contented post-prandial smiles fell away as your arguments unfolded. Their pens flew across the page taking notes.

Walker asked the Court to adjourn the matter so he could consider overnight the arguments you'd raised – the new slant you'd put on the case.

You also appeared, absent your leader, for State Government agencies in the substantial 'WA Inc' Royal Commission. In fact you were meant to have had three leaders but not one of them actually appeared.

That commission found former Western Australian Premier Brian Burke (and other former Premiers) had acted improperly. The Commission's first report was described in the press as 'a chronicle of corruption and deceit in high places'.

Your honour had five readers: Peter Hanks (now QC), Albert Koolmees (now in-house corporate counsel in Sydney), David Gilbertson, Norman O'Bryan (now SC) and Danielle Huntersmith.

Also while a senior-junior, you and your brother-in-law began the business of Bioproperties, which manufactures and supplies live vaccines to the worldwide food-animals industry.

It all began with a vaccine for chronic respiratory disease in chickens – in common parlance, coughing chooks.

It's now a significant worldwide business, engaged in research and development, and employing highly qualified staff, many with PhDs in their respective specialties.

Your commercial practice in the law is therefore also informed by your own personal business experience.

Like most successful barristers you have also achieved that very difficult balance between work and family. One junior recalls being in conference with you when word came that your house was on fire. You helpfully suggested to your wife that she should get out of the house and leave it to the fire brigade. In fairness you did interrupt the conference and had your junior drive you home.

Both your readers – and, since your taking silk, your juniors – speak most highly of all they learned from you. The immediate common description they each give is of the calm, master strategist and tactician.

Your on-going wise counsel to your readers, your juniors and to others – legal, strategic, ethical and moral – has been highly valued.

On behalf of the Victorian Bar, I wish your Honour long and satisfying service as a Judge of this Court.

*County Court*

# Judge Katherine Bourke

Address by Peter Riordan SC, Chairman of the Victorian Bar Council on Tuesday 18 December 2007

I appear on behalf of the Victorian Bar to offer our warm congratulations to your Honour Judge Katherine Bourke on your appointment to this Court.

Your Honour was educated by the Presentation Sisters first at O'Neill College, and then at the Presentation Convent.

Your Honour practised as a solicitor before coming to the Bar.

You've practised as a barrister for more than 18 years, and contributed significantly to the Bar and the Common Law Bar Association. The Bar welcomes your appointment to this Court.

That was the welcome that Your Honour ordered; but it leaves out so much detail from the fabric of such a rich career – I might fill in just a little colour to the canvas.

Your Honour was one of five girls. It's a little late for brothers to be of any use to you now – however, perhaps better late than never – and as a Judge of this Court, your Honour has a positive abundance of judicial brothers – as well as a few extra sisters of the judicial variety.

Your Honour did very well under the tuition of the nuns and we wonder if, in your younger days, you were something of a nerd. You played cello in the school orchestra, and in the State Catholic Schools Orchestra. You were Dux of the School and completed your year 12 in the top 100 students in the State of Victoria overall.

You studied law at the University of Melbourne, and graduated with a Bachelor of Arts and a Bachelor of Laws.

You have since completed the Master of Laws degree at Melbourne, not by coursework, but the serious research degree by major thesis. Your thesis was on crimes compensation.

Your Honour played competitive soccer at the University of Melbourne. You were a foundation member in establishing the University Women's Soccer Club, which is still very strong.

The University has you and your friends to thank for that. And you have soccer to thank for major knee reconstruction surgery.

There's nothing very good about that sort of surgery – other than that not having it is worse.

But, at least in your Honour's line of work, it was part of the bank of personal experience you were able to draw on.

You served articles with Andrew Lumb of the firm Ford & Co – now Nevett Ford of Melbourne and Ballarat.

You continued with that firm after admission, first as an employee solicitor, and then as an associate of the firm.

You came to the Bar in 1989 and read with John Monahan.

Your Honour had one reader, Rebecca Boyce.

In May 2000, your Honour was appointed Chair of the Bookmakers and Bookmakers' Clerks Registration Committee – succeeding Mr Don Hammond, a former Stipendiary Magistrate.

It would be fair to say that racing is in the blood. Your Honour's father, Dr John Bourke, served for many years as the Chief Veterinary Surgeon for the Victoria Racing Club, and for Racing Victoria Limited.

Your uncle, David Bourke CBE, served nearly 20 years on the Committee of the VRC – seven of those years as Chairman.

You never let family relationships interfere with your work as a barrister.

Offered a junior brief with Tobin SC, in a case in which your uncle David, as VRC Chairman, was the named defendant, you could smell a winning brief and you didn't hesitate. No room for sentiment.

Your Honour has had interests with Tim Tobin in a number of horses. You give them their names: *Bold Litigator*, *Tortfeasor* and *Malfeasance* are a few.

You had intended the last to be *Misfeasance*, but the mare turned out to be a colt – hence the increase in turpitude to *Malfeasance*.

You have some idiosyncratic methods of picking bets. You consult with an octogenarian trackman which, I'm informed, is about as reliable as reading tea-leaves.

Your other system is that you'll go for anything trained by Gai Waterhouse, combined with an intuitive 'feel' for jockeys' names. This system has not fared much better although it did result in a good Trifecta win recently – sort of. The system indicated a loser; but as vanity intervened and you refused to be seen in glasses, you misread the number and – bingo – you accidentally got the Trifecta. The luck of the Irish.

In July 2004, you were elected to the VRC Committee, and you were recently re-elected for another term.

Following the tradition of Mr Justice Crockett and Justice Peter Young of the Family Court, your Honour is being permitted to retain your place on the Racing Club Committee.

In your practice, your Honour has been a circuiteer *par excellence*.

I have practised in a circuit town and I know what goes on on circuit.

However, you have very loyal friends. Called upon for anecdotes, they've sheltered under the defence that what occurs on circuit stays on circuit – hence so many stories about racing.

However, it's premature for your Honour to relax. I do have some – and I'm only a little intimidated by your Honour's threat of a citation for contempt in the face of the Court.

There was the circuit in Mildura when the circuiteers found time to escape the incessant strain of circuit work, and took out a fast-moving houseboat on the river. Your Honour was a good sport and rode behind on an inner-tube. The details are sketchy but it seems that your Honour was able to maintain your poise while being thrown around on the wake of the boat – even after there was, what Jennifer Hawkins would call, a wardrobe malfunction.

A transcript you may remember is from the Wangaratta circuit in a case before Deputy President Coghlan.

Your Honour had to cross-examine an 80-year-old medical witness, whose temper had not improved with age. He was deaf, and came to the Tribunal without his hearing aid – probably just to be difficult.

I shall call him John Smith.

Plaintiff's counsel: 'Your name is John Smith'?

Witness: 'Well, sort of.'

Plaintiff's counsel: 'What do you mean, "sort of"????'

Witness: 'It's Dr John *Henry* Smith.'

All this shouted so Dr Smith could hear without his hearing aid. And things went downhill from there.

Given permission to refer to his voluminous handwritten notes, Dr Smith complained loudly that: 'There are pages and pages and pages… [this] will take me forever!'

Asked by plaintiff's counsel to remain in the witness box for cross-examination by your Honour, the good doctor looked at your Honour and responded 'This is nonsense!'

After you completed cross-examination, Dr Smith wouldn't even go until, after being told three times that he could now leave, the witness stood up, turned around, and walked to the Bench, and bowed to the Deputy President, and thanked her for her attendance!

Similar good times await your Honour – and for the next 24 years.

You served as a member of the Victorian Bar Council for two years, in 2000 through 2002. During that time you were a member of the Counsel Committee of the Bar Council and, with Jack Rush QC and James Gorton, constituted the Common Law and Compensation Bar Portfolio of the Bar Council. You were also on the Pro Bono and Major Events Portfolios.

You served on the Executive of the Common Law Bar Association for six years, and on that Association's Litigation Procedure Review Committee.

You served a year on the Bar Equality Before the Law Committee.

You were a Director of the Essoign for three years. But you have, single-handedly, established and run the Calcutta at the Essoign for about ten years – and to this day the legendary Jack Styring still does the phantom race call.

The acid test of any advocate is what those who have been opposed to them say. Your Honour passes with flying colours.

Those who have been regularly opposed to you say you have been a strong advocate – both effective *and* pleasant – and an honourable opponent whose word is her bond.

On behalf of the Victorian Bar, I wish your Honour long and satisfying service as a Judge of this Court.

*County Court*

# Judge Philip Misso

Address by Peter Riordan SC, Chairman of the Victorian Bar Council on Monday 17 December 2007

I appear on behalf of the Victorian Bar to offer our warm congratulations to your Honour Judge Misso on your appointment to this Court.

As junior counsel, your Honour appeared in the case that has been called the *Donoghue v Stevenson* of the serious injury jurisdiction: the 1991 decision of the Full Court in *Humphries v Poljak*.

You also appeared in the Court of Appeal in *Barwon Spinners v Podolak*, the other seminal decision in this area of law.

Having contributed to making the law in that area, your Honour now joins the Court that hears most serious injury cases.

Your Honour was educated at Xavier College and at Monash University, graduating Bachelor of Jurisprudence and Bachelor of Laws.

At Burke Hall and Xavier, you played football and cricket. Indeed, it's said that you were up for any sport – not only football and cricket, but baseball, tennis, rowing, athletics and golf as well – and later in life, field hockey.

You were a pennant tennis player for about 15 years, and have a golf handicap of 14. We are expecting that to go out, under the tough regime of the Chief Judge.

You describe yourself as having been 'an ordinary student' at Xavier – but the Jesuits obviously got through to you because you took first-year Latin as part of your Bachelor of Jurisprudence course – very likely the first student of that course to do so.

Your Honour has also been a loyal old boy. You were one of the founders, and substantial supporters, of the Old Xavierians Field Hockey team. You also served as President of the Old Xavierians Association.

You served articles with the late Vaughan Kiessling, a sole practitioner.

You came to the Bar immediately after admission, being admitted on 2 April and commencing your reading the very next day, on 3 April.

You read with Bill Gillard who, of course, later became a Supreme Court Judge and is now retired from the Court.

Not only did you have an excellent Master, but you had also another extraordinary resource and support, particularly in the critical first five years or so of starting off at the Bar – your father, Ivor Misso.

Sadly Ivor died a little over a year ago.

Ivor Misso was a highly respected and very-well-liked member of the Victorian Bar. He'd been an Advocate of the Supreme Court of Ceylon. He had his Bachelor of Arts and Bachelor of Laws (with honours) degrees from the University of London, and was a Barrister of the Honourable Society of the Middle Temple in London, tracing the origins of its site to the Knights Templar. He was for many years an Examiner to the Council of Legal Education in Ceylon.

Ivor came to Australia, and signed the Roll of Counsel here in 1959. He practised until December 1983. He was a gentleman.

Your father encouraged you never to refuse any brief – following not only the cab-rank rule that is the foundation of the independent Bar, but more than that. It was also in the Anglo-Australian tradition

of a barrister being a good all-rounder with a wide, rather than narrow and specialised, practice.

So it was that, particularly in your first seven years at the Bar, you did everything. You were mostly in the Magistrates' Court and in the Family Court, but you did everything: crime, family law, and the full range of civil work.

And whatever came in, and however late in the afternoon or evening before the appearance, it came to you, you had the extraordinary resource of your father to coach and advise you.

It is an uncommon privilege of knowing a parent in the practice of the parent's profession – both of you adults – in this case, brothers in the law working together.

Your Honour built your practice into this Court and the Supreme Court, and also the Industrial Relations Commission and the Federal Court.

Your Honour's first appearance in the High Court was with Don Ryan QC (now Justice Ryan) in the *Argyll Diamond Mine* case in Perth.

Most recently, you have become the junior counsel of choice for many in plaintiff's personal injury work.

You have also done a lot of circuit work – about 11 years on the Geelong circuit, and about four years on the Bairnsdale circuit.

Your Honour had six readers: Michael Tinney, John Sutherland, Linden Woodfall, Andrew Field, Bianca Dukic and Rima Newman.

You were just short of the required ten years' call when Michael Tinney asked to read with you on the recommendation of his father's clerk, Kevin Foley. The Bar Council gave leave for you to take a reader.

Your popularity as a mentor continued until, it is said that to quell the tide, you crashed into your last reader's parked car. I understand that your Honour says that it was an accident and that you were not aware it was Ms Newman's car – I am not briefed to cross-examine.

Your readers and your neighbours in chambers all speak of your Honour's skill of engaging with, and relating to, clients as individual human beings.

There was a constant stream of serious-injury clients. You won the trust of each one of them.

Warm and engaging with your clients, you were, however, well capable of showing a degree of flint and steel towards the other side.

After a particularly heated exchange in one case, your leader, McGrath QC said quietly 'Put away the six-gun, Cisco.' Those of us who remember the black and white gunslinger TV Series 'The Cisco Kid' have just dated ourselves.

Your Honour has had other eccentric leaders.

Arthur Adams QC, asked for humorous anecdotes about your Honour, responded immediately: 'There are none. He wasn't allowed to be funny – that was my role.'

Your Honour has a deep and mellifluous voice. You've even been described as 'charismatic'.

You enjoy discourse, as does also your wife, Jane. On being told of your appointment, one of your sons commented: 'So Dad, they've given you a job where you can talk and no one can interrupt.'

Your Honour is fond of electronic gadgetry: Ipods, Blackberries, and the like. You were one of the first at the Bar to have a state-of-the-art, voice-activated Blackberry mobile telephone.

In the Geelong Court foyer, this was a problem.

The booming Misso voice spoke to the voice-activated Blackberry to get a phone number: 'Ryan Carlisle'.

This created general confusion as several solicitors from that firm came running from different corners of the court, thinking they were being summoned by the Tipstaff.

Your Honour is also a keen bushwalker – walking the Victorian Alps, Cradle Mountain, and the far South Coast of Tasmania – and visiting the 1891 lighthouse on Maatsuyker Island, Australia's Southern-most lighthouse, in nearly-constant rain and gale-force winds.

Your Honour will be missed by colleagues, by clients, and certainly by those senior counsel who have had you as their senior-junior.

You are known for the ability to cut through a morass of papers and identify the core issues.

You have also been able to take carriage of the case in which you're being led, as required.

In the landmark case of *Barwon Spinners v Podolak*, you were being led by Chris Maxwell QC (now Justice Maxwell, President of the Court of Appeal). Unexpectedly, your leader had, in the middle of argument, to go to Canberra; but you were more than capable of taking over leadership of the team.

Your Honour is two-thirds of the way through your 29th year at the Bar. You have substantial experience in a wide range of law, both prosecuting and defending in crime; and representing civil plaintiffs and defendants. You have appeared in every level of every Victorian court and tribunal. This experience you bring to this Court.

On behalf of the Victorian Bar, I wish your Honour long and satisfying service as a Judge of this Court.

*Court of Appeal*

# Justice Alex Chernov JA

The legal profession gathered on 28 February 2008 to farewell Justice Alex Chernov, in the presence of his family, upon his retirement from the Court of Appeal. The range of people attending the Banco Court reflected the diversity of Alex Chernov's interests throughout his impressive career as barrister, academic, judge, university chancellor and Collins Street farmer.

Alex Chernov was born on 12 May 1938, to Russian parents, in Lithuania, a country which was exposed to the Soviet Union, especially after the conclusion of the Nazi–Soviet pact in August 1939. Within 12 months, the Soviet Union had annexed Lithuania, together with her northern neighbours, Latvia and Estonia.

Chernov began school in Salzburg, where his parents lived during the war. He lost his father early in the war. His widowed mother brought her two sons to Australia in 1949. They began life in Australia at the Bonegilla Migrant Hostel. Chernov spoke no English when he began his schooling in Australia. He was educated at Camberwell and Caulfield North State Schools, and won merit selection entry to Melbourne High School. The pattern of remarkable achievement had begun.

He first studied Commerce, graduating Bachelor of Commerce from the University of Melbourne in 1961. He taught as a senior geography master at two Melbourne secondary schools to support himself through law school, and graduated with an Honours Degree in Law in 1968.

After graduation, Chernov tutored in law in the Melbourne University Colleges For five years (1971–75), he was then Lecturer in Equity in the Council of Legal Education law course at what is now RMIT University. In 1966 he married Elizabeth Hopkins; they had three children, Caroline, Andrew and Michael. The Chernov home was delightful to visit, a measure of the warmth of the hospitality of Elizabeth and Alex.

Chernov served articles with the late Brendan McGuinness at his office in Collins Street. He was admitted to practice and signed the Roll of Counsel in March 1968. He was appointed Queen's Counsel in 1980. He was Chairman of the Victorian Bar Council from April 1985 to September 1986. He was Vice-President of the Australian Bar Association in 1986–87; and President of the Law Council of Australia in 1990–91.

Chernov co-authored *Tenancy Law and Practice Victoria* with the Honourable Robert Brooking AO (now retired from the Court of Appeal) in 1972, and took sole responsibility for the second edition in 1980. That book has remained one of the leading legal texts – a very substantial work of some 760 pages in its first edition and 600 pages in its second edition. It was pleasing to see Justice Brooking among the several retired judges who attended the farewell in the Banco Court.

Only a few barristers in the history of the Victorian Bar could match Chernov's contribution to the Victorian Bar from the time he signed the Roll of Counsel to his elevation to the Bench. He had been at the Bar three years when he became Assistant Honorary Secretary of the Victorian Bar Council. Working with Peter Heerey (who was himself appointed subsequently to the

Federal Court) as Honorary Secretary, he served two years in that position, 1971–3.

Chernov was elected to the Victorian Bar Council in September 1971, and served on the Council for 14 years (1971–86). His Honour served as Assistant Honorary Treasurer for eight years (1974–82) and Honorary Treasurer for two years (1982–84).

Chernov was a Director of Barristers' Chambers Limited for five years (1982–86) and on the Management Committee of the Barristers' Benevolent Association for five years (1981–85). He was also on the Committee that brought about the establishment of Owen Dixon Chambers West. He served on that committee for five years, through its evolution from an Accommodation Policy Committee to the Owen

**Dusk, dawn and daylight**

From eight miles high, dusk was a two-tone ribbon of orange and grainy black, wrapped round the earth's girth.

Five minutes on, the ribbon was all black.

The stars appeared and held centre stage until 'put to flight by the pale sign traced above the curtains by the raised finger of dawn'.

The vaulted ceiling displayed a cloudless sky of azure
while a zephyr brushed the cheek of vertical mortals.

*Proust *A la recherche du temps perdu*

NIGEL LEICHHARDT

Dixon Chambers West Development Committee (1981–86).

Chernov served on numerous other Bar Committees including, for example, six years on the Ethics Committee (1972–73 and 1975–80) – an onerous task, and one perhaps, insufficiently appreciated by the wider Bar community to the present day.

Chernov's clients were the ones that ultimately benefited most from his meticulous preparation, his skilful and persuasive style of advocacy and his wisdom and experience. But he was a natural teacher to his readers (of whom he had eight) and his numerous juniors. Working with Chernov on a case was always a pleasure because he could combine leadership and responsibility for the brief with much good fun and, at times, mischief. It was always easy to attend to the list of tasks he would set because of the guidance, encouragement and good humour that would accompany delivery of the list. He was the master of 'esprit de corps': conferences would take place in chambers and out – at Jimmy Watson's, his den at his home in Hawthorn and even watching training on a Thursday afternoon at Princes' Park. Chernov's preferences in the arts, restaurants and football club were all sound.

The late night/early morning conferences at his home in Hawthorn were both legendary and exhausting in equal measure. One would be told 'Don't turn up until around 10.00pm'. When one dutifully arrived at the appointed time, the scene resembled the changing of the Guard at Buckingham Palace with one set of juniors and solicitors leaving as one arrived. Fortune had favoured the early conferees. What was most disconcerting was that Chernov would often see a new angle in a case at about 1am and take to preparation with renewed enthusiasm for the case. As he gathered a second wind, he resembled a precocious golden retriever finding a buried bone, while his juniors were a spent force gazing at the antique clock on the mantelpiece. No one was more capable of losing his own passport, wallet or Mont Blanc fountain pen. The taxi drivers of Melbourne were accustomed to being asked to check their taxis for lost goods with Chernov's name on them. The mechanics of Melbourne delighted in Chernov's love of his Alfa Romeo.

Chernov became one of Australia's leading commercial silks and was retained in all the big commercial trials in Victoria and elsewhere throughout the 1980s and 1990s. While all this was going on, Alex's influence and energies were brought to bear in several forums beyond the Victorian Bar.

Chernov was Vice President of LawAsia in 1997. This was a substantial commitment. LawAsia works to promote the rule of law in a diverse range of political, cultural, social and economic contexts throughout the region, and to foster professional and business relations between lawyers, with the Economic and Social Council of the United Nations observer status with the World Intellectual Property Organization, and operational relations status with UNESCO (United Nations Educational, Scientific and Cultural Organization).

Alex Chernov was appointed a Judge of the Supreme Court of Victoria in May 1997, and elevated to the Court of Appeal in October 1998. Though no one would gainsay the formidable inaugural Presidency of the Victorian Court of Appeal of Winneke P, the fact remains that before the appointments were announced by the government the blackboard above the bar in the old Essoign Club on 13th Floor East quoted similar odds for Winneke and Chernov to become the first President of that Court. The blackboard tote reflected the esteem in which the Bar held these two lifelong friends.

This short acknowledgement of the retired judge's career is not the place in which to discuss his contribution as a judge to the jurisprudence of Victorian law, but it was substantial; he more than honoured the promise he made at his Welcome to the Court in May 1997 that he would work hard as a judge. Moreover, he was a popular judge: with his peers, because of his propensity for hard work and wise counsel; with the Bar, because of his unfailing courtesy to those who appeared before him, his mastery of the papers and his solicitude of inexperienced counsel who were briefed to appear in his Honour's Court.

The notion of Chernov sitting still in retirement is fanciful. While it is true that his Honour's favourite tailors and chefs in Paris may expect to see somewhat more of him in the years to come, Chernov will direct his energies towards the University of Melbourne and those other institutions with which he has been closely connected. He has been a member of the Melbourne University Council since 1992. Since 2004, he has been Deputy Chancellor at the University of Melbourne. There is also the suggestion that he may return to earn 'a real buck' as a mediator and arbitrator in spare moments.

In reviewing a professional life which culminated in the conferral of an AO for service to the law and to education, it is futile to fasten upon any particular achievement because there have been so many. In days when we hear continued references to 'work/life balance', perhaps his greatest achievement, in the light of all that he has given to the Bar and to the Victorian community, with the inevitable sacrifices and absence from family, is the love and admiration of his family so plain to see when they were sitting in the jury box at his farewell. They just adore him. The Victorian Bar wishes Alex Chernov well in his retirement.

*Supreme Court*

# Justice Bernard Teague

At the Farewell to Justice Bernard Teague (hereinafter sometimes referred to as 'Bernie') on 14 February 2008, it became apparent from the speeches that his life divides conveniently into pre- and post-Bench. Born in St Kilda on 16 February 1938 into a nurturing family which focussed on education, Bernie was a precocious student who attended De La Salle, Malvern, where he matriculated at the age of 15. He was school captain and dux of his final year.

Too young to attend university, he worked for a year before undertaking his National Service at the age of 17. As he had aspirations of a career in the diplomatic corps he commenced a Political Science (Honours) Arts course at the University of Melbourne. It quickly became apparent to him that this was not where his future lay and, accordingly, he decided to switch to law. On announcing this decision, his mother Eileen, showed remarkable prescience. Opposing the idea, she remarked, 'You can't do law, you will only finish up mixing with criminals'.

After completing an Honours Law degree and a Bachelor of Arts, he obtained articles at what was then Corr & Corr. It was his original intention to go to the Bar and, in this regard, he had made arrangements to read with Robert Brooking (later Brooking JA). However, at this time he faced the dilemma which confronts many young lawyers. He had married the love of his life, Patrice, in 1963, and the lack of income if he went to the Bar, combined with the likely inroads into his family life, persuaded him to accept a partnership offer at Corrs that same year.

A measure of the affection and respect that the then partners at Corrs have for Bernie is indicated by the number who attended his Farewell. Sadly the partner with whom he served his articles, John Lewis, died some months ago. The decision to join Corrs was a happy one and he remained there until his appointment to the Supreme Court on 13 October 1987.

The period 1963–1987 is a tribute to both Bernie's intellectual capacity and his work ethic. As a practising solicitor he specialized in litigation, but at Corrs he was afforded the opportunity to concentrate on media law. In that period of 24 years, he built up a national and international reputation for his expertise in that area of the law.

He was the solicitor to both the *Herald* and *Sun* newspapers when they were separate entities, Channel 7 and Melbourne University Press. These retainers were on an at-call basis and involved guiding those clients through difficult, delicate and, potentially, very expensive problems. These included the litigation by Ralph Nader in 1972, Wilfred Burchett affair in 1974, and the infamous Khemlani affair which was, ultimately, a major contributor to the 1975 dismissal of the Whitlam Government.

The late ED 'Woods' Lloyd once observed to me, 'Bernie is a wonderful compromise between the pragmatic and the legalistic. After all, unless you are prepared to take a robust approach sometimes, the truth would never be published.'

In 1974 Bernie was elected to the LIV Council where he was to remain until his appointment to the Bench. They were

exciting times. He found himself surrounded by a group of younger lawyers who were, effectively, the movers and shakers in the profession in Victoria. Lawyers including the late John Richards, the late Tony Smith (later Judge Smith), David Jones (later Judge Jones), David Miles, Matt Walsh and Alan Comell were all prepared to challenge the status quo. What had formerly been regarded as a respected, but rather stodgy men's club, took on a new life.

Bernie was a participant in many exciting changes, although these did not include the burning down of the old Law Institute building in Little Bourke Street by an obliging, but unknown, arsonist in 1978. Only four weeks before, at the

instigation of Alan Comell, the insurance cover over the building had been trebled. This incident caused great interest on the part of the Bar Council who sent a deputation to the Institute to find out how they could achieve something similar.

Reforms during the Teague years included:

- The streamlining of the disciplinary procedures to include lay involvement.
- The formation of sections to represent solicitors practising in specialized areas.
- The appointment of a Lay Observer who was the predecessor of the Legal Ombudsman.
- The introduction of a compulsory professional indemnity scheme which became the envy of all other States.
- The introduction of certified specialist status for solicitors.
- The organization of on-going legal education for solicitors.
- The creation of a Management Advice Service which visited practices on request to assist with problems.
- The upgrading of the *Law Institute Journal* to bring it into the 20th century.
- A free legal advice service to members of the public.
- The organization of international law conferences in Melbourne.
- The successful campaign to force banks to pay interest on trust moneys.

This latter achievement which was headed by Alan Comell and called The Westpac Deal, meant the provision of millions of dollars for legal aid, legal education and proper supervision of trust funds. It represented a break through a defiant wall of non-cooperation on the part of the banks and brought about similar changes in all other states.

While Bernie recognized the profession's impatience with the artificial restrictions placed upon solicitors' entitlement to advertise, and pressed for liberalisation, personally he regarded the freeing up of the advertising restrictions as something of a Pandora's box. However, it was typical of him that as President of the Institute, he argued forcefully for a change about which he personally was ambivalent.

He was (and is), however, an ardent advocate of a national profession with total reciprocity of admission from state to state. The corollary was his concern during his time on the Law Institute Council that the Law Council of Australia was a toothless tiger, with little to show for the considerable amount of money the Law Institute poured into its continuing existence.

Although Bernie had a massive dual commitment to Corrs and the Law Institute of Victoria for 13 years, and although he served as President of the Law Institute in 1978 and 1986, Corrs never suffered any financial detriment because of his absences.

Indeed, due to his legendary work hours, in both years that he was President he still recorded more than 2000 billable hours at Corrs.

Those who know him well will respond immediately by pointing to the fact that he spent very little time in bed. That, however, cannot be the case, because at last count he had fathered seven children.

Rather the truth is about early arrivals. As a partner at Corrs it was his habit to catch the first tram into the City shortly after 5.00 am. Frequently, he worked a seven-day week. His responsibilities at the Law Institute, particularly when President, virtually guaranteed that he did not return home until late at night. Because he felt that he needed more exercise he, ultimately, gave up the first tram and switched to the railways. He began to catch the first train into the City shortly after 5.00am. This habit of an early arrival and a seven-day working week continued throughout the years that he has been on the Bench, although his means of transport changed to bicycle some ten years ago. It was then, in search of even more exercise, he gave up public transport for good and rode his bicycle to Court each weekday arriving at about 5.30 am. He did, however, afford himself the luxury of driving to the Court on Saturdays and Sundays because of the reduced traffic.

At the time of his appointment to the Supreme Court in 1987 Bernie enjoyed a national and international reputation as a common lawyer generally and a media law specialist in particular, which was at its height.

When in October 1987, Attorney-General, Jim Kennan, announced the appointment to the Supreme Court of a practising solicitor, Bernard Teague, there was a mixed reception from the profession. Those who knew Bernard Teague well, whether as practising barristers or solicitors, enthusiastically endorsed the Attorney's break from tradition. However, in the eyes of many members of the Victorian Bar, Jim Kennan had lost his marbles – a practising solicitor indeed?! What would be next? Academics, women, homosexuals, or Aborigines?! Senior members of the Bar who had for long coveted the ultimate reward of a judicial appointment, saw one window of opportunity closed. There was a discussion of a boycott of his Honour's Welcome, but wiser heads prevailed.

What followed at Justice Teague's formal Welcome was a disgrace, and involved behaviour by the then Acting Chairman of the Victorian Bar Council which, at best, was ill-mannered and, at worst, inexcusable. The transcript of the Acting Chairman's speech of 'welcome' (so-called) occupied two typed pages and the latter half consisted of a condescending reminder of the complexity of legislation and the need for judges to eschew administrative matters and to decide cases:

> The role of judges is not and cannot be administrative. It involves essentially deciding cases in accordance with the law and thereby dispensing justice. Those before the Courts must be entitled to put all their arguments and to have those arguments dealt with fully and justly. If ever judges became regarded as administrators who decided cases in accordance with convenience or the wishes of the State, far-reaching inroads would be made into the liberty of the individuals who comprise our society.

These passages were more appropriate for a form III legal studies class, rather than a Welcome to an appointee to the highest Court in our State. It represented a black day for the Victorian Bar and was contrary to what I had always understood the Victorian Bar stood for. In particular the references to administration and the judicial process, at best displayed a monumental ignorance of the Court experience of the new appointee and the national and international regard in which he was held.

More than twenty years later, on 14 February (the anniversary of the St Valentine's Day massacre) Justice Bernard Teague retired.

Contrary to the concerns of the Acting Chairman of the Bar Council who had

spoken at his Welcome, little of his time had been spent in administration and indeed even in the eyes of his most carping critics, he had demonstrated that he had a pretty handy grip on the concept that being a judge 'involves essentially deciding cases in accordance with the law and thereby dispensing justice'.

After his infamous Welcome, Justice Teague's first case was a matter of *PJ Constructions (Vic) Pty Ltd (in liquidation) v TM Burke Pty Ltd* which involved the concept of unjust enrichment. Now, even at the Essoign Club, 'unjust enrichment' was not a common topic for conversation at lunch. There were some of us (supporters of the Teague appointment) who were sufficiently paranoid that we believed that the allocation of this matter involving an obscure area of the law, was just a continuation of his 'Welcome' to the Bench.

In the early months, Justice Teague sat predominantly in the Civil Jurisdiction, and quickly gained the confidence of most of his original detractors. However, the real milestone in his judicial career came about in a most unexpected way. In 1988, he requested he be listed in crime, an area in which even his most outspoken supporters believed 'he dare not go'. Not only was his first participation in a criminal hearing at the age of 50, but it was to preside over a murder trial! The rest is history. He found the subtleties of the criminal law fascinating and during the last ten years he sat almost exclusively in crime, and by the date of his retirement, he had presided over more than 90 murder trials. These included the trials of Edwin Lewis, Peter Knight and Keith Faure. At the time of his retirement. Justice Teague was the principal Judge in the Criminal Division and had responsibility for allocating eight judges to particular matters.

Appointment to the Bench did nothing to make him one dimensional. He had served on the Board of Examiners, before moving to the Council of Legal Education. He served as Chairman or Deputy Chairman of the Adult Parole Board for 17 years, and Chairman of the Forensic Leave Panel and Forensicare for nine years.

He was on the Council and Board of the Australian Institute of Judicial Administration for six years. He was the inaugural Chairman of the AIJA Education Committee: playing a key role in the establishment of the Australia-wide Judicial Orientation Program. He was the convenor of the AIJA Technology for Justice Conference in 1998. In 2004 he was made a life member of the AIJA. He was a member of the International Bar Association for more than 20 years and on its organizing committee for its 1999 Melbourne Convention, the first IBA biennial conference held in Australia. He played a key role on the organizing committee of the 2003 Commonwealth Law Association conference in Melbourne and, was responsible for persuading many senior overseas judges to make the trip to Melbourne. Of course, all of this was over and above more than a full-time commitment to the Supreme Court.

In Court Bernie continued to display the courage to innovate and experiment, and his sentence in the matter of *R v Avent* in 1995 was the first televised in this state.

Occasionally his early arrival at Court still caused some problems. On one occasion on his arrival at Court in the early hours of the morning, he found a broken glass panel in the first floor door into Judges' Chambers and a trail of blood. Quite properly he rang the police and when they responded he showed them where the break-in had occurred. Everything was going swimmingly until one police officer, unaccustomed to finding anybody occupying a Court at 6.00am, was prompted to ask 'And who the bloody hell are you?'

On another occasion, while riding a tandem to work with Patrice behind him (as many Supreme Court Judges do), he allowed the front wheel to catch in a tram track and suffered a heavy fall. He dislocated his shoulder and it was necessary to go to St Vincent's to have it put back into place under anaesthetic. However, as he was conducting a murder trial at the time, he felt that he should persevere and, in any event, after medical treatment, he still arrived at Court by 9.00 am. His only concern was that he might fall asleep on the Bench as a result of the after-effects of the general anaesthetic. He warned his Associate and his Tipstaff to keep an eye on him for the first signs of him passing out!

I am aware that this tribute to Bernard Teague does not do full justice to his wry humour, his love of his family, his involvement in international legal organizations, his facility for innovation and reform and his unfailing service to the people of Victoria. All of those matters were fairly dealt with in the affectionate and appreciative speeches made at his Farewell. What, however, I hope I have done is to demonstrate that the Victorian Bar in 1987, through its Acting Chairman, got it hopelessly wrong.

There is no better way to sum up this tribute than by repeating the words of Peter Riordan QC, Chairman of the Victorian Bar Council, when he addressed the Court at Judge Teague's Farewell. On that occasion he said:

> Your Honour responded to the challenge of being the first and only practising solicitor to be appointed as a judge of this court in your own inimitable way. Your Honour was one of the most experienced and highly regarded litigation lawyers in the state, particularly in the areas of defamation and personal injury. However, it could be said that Your Honour did not have a great deal of experience in the criminal law. In fact Your Honour has remarked that the first time you set foot in a criminal court was to see a murder trial, and you were the judge. However, there was never any doubt that Your Honour's work ethic, intelligence, not to mention your pragmatism and deep concern for fairness, would ensure that you met the challenges that were presented to you by this court. In fact, as has been mentioned by the Solicitor-General, since 2001 you have been the Principal Judge of the Criminal Division of this Court.
>
> It would be remiss of me not to mention that the Bar is very grateful for Your Honour's tireless work in ensuring that our Supreme Court has adopted the reforms and efficiencies to ensure that it remains the pre-eminent Supreme Court in this country.
>
> On behalf of the Victorian Bar, I would very much like to thank you for your great contribution to the legal profession and to this court.

*Family Court*

# Justice Joseph Kay

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Friday 15 February 2008

I appear on behalf of the Australian Bar Association – in particular, of course, on behalf of the Victorian Bar.

Your Honour has served as a Judge of this Court for nearly 22 years – more than 14 of those years assigned to the Appellate Division of the Court.

Your Honour came to the Bar, almost immediately after admission, and read with Rod Joske – later Mr Justice Joske of this Court. You quickly developed a strong general practice, but the insistent demands of your Matrimonial Causes clients steered you to exclusive practice in that field.

You were recognized as a leader and gave much time and energy to family law policy and law reform. You served on every family law committee there was at the Bar and, as Mr Kennedy will tell us, through the Law Council of Australia and the Government's Family Law Council.

You chaired the Family Law Bar Association and formulated the Bar's responses to Government and Law Reform agencies on Family Law matters. You were a Bar appointee of the Council of Legal Education, and a member of the Bar Fees Committee. You had four readers.

You took pleasure in the distinction of your appointment to this Court.

Movingly, you spoke at your Welcome of your parents' migration from Poland in the Great Depression to escape bigotry, and of their joy in your achievements in this country.

Even as you achieved greater seniority and distinction on the Court, you never lost the simple delight in that distinction.

You once said to a friend: 'My parents came to Australia with nothing. Last night, I sat down to dinner between the Chief Justice and the Governor-General. Only in Australia… '.

But you never took on airs and graces. Shortly after your appointment a barrister greeted you in Domino's 'Hello, Judge'. You responded 'Hello, Barrister' – and thereafter you both returned to first-name terms.

Particularly in early days on the Court, the mercurial side of your nature flashed through from time to time.

On one occasion, you came down from the Bench alongside counsel at the Bar table: 'Look!' You pointed to parts of the document from which counsel was addressing you. 'This is how you read a balance sheet!'

Another favourite is your final clincher after a heated exchange with counsel: 'Let the transcript record that counsel threw down the document I had ruled irrelevant onto the Bar table in a fit of pique!'

But such flashes were no more than that. When you later asked for a document, and were politely advised that it was the very document you had ruled irrelevant, you smiled, and the air was cleared.

And even the most heated exchange in court stayed in court.

The intense concentration and competitive edge we have all seen in your Honour at the Bar and on the Bench have deep roots: in the Coca Cola Yo-Yo Championships – to say nothing of your having developed a distinct partiality to Diet Coke.

More competition, and a mastery of words, have roots in the Moomba Scrabble Championships – and you were a fiercely competitive Table Tennis Champion.

Before the Torts exam at the University of Melbourne, your classmates were nervous. You were relaxed, languorously sucking at a pipe. 'Did you know that *Rylands v Fletcher* was disapproved in the Canadian Court of Appeal?' you quipped.

The mercurial and competitive side of your nature also manifested itself in your driving. One day you sped through a roundabout. You turned around to look behind you – and saw that Bumper, the family dog, was no longer on the back seat. An open window, a small dog, and Your Honour's emulation of Stirling Moss were not a good combination.

There is a quaint symmetry in appointments between you and Justice Dessau.

In June 1986 you were appointed to this Court; and in July that year, she was appointed to the Victorian Magistrates' Court.

You wrote to congratulate her, and added that you looked forward to hearing appeals from her decisions.

By June 1995, when she was appointed to this Court, you were on the Appellate Division.

Your congratulations repeated that you looked forward to hearing appeals from her decisions.

You have been the Liaison Judge for the whole of Australia under the Hague Convention. One of your roles as such has been to assist other judges worldwide. Domestically, you liaised with the Commonwealth and the State Central Authorities.

You have been the Australian judicial representative at the Special Commission Meetings every four years, and at the Judges' meetings.

You have been a regular contributor to the Judges' newsletter on the Convention, published out of the Permanent Bureau of the Hague Conference.

You are a national and international authority on the Convention – amongst three or four judges who have led the way in its development and application.

Mr Kym Duggan, the Assistant Secretary of the Family Law Branch of the Commonwealth Attorney-General's Department, who is the leading Governmental officer in relation to the Hague Convention, came from Canberra yesterday so as to be here in your honour. He is in court today.

In addition to being the Australian delegate at the Hague Convention Special Commission Meeting and at the Common Law Judicial Conference on International Child Custody in Washington, your Honour has presented papers on family law related topics in London, Bath, New York, Washington, Kansas City, New Orleans, San Francisco, Vancouver, Quebec, Jerusalem, Capetown, Auckland and, of course, throughout Australia.

Your friends hope you and your wife Yvonne will enjoy using the frequent flyer miles in your retirement.

Although it was only with some effort that they put it into words, your friends at the Family Bar Association say you will be really missed on the Court. Your attendance at Family Law Bar Association functions during your time in office has been much appreciated – and they hope to see a lot more of you.

On behalf of the Australian Bar Association, and all the independent Bars of Australia – in particular, the Victorian Bar – I wish Your Honour and Yvonne a long and satisfying retirement.

**High altitude**
for the late Ian Bowditch

Your deft touch defused exploding egoes.

Your gentle ways merited the title of gentleman.

Me, I remember you as a man of unfailing decency.

Your lastborn has honoured you in a song whose airplay
evokes and prolongs
the memory of a man
whom neither death nor disease shall conquer.

NIGEL LEICHARDT

# David Roy Cross

David Cross was a country boy from NSW who grew up in the bush just north of Sydney and with a love of the bush and the ballads of Henry Lawson and Banjo Paterson. He graduated in Arts at Sydney University and for a time was a teacher in English. He then repaired to Melbourne and graduated in law at Melbourne University in the 1950s. He did his articles with Dan Condon, whose office was in Chancery Lane (Little Collins Street) almost opposite the entrance to Selborne Chambers. In those days as you entered Selborne Chambers from Chancery Lane, on your right were the chambers of Bob Menzies and on your left were those of Harry Wolf – known as 'the wolf at the door'. Then just inside the door were the chambers of Hubert Frederico with whom I read in 1950. Dan Condon used to brief Hubert Frederico and then, fortunately, his reader and thus David Cross's and my paths crossed for what was to be a long association and friendship.

David remained as a solicitor with Dan Condon until 1962 when he came to the Bar and read with me in Room 504 in Owen Dixon Chambers and adopted Jack Hyland as his Clerk as I had done when the Bar moved from Selborne Chambers in 1961.

I had inherited Room 504 from Oliver Gillard when he was elevated to the Bench. It was a lovely sunny room overlooking William Street and about level with the statue of justice on the law courts. She was not blindfolded as was traditional for statues of justice, as Harry Winneke CJ insisted that justice was not blind.

At that time my practice at the Bar was mainly common law and particularly in civil juries. David Cross enthusiastically followed suit, mainly appearing for defendants. He was soon regularly briefed by the big names in the insurance field in those days, such as Bernie Teague, David Jones, Frank Whelahan, Neville Lane, Alan Douglas, Brian McCarthy, Geoff Durham, Peter Coldbeck, David Lewis, Jack Lewis, John Bell, Bruce Millar, Austin Parnell, Tony Harold, John Richards, George Kefford, Paul O'Connor, John Clements and Roy Lidgerwood.

David also developed a circuit practice, particularly in Ballarat where his redoubtable opponent was usually Ted Laurie.

As well as his legal practice David was a prolific author. His better-known books (all of which bear reading) are:

*George and the Widda-Woman*
*The Mug Gardener's Handbook*
*Kill all the Judges* (beautifully illustrated by George Luke)
*I'll Plead Insanity*.

He received an award at the Adelaide Festival Writers' Week for *George and the Widda-Woman* which he read on the ABC on weekdays at 10am when our conferences came to an abrupt halt after which we had to race across William Street to Court by 10.30.

David was a francophile. He taught himself to read French. He resided in Paris for some time and frequently attended the Halls of Justice there. He was a member of and frequent visitor to the premises of the Alliance Française de Melbourne.

David retired from the Bar in 1991 and thereafter lived in Canterbury. He had earlier disposed of his house in the Blue Mountains to which, during his life at the Bar, he had retired during legal vacations to relax and bird-watch.

After his retirement Dawn and I enjoyed an annual lunch with him at which we had great fun recalling our Bar life and experiences and the characters at the Bar and on the Bench. He always presented me with a bottle of liqueur (French of course) which he maintained was a reading fee in addition to the original 50 guineas which was the traditional reading fee way back then.

He composed and illustrated his own Christmas cards of which we have a complete set.

In July this year, quite out of the blue, I received a letter from a friend and neighbour as follows –

Dear Mr and Mrs Colman,

It is with great sadness I am writing today to inform you of the death of David Cross on Tuesday 3rd July, following a long illness.

Following David's wishes there was to be no funeral or memorial service. He therefore asked that I write personally to each of his friends to inform them of his death.

David has been a great friend and neighbour to many people, and I know that we will all miss his wit, raconteur skills and his many kindnesses over the years.

So typical of David. He always said 'I never ask anyone how they are. They always tell you and in great detail.'

He was a great believer in a strong independent Bar and, I believe, a great credit to it.

GEOFFREY COLMAN QC

# David Maclean SC

*After an illness of 13 months, David Maclean died on 23 January 2008. A requiem mass and funeral were held on 29 January 2008 at Newman College.*

David was born on 17 July 1957 at Seymour, the elder son of Allan and Marjorie. At the time, his father Allan was serving at Puckapunyal as Officer in Charge of the RAEME Trade Repair Workshop (Electronics). David spent several years in the UK, when his father was posted to The Royal Military College of Science at Shrivenham and The Royal Radar Establishment at Great Malvern. David's education was that of a family in the services: he attended 13 schools in all. He completed his secondary education at Mazenod College in Melbourne.

David studied law and arts at Melbourne. He was a resident student both at Newman and at Trinity. David graduated BA LLB (Honours) in 1981. From 1981 to 1983, he served articles with Conlan & Leishman at Port Fairy. After a short stint as a solicitor with Moules, David signed the Roll of Counsel on 19 May 1983. He built up a practice in the commercial and equity jurisdiction. He took silk in November 2004.

David developed a strong interest in equity and, with the encouragement of Frank Callaway QC and Ross Sundberg QC, with whom he shared chambers, and Ian Spry QC, he took a sabbatical in 1987 at Oriel College, Oxford, and made significant progress towards the completion of *Trusts & Powers*, which was published in Australia by the Law Book Company and in the UK by Sweet and Maxwell. The Provost of Oriel, Sir Zelman Cowen, supplied the Foreword. Sir Zelman made the prescient observation that *Trusts & Powers* would establish David as a legal scholar.

David's interest in equity led to further publications: he contributed the chapters on injunctions, delivery up and cancellation of documents to *The Principles of Equity* and the chapter on injunctions in *The Laws of Australia*. Between 1991 and 2003, David was the Book Review Editor and New Books Editor of *The Australian Law Journal*, as well as being an author of articles and a regular contributor to the Trusts and Equity column in that journal. He was an industrious law reporter. He reported for the *Victorian Reports* from 1985 to 1990 and for the *Federal Court Reports* during the 1990s. In 2006, he was appointed editor of the *Victorian Reports*.

David's particular expertise was in superannuation, trusts (including discretionary trusts, unit trusts, charitable trusts), injunctions, rectification and other equitable remedies. In recent years, he was junior counsel in the complex proceedings concerning the Ansett superannuation funds following the collapse of the airline in 2001 (2001–2003), and long-running superannuation fund litigation in the oil industry from 2001. He advised widely in both litigious and non-litigious matters: superannuation funds (including dealings with APRA and ASIC), banks and other financial institutions, insurance companies, religious and charitable bodies of all kinds. His working life was somewhat monastic. He would spend long and solitary hours in his chambers, poring over texts, handwriting every pleading and advice before having it typed. He possessed a huge library of equity and property texts, which he generously made available to colleagues throughout chambers. He was a good and loyal member of his chambers on the first floor of Owen Dixon West; he co-employed the same secretary, Lena Sokolois, for 20 years. Between August 2000 and October 2003, he was a director of the Bar Superannuation Fund.

David's range of interests outside the law was nothing less than vast. There was nothing that did not interest him, and few things upon which he could not knowledgeably speak. He was an avid reader and collector of books, anxious to tell of what he was reading and to hear of what there was to be read. Apart from his books, he loved his wine, his collection of antique and rare watches and his vintage cars: an MG, a Jensen and a Lamborghini. He greatly enjoyed dining with friends and colleagues. He would head off most Fridays either to the Florentino or the more demotic Pellegrinis where he would join in the banter generated by Sisto Malaspina, and tease patrons associated with teams other than the Saints. Less well known, but no less seriously held, were his love of soccer and a love/hate relationship with the England football team.

Despite his quiet and droll manner, David was gregarious. The catholicity of his interests was matched by the range of his friendships. Rupert Myer, a friend from Trinity days, and Andrew Fairley, a colleague in superannuation, both gave beautiful eulogies at Newman.

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# Truth and the Law

**Most Reverend Peter J Elliott**
Titular Bishop of Manaccenser,
Auxiliary Bishop of Melbourne

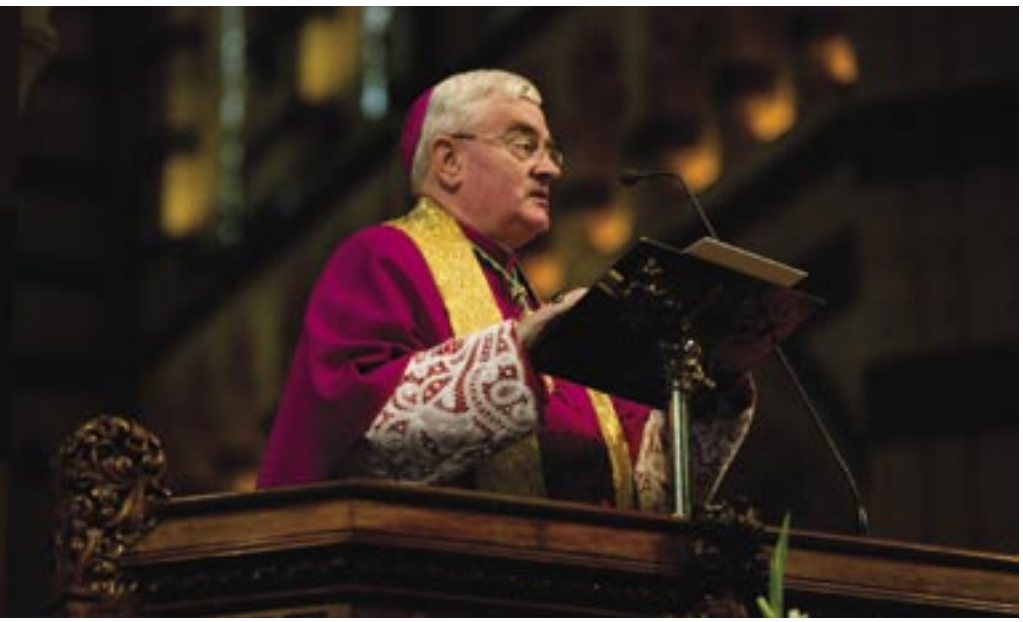
Ecumenical service to mark the Opening of the Legal Year
St Paul's Cathedral, Melbourne,
Tuesday, 29 January 2008

The congregation

Let me first express our gratitude to Dean David Richardson for welcoming us to St Paul's Cathedral for this ecumenical service. As many know, the Dean is preparing to leave us. When I first heard that he was 'going to Rome' my heart leapt, but then I was informed that this is a geographical, not a spiritual, move. He will take up the prestigious office of Director of the Anglican Centre, housed in the Palazzo Doria Pamphili on the Via del Corso, 'deep in the panting heart of Rome'. As we congratulate him on his appointment, so we rejoice to behold his lasting achievement, that which surrounds us this morning, the restoration of Butterfield's magnificent cathedral.

Secularists assert that religion is a 'private matter', for they are radical individualists. Moreover, they assume that everyone is naturally an atheist, that *they* represent what is normal. This secularist illusion gets to us, particularly through the media, and we may even absorb that false assumption. But anyone who makes a stopover on a flight to Europe can enter cultures where life is communal and religion is normal. If you observe the world beyond our narrow horizons, assertive individualism and atheism find no place in the lives of most of the people who inhabit this planet.

This is why a communal religious observance is a normal way of marking the Opening of the Legal Year. What gathers us here today for this specific ecumenical observance is our shared Christianity. We do not apologise for that; on the other hand, we do not impose it on others. In a democratic pluralist society we freely choose to commence the Legal Year by placing ourselves under the care of God, the Holy Trinity, who is revealed in the words and deeds of Jesus of Nazareth.



Bishop Peter Elliott delivers the sermon

In the Gospel we have just heard, he promised his disciples that he would send the Spirit of Truth, the Holy Spirit, to guide his people into all truth. Christians are called to be open to this Spirit of Truth. All men and women who serve in the honourable profession of the law should seek, welcome and serve truth. Yet this has not always been so.

At the heart of the sixteenth century, in the England of Henry VIII, two Christian lawyers rose to the highest office in the land and both of them ended up on the scaffold at the Tower – Sir Thomas More and Sir Thomas Cromwell. In my tradition, the former is revered as a canonised saint, the patron of your noble profession, while the latter is reviled as a toady and plunderer of monasteries. But Thomas Cromwell was no monster. A flawed but brilliant man, he also died courageously and prayerfully. Yet he represents something else that, I would argue, undermines truth in the practice of the law. He is one of the remote fathers of legal positivism. By acceding to the dictates of a tyrant, he divorced morality from law.

St Thomas More remained faithful to an older and richer tradition, to the natural law. The Judaeo-Christian ethic rests on this natural law: that good is to be done and evil avoided, that there are objective moral standards, moral truths. Throughout the Hebrew and Christian Scriptures, in the highest literature and the best popular culture, we find a fascination with the human struggle to discern right from wrong, to identify good and evil, questions requiring a moral judgement we call 'conscience'. The natural law posits that these realities are knowable through reason, indeed written into the very nature of the human person. Hence the making and application of good laws is assured by remaining true to the higher principles of an ethic grounded in our very nature as moral beings, derived from what may be called 'the truth of the person'.

Legal positivism, by contrast, separates morality from law. There are many ways of attempting to define this dualism, this self-verifying theory of law. The autonomy of law was articulated by the utilitarian Jeremy Bentham, an atheist, who in my world view, represents the shadowy side of the Enlightenment. A brighter side of that ambiguous movement held to the natural law tradition, as in the founding fathers of the United States. This natural law tradition ultimately flowered in the 1947 *Universal Declaration of Human Rights*, which, for the record, was partly influenced by the Catholic lay philosopher, Jacques Maritain.

At least in its extreme form, legal positivism offers no guarantee of protecting human rights from tyranny. At that stage we can no longer find truth in the law. Law now depends on the dictates of the State, or is determined by the more forceful opinions of individuals or factions, or law making may be driven by ideology, such as the push for a so-called 'right' to abortion. In our society such trends are justified by appealing to an undefinable authority, 'community values' or 'community standards', so right or wrong is replaced by approximate consensus.

In this decadent context we have great and urgent responsibilities. We now face the challenge of social engineering, that is, attempts to use legislation and subsequent laws to change the way people act and think. Ethical, hence legal, issues arise, concerning the value of human life, the right to life, the integrity of marriage, even the nature of parenthood and the family.

Many people are concerned about these matters. As we gather in this cathedral, in East Melbourne at the John Paul II Institute for Marriage and Family, of which I am Director, the annual National Colloquium on Bioethics is in progress. Experts from all over Australia and beyond and from different denominations are working on the theme 'Conscience in Professional Life: Doctors, Lawyers and Legislators'. Today doctors, lawyers, legislators and bio-ethicists are discussing the question of the jurist and conscience.

You may not agree with, or know much about, Catholic social ethics. But I would

Dean David Richardson

Bishop Elliott and Dean Richardson lead the procession

Bishop Elliott with his brother, Paul Elliott

Judge Duckett and Judge Robertson

hope that at least you admit that the tradition I represent is carefully thought out, reasoned, coherent, based not on blind faith, as secularists imagine, but on the natural law tradition together with the spiritual and moral wisdom and experience of many people across four millennia.

Your prudent advice to legislators is critical, if the good of society is to be promoted and harm avoided. In the brutal twentieth century, calculated social engineering destroyed life and liberty. Today it entices legislators and those who advise them 'to make a name for themselves'. Those tempted in this way should beware. They will leave a name for themselves, but in the annals of infamy, held responsible for consequences of human suffering, deaths and social fragmentation.

In any social context we also see that the law is a great teacher. The pedagogy of the law raises another dimension of truth and the law. Law not only maintains justice, with equity and impartiality, but can educate people to respect human rights and dignity.

Nevertheless, in the estimation of the masses, what is legal is what is moral. Therefore changing law may well change moral perception. This possibility obviously complicates debates on legalising drugs. It is relevant in the conversation on decriminalising abortion. But there have been more sinister possibilities. In an authoritarian society people may accept something that is immoral, for example racism, because it has been legalised by the state. That happened through the Nuremberg laws of 1935. Eleven years later, after unspeakable horrors, in that same city the political criminals responsible for those debased laws were held to account. But if you think the Nuremberg Trials, and current international cases against genocide and war crimes, can be justified by anything but natural law principles, then think again.

You are called to serve society through this pedagogy of the law. In a different, but related, way I share your responsibility. But let us all do a reality check. We function in an ethically confused society, where nice people do nasty things, driven by greed. In the work of your profession and mine we are encountering more of this 'respectable' criminality.

Hypocrisy is evident. Sectors of the media make celebrities out of terrorists, gangsters, abortionists, teenage delinquents and con men. Judges are lambasted for being too severe or too soft. Ethical thinking is befuddled by sentimental political correctness. The only fumbling attempt at ethical discourse is the use of safe relativistic terms, 'appropriate' or 'inappropriate', never 'right' or 'wrong', for those words express objective morality and suggest that there is moral truth. Yet our legal system rises or falls on its fidelity to moral truth.

Rod Smith, Simon Wilson QC and Paul Elliott QC

In some universities and on the fringe of popular culture, the fashion is 'postmodernism'. Its radical individualism tells us that there is no truth, only 'your truth' and 'my truth'. Culture wars are reduced to power struggles. All values are human constructs to be 'deconstructed', preferably by cynical comedians posturing at 'comedy festivals'. Postmodernism echoes the empty words of Pontius Pilate: 'truth – what's that?' But even as he spoke, there was the truth, standing in front of him, staring him in the eyes, scourged and crowned with thorns. To serve the truth is to serve Him and be prepared to suffer for it.

At the same time, amidst all the moral confusion and cant, there is a beautiful simplicity and tranquillity about the truth we find in the practice of the law. This is evident in some of the great decisions of our legal tradition, those magisterial precedents that benefit both individuals and the common good, and do no harm. Note, however, that in such decisions, great jurists do not hesitate to have recourse to the concept of 'natural justice'.

I want to return to what gathers us together this morning, religion, in particular Christianity.

To what I propose, secularists may reply that natural law involves specific religious beliefs, that is, *faith*, and for this reason it can have no part in the making and practice of the law in secular society. Yet nowhere have I appealed to faith. The principles of the natural law and their interpretation and application as natural justice rest on reason. Certainly reason often needs the illumination of revealed religion, yet even that is received best through a reasoned faith, brilliantly articulated by the late Pope John Paul II in his letter, *Fides et Ratio, Faith and Reason*, further developed by Pope Benedict in his amazingly controversial Regensberg Lecture.

Undaunted secularists go on to warn us against 'imposing religious values' on society. So we have yet another phobia or prejudice on our hands! Some call it 'theophobia', fear of God, or 'christophobia', fear of Christians. But Christians cannot and do not want to turn Australia into a theocracy. If one tries to identify the engines driving social engineering, it is the secularists who are trying to impose their values on our society, strange values indeed: a 'toleration' that breeds intolerance,

Professor Cheryl Saunders and John Glover

Justices Osborn, Ashley and Nettle

Judicial perambulations

'choice' that kills the innocent, 'dying with dignity' that could unleash terror and also ruin another noble profession.

In this context, just before Christmas, in an aggressive article in *The Australian*, a secularist journalist invoked 'the separation of church and state'. Now he could have been reminded that this is Australia, not the United States. Even there, several centuries ago this 'separation of church and state' expressed the wish of *religious* people to be free from any established church, and that is in our own constitution. Only later, in the last century, was the separation of church and state reinterpreted by the US Supreme Court in dogmatic secularist terms, leading to the silliness of banning Christmas cribs in public places. Such foolish trends are evident in this country.

However, my final consideration is how natural law and our own Christian traditions open a more personal dimension of truth and the law, what we might call 'the truth of service'. Here the practice of the law is understood as a service to society and individuals, especially the poor, the most vulnerable and dysfunctional.

Unfortunately, in our times there is a temptation to replace service with expertise, to slide into an impersonal mechanical functionalism. But that is not impartiality. It only reduces judges, magistrates, barristers and solicitors to technicians, under the tyranny of the laptop.

By contrast, service rests on commitment to seek whatever sustains and protects people, for their human flourishing and liberty. The values of the natural law are behind those goals. Only through service can your noble profession be understood as a vocation, rather than a skilled and frenzied quest for money, power or prestige, noting St Paul's warning in our second reading today. Service has an attractive integrity of its own, constantly reforming and cleansing our working lives.

May this personal truth in the practice of the law shine forth in your lives. But keep asking for the spirit of truth. Pray for that spirit. Try to rediscover and value what really lies behind the marvellous edifice of the law. But, above all, offer people the best service you can. We are a flawed humanity on a common journey, or should I say in the light of Christ the Truth, we are on an adventure, a pilgrimage where life has form, a plan, meaning, purpose and a destiny.

# The Red Mass

Mass celebrated by **Archbishop Denis Hart** at Saint Patrick's Cathedral, Melbourne, for the Opening of the Legal Year, 29 January 2008

## INTRODUCTION

Dear Brothers and Sisters,

The Red Mass is an ancient tradition, invoking God's blessings and guidance on the administration of justice under the power of the Holy Spirit.

On the first Pentecost the tongues of fire transformed the apostles from fearful people into men filled with the Holy Spirit, totally committed to truth, and courageous in the service they would render to deepening and extending the faith in Jesus Christ which we have received from them.

In extending you a warm personal welcome, I recognise especially the presence of representatives of government, judges and magistrates, barristers and solicitors, members of legal staffs, families and friends.

The Holy Spirit is powerful to make weak things strong, to bind up hearts that are broken, to bring justice and integrity to our people. As we call to mind our sins, let us ask that the Spirit of God will grant us the life we need in our chosen profession and in the service that we render to society.

## HOMILY

Dear Brothers and Sisters

The earliest evidence of a celebration of the Red Mass was in Paris during the thirteenth century. Successively it spread to other European countries within a period of 50 years. In Australia it has been celebrated since 1931. It is a Red Mass because it is the Mass of the Holy Spirit. The red vestments that are worn are symbolic of the fire, light and guidance of the Holy Spirit sought for the members of the profession and for the service that you render to our society. It is a moment of appreciation on behalf of the Church, and from me personally as archbishop, for your genuine service of justice and the search for truth.

Archbishop Dennis Hart

Regularly in their messages for the World Day of Peace on 1st January, the Popes have stressed that peace within individual families in societies arises 'in that they should be built on solid foundations of shared spiritual and ethical values'.

Pope Benedict said this year: 'It must be added that the family experiences authentic peace when no one lacks what is needed and when the family patrimony is well managed in a spirit of solidarity without extravagance and without waste. The peace of the family requires an openness to a transcendent patrimony of values and at the same time a concern for the prudent management of both material goods and interpersonal relationships.' (John Paul II, WDP 2008, 9)

Pope Benedict goes back further to the fundamental challenge of lawmakers, administrators and practitioners in a secular state when he says: 'The Church has often spoken on the subject of the nature and function of law: the juridic norm which regulates relationships between individuals, disciplines external conduct and established penalties for offenders, and has as its criterion the moral norm grounded in nature itself. Human reason is capable of discerning this moral norm, at least in its fundamental requirements and thus ascending to the creative reason of God, which is at the origin of all things. The moral norm must be the rule for the decisions of conscience and the guide for all human behaviour.'

He asks: 'Do juridic norms exist for relationships between the nations which make up the human family? And if they exist, are they operative? The answer is, yes, such norms exist – but to ensure that they are truly operative it is necessary to go back to the natural moral norm as the basis of the juridic norm. Otherwise, the latter constantly remains at the mercy of a fragile and provisional consensus.'

In our administration and service of law, despite our hesitation and doubts, we must realise that we are capable of discovering at least in essential lines the common moral law, which over and above cultural differences, enables human beings to come to a common understanding regarding the most important aspects of good and evil, justice and injustice. It is essential, then, to go back to this fundamental law committing our finest intellectual energies to this quest and not letting ourselves be discouraged by mistakes and misunderstandings.

The Pope says: 'Values grounded in the natural law are indeed present, albeit in a fragmentary and not always consistent way, in universally recognised forms of authority, in the principles of humanitarian

Judge Philip Misso, Caroline Andrews and Federal Magistrate Maurice Phipps

Judge Damien Murphy with Associate and Judge Marie Kennedy

Archbishop Hart leads the procession into the cathedral

Justice Curtain, Justice Marshall and Justice Tracey

Fr Jim Clarke, Justice Susan Crennan, Justice Paul Coghlan and Fr Tony Kieran

The judicial procession

Justice Bongiorno, Justice Ryan, Alan Myers QC and Justice Heerey

Patrice Teague, Justice Teague, Justice Vincent, Judge Walsh and Mrs Walsh

law incorporated in the legislation of individual states: Mankind is not lawless. All the same there is an urgent need to persevere in dialogue about these issues and to encourage the legislation of individual states towards a recognition of fundamental human rights.'

There is a specific matter that I wish to place before you as men and women concerned with the law and its application, and that is my concern about proposals to give legal recognition to couples in a relationship who are not married, including providing marriage-like legitimacy to same sex intimacy.

Two issues arise from these proposals.

The first is with the proposals themselves, which I emphasise are emphatically opposed by the Church.

The Church's position on this matter is quite clearly stated in the paper published by the Congregation for the Doctrine of the Faith in 2003, and which is publicly available on the Vatican website, titled *Considerations regarding proposals to give legal recognition to unions between homosexual persons*.

The publication quite rightfully points out that society owes its continued survival

Justice Cathy Williams, Justice Bernard Teague, Archbishop Hart, Justice Susan Crennan, Justice Frank Vincent and solicitor Tim Mc Farlane

to the family, founded on marriage. The inevitable consequence of legal recognition of same sex unions would be the redefinition of marriage, which would become, in its legal status, an institution devoid of essential reference to factors linked to heterosexuality; for example, procreation and raising children.

If, from the legal standpoint, marriage between a man and a woman were to be considered just one possible form of marriage, the concept of marriage would undergo a radical transformation, with grave detriment to the common good.

A state which gives legal standing to such unions fails in its duty to promote and defend marriage as an institution essential to the common good and will result in changes to the entire organisation of society, contrary to the common good.

The Church teaches that men and women with same sex tendencies must be accepted with respect, compassion and sensitivity and not subject to unjust discrimination.

The legal registration of relationships between same sex couples on the other hand is a radical departure from the principle of tolerance and must be opposed.

The second issue arises from the Church's obligation to act always in conformity with its doctrines, beliefs and principles.

Should such proposals become law, the Church would have to assess its ability to cooperate in their application.

The question that would then arise is how to ensure that Church bodies are not directly or indirectly discriminated against or subject to sanction when they act accordingly.

Other religious leaders may have similar concerns.

Therefore, I invite you all to examine proposals of this kind closely and consider their moral, ethical and other consequences.

In your practice of law and in my teaching and leadership, an ever deepening awareness of the natural law of our humanity, of the search for truth and of the realisation that human powers of intellect and will are limited and require the divine to make them complete is the source of our continuing search and reflection.

As you exercise your magnificent service to society, let none of us forget the importance of natural law and natural justice. We can make a very real difference in advocating and discerning the causes of those with whom we work. We value the magnificent contribution which the legal profession makes for the common good. Even in the most difficult of cases, we as people of faith are provided with the natural law, the divine positive law and the grace of the Holy Spirit to reflect on what we must do as people of faith and goodness.

May the Holy Spirit fill your hearts with his light and guide you now and always on your journey this year.

DENIS J. HART
Archbishop of Melbourne

# Alien or Citizen:
## Law as Story in Judaism and in Australia

Sermon for the Opening of the Legal Year
**Rabbi Fred Morgan**, Senior Rabbi, Temple Beth Israel
29 January 2008

When I first came to Australia ten years ago from Britain, one of the differences that struck me related to elections. In Britain, as in America, there is no compulsion to vote under the law; whereas here in Australia, it is an infraction not to vote in elections. When someone fails to vote, he is sent an official form requesting a detailed explanation. The form states, 'If the reason is considered valid and sufficient, no further action will be taken… If the reason is NOT considered valid and sufficient, an Infringement Notice will be sent to you.'

Recently I saw a copy of one such explanation, which I would like to share with you:

> I had every intention of voting in the election, however, my recollection of the dates 24, 25th November are a little bit hazy.… I strongly suspect that I was abducted by Aliens, and was unable to attend a voting booth due to my absence from the planet Earth. All I remember from that weekend is waking up on the Sunday morning with an extremely sore anus and a strange hard lump in my arm which I suspect is an Alien tracking device of some kind that they have implanted in my wrist under the skin. I can provide pictures of this but I am sure you are fully aware of this kind of device, as I am led to believe that the Government provides names and locations of people to the Aliens, for a Abduction.


The congregation at Temple Beth Israel

I must say, I would not like to be the person who has to judge whether this reason is 'valid and sufficient' in law!

However, this response and its context, the Australian election, do lead me to reflect on one meaning of the law, the role that the law plays in creating a coherent and effective society. This meaning of the law is at the heart of Torah and Jewish tradition, and it also seems very appropriate to highlight this theme in the service for the opening of the Australian Legal Year 2008.

This week's synagogue reading from Torah is a section from the Book of Exodus called *Mishpatim*, a Hebrew word that means 'Laws'. Many scholars identify *Mishpatim* as the core legal document within the Torah, the original stratum of

Justice Kaye reading during the service

Justice Goldberg, Justice Dessau and Mark Dreyfus QC

Rabbi Morgan and Mark Dreyfus QC

and carrying the Torah

law that will govern the Jewish people once they have completed their trek through the wilderness and settled in the Promised Land. Last week's Torah portion, *Yitro*, described how the Jewish people received the 'Ten Commandments' at Mount Sinai after their Exodus from bondage in the land of Egypt. In Jewish understanding the 'Ten Commandments' are not in fact 'commandments' but rather a general statement of principles that underlie the legal code of *Mishpatim*. It is this code of laws, *Mishpatim*, that provides the framework for Jewish living.

The code opens, perhaps unexpectedly, with laws that hearken back to the situation of the Jews in Egypt: if you have slaves, then you must release your slaves in the seventh (sabbatical) year. But if a slave refuses to go free, for whatever reason, then you should mark him by piercing his ear on the doorpost of the house and he remains a slave forever. At the conclusion of the portion *Mishpatim*, the Torah returns to the subject of slaves: if a slave is harmed, for example, if he loses an eye or a tooth, then he is entitled to go free. The

Deborah Mandie, Justice Mandie and Mrs Marilyn Mandie

Mark Dreyfus QC

Justices Kaye and Mandie with Rabbi Morgan

thrust of these laws is clear. Even slaves are human beings, deserving of dignified treatment under the law.

Even without these laws regarding the dignity of slaves, we would know this from the story of Creation which opens the Book of Genesis. In this story we read that God created man and woman in the divine image (in Hebrew, *b'tzelem Elohim*, 'in the image of God'): all humankind is included in this characterization, no group is excluded, not even slaves who occupy the lowest rung in society.

The Creation story in Genesis is just that – a story. What transforms the Creation story into a social reality is the framework of law in *Mishpatim*. Through the law about slaves, we live out the meaning of God's creation of humanity *b'tzelem Elohim*, 'in the divine image.' In other words, it is the law – the legal code of *Mishpatim* – that transforms the Creation story into *our story*, the story of the Jewish people. The law breathes life into the story of Creation.

As slaves in Egypt, a land of bondage, we Jews know what it is like to be treated as less than human, as subhuman, as possessions devoid of any divine spark or intrinsic meaning. The laws of *Mishpatim* that require us to treat slaves with dignity because, despite their situation, they are still children of God, created in God's image, reiterate our story and keep it alive for generations far into the future. Jewish law provides the Jewish community with its ongoing story by reminding us, again and again, that we are created in God's image, that we were slaves but now we are free, that God expects us to live lives of virtue by treating others with the dignity that is their right. When we read *Mishpatim* in synagogue this Sabbath, this is the story that you will hear, in the form of legal obligations and norms for the Jewish people. In this way, the law gives us our story by defining the norms which enable us to participate most effectively and coherently in the life of our community.

As it is with Jewish law, so it is with Australian law. Australian law also tells a story, the story of civic virtue and social justice as envisioned by those who framed the legal norms of this country. That is why it is so important that there is coherence between the social narratives that we tell our children and the laws that express the enduring values of Australian society. They are not separate domains of life. To live life as Australians is to live life in accordance with the laws of this country and to appreciate the story that our laws encapsulate, for example, by voting in elections that tell the story of our democratic roots.

Life lived deliberately outside the law is, in effect, life lived outside the society in which we dwell – being *in* the community but not of the community, rejecting the conjunction between society's story and our own story. This is perhaps what Rabbi Tzadok meant when he used to teach, 'Do not set yourself apart from the community (*al tifrosh min hatzibbur*)' ('Sayings of the Fathers' 4:7). In short, life lived deliberately outside the law is life lived as an alien – or, if you will, as someone abducted by aliens. Without acknowledging the stories that underwrite our values as a community, by 'setting ourselves apart from the community', we make ourselves strangers, aliens, to society – whether as Jews, or as Australians.

How our lives under the law are judged to be 'valid and sufficient', however, I must leave to others to decide.

# Buddhist Ceremony

A service was held at the Fo Yuan Art Gallery on 29 January 2008

Justice Kellam and Judge Julie Nicholson

Abraham Cheong

The ceremony in progress

The 'Gift-giving' ceremony

Michael Wells

# International Commission of Jurists Opening of the Legal Year

29 January 2008


Justice Tony Pagone

On behalf of the ICJ, I have great pleasure in beginning this morning by acknowledging the traditional owners of the land on which we stand, the Wurundjeri people. We pay our respects to their elders and ancestors and are especially honoured by the presence of Ms Joy Murphy.

Professor David de Kretser, Governor of Victoria, Mrs de Kretser, Chief Justice Warren, Your Honours, Joy Murphy, representatives of various community groups, ladies and gentlemen.

It is my role, and great pleasure, on behalf of the ICJ, to welcome all of you here today and to thank you for your participation and presence.

Some form of event to mark the beginning of the legal year has taken place in Melbourne since at least 1938. An article in the 1993 Autumn issue of the *Victorian Bar News*, records that some time in 1937 some young lawyers were discussing, over drinks at a hotel, a colour film of the opening of the legal year in Westminster. They were impressed by the pageantry of the occasion and decided to implement something similar in Melbourne.

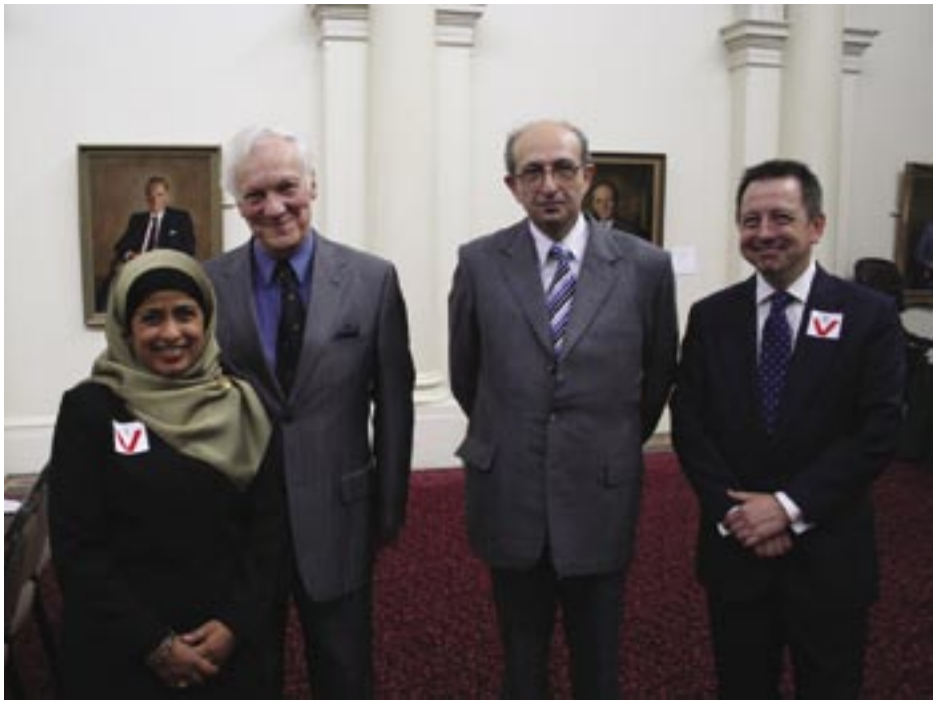
Audience

The service in Westminster is of much longer tradition than the one in Melbourne. The website of the Judiciary of England and Wales, formerly that of the Lord Chancellor's Department, records that the current service to mark the beginning of the legal year dates back to the Middle Ages, when judges prayed for guidance at the start of the legal term. The services which have taken place in Melbourne to date, and others which are taking place today, have followed that tradition. I am pleased to report that there are also similar services in other parts of the world, including, as I recently discovered, in Italy.

Last year the Executive of the ICJ thought that there was merit in extending that tradition as a symbolic public reminder of the importance in our legal system of the rule of law and of equality before the law in a diverse community. What this event here today has sought to do is to focus upon the diversity of our community as a reminder of the importance of the rule of law, equality before the law, and of the common public commitment to those core values in a diverse and complex community. To that end, we have invited judges, lawyers, law makers and administrators, together with as broad a cross-section of the community as we could think of, to reflect its diversity and difference.

A public event to mark the beginning of the legal year, and your presence here this morning, are important reminders of the relationship between a diverse community and those who administer its laws. The start of the legal year provides an opportunity for community representatives and those charged with the administration of its laws to meet together and to reaffirm the common core values which are essential to a healthy legal system in a liberal democracy. Public confidence in the administration of the law is, we think, enhanced by public reminders of the core values of the rule of law and of equality before the law in a diverse community. We thank you for coming and in extending an important tradition more broadly into the community.

GLENN McGOWAN SC



Speakers: Tasneem Chopra, Rev Prof Robert Gribben, Justice Pagone and Glenn McGowan SC

Chief Justice Marilyn Warren and Judge Graeme Anderson

# A time for renewal

Address by the **Honourable Marilyn Warren AC,**
Chief Justice of the Supreme Court of Victoria delivered at the opening by the International Commission of Jurists, Queens Hall, Parliament House, Victoria, 29 January 2008

The Opening of the Legal Year is a special time when all those committed to the law renew and refresh their commitment.

The law is about much more than its lawyers, judges, magistrates and tribunals.

It is about everyone who participates in the certainty, comfort and harmony that the law brings to our society.

The citizen and government function and thrive in the relative certainty that the law will protect and enforce their rights and obligations. Those rights and obligations may relate to fundamental human rights – the right to speak, to be protected from the immoral conduct of discrimination and to religious and political freedoms. Those rights and obligations will bring order when government sets about the acts of governing, when commerce interacts and when the citizen is called to answer for conduct that threatens our society.

The citizens and government take comfort in that the law will blanket and protect them as individuals and institutions, in all they cherish and represent. The law enables the citizen and government to do what must be done in society.

The law is the best tool available to enable and protect social function and interaction. The citizen and government flourish peacefully in the harmony yielded by the law.

On these occasions the spectre of the rule of law is promoted with great emphasis. When those committed to the law enforce the law they mostly do it without reflection on the rule of law. When the police quell disputes, control the citizenry and arrest and charge miscreants under the law they add thread to the fabric that becomes the law.

So, too, when those helping the homeless facilitate the identification and protection of the human rights of the homeless they act under the law. They attempt to bring social balance and fairness to all.

Judges, magistrates, tribunals, court administrators, jury keepers, judicial educators, teachers of the law, the builders of court buildings, the drafters of the law and the lawmakers and the media who tell the story of how the law is played out, all participate in commitment to the law.

No one works for the law as an island. Actions have consequences for others. They are part of a whole system of the rule of law. Courts are one part of the rule of law that add to the certainty, comfort and harmony the law gives to our society. So too are parts formed by the police, corrections personnel, court and government employees and all who add to the protective and enabling capacity of the law as we know it.

To participate within and benefit from the law is a privilege which must be celebrated on this day. The certainty, comfort and harmony provided by the law means we are not threatened by military coups, rebellions, riots, the imprisonment of dissidents, seizure of property, censorship, religious, racial or gender discrimination, persecution or social harm.

The law is a growing, changing, amorphous concept. We reach out to touch, understand and know it. It is always there. The law grows and changes to meet the growth and change of society as it evolves.

Those committed to the law take the Opening of the Legal Year as the time to recommit to fairness and impartiality and revive their courage to maintain and apply the law.

In reality, there is no opening of the legal year. The law is always open. The opening is merely a temporal marker to pause momentarily to consider what the law is about and our individual roles in it.

The Opening of the Legal Year is but a time for renewal and recommitment.

Let all of us within the law do that now.

# Legal Laneway Breakfast

Brilliant sunshine and hot cups of coffee greeted more than 400 people in Hardware Lane on an early Wednesday morning (30 January) at a celebration to mark the Opening of the Legal Year.

The Legal Laneway Breakfast, formerly 'Portia's Breakfast', also stood up to its status as the biggest and most inclusive networking event on the legal calendar. Noted professor and former Victorian Supreme Court Justice George Hampel QC commented that, 'The occasion provided an opportunity to mix with a wide range of lawyers of different ages and backgrounds from so many fields of practice and organizations.'

Victoria Law Foundation, supported by the City of Melbourne, hosted the successful event with Australian Women Lawyers, Victorian Equal Opportunity and Human Rights Commission, Judicial College of Victoria, Legal Services Board, Leo Cussen Institute, LIV Young Lawyers' Section, Sentencing Advisory Council, Victorian Law Reform Commission, Victorian Women Lawyers, Women Barristers' Association and Women's Legal Service Victoria. Co-host and CEO of the Judicial College of Victoria Lyn Slade said, 'The Judicial College is very pleased to be one of the sponsors, and it's great that the breakfast brings all sections of the profession together so that judges, barristers, solicitors, support staff and others can mingle informally and enjoy a relaxed celebration before gearing up for the year ahead.'

Besides being a secular celebration of the Opening of the Legal Year the Breakfast also proves a major legal networking opportunity with a notable cross-section of the legal community in attendence including most heads of jurisdiction, members of all courts, heads of legal sector agencies, judges, solicitors, barristers, community legal centre workers and academics.

Guest speaker Alexandra Richards QC recognized Victoria Law Foundation's pioneering work in making law accessible for 40 years and highlighted the significance of 2008 as the centenary of women's right to vote. She also acknowledged another significant upcoming event on the legal calendar; Law Week 2008 (12–18 May), which takes on the theme of

Gabrielle Deal, Meenal Kashyap and Christine Petering from the State Revenue Office

Alexandra Richards QC, Victoria Law Foundation Board Member

'Reaching Out' this year with a focus on people with special needs, and others who may not otherwise find easy access to legal information and services.

With guests wholeheartedly supporting the fundraising raffle that was held during the breakfast, over $1000 was raised to support the Women's Legal Service Victoria (WLSV) who provide women with vital legal advice on violence and relationship breakdown. 'The money will enable WLSV, as a not-for-profit organization, to mark the beginning of the legal year on a very positive note!' said Gillian Dallwitz, CEO of the WLSV. The featured prizes were generously donated by local businesses, including a night for two at the Sebel Hotel with breakfast at Treasury Restaurant.

We thank our major sponsor the City of Melbourne and all the local businesses that were part of the Legal Laneway Breakfast for their involvement and cooperation including:

Café Max
Wine Dine and Unwind
Knife Fork Bottle and Cork

Raffle prizes were kindly donated by:

The Sebel Hotel
Crumpler
Rap Products
Discurio
Supreme Court Building & Services Unit

Also, a special thanks to the following for their support:

Caffe Alfresco (mobile coffee service)
Brunetti of Carlton
Pink Noise
ISS Security

Thanks once again to our City of Melbourne for sponsorship and the Legal Laneway!

Mardi Jarvis, Family Court of Australia, Tracey Jones, Federal Magistrates Court, Ilana Katz and Sally Field, Family Court of Australia


Tim Bloxsome, John Dossis, and Mike Donelly, from Essendon Community Legal Centre, and Maciek Krymski, Judicial College of Victoria

Laura Racky, Maddocks Lawyers, Prue Elletson, Victorian Law Reform Commission, Claire Downey, Supreme Court of Victoria, and Justine Lau, Victorian Women Lawyers

Mick Francis, Department of Justice, Chief Magistrate Ian Gray and Her Honour Judge Coate, Coroner's Court

Ben Keller, Kliger Partners, Michael Brett Young, Law Institute of Victoria, and Aitan Schmideg, Kliger Partners

Maria McGarvie, previous Victoria Law Foundation staff member, Melanie Szydzik, Supreme Court of Victoria, Margaret Fried, Department of Justice

# Judgment Day

## Victoria's top judges put themselves under scrutiny

Victoria's top judges want to know what others think about how the judiciary performs its roles.

Putting themselves on the line, senior judges are participating in the Judicial College of Victoria's 'world-first' 360 degree judicial feedback process.

Supreme Court Chief Justice Marilyn Warren, Court of Appeal President, Justice Chris Maxwell, County Court Chief Judge Michael Rozenes and other judicial officers are asking their colleagues, court staff and the legal profession what they think of their professional skills.

Chief Justice Warren, chair of the Victorian Judicial College, said, 'As judges we seldom receive honest and helpful feedback. The 360 degree feedback survey will provide both. It is a powerful professional and personal development opportunity.'

'The 360 degree pilot program for judicial officers is ground-breaking. Until now lawyers and judges had little opportunity to provide constructive feedback, and judges little opportunity to receive it. Now each year through this project, judges can. I expect it will help us greatly.'

Two College Board members, Chief Magistrate Ian Gray and new VCAT President Justice Kevin Bell, pioneered the pilot. Both said they found the experience invaluable.

Chief Justice Warren, Justice Maxwell, Chief Judge Rozenes and other participants have each identified a group of 'raters' to provide feedback.

CEO of the Judicial College, Lyn Slade, said the raters complete an anonymous online questionnaire focussing on the judges' work-related behaviours – timeliness, courtesy, listening skills and verbal and non-verbal communication – as they performed their judicial functions.

'It can seem a little confronting at the start but it is a tremendously invigorating exercise, especially for longer serving judges,' College Board member Chief Judge Rozenes said.

Once the survey data is collated, the judicial leaders will each have a lengthy one-on-one individual debrief, to gain insights into how they are perceived by others, what their strengths are, what challenges they face, and develop some strategies to work on.

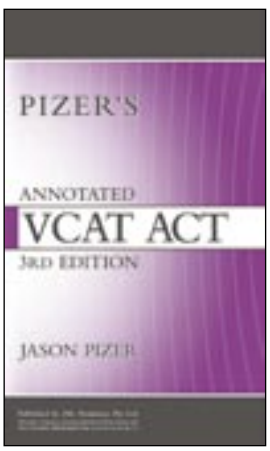
This innovative concept is attracting national and international attention. The New South Wales Judicial Commission has visited the Victorian College to learn about the project so they can run a pilot for their judges. The National Judicial College and judges in the Family Court are also interested.

# Pizer's third edition launched

Suppose you have just been appointed to the Supreme Court of a remote desert island. The appointment is on the basis of BYO library (your new jurisdiction has no legal texts) and your air freight weight allowance is miserly. Which books would you pack?

According to Court of Appeal President Maxwell the obvious candidates include *Fleming's Law of Torts*, Aronson et al's *Judicial Review of Administrative Action*, *Miller's Annotated Trade Practices Act* and *Pizer's Annotated VCAT Act*.

His Honour volunteered his desert island legal references when speaking in July at the launch of the 3rd edition of Jason Pizer's *Pizer's Annotated VCAT Act*.




Exporting Pizer's to an anonymous island beyond the jurisdiction of VCAT might seem unexpected but President Maxwell stood by his choice.

'It is more than simply a VCAT text. As an administrative law text it holds its own with the best on topics of broad application like natural justice and want of jurisdiction or power.

'It is a marvellous book. It is phenomenally detailed without being complicated.'

Earlier in the evening VCAT's Acting President, Judge Bowman had formally launched the latest edition of the self-published work.

Judge Bowman was also lavish with his praise of the book.

'A legal text is approaching iconic status when it is referred to only by its author's name. *Pizer's* is now such a book. And – as textbooks go – it's a good read.'

Judge Bowman noted that since the previous edition of *Pizer's* was published in 2004 legislation as diverse as the *Private Security Act* and the *Geothermal Energy Resources Act* have conferred a further 18 statutory jurisdictions on VCAT.

He said that although the general population perceived VCAT as chiefly a town planning tribunal, such work had accounted for less than 5 per cent of the 90,000 VCAT applications filed last financial year.

Although most VCAT cases settle, thousands still progress through to final determination each year.

'*Pizer's* sifts through those decisions in what really is an astonishing piece of research.'

PAUL DUGGAN

*Pizer's Annotated VCAT Act* (3rd edition) is published by JNL Nominees Pty Ltd. It is available for $130 from VCAT and the author direct c/ Clerk A

# Court 4 in the Supreme Court re-opens

By Justice Frank Vincent, Court of Appeal, Supreme Court of Victoria, 7 April 2008

Thank you, Chief Justice, for the opportunity to contribute to this occasion. For a number of reasons, this court holds particular significance for me, and it is wonderful to see it so splendidly restored and adapted for use in a new century.

My connection with this room began over half a century ago when, as a second- or third-year law student, I sat in the public gallery and watched the charismatic Frank Galbally, who was then at the height of his powers, successfully defend a policeman charged with the murder of his wife. Obviously attributing his success in some small part to divine intervention, immediately after the verdict, Galbally and his client walked down the street to St Francis Church to pray. Their piety was observed by a passing newspaper photographer who, by chance it seems, was in the vicinity and with his camera ready.

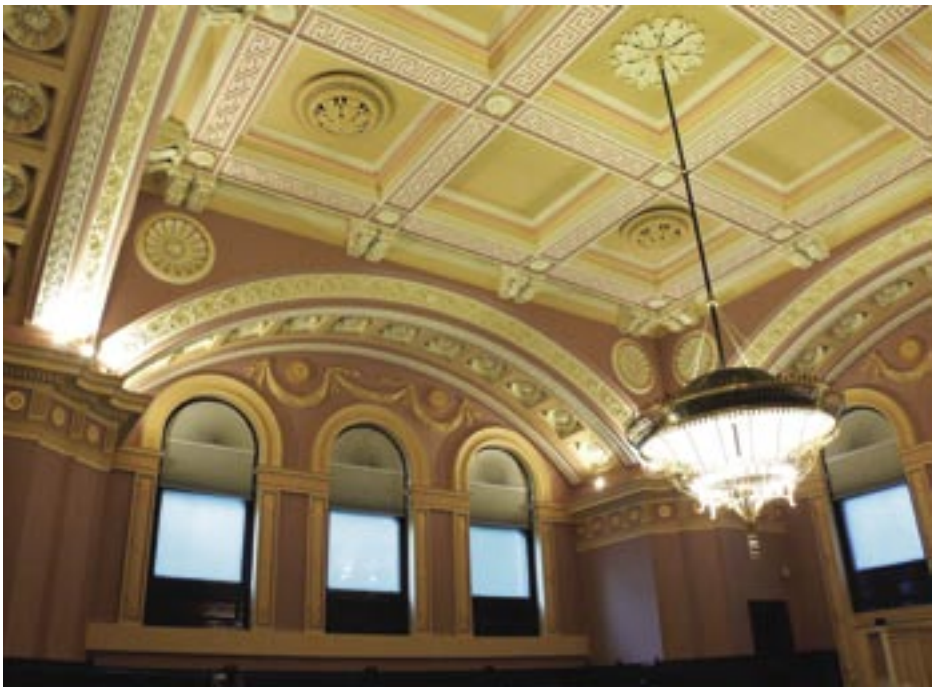
Justice Frank Vincent addresses the gathering

It was in June 1964 at the age of 26, and a barrister for three years, that I first took my place at the Bar table here, appearing on behalf of one of two men charged with murder. The trial judge, Monahan J, was a great criminal lawyer and judge. I am reasonably confident that he was even more terrified by my lack of experience than I was. A wily prosecutor named Bill Fazio leading a young Michael Kelly represented the Crown and the legendary Jack Lazarus appeared for the co-accused. I remember telling my client, who I recall was known, and not inappropriately, by the nickname 'Lard head', that I had not appeared in a trial of that kind before. He responded that that was all right and that he was similarly inexperienced.

Somehow or other we both managed to negotiate the process successfully. However I often wondered whether even Lard head's equanimity was shaken at the commencement of the hearing. In an endeavour to present myself as totally at ease, indeed something of a cross between 'the Fonze' and Bobby Darrin, I had practised getting to my feet, shrugging my gown casually around my shoulders and announcing my appearance. It all went quite well until I indicated that I appeared for the wrong person.

Counsel appearing in those trials were forbidden to refer to the death penalty. Of course, and particularly in cases in which there was concern that it might be imposed, it was almost irresistible not to make some comment obliquely alluding to it. When this was done, judges generally would let the breach pass without anything being said.

In that trial however, my reference could hardly be described as a passing allusion. I concluded in my final address with the statement that:



The 'new' look

> In one sense, it can be said not to matter whether this trial ends with the day of a gaol gate or the snap of a gallows rope. Each is a terrible sound and I pray to God that it will not be in such a moment of silence that you discovered the meaning of reasonable doubt.

I think that all I need to say of the trial judge's response is that it has remained clear in my memory.

Waiting for the jury in cases of that kind was very stressful. In that matter, the jury returned quite late on a Friday night. The prosecution and the defence team, which included a young law clerk named Ian McIvor, had been waiting in a nearby watering hole and it is probably sufficient to state that it was good for all concerned that they were not out any longer. When they returned a verdict of guilty of manslaughter, Jack Lazarus stated helpfully, I think, in relation to his client's position, 'It's the drink, your Honour.' Monahan J responded, 'Quite so, we will adjourn till Monday.'

As both a member of counsel and a judge I have spent a remarkably large part of my working life in this room. As a barrister, I appeared regularly in Court 4 over more than 20 years. Once, I appeared in four murder trials in immediate succession in this court. Throughout that period, there were only two possible sentences in those cases – the death penalty which was abolished at the end of 1974 and imprisonment for life. For practical purposes, all cases were fully contested. It was unclear whether a plea of guilty could be lawfully entered in a death penalty case, although I am aware of one occasion on which it was accepted. As both sentences were mandatory, there were no plea proceedings and save for asking whether the convicted person had anything further to say about the verdict, the sentence was handed down immediately. On four occasions, I sat at the Bar table, devastated, as I heard my client sentenced to death. On one of them, the judge, after imposing sentence on the co-accused, realized that he had not asked whether that man had anything to say. Accordingly, his Honour, sensitive to such matters, had him brought back to the court, apologized profusely and then made the enquiry. Unsurprisingly, the deeply shocked individual muttered 'no' and his Honour sentenced him to death again, once more apologizing for his omission.

As a trial judge for 17 years, I presided in a very large number of cases here. The Russell Street Bombing trial, that of the persons accused of the murder of the police officers in Walsh Street, the eight police officers charged in relation to the death of a man named Jensen, the trial, also of police officers, arising out of the death of a man named Gary Abdullah, the first murder trial of Peter Dupas, the plea hearing for Beckett and the trial of Camilleri for the killing of two Bega school girls, the plea hearing in relation to the serial killer, Paul Denyer, and a vast number of less well known proceedings were all conducted in this room.

The first hearing in what was then called the Central Criminal Court commenced on 14 February 1884. It was, the *Argus* of the following day reported, the real opening of the newly constructed building and, the newspaper recorded that the court was 'thronged' with people:

> At ten minutes past 10 o'clock, amidst a silence which the voice of the crier was not needed to produce, his Honour entered the bench from a little door at the back. The bar rose, and a compact row of wigged heads bowed deferentially, the judge responding in like manner to the salute. A moment's pause occurred, while expectation was on tip-toe to hear the first official words which should agitate the yet unsanctified air of the Court. His Honour made no sign, and the bar had no nerve to speak. The associate was the only man equal to the occasion, and his first memorable words were, 'Bring William George Clamp to the bar!' An officer in the dock dived down into the bowels of the earth by way of the stone staircase, and presently brought up from the underground dungeon, a prisoner. But his name was not William George Clamp, and he was ignominiously dismissed to the regions below, amidst the unchecked titter of the spectators. The real William George forthwith appeared, and the business proceeded as smoothly as if the first event in the Court had not been a bungle.

The *Age* journalist who reported on this courtroom, a few days later, in an article entitled 'New Law Courts Blunders – Poor Arrangements in Central Criminal Court' was singularly unimpressed by this courtroom. He stated:

> The great *bête noir* of the new structure appears to be the Central Criminal Court, which in the first place is difficult to find, and which when found is seen to be defective in the last degree.

A bird's eye view

He was critical of what he described as the 'utter absence of acoustic properties' and continued:

> Another difficulty is presented by the peculiar principle on which the different persons are located, the jury being to the left of the bar, the witness to the right and the prisoner immediately behind. A zealous counsel, therefore, who desired to keep all parties before him would require to be perpetually revolving so as to face all corners – an operation which could only be gracefully performed on a piano stool or some similar piece of mechanism. …

He pointed out that it would not be pleasant or even comfortable experience to be tried in this court:

> In a British court, where every man is supposed to be innocent till he is proved guilty, it seems somewhat incongruous that a prisoner whose guilt has not been established should be compelled to traverse an underground tunnel, which leads into an underground cell, where he is exposed to the utmost discomfort, till his time for trial arrives; and when that eventful epoch has come he is sent up a flight of stairs into the prisoners dock – a place which for barbaric and repulsive appearance could hold its own with some of the halls of the Inquisition. In this dock, designed in such a humane and genial style, no seat is provided for the prisoner, who, it must always be remembered, has not yet been proved guilty, and it is enclosed with an iron railing, surmounted by cruel barbarous spikes, an ingenious invention intended to prevent the unconvicted prisoner from even leaning upon the railing, no matter how many dreary hours the case may last.

There was also considerable criticism of the straight-backed throne-like chairs with which the court was equipped but were still in general use when I first came here and are still littered around the building. One of them I noted was in the Banco Court and used for Justice John Coldrey's farewell last Thursday. They were certainly of solid construction.

For the major part of its history, Court 4 has been used for the most serious criminal trials conducted in the Supreme Court. However, due to the changing character and complexity of proceedings over recent years, it is not always suitable. It was also used from time to time for hearings by the Old Court of Criminal Appeal. Generally referred to for many years simply as the Criminal Court, within its walls our community and our legal system has confronted and been confronted with an extraordinary range of human problems and interactions for over 124 years. It was here, for example, that Colin Ross was tried and convicted in 1922 in relation to what became known as the Gun Alley murder of a little girl. Ross was later executed.

As Weinberg J pointed out in a paper concerned with the problem of delay in the criminal trial process:

> Ross was charged on 12 January 1922, and committed for trial on 26 January. His trial commenced on 20 February with a verdict on 25 February. His appeal to the Full Court was denied on 20 March and an application for leave to appeal to the High Court was refused a little over a fortnight later. Ross was then hanged on 24 April.

The process appears to have been highly efficient as it was completed in a little over three months but I observed in quite recent newspaper reports that, as a consequence of doubts raised in relation to that conviction, you Mr Attorney, have sought the advice of three members of the Court concerning the possibility that there may have been a miscarriage of justice.

Within my personal memory, William John O'Meally was convicted of murder in this room. Later, a man named Taylor and he were the last persons in Victoria ordered to be whipped. Twice in this building but not in this room, I was required to present submissions for men who were at risk of the imposition of that barbaric punishment.

In this room were conducted the trials of Lee, Clayton and Andrews and Ronald Ryan. Jean Lee was the last woman and Ronald Ryan the last man to be hanged in this State.

Great judges and advocates and some who were not so great have occupied the bench and bar of this courtroom over the last 124 years.

Acknowledging the force of some of the criticism of this courtroom that were initially made in 1884, I have always been proud to enter it.

It is said that there is a ghost in Court 4. If there is, I'm sure that it knows me well. Perhaps the time will come when we'll get together and compare notes.

# Building cases – a new approach

The Supreme Court has recently published a practice note as to changes in the conduct of building cases which are directed to reducing the cost of litigation in this area. The **Honourable Justice Byrne** explains the basis for, philosophy behind, and practical application of the new approach.

The Supreme Court proposes to introduce on a trial basis a new approach to the management and trial of construction litigation. A copy of the Practice Note explaining this is on the Court website at <www.supremecourt.vic.gov.au>. A discussions session is to be held with all members of the Construction Bar in March to explain the features of the new approach in greater detail and to answer queries.

The decision to explore this new approach has been driven by an ever-increasing demand from litigants, governments and lawyers to contain and reduce the costs of litigation. This is so in the Commercial and Equity Division of the Supreme Court, which is primarily concerned with litigation concerning very large sums of money. The view of the Court, as the principal commercial court in the state, is that it should deal with these cases with great attention to the facts and a sophisticated and careful attention to the law. What might be considered as good enough for a lesser dispute is not accepted here. This produces detailed analyses of fact and law by all involved and lengthy judgments by the Court. The time and effort involved in this is productive of cost to the litigants and, perhaps, delays in the obtaining of a result.

Nowhere is this more evident than in construction cases. Typically, these involve multiple issues and large numbers of documents. It is for this reason, as well as the fact that these cases in the Building Cases List represent a relatively small homogenous number of the Court's major litigation, that the new approach has been directed to them.

The decision has been the result of a number of factors which have all emerged in recent times.

- A significant number of these cases are settling, it seems, because one or more of the parties is exhausted by the litigation, financially or otherwise. The resolution of a genuine dispute in these circumstances must be seen as a reproach to the system that causes it.
- Enquiries in overseas jurisdictions have disclosed that:
  - similar concerns are being expressed;
  - the procedures available to the different courts are not dissimilar;
  - any differences in experience appear to be the product of the differing quality of the legal representation.
- Enquiries of those involved in litigation

in this Court disclose an attitude in litigants that they would, of course, like to win their case, but that a very great importance is given to obtaining a result, any result, and that as quickly and cheaply as possible.

- From its early tentative steps in the 1970s, the judge management of civil litigation has grown apace. And the more it is provided the more is it requested. This has led to a drastic shift in the relationship of the judge and the litigation. No longer is he (no 'she' in those days) a silent spectator to the adversarial conflict conducted by hired gladiators; he or she is now expected to take an active, even a pro-active part in the process. In short there has been a shift away from the adversarial and in the direction of the inquisitorial process. This has had an effect upon the relationship between the Bench and the lawyers. Lawyers must reconcile their obligations to their client with their obligation to assist the judge to perform this new managerial role.
- There has also been a progressive change in the relationship between the public and the Court. They expect the Court to provide a dispute resolution service, and judges in recent years see their function as providing that service. Mediation, even Court-annexed mediation, is now the norm. It is no longer, if it ever was, the case of judges doing the litigants a favour in hearing their case.
- Construction litigants, after all, have a choice as to the forum in which they bring their claims. In addition to this Court, the Federal Court and arbitration, the enlargement of the jurisdiction of the County Court provides for them a state-based alternative for their claims. If they want to conduct their construction litigation in this Court they do so under the new approach regime.
- Aspects of this new approach anticipate the publication and implementation of the recommendations of Professor Cashman's *Civil Justice Review*.
- My impression is that a particular characteristic of lawyers who practice in this area is that they have a capacity for addressing detailed facts and for coping with large numbers of documents. This is their strength and also their weakness. It is a weakness because their focus on the detail means that they may have a reluctance to abandon a weak argument or an improbable factual contention in the interests of the litigation as a whole.

## THE NEW APPROACH

The philosophy behind the new approach is to proceed cautiously, using the existing powers of the Court and the considerable expertise of the Commercial and Equity Division judges, to introduce what I have called a culture of professional detachment and co-operation[1] which will focus upon the core issues in the case. The Court accepts that litigation at the beginning of the twenty-first century is conducted in an environment which differs greatly from that in preceding decades. It acknowledges that the cost of litigation is a function of professional time invested in the litigation and the cost of that professional time. Given the limitations of its power to impose limits upon the charges of lawyers to their clients, the focus must be directed to reducing, as far as possible, the professional time involved. This, in turn, requires all involved to address only the essential issues in the case and to put aside peripheral issues as well as those with little prospect of success and those whose outcome will not affect the major objective of the litigation. The theme of the Court's approach is that the litigation of construction disputes should be approached by the parties, the lawyers and the Court in a way that resembles the building project itself – with attention to time and cost and to the budgeting of both. To this end, the New Approach addresses administrative as well as procedural aspects of the litigation.

## ADMINISTRATIVE MATTERS

A principal feature of the new approach will be the convening of an early meeting of the lawyers and the litigants themselves chaired by a Master of the Court, which is concerned to identify the resources of all to be applied to the litigation. This resources conference will be held after the close of pleadings so that issues have been identified and will be conducted on an informal and, where necessary, confidential basis. The purpose of the conference is to identify what resources should be applied to the litigation by the litigants, by the lawyers and also by the Court. At this conference the general framework for the conduct of the interlocutory and trial process will be laid down and consideration given to procedures, including information technology procedures, which may advance the resolution of the litigation. The parties will be required to address the financial outcome of the litigation on all likely outcomes. Parts of this conference may, with the approval of the Master, be conducted on a without prejudice basis. Communications at such times will be confidential. Following this conference, the Master will prepare a report (not including privileged matters) which may be used by the Court and the parties for the purposes of charting the progress of the litigation and for costs purposes.

A second and novel procedure, adopted from the Technology and Construction Court in London, is a requirement that the lawyers for the parties complete a detailed questionnaire regarding the dispute and the litigation. This is a document for whose accuracy and continuing accuracy they must accept responsibility.

The third administrative feature will be the docketing of construction cases to individual judges within the Commercial and Equity Division. This will have the consequence that the judge will commence the trial having had an intimate knowledge of the progress of the litigation and a consequent ability to identify the positions of the parties before the trial commences.

## PROCEDURAL MATTERS

The new approach does not involve an enlargement of the powers of the managing judge or the trial judge; rather a greater readiness to give effect to the existing powers of the Court in managing and trying construction litigation. The judges will be ready to fix times for the performance of various procedural steps and to determine preliminary issues for trial where this will assist the resolution of the whole dispute. At trial judges will be more ready to exercise the powers of the Court to direct the way the trial is presented and, where appropriate, to impose time limits for the performance of various aspects of the trial. To the extent that this might seem novel, or even unpalatable, it will be one of the factors that will weigh in

the decision to select the appropriate court for the litigation.

## A NEW ATTITUDE TO LITIGATION

Experience has shown that the new approach, like anything new in litigation, will not succeed unless it has the support of the profession and of litigants to the leadership shown by the judges. The powers that will be exercised in the management and trial of the litigation are not new powers, and judges in the past have sought to exercise them. The new approach will not be successful unless the profession and the litigants themselves respond to the initiative.

What is required of the profession is that barristers and those responsible will cooperate with the work of the judge in identifying the real issues and the most efficient way of resolving them, bearing always in mind that this is a court of law and not a commercial institution; efficiency must always yield to the demands of justice. They will not needlessly raise issues of fact and law or promote arguments which have little prospect of success or which, if successful, will have little bearing upon the outcome of the litigation as a whole. They will assume a responsibility to inform and to keep informed the judge of matters which he or she must know in order properly to manage the case, to cooperate with other parties and with the Court in connection with the conduct of the proceeding, to take reasonable steps to resolve issues as may be resolved by agreement and to narrow the remaining issues. Judges will not tolerate evasive pleading; the pursuit of issues over amounts which are small in comparison to the costs involved in determining them. Judges will not countenance lengthy cross-examination regarding the detail at the periphery of the litigation. Judges will be ready to impose time limits.

As any lawyer will know, these objectives will not be achieved unless the lawyers and their clients are prepared to act co-operatively to achieve them. Professor Cashman proposes that such matters as these be included in legislation which will set out a series of overriding obligations of litigants and their lawyers and will provide penalties for non-observance. The new approach seeks to achieve this objective by an acknowledgement on the part of lawyers and their clients that the days of true adversarial litigation have now gone – days where the fundamental objective was to win. That this will raise delicate ethical questions and will confront lawyers with conflicts of loyalty cannot be doubted. Prosecutors and expert witnesses face this every day. This will demand of lawyers a degree of professional detachment – a recognition that they have a dual obligation and that their client's fee purchases only one of them.

What is required here is a new attitude on the part of lawyers and an acceptance by litigants that there is a limit to the resources that the state should be expected to provide to them free of charge for the resolution of non-important issues. The lawyers should continually ask themselves why a particular procedural step is necessary for the purposes of advancing the litigation as a whole and whether it has a reasonable prospect of success. The litigants, for their part, must, respect the decision of their lawyers that not every conceivable issue should be placed in the arena. The temptation to engage in a procedural step or to pursue a particular issue simply because it is theoretically open or even, perhaps, because the enlargement of the litigation will be productive of more costs, must be resisted. The tedious feature of modern adversarial litigation of resisting any suggestion or application by one's opponent lest cooperation be seen as a sign of weakness, will cease.

All of this will impact particularly upon counsel, for it is often their role to determine tactics and to advise on procedures. Barristers will be expected to consider with greater care the matters contained in pleadings and witness statements. Are they necessary? Are they cost effective? How will they advance the objectives of the litigation? Barristers will have a particularly important role also because an important reason for their existence as a separate branch of the profession in litigation is that they are lawyers who are one step removed from the clients and, therefore, more able and expected to bring to their task a degree of detachment which may be more difficult for a solicitor to achieve. Barristers will be expected to apply this detachment, as well as their professional skill, to construction litigation.

Solicitors, too, will be expected to look hard at their role. In advising their clients and instructing counsel, they will be conscious of the objectives of the new approach. They must be cooperative in their dealings with other solicitors and with the Court. Machismo for its own sake is to be avoided in correspondence as elsewhere. They will be expected to address questions such as the ambit of discovery and the compilation of court books with a more than usually critical approach. As is the case with barristers, they must ask themselves at every stage why it is that a procedural step is to be taken and what might be its utility in the scheme of the litigation. They will bring to all of this their own special contribution because of the close relationship they enjoy with the lay client.

## CONCLUSION

The profession and the wider community must accept that the continuing viability of litigation as a technique of dispute resolution in the construction industry cannot continue as at present. If those presently involved in the litigation do not acknowledge this and take a constructive step in the direction appointed by the new approach there is every prospect that the future in the Supreme Court for construction litigation will be very much reduced or even disappear. This would be an outcome which I, for one, would not like to contemplate.

JUSTICE DAVID BYRNE SC

## ENDNOTE

1 See my article, 'The Future of Litigation in Construction Law Disputes' in 23 *Building and Construction Law* 398 at 408.

# The second bite at the cherry
## Further evidence on appeal

**Ian Freckelton SC**

> [P]arties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry.
>
> *Taylor v Lawrence* [2002] EWCA Civ 90 at [6] per Lord Woolf CJ

> Robin Oig saw what had happened with regret, and hastened to offer to his English friend to share with him the disputed possession. But Wakefield's pride was severely hurt, and he answered disdainfully, 'Take it all, man – take it all; never make two bites of a cherry.'
>
> SIR WALTER SCOTT,
> *Chronicles of the Cannongate*, 1827

### INTRODUCTION

Cherries are not easily amenable to more than one attempt at consumption; multiple bites at them can be problematic in a variety of ways. Notwithstanding the pronouncement of Lord Woolf CJ in *Taylor v Lawrence* [2002] EWCA Civ 90 at [6] (above), it is the desire of a percentage of unsuccessful parties to litigation to have a 'second bite at the cherry' by introducing, on appeal, evidence that was not adduced at trial, whether for justifiable or indefensible reasons.

In recent years, particularly in Western Australia during and after the Mickelberg saga, attempts to re-open cases on the basis of 'further evidence' have been made with increasing frequency, although with only modest levels of success. A consequence has been the evolution of a substantial jurisprudence in relation to adducing 'fresh evidence' and 'new evidence' on appeal. This article reviews the principles emerging from that case law, with a particular focus upon how it affects Victorian litigation.

### TERMINOLOGY

An important distinction exists between 'fresh evidence' and 'new evidence'. 'New evidence' is evidence additional to that which was adduced at first instance but which with reasonable diligence could have been discovered. 'Fresh evidence', by contrast, is evidence that either did not exist at the time of trial or which could not have been discovered with reasonable diligence. 'Further evidence' is a compendious term that includes both 'new evidence' and 'fresh evidence'. On a number of occasions in the decided cases, the terms are confusingly interchanged.

### REASONABLE DILIGENCE

In both the criminal and civil contexts, reasonable diligence must have been exercised before fresh evidence or new evidence is permitted to be adduced on appeal. This is subject to the overriding discretion to admit such evidence to prevent a miscarriage of justice. While the requirement of the exercise of 'reasonable diligence' in this context is demanding, it is does not demand perfection on the part of litigants or their legal representatives. It is a question to be asked in the context of the case. If 'exceptional efforts and some good fortune to obtain' the evidence would have been necessary, the evidence will not be regarded as having been able to be found with reasonable diligence (*R v Rozynski* [1996] NSWSC 19). It is incumbent on the party seeking to adduce further evidence to show the reasonableness of the efforts made at and before the hearing at first instance or the unreasonableness of what would have been required to obtain the evidence.

Historically 'great latitude' is extended to an accused in this context and it is only in the exceptional case that evidence which was not actually available to him will be denied the quality of 'fresh evidence' (*Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ) on the basis that an accused will often be disadvantaged in intellectual terms, or in

terms of financial and legal resources in the conduct of their case.

## REASONS FOR COURT DISINCLINATION TO ALLOW FURTHER EVIDENCE

Further evidence is only permitted by appellate courts 'in the most exceptional circumstances' (*University of Wollongong v Metwally* (No 2) (1985) 59 ALJR 481 at 483) in the interests of justice and subject to a number of restrictions. This is because it is generally contrary to the principle of finality in litigation for appellate courts to reopen cases because of additional information not adduced at trial. One aspect of the finality principle is that litigants are required to bring forward their whole case at the one time and not to develop it in staccato fashion. If a second chance were readily available, litigants might put forward what they conceived to be their best case first, then should that fail, they might try another tack on appeal.

On the basis of parties being responsible for determining how to run their own cases, appellate courts extend more latitude to arguments on appeal based on fresh evidence. The courts are even less inclined to permit evidence that does not satisfy the criteria for being fresh.

## NEW EVIDENCE AND FRESH EVIDENCE IN CRIMINAL APPEALS

Adducing of further evidence in criminal matters on appeal arises from provisions permitting such appeals and providing latitude to appellate courts as to the evidence that they can take into account. For instance, under s. 574 of the *Crimes Act 1958* (Vic), the Court of Appeal may 'if it thinks necessary or expedient in the interest of justice…order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court whether they were or were not called at the trial or order the examination of any such witnesses'.

Where further evidence is permitted to be adduced, there is a flow-on effect – the appellate court is entitled to receive evidence 'which tends to support, contradict or weaken the new evidence or the inferences which might be drawn therefrom contradicting, qualifying or otherwise bearing upon that evidence' (*Ratten v The Queen* (1974) 131 CLR 510 at 517; *Mickelberg v The Queen* (1989) 167 CLR 259 at 301). This can enable the Crown to answer or place in context the further evidence.

Although this is attended by a degree of circularity, case law has tended to suggest that the decision to receive further evidence (especially in criminal appeals) is intimately bound up with whether a first instance decision should be set aside on the basis of the absence of the evidence. The overriding test in criminal appeals is the interests of justice.

The distinction between 'new' and 'fresh' evidence continues to be recognised in criminal cases (see for example *Beamish v The Queen* [2005] WASCA 62 at [13]; *Mickelberg v The Queen* [2004] WASCA 145 at [415]; *Mallard v The Queen* [2003] WASCA 296 at [12] and [13]), although somewhat variably. Recent authority establishes that the 'freshness' of evidence may be less significant in criminal appeals than in civil appeals (see *Mickelberg v The Queen* (1989) 167 CLR 259 at 301). There is something of a circularity of reasoning often engaged in, though – if the evidence would establish a miscarriage of justice, it will be received. If not, especially if it is 'only' new evidence, criminal courts are loathe to receive it, lest they open the door unduly to a proliferation of litigants endeavouring to take further nibbles at the proverbial cherry.

Barwick CJ in *Ratten v The Queen* (1974) 131 CLR 510 at 516 held there to be a miscarriage of justice if on the material before an appellate court the appellant is shown to be innocent or there is such a doubt about his or her guilt that the verdict should not be permitted to stand. When material placed before an appellate court satisfies it of a miscarriage of justice in this sense, it will not matter whether the further material or some part of it is not technically 'fresh'. If the court finds that guilt beyond reasonable doubt is not established, to maintain a verdict of guilt would be a miscarriage of justice so the verdict of guilt will be quashed and the appellant discharged. It will not matter that the trial was fair and without blemish. On occasions, the further evidence ground of appeal is described in terms of 'a residual discretion in exceptional cases to receive on appeal new or further evidence which is not fresh evidence if to refuse to do so would lead to a miscarriage of justice' (see for example *R v Katsidis; Ex parte Attorney-General* [2005] QCA 229 at [3]). For 'new evidence' to be admitted on criminal appeals it must be such that its absence at the time of the trial involved a miscarriage of justice in that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the new evidence had been before it at trial (*Gallagher v The Queen* (1986) 160 CLR 392 at 399; *Mickelberg v The Queen* (1989) 167 CLR 259 at 273, 275 and 302).

An appellate court will receive 'fresh evidence' if it can be clearly shown that the failure to receive it might have the result that an unjust conviction is permitted to stand (see *R v McIntee* (1985) 38 SASR 432 at 435 per King CJ; *R v AHK* [2001] VSCA 220 at [8]; cp *R v Ford* [2007] VSCA 221 at [84]). In determining whether there is a significant possibility of a miscarriage of justice on the basis of fresh evidence, the

**In determining whether there is a significant possibility of a miscarriage of justice on the basis of fresh evidence, the appellate court requires to be satisfied that the evidence has 'cogency, plausibility and relevance' (*Lawless v The Queen* (1979) 142 CLR 659). To this end fresh evidence has to be credible in the sense that a reasonable jury *could* accept it as true but it is not necessary that the appellate court concludes that it is likely that a reasonable jury *would* believe it (*Mickelberg v The Queen* (1989) 167 CLR 259 at 302).**

appellate court requires to be satisfied that the evidence has 'cogency, plausibility and relevance' (*Lawless v The Queen* (1979) 142 CLR 659). To this end fresh evidence has to be credible in the sense that a reasonable jury *could* accept it as true but it is not necessary that the appellate court concludes that it is likely that a reasonable jury *would* believe it (*Mickelberg v The Queen* (1989) 167 CLR 259 at 302).

There are two main formulations of the requirement. The first is that found in the judgment of Rich and Dixon JJ in *Craig v The King* (1933) 49 CLR 429 at 439, which was applied by Menzies J in *Ratten* (1974) 131 CLR 510 at 526 and by Mason J and Aickin J in *Lawless* (1979) 142 CLR 659 at 676-677, 686. It required the 'fresh evidence' to:

> be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced.

The second is that contained in the judgment of Barwick CJ (with whom McTiernan, Stephen and Jacobs JJ concurred) in *Ratten v The Queen* (1974) 131 CLR 510 at 519–520. It required the court to consider the 'fresh evidence' in order to determine whether, when the fresh evidence, if believed by the jury, is taken with the evidence given at the trial in the sense most favourable to the accused:

> it is likely that a verdict of guilty would not have been returned. In considering the material before it for this purpose, the element of credibility will be satisfied if the court is of opinion that the evidence is capable of belief and likely to be believed by a jury. …[I]f there is fresh evidence which in the court's view is properly capable of acceptance and likely to be accepted by a jury, and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered.

The Western Australian Court of Appeal in *De La Espriella Velasco v The Queen* [2006] WASCA 31 at [157] (citations omitted) summarised an aspect of the relevant distinctions as follows:

> If the evidence is 'fresh evidence', then the court only has to reach a conclusion that there would have been an increased chance of acquittal in order to decide that there was a miscarriage of justice. It must be shown that the jury would have been 'likely' to have entertained a reasonable doubt; or 'might' have; or there was a 'significant possibility' of that being so.
>
> However, if the evidence is 'new' evidence, then it is not enough merely to show an increased chance of acquittal. The 'new' evidence must be strong enough to show that the appellant is innocent or raises such a doubt that the Court concludes that the accused 'should not have been convicted'.

Fresh evidence was permitted by the New Zealand Court of Appeal in *R v Dougherty* [1996] 3 NZLR 257 when evidence of DNA testing using a new technique, discovered after the date of the trial, established that there was no scientific evidence to support the identification of the appellant as the assailant. Accordingly, the Court held that the evidence was admissible and concluded that a miscarriage of justice had taken place because, had the evidence been available at trial, its cogency was such that it might reasonably have led the jury to return a different verdict. Another instance determined to be fresh evidence was a gallows confession by another person to a homicide for which the appellant was convicted (*Beamish v The Queen* [2005] WASCA 62 at [422]). A further example was information derived from investigations by the New South Wales Police Integrity Commission but unknown at the time of a trial about the propensity of a police officer to verbal suspects, plant evidence, prepare and use false statements for use in judicial proceedings, and commit perjury. The New South Wales Court of Appeal held that 'the effect of this new material would have been to permit a very powerful challenge to the police evidence' (*R v Heuston* [2003] NSWCCA 172 at [41]).

## EXPERT EVIDENCE

The law as to further evidence in the form of expert evidence is a subset of the general law. It has been held on a number of occasions that there must be more than additional expert opinions which substantially overlap with expert opinions available at first instance (see for example *Leach v The Queen* (2005) 159 A Crim R 183 at 195; *R v Cheatham* [2000] NSWCCA 282) or a new hypothesis (see for example *Saunders v R* [2004] TASSC 95). However, where expert evidence is such as to constitute a significant or real possibility that a reasonable jury would have acquitted the appellant, expert evidence that is 'new' rather than 'fresh' may be admitted. Thus in *R v AW* [2005] QCA 152 at [14] the Queensland Court of Appeal permitted evidence from a colorectal surgeon that it was 'extraordinary' and 'fanciful' to contemplate that a fork in the rectal canal of an intellectually disabled victim would have been present for more than a week, let alone for four months, as alleged by the Crown at trial. By contrast, evidence proffered by an appellant that he had undergone a polygraph examination was found by the Western Australian Court of Criminal Appeal in *Mallard v The Queen* [2003] WASCA 263 at [368]–[369] to be 'entirely unscientific and worthless' and thus its absence was not such as to have led to a miscarriage of justice.

Further, in *R v JH* (*Childhood Amnesia*) [2006] 1 Cr App R 10 the English Court of Appeal permitted new evidence from a cognitive psychologist about the risks of memories said to relate to very early phases of a person's life. It found (at [38]) that the evidence was credible, relevant and capable of affording a ground of appeal.

If evidence of an expert area is unknown or hardly known at the time of trial, failure to adduce it will not be regarded as a breach of the requirement by legal representatives to exercise 'reasonable diligence' (*R v Rozynski* [1996] NSWSC 19).

## FURTHER EVIDENCE AT SENTENCING

To be admissible on appeal, further evidence in relation to re-sentencing needs to shed a new light on matters considered by the sentencing judge which would 'very probably have altered the sentence imposed' (*Anderson v The Queen* (1997) 18 WAR 244 at 253–254.) It is incumbent on the appellant to establish the true significance of such matters. An example occurred in *Eliasen v The Queen* (1991) 53 A Crim R 391 where, unbeknown to the appellant, he was HIV-positive at the time of sentencing. In that

case Crockett J (McGarvie and Phillips JJ agreeing) observed that the court accedes 'very sparingly' to such applications. However, in an appropriate case, the court may permit evidence of matters or events that have occurred since the date of the passing of the sentence to be placed before the court with a view to reconsidering the matter in light of the additional evidence or to show the true significance of the facts which were in existence at the time of sentence (*R v Holland* [2002] VSCA 118 at [35]). In *R v WEF* [1998] 2 VR 385 at 388–389 Winneke P (Charles JA and Hampel AJA agreeing) said:

> In normal circumstances, if it is suggested that subsequent events have made or made to appear a sentence, appropriate when passed, manifestly excessive, then that is a matter for the consideration of the Executive in the exercise of the prerogative of mercy and not a matter for an appellate court. …this court has recognised that there is a rare exception to this otherwise fundamental rule. The court will receive evidence of events occurring after sentence, in appropriate circumstances, if those events can be said to be relevant, not so much per se, but because they throw a different light on circumstances which existed at the time of sentence.

In *R v Nguyen* [2006] VSCA 184 at [36] the Victorian Court of Appeal summarised the relevant principles:

(i) the new evidence must relate to events which have occurred since the sentence was imposed;
(ii) the evidence must demonstrate the true significance of facts in existence at the time of the sentence;
(iii) the evidence will not be admitted if it relates only to events which have occurred after sentence and which show that the sentence has turned out to be excessive;
(iv) the new evidence may be admissible even though the applicant did not refer to the pre-existing state of affairs in the course of the plea;
(v) upon the admission of the new evidence, it is unnecessary to determine whether the original sentence was vitiated by error, or whether it was manifestly excessive; and
(vi) the question is whether, on all of the material now before the Court, any different sentence should be substituted to avoid a miscarriage of justice.

## FURTHER EVIDENCE IN CIVIL APPEALS

The principles on which further evidence can be admitted are known as the principles derived from *Ladd v Marshall* [1954] 1 WLR 1491:

> [F]irst, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

These principles have been held to be 'the starting point, but there is a discretion to depart from them in exceptional circumstances' (*E v Home Secretary* [2004] QB 1044 at [82]). The common law is restated but in some instances adjusted by statutory provisions. Thus, r 64.22(3) of the Supreme Court (General Civil Procedure) Rules (Vic) provides broadly that:

> The Court of Appeal shall have power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner.

It has been emphatically stated on many occasions that verdicts in civil cases which have been regularly obtained should not be disturbed without 'some insistent demand of justice' (see for example *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435 at 444). In *Commonwealth Bank of Australia v Quade* (1931) 178 CLR 134 at 141–142 the High Court observed that the high bar against reception of further evidence on appeal is supported by considerations of justice and public interest.

The discovery of further evidence is rarely a ground for a new trial unless:

(a) it is reasonably clear that if such evidence had been available at first instance at the first trial and had been adduced, there would have been an opposite result;
(b) if it is not reasonably clear that such would have been the outcome, it must have been so highly likely as to make it unreasonable to suppose otherwise; and
(c) reasonable diligence had been exercised before the first trial to procure such evidence (*Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435 at 444).

**Different considerations arise depending on whether the evidence that is sought to be adduced is of matters that were in existence *before* (or at the time of) the trial, or whether it relates to matters that arose *after* the trial.**

However, there remains a degree of latitude, enabling flexibility to satisfy the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing civil actions to an end.

Different considerations arise depending on whether the evidence that is sought to be adduced is of matters that were in existence *before* (or at the time of) the trial, or whether it relates to matters that arose *after* the trial. Where the evidence in question relates to matters which occurred *before* trial the court will ordinarily refuse to admit such evidence unless it is satisfied that it is sufficiently credible, that it could not have been obtained with reasonable diligence for use at the trial and that there is a high probability that the result would

have been different had it been received at trial. Where the proposed evidence is of matters that have arisen after trial, the applicable principles governing the exercise of the court's discretion were epressed by *Lord Wilberforce in Mulholland v Mitchell* [1971] AC 666 at 679–680 as follows:

> …the matter is one of discretion and degree. Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions, common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that the Courts will allow fresh evidence where to refuse it would affront common sense, or a sense of justice. All these are only non-exhaustive indications; the application of them, and their like, must be left to the Court of Appeal. The exceptional character of cases in which fresh evidence is allowed, is fully recognised by that court.

Cases where a trial has miscarried through misdirection, mis-reception of evidence, wrongful rejection of evidence, or similar, or where there has been 'surprise, malpractice or fraud' are technically not cases of 'fresh evidence' (*Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140) Nor is a case where the material constituting the further evidence was unknown to the unsuccessful party by reason of misconduct on the part of the successful party, such as an admitted failure to comply with the requirements of the trial courts order for discovery of documents (*Quade* at 140–141; see also *Foody v Horewood* [2007] VSCA 130).

## ASSESSMENT OF DAMAGES

Assessment of damages is a 'once and for all' award that takes into account an array of inherent uncertainties and exigencies, with the consequence that admission of further evidence should only take place in exceptional circumstances. Brooking CJ in *Mobilio v Balliotis* [1998] 3 VR 833 at 853 observed:

> It is a matter of degree, but I am not prepared to say, using the words of Viscount Dilhorne and Lord Pearson in *Mulholland*, that the circumstances of this case are exceptional or (using the words of Viscount Dilhorne) that the question was determined at the hearing on a basis which events after it have falsified. Nor, using the words of Lord Hodson, would I say that the basis upon which the case was decided at the hearing was suddenly and materially falsified by a dramatic change of circumstances. In picking up these expressions I do not of course suggest that there is any 'precise formula which gives a ready answer', reminding myself of the caution expressed by Lord Hodson.

Subsequently, Chernov JA in *Foody v Horewood* [2007] VSCA 130 at [66] has concluded that decided authority makes it apparent that, ordinarily, the discretion to receive evidence of events *after* trial is exercised 'only rarely';

> [G]enerally only if it bears upon matters falling within the field or area of uncertainty, in respect of which the trial court had made an estimate on an assumption that was then common to both parties and that that assumption has clearly been falsified by subsequent events, such that the refusal to admit the further evidence would affront common sense.

## FAMILY LAW

Under s. 93A of the *Family Law Act 1975* (Cth), subject to s. 96(2), in an appeal the Family Court is obliged to confine itself to evidence given at first instance but:

> has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given:
> (a) by affidavit; or
> (b) by oral examination before the Family Court or a Judge; or
> (c) as provided for in Division 2 of Part XI.

In *CDJ v VAJ* (1998) 197 CLR 172 the High Court considered whether the (close) predecessor to the current version of s 93A affected the exercise of the common law principles concerning the reception of fresh evidence. The court held that it did, noting particularly that the provision enables the drawing of inferences of fact and the reception of 'further evidence', as against 'fresh evidence', 'new evidence' or similar. McHugh, Gummow and Callinan JJ (at [191]), giving the principal judgment, held that the common law cases 'have nothing authoritative to say about the admissibility of further evidence in respect of a statutory power to admit evidence on appeal' (at [97]). They observed that the purpose of the power to admit further evidence is to ensure that the proceedings do not 'miscarry'. They noted too that the jurisdiction of the Full Court 'is neither purely appellate nor purely original' (at [111]) and emphasized that particular considerations apply to cases dealing with the welfare of children, as to which there can, for instance, be additional insights since the decision made at first instance. They found too that 'in some exceptional cases', including those dealing with allegations of physical and psychological abuse of children:

> [I]t might arguably be a proper exercise of discretion for the Full Court to admit further evidence and order a new hearing even though it is not reasonably satisfied that the evidence would have produced, or at a new hearing would now produce, a different result (at [149]).

In such cases, it may be enough that the court thinks that there is a very real risk, although not a probability, that the order on appeal may actually endanger the child:

> [T]he consequences for the child may be so grave that arguably the best interests of the child might require the admission of the further evidence and a new hearing to investigate all the further evidence (at [149]).

Alternatively, as Kirby J put it, the paramountcy principle may weigh heavily against the principle of finality. However, more is needed than 'a real chance that the order under appeal does not serve the best interests of the child' (at [151]).

## CONCLUSION

There is no single unified principle that is applied across the appellate jurisdictions

in relation to the reception of further evidence. However, the burden is a substantial one for appellants seeking to adduce further evidence at trial. There is a considerable overlap of principle between the criminal, civil and family law areas. Evidence is not generally received on appeal which existed at first instance and which was either known to the party or could have been discovered with proper diligence. There must be a demonstrable miscarriage of criminal or civil justice for such evidence to be admitted on appeal, or in the family law context and particular consideration relating to the best interests of a child.

With evidence that could not have been discovered with reasonable diligence or that has subsequently come to light, the bar is slightly lower. In the criminal jurisdiction, the evidence must be credible, cogent and convincing such that the jury would have been 'likely' to have entertained a reasonable doubt; or 'might' have; or there was a 'significant possibility' of that being so. In the civil jurisdiction the distinction between new evidence and fresh evidence appears no longer to be so firm. A new trial will not be ordered unless:

(a) it is reasonably clear that if such evidence had been available at first instance at the first trial and had been adduced, there would have been an opposite result;
(b) if it is not reasonably clear that such would have been the outcome, it must have been so highly likely as to make it unreasonable to suppose otherwise; and
(c) reasonable diligence had been exercised before the first trial to procure such evidence.

It is likely that the criminal and civil tests will continue to converge, save where the interests of others, such as children or creditors, constitute additional reasons in the interests of justice as to why further evidence should be permitted. For the present, though, it is only in exceptional cases that appellants are allowed 'a second bite at the cherry' by adducing further evidence on appeal. Ultimately, further mastication of what should have been completed at trial is permitted only on the basis of the importance of the further evidence to avoid a miscarriage of justice.

# Verbatim

*R v Towie*
before Cummins J. 4/2/08

**Mr Richter**: I was going to…

**His Honour**: Is it about the clothing on the view?

**Mr Richter**: No.

**His Honour**: No, it's not? That's all right.

**Mr Richter**: It's about clothing more generally, your Honour. I was going to ask for leave for counsel to remove their wigs too and I wanted to argue the proposition. I know that your Honour has from time to time declined for that to happen, but in my respectful submission if anyone is to wear a wig in court it ought to be your Honour, because your Honour, of course, is the ultimate binding authority in this court and as such needs to represent the majesty of the law. We are…

**Your Honour**: Which way is this argument going?

**Mr Richter**: It starts off with flattery and ends up with the conclusion that the judge ought to wear a wig and not counsel, or nobody wears wigs.

**Your Honour**: I think you've got a lot of logic on your side.

**Mr Richter**: I have.

**Your Honour**: And my associate keeps telling me that I haven't got the logic right. Number one, I can't direct people what to wear in court under the statute. That's the first thing, so I don't direct people. Number two, I don't like wigs and I haven't worn them for more than 15 years so I'm not going to start now with two years to go, so I reject that.

**Mr Richter**: If we unanimously…

**Your Honour**: I've never had a complaint from anyone about my not wearing a wig. I've had a couple of complaints but never about that. Third, the reason I do suggest counsel should wear wigs, without binding them, is I think everyone at the Bar table should look the same.

**Mr Richter**: Yes. That part I agree with.

**Your Honour**: And my own view is I think that, therefore, counsel ought to wear wigs, but you can discuss it amongst yourselves.

**Mr Richter**: Do I take it that if we have a consensus amongst ourselves not to wear wigs your Honour will not override it?

**Your Honour**: I'm a democrat.

PS: the prosecutors declined to remove their wigs so that counsel are still all bewigged.

# Does the Bar matter?

**Geoff Gibson** practised at the Bar for 15 years before going to a leading national firm as a partner in 1986. He returned to the Bar in 2002. In the article below he suggests that members of the Bar should take a little more responsibility for each other – not on a professional, but on a personal basis – that we all need the assistance of our fellows to cope with the problems of sole practice.

When I did a course in wine tasting many years ago, our tutor told us not to bother buying magazines about wine. He said all the wines were scored three stars or more because the industry was small and the publishers were beholden to its members and their advertisers. It is like those TV travel shows – inevitably bland, and everything is just dreamy. You are as likely to find an old Grange being described as cough syrup in a wine magazine as you are to find an agent describing his listed Toorak properties as lemons. You would not wish to thirst for truth.

Professional associations and their journals are likely to convey the same impression. You are not going to read much about the dark side of union life from ACTU publications. You may not leam all that much about medical malpractice from *The Lancet*.

We lawyers have the same diffidence about airing our dirty linen. We might experience a frisson of gossip when something goes wrong, but we are reluctant to discuss our real feelings on personal failure in any depth, either publicly or at all.

It is, I think, worse at this end of town than the other end of town. Among the reasons for the difference are the greater institutionalized insecurity of barristers and their reluctance to cast off the mantle or myth of the knight errant. They have not, apparently, taken seriously the lessons learned by Don Quixote. It is true that Don Quixote became a knight because he was crazy, and not the other way around, but in his madness, as was the case with King Lear, he acquired wisdom. He had the wit to observe (*Don Quixote* II, 3) that 'the wisest person in the comedy is the clown'.

Some of these reflections occurred to me after the publication of a piece I wrote on the suicide of Brendan Griffin that was headed 'Surviving the Law'. I had written it not for general publication, but for the comfort of the immediate colleagues and family of Brendan Griffin. When the editors of *Bar News* asked if they could publish it, we discussed it and with some hesitation we decided that it could be made public.

I am immensely glad that it was. I had not expected the response. It was entirely extraordinary. People – by the score – wrote to me, called on me, emailed me, phoned me, and crossed the road to talk to me. It was as if people had been sitting in a dark room and someone had jumped out the window. It was as if barristers had been forbidden to talk about these things or they had been punished if they did.

There were two themes in the response. One was that we in the community at large are not open enough in talking about illness of the mind or suicide. The other was that we in the law just do not talk at all, so people say, about the incidence of stress on this side of the profession or, for that matter, the other side. We just preserve our heroes on their pedestals and pretend that nothing is wrong. After all, if it could happen to one of those hot shots, how could I expect to survive?

These messages were expressed to me repeatedly. I still get them. Not one person has written to me to complain of what I said. Not one. This, you might think, is a symptom of the sterile meekness of public discussion within this profession. I agree

– this lack of public discussion is, I think, part of the problem.

You may get a different view of these things at the other end of town. Most lawyers there are involved in a partnership running a business. Cooperation is mandatory there; here, it is for the most part banned.

If you spend fifteen years or so as the insurance partner for a large international law firm, you get a broad view of the range of human fallibility. As the confessor of first and sometimes last resort, you get to see how personal failings become manifest in ways that may hurt others.

After a while, the pattern can become sickeningly familiar and predictable. You can see in some people, unhappily only after the event for a lot of them, a sad, downward progression that becomes a spiral. Not in any necessary order, you might see people out of their depth; people who do not know what they are doing; people stretched too far or worn out; anxiety; harassment; alcohol or other drug abuse; serious illness – of the mind or body; dishonesty, violence or other crimes; gaol; or in the end, death from stress or suicide. As, I said, there is no necessary order of degree. The categories of misery never close.

You get to recognize some of the symptoms of risk to your clients, yourself or your staff. A lot of the time you get no warning at all. Some people who get into trouble, morally or mentally, become fiercely adept at hiding it. The ones who terrify you are those who most need the help and could most benefit from it, but who, for whatever reason, are determined not to ask for help. They will just keep it to themselves although they know, in their hearts, that things can only end badly, and that in the end they must get caught. You recall the insight of Einstein: 'A person falling freely will not feel his own weight.'

The very worst are those who do not know that something is wrong. 'I may have omitted to mention to you that I forgot to stamp that little debenture. The borrower folded and, unhappily, the bank is looking to us for the missing one hundred million dollars. I think you said our insurers are good for $50 million. Would it square things up if I offered to kick in my share of a lean-to at the back of Venus Bay? Oh my God, don't tell me that this might affect our Listing?'

I am not so interested for the moment in any potential liability of lawyers to clients for the faults of others. There is, however, no doubt that law firms can suffer damage as a result of inadequate or improper professional conduct. This extends far beyond financial liability to disappointed clients. Their reputation can be badly hurt. No firm wants to be accused of serial and serious over-charging, of suffering a culture of discrimination against or harassment of women, of being too close to corporations to discharge their obligations as officers of the court, or of having a partner sent to gaol for dishonesty that occurred, it seems, just because he could not keep up with his partners. Members of these firms have a keen interest in trying to spot any failing so that it can be dealt with, hopefully before anyone gets hurt.

Another way to learn of the reach of weakness in our profession is to give character evidence for a senior lawyer who has hit the fence. I have done it for a lawyer on either side in the most responsible position. Each had been a person and a lawyer beyond reproach. One was, and is, of towering professional and intellectual standing. Each was looking at not just disbarment but imprisonment, and the complete ruin of a life. One of those cases could, in my view, have been prevented by appropriate collegiate intervention. As you sit and listen to the proceedings unfold, you cannot help reflecting on that old saying about your being in their place but for the grace of God – what others call simply the luck of the draw.

As a professional association for lawyers, the Bar is exposed to similar damage to its reputation if its members fail or fall in one or other of the ways that barristers can and do fail and fall. But, at least until recently, the Bar has not reacted to the symptoms of trouble in the same way that members of law firms do. Some may think the problem with the Bar is that it lacks maturity as a body; others may take the contrary view that it gives too much credit and respect for maturity and authority.

The Bar, of course, is not a partnership and its members do properly prize their independence, but I would have thought that most barristers see themselves as having a moral duty to help, or try to help, a barrister who is in trouble. As a body of barristers, the Bar also has what might also be called a professional or even a political interest in trying to prevent aberrant behaviour by its members causing damage to others or to its members.

The main duty of barristers is to do what they can to ensure that their clients get good professional service. But the discharge of that duty will coincide with pursuing the interests of the Bar in trying to keep intact the collective standing of barristers as a whole. We need not kid ourselves. If a barrister misbehaves and is caught, and the process is public, the result will be to lessen, however slightly, the reputation of every other member of the Bar.

I am not for the most part here talking about legal duties or legal liabilities. I am talking of what I see as a moral duty and a professional interest that the Bar has in coming to the aid of barristers in trouble.

As time goes on, the difference between the Bar and major law firms may become more apparent than real. When I joined the Bar in 1971, there were about 400 of us. When I left the law firm I was a partner of in 2002, it had about 1,000 lawyers.

This Bar now has about 1,600 members. In the meantime, the ripe commercialism that was the hallmark of the other side is becoming more and more pervasive here. So, for that matter, is the concentration on the dollar. On the plus side, the Bar offers better prospects for professional self-esteem and membership for life; and a lot less of the internal knee-capping and throat-slitting. The Bar has also stayed true to its central function of offering access to all to the cream of the profession whose members are a collegiate body committed to giving the best legal advice and most importantly, independent legal advice. This has been an aspiration abandoned at the other end of town for the most part if there is a government or major public company in the field.

What we need to think about, in my view, is how we at the Bar can improve our provision of what may otherwise be called pastoral care and what managers call risk management for those who might need it.

The first thing to do is to scrap all this claptrap about men being men; big boys don't cry; if you don't like the heat, stay out of the kitchen; this is a contact sport; and all the other inane slogans of the locker room or barracks room that went west with the relief of Mafeking, and which are the first and last resort of people who have difficulties with the process of

rational thought. Educated adults in the year of 2008 know that people under stress can fail and become ill or turn to crime, and in either event become able to harm others as a result. This frequently occurs in circumstances where that harm could have been avoided if the person under stress had got help quickly enough.

Secondly, and relatedly, we need to stop beatifying our ancestors. Leave that process to a different kind of faith that knows how to manage the process. It promotes a culture of unreality if not dishonesty to refuse to tell or acknowledge the truth about those who are no longer with us. This is becoming something of a national trait in Australia. It would be silly to pretend that anyone is without fault. No mortal can claim immunity in death, not even a barrister. Even poor old Manning Clark, who never seemed to me to do any harm to anyone, gets routinely dug up to face allegations not put to him when he was with us, frequently by his friends, and frequently by people of the ilk who are the first to accuse others of not behaving like gentlemen.

Voltaire may not have got a lot right, but he was in my view dead right when he said: 'One owes respect to the living, but to the dead one owes nothing but the truth.' (That observation was cited on the title page of a biography of Nellie Melba. If people knew all the truth about a woman who was alleged to have abandoned her child to pursue her career, you wonder whether she might still have her picture on our $100 note. To the unbeliever, beatification will always entail falsehood.)

The next thing is to overcome our diffidence in talking about these problems. If you are a lawyer and you have a heart attack, all of the nursing staff will say, when they learn of your occupation, 'Well, another stress case.' This is for them a fact of life – it is just like a soiled sheet. But most victims will not have admitted it. Women, for the most part, do not have the same problem in talking about personal difficulties. They seem better placed to talk through emotional problems. The problem may not be so bad nowadays with younger men. The failing may be characterized, I think as one of age and gender.

Fourthly, we are not talking about dobbing, or what is now fondly called 'the nanny state'. Nobody likes dobbing, but dobbing involves informing for spite or reward, or arises because the informer is a member of the Gestapo manque. We are not talking about this.

Let me give an example. I have only once complained about a cab driver. This is because I do not want to do anything that might cost someone their job. But one night about fifteen years ago I had a driver who was very jumpy. When I politely questioned him on his route, which was bizarre, he jammed on the brakes and asked if I wanted to get out there and then – in the middle of very heavy traffic. I was alarmed – enough to ring his depot and say that I thought his condition made him a risk to others if not himself. I was not thinking of the damage to the name of the company (what we now call 'the brand') – just the risk that the driver posed. I thought then, and I think now, that refusing to do anything would not have been morally right. (I doubt whether the person at the depot who took the call had the same view – she sounded like I may as well have been playing a part in *Blue Hills*.) In my view, we face similar issues in dealing with our colleagues more often than we acknowledge or even realise.

Finally, and with more difficulty, we need to find a way of raising some kind of alert if that needs to be done. It is not just a matter of clearing away the outmoded views of the kind I have described. Some of the unfortunate failings we see around us suggest that we may have a problem which, in the revolting argot of our time, may be described as truly 'systemic'. Barristers who do not believe that we have this problem and that we are suffering harm to our reputation as a result, are in my view living in Fantasyland.

There are not many lawyers at the Bar who would want to be heard to boast that they have less interest in the character or fate of lawyers in their group than do lawyers at, say, firms like Freehills or Allens Arthur Robinson. A requirement of professional independence is not a prescription for moral blindness or commercial insanity.

Take an example of moral duty. You are tracking a robed barrister who is walking to court down William Street to Lonsdale Street. She is so preoccupied with reading her brief and talking on her mobile that she does not see that the traffic light has turned against her and that she is about to step into the path of a speeding cement mixer. Should you stand by silently waiting for the laws of physics to do their work? (You reflect that the last time you showed courtesy to a woman barrister you got a verbal backhander.) Or do you opine that the cure for this kind of behaviour is stiffer penalties for jay walking?

Of course you would be subject to what I regard as an absolute moral duty to do all that you can to prevent harm to this colleague, and short of moral insanity every barrister would do just that. Indeed, in some jurisdictions, you might be looking at your moral obligation as the subject of criminal sanctions.

Take another example. (For the removal of doubt, you should treat these examples as hypotheticals, as a kind of optional reality.) A colleague on your floor is having a bad run. He has lost his main client. He has suffered a terrible divorce. (The wife, he said, got custody of the money.) He has a child on hard drugs. He was knocked back – yet again – for silk. He is obviously drinking too much – obviously because you can see the effect of it every afternoon, and now on some mornings. You now suspect he is on the grog when he gets in to work. What support he had among solicitors is evaporating quickly. There are mutterings from them as well as from the Bar. Clients have been known to walk out pale-faced and wide-eyed.

This person who was once a reasonable and courteous lawyer is now becoming at best a useless relic and at worst a dangerous wreck. He is, as they say on the terraces, an accident waiting to happen, a train waiting to go off the rails. The only people he gets on with are his colleagues on his floor. What are they to do?

He regards as quite mad anyone who suggests that he might have a problem. (His father smoked 50 Craven A and drank a bottle of Bond 7 a day and he lived until he was 90. He then got hit by a speeding cement mixer.)

Another example. A barrister with a very good practice appears to be subject to mood swings. Those who know her, or who know something about this medical condition, suggest that she is bipolar. She has a bluff way of dealing with the issue (in the manner of some case hardened minorities who think that everybody else should just mind their own business). Colleagues – barristers and solicitors – make slightly nervous jokes about whether

she is on green pills or yellow ones each day. In truth there are occasions, even in court, when her behaviour appears to be nothing short of what ordinary people would describe as manic. Part of her charm is that she treats most of our protocols as nonsense; part of the problem is that she does not care.

This has been going on for some time. Then you hear that a large, nasty case which her client lost is now the subject of a costs application against the solicitors who instructed her. Someone has taken the view that she is immune as a barrister to this sort of claim. That view is probably wrong, because this is a disciplinary procedure, but for all sorts of reasons – professional, commercial, personal and political – the solicitors are reticent to join her in the claim. (This reticence is shared by an informed client who is a PI insurer – but the incident is doing nothing to soften the attitude of this insurer to lawyers.)

Now, if the liability of counsel came to be tested in a court, nice issues of law and causation would arise. But would any one of us want it to come to that?

Another example. It is not a simple thing to terminate the services of counsel during a trial. A junior behaves so badly during a trial that senior counsel is professionally embarrassed. The junior is bullying a young solicitor. The bullying is subtle, but it is there. It is as if she cannot help herself. The clients are by and large oblivious, or happy enough to pretend that they are, because of the performance of both counsel in court. This is, as usual, both superb and assured. But outside court, her behaviour is so bad that senior counsel feels constrained to apologise formally to the solicitor. The trouble is that junior counsel has been manifesting these symptoms for some time, but no one has been able to manage the problem.

Notice that this problem, as in the previous two, is not just an issue of conduct. There is a real risk that the interests of the client are being adversely affected by the bad behaviour of counsel. Assuming that in this case senior counsel was not acting irrationally in apologising to the solicitor for the behaviour of her junior, is this in not a serious problem for both counsel and the solicitor, and above all the client?

One final example, to move up one rung. Judges are difficult to manage because, at the Bar, they have spent the whole of their professional lives away from management, at either end, and those who have the awful task of trying to manage them may suffer from a similar disability.

One hypothetical member of senior counsel, who enjoyed many good lunches at the Bar, finds life on the Bench so boring that he is driven to wind up proceedings each day well before lunchtime so that he can spend the rest of the day at leisure lunching with his mates at a gentlemen's club. His judicial colleagues are unhappy because they, or most of them, are putting in the hours. The Bar is unhappy because this does not look good and fewer cases are being dealt with. By and large the truth is kept from the clients and the press. Some lawyers make a blokey attempt to cover up the mess by saying that his Honour disposes of more cases in a morning than others do in a week. The judge remains serenely impervious to criticism, comment or direction. The problem, then, is intractable.

Eventually the alcohol gets to this judge and he dies. The precise agent of death does not matter. The normal obsequies are performed. The ceremony of innocence is again drowned, and the breach of public trust goes unremedied and unremarked.

On any defensible meaning of the word 'responsible', can we say that we are running this profession responsibly if that kind of behaviour at the top is tolerated? This problem, you may think, is just the logical result of our failure to deal adequately with the expressed failings of those climbing up the ladder. The history that will be alleged against us is our repeated, generational failure to do enough to stop our failures from hurting innocent people. It will be said that we are guilty of culturally permitted misbehaviour. How often does the Bar disqualify or even suspend one of its members?

There are some things to notice from the last example. One is that because we are talking of the Bench, there is a breach of public trust. It is not different for the Bar. Barristers are a privileged profession enjoying a statutory monopoly which at its upper level is endorsed by a form of royal warrant (not quite in the same manner as Benson & Hedges). So central is their importance to the system that disappointed clients are not allowed to claim compensation from them if they botch a job in court – because, for example, of a hard night out on the tiles.

The professional obligations of us lawyers are, at least to my mind, much, much more significant than those imposed by black letter law. But, for what it is worth, the statute that purports to regulate the profession in Victoria does impose an obligation of candour on all barristers.

If this case were not hypothetical, a public discussion of it might upset the family and friends of his Honour. But we no longer live in a world where sensitivities

## FEDERALISM AUSTRALIA

We live in an 'indissoluble Federal Commonwealth under the Crown'. But, due to the actions of 'unelected' judges, that federalism is one in which: (a) the states are dependent on the Commonwealth for funds to balance their budgets (courtesy of the *Second Uniform Tax Case*); (b) the Commonwealth, whose limited powers are spelled out in the Constitution, can now legislate in almost any field in reliance on the external affairs power or the corporations power (courtesy of the *Tasmanian Dams Case, Richardson v The Forestry Commission* and *New South Wales v the Commonwealth*).

A federation? Who is kidding whom? Provided the Commonwealth frames its legislation correctly it can interfere in any sphere of State activity.

We have not had a referendum to alter the relative powers of State and Commonwealth. The judiciary has enlarged the Commonwealth's powers. But no one protests.

One wonders, then, why there should be so much concern expressed that 'unelected' judges may be given power, under a Charter of Human Rights and Responsibilities, to interfere with the impact of legislation on the fundamental rights of the individual.

Is it so important that the individual be subjugated to the will of the majority?

can dictate that issues of public importance be dealt with 'in club'. How much more upset were all those litigants who were denied their Magna Carta rights because his Honour cared more for himself? And what about the eight hundred years' spadework put in by the professional ancestors of this devotee of the long lunch?

The other matter to notice is the way a problem – in this case the abuse of alcohol – may result in the termination of life. When I spoke in my previous note of the suicide of a partner, I spoke of an event that we could foresee but which we could do little to prevent. I had meant to refer to another partner that we lost.

Rod Bush was much younger than me. He frequently got in earlier than me. I used to arrive at about 6.45am and if Rod was arriving then, he would be putting his tie on. If we left about thirteen hours later, he would come back that night. The cancer he died of did not therefore come from nowhere.

At the funeral, his brother told us – and his widow and his three children – how Rod had just lived to be a partner of the firm. Well, he left me with the clear conviction that Rod died for the firm too, and that we his partners were morally complicit in his death. It was too predictable a result of the way he was ruining his life, and we had not done enough to save him. We, who knew more about these things, had not gone to help him.

The lesson is, I suppose, that some exercises in self-destruction just take longer than others – and they are therefore so much more painful for others. That was, I had hoped, the point of my previous note. Whether you elect to kill yourself with a rope or a bottle may itself be the result of an accident of history.

Now, none of this will come as a surprise to any member of the Bar, unless perhaps they have led a very sheltered or a very privileged life. The point of this note is to raise for discussion whether we can and should be doing more to help colleagues at the Bar who are showing signs of distress.

As I have indicated, you can look at it as pastoral care, or risk management, but look at it I think you should. At the moment we are at risk of being compared to someone who has been selected to represent his country in Test cricket but who claims to be unexaminable about the suggestion that he turns up to every after-match party loaded on spirits or something worse. He takes the view that he was brought up on – what happens on the field stays on the field, and what happens off the field is none of their business.

Well, that may have been the case in the good old days, and some of us may mourn their passing, but they have passed. Those were the days, the good old days, when such women as there were at the Bar were liable to be treated as a commodity. We have, I think, greatly improved here, and I agree with those who believe that alcoholism was a worse problem at the Bar one or two generations ago. But it is simply silly to say that an organisation as big as ours will have no members who have very big problems.

May I say something about drugs other than medicinal drugs or alcohol? I have not seen any evidence of their being used by barristers. I suppose in a group of 1600 it is statistically inevitable that there will be some users, but I have not seen it. I have, though, seen it at the other end of town. One young lawyer with a bright future succumbed to a habit. That led her to steal from us. She was very fortunate not to go to gaol. As it is, she just finished her career and ruined her life.

What I am not seeking here is a further phalanx of people in grey, people who have no knowledge of or sympathy for the profession, but who are very jealous of those who do. If there are professional problems, they should be dealt with by and within the profession. One thousand years of legal history gives no comfort to those who say that change to the profession is only of use if it is inflicted from above by people who do not know what they are doing and, in the end, do not much care one way or the other.

But while it may be the case that the collegiate life and credit of this body are being leached out of it by life-deniers in drab cardigans, this is not in itself a ground for reverting to a time when the whole Bar could be found in Selbourne Chambers; when barristers charged in guineas; when we got notified of the defrocking of a lawyer in a confidential pink slip; when the Bench was manned from the schools of the Protestant Ascendancy or the Jesuits; and when the pubs shut at 6 o'clock – as a matter of law.

Members of the Bar may claim immunity for their failings in court but the Bar as an institution cannot assert irresponsibility for all of their failings outside of court.

If we continue to insist that our heroes remain untouchable, and unexaminable, and if the Bar does not accept responsibility for the conduct of its members out of hours, where does that leave us with League footballers? Beneath them or above them? Which is worse?

When I have referred to a moral obligation, I have done so on the footing that our ideas of professional conduct presuppose such obligations. If authority is sought, I would claim it from the man the present Pope describes as having been of 'undeniable greatness', Immanuel Kant (*Groundwork of the Metaphysics of Morals* (1785) 77/434; 78/435).

> In the kingdom of ends, everything has either a *price* or a *dignity*… Skill and diligence in work have a market *price*; wit, lively imagination and humour have a fancy *price*, but fidelity to promises and kindness based on principle, rather than instinct, have an intrinsic worth, that is *dignity*.

I am suggesting that we need to do more to preserve our dignity, in the sense that we use the word, and in the sense that Kant used the word. It may sound old fashioned, but I believe that dignity matters for lawyers. It is like courtesy. A professional group that cannot conduct itself with dignity and courtesy no longer matters.

I raise these questions in the temper of the words uttered three lines from the end of *King Lear* by one of the few survivors of that disaster in human relations: 'Speak what we feel, not what we ought to say.' Now, I acknowledge that Cordelia got rudely taken out of play by a silly old king for doing just that, but the whole point of the play – the whole cause of the tragedy – is that the king was both silly and nasty to condemn his daughter for plain speaking.

Kings, even kings – especially kings – can be both silly and nasty. People who do not wish to confront the truth are part of the problem. If we as a professional body do not learn these lessons, and if we insist on staying in the moral or intellectual equivalent of the mindless dreamtime of commercial television, we are at risk of being hit by a speeding cement mixer.

GEOFF GIBSON

# Humbugging with the mob

Ashley Halphen spent three months last year working with the Northern Australian Aboriginal Justice Agency. This involved appearing on behalf of clients in the Supreme Court, the Darwin Court of Summary Justice and a number of 'bush courts' located in Arnhem Land and other remote parts of the Territory. He gives us a grass roots view on the clash of cultures and highlights the irrelevance, in many ways, of our laws to solving the problems of Australia's oldest inhabitants.

Not that this story need be long, but it took 'one big long time' to make it short.

I left the south many moons ago. From four seasons a day to two seasons a year; from shopaholics to storm chasers; and from long macchiatos to green cans, Darwin is so much further than a flight away.

Summer football and barramundi dominate the long hot days. A dry shirt is hard to find. Cyclones are always a concern – Helen assaulted the city at a category two level one night when people were going about their Friday night business. The biting interest in crocodiles is seen almost daily on front-page headlines. It is said that the terrorist attack on the Twin Towers managed only a page three cover on 9/11.

Third and fourth generation Asians say, 'have a good one,' with an authenticity that would make Bob Hawke sound like a foreigner. Restricted areas are scattered about causing some confusion. You can be celebrating with stubby in hand up the street and be committing a summary offence just down the road. Clans in ceremonial costume eat KFC in the mall; nowhere else does the clash of culture align so vividly.

The steamy, aromatic Asian-like markets of Parap and Nightcliff are the epicentre of weekend social activity. If tropical fruit isn't enough then filleted fish the size of a baseball glove or the sizzling charcoaled sensations of skewered meat should satisfy the most robust of appetites. These crowded markets are the pulse of a community at the cusp of realizing the great potential of its distinctive Australian signature.

Lest we forget, the darker side of the social landscape. Many people, predominantly Aboriginals, spend their days watching television, gambling, drinking and fighting. Mainstream productive engagement without numeracy or literacy skills is for some a fantasy.

I have appeared in the architectural

splendors of the Supreme Court; taken instructions under the shade of palm trees; and assisted many a 'longrasser' at the Darwin Court of Summary Justice.

The city courts are a walking distance, but the bush courts are not as easily accessible. Oenpelli, for instance, is located beyond sealed roads and passed flooded dirt tracks. So remote are some courts, only a chartered flight or a 4WD will get you over or through crocodile-infested swamps, marshes and waterholes. When I got out of the paddy wagon in Maningrida, I found myself in Arnhem Land; an oasis without postcode. I am grateful to the NT police for the escort.

And then there was Nhulunbuy, situated at the north eastern tip of Arnhem Land, once considered never-never land until the discovery of bauxite. The subject of the nation's first protracted lands right it was imposed. One conversation above many stays with me; it seems to stand for all the Aboriginal submission apparent in the face of authority. I told Timmy that he was probably going to jail. I asked him if he had any questions. He looked at me and asked me if he could have a cigarette. There it is; the fetchers fetch and the fetched go to jail.

But then came Wadeye. It is one of the largest of Australia's 1200 remote Aboriginal communities. It is home to Johnny Necktie. Yo! It is a community devoid of minerals, trade or artistic pursuit. A community bereft of purpose or drive. The heaviest burden is sometimes to have nothing to carry. You see anomie in the excrement, the barbed wire, the graffiti and the aimless wanderings. It's the saddest place I've ever been, rather an ex-place.

my ankles. Bush court had even less mercy. Instructions were taken on the run as my wet shirt gripped itself to my chest. The busy list included gang riots, group bashings, liquor infringements and drug trafficking. A five-headed committal, numerous hearings, pleas and various other applications passed through the criminal justice process like a streak of speed.

On the chartered plane, I peered out to find children climbing the nearby trees and became aware of a degree of cynicism I had never before encountered.

Finally there was Nauiye on the Daly River…just 100 kilometres east of Wadeye. A sanctuary of sorts: lush, tranquil, perennial. Crime here is trifling – an utter reflection of social cohesion. My cynicism was shortlived.

Wherever the venue, I generally dealt

**Walkabout is a timeless syndrome. Cigarettes provide one effective means of ensuring clients, field officers and interpreters remain within a shout of the courthouse door.**

challenge, it is now a red dusted laden mining town.

The city centre is white; the nearby communities are populated exclusively by Aboriginals. It sounds like segregation, but is really a mutual convenience. Yirrkala, Ski Beach and East Woodie communities all lie on a spread of coastline along the Gove Peninsula that would make any property developer salivate.

Walkabout is a timeless syndrome. Cigarettes provide one effective means of ensuring clients, field officers and interpreters remain within a shout of the courthouse door.

Most Aboriginal clients do not answer bail. We locate clients at their communities and drive them to court. We pulled Timmy from his sleep. He was dressing himself as he walked to the car. Timmy had breached a suspended sentence only three weeks after

Once there existed many rival clans. Such was the animosity, the missionaries of the day permitted entry for supplies on a rotational basis only. The missionaries are long gone and the clans have converged into one localized area. Today, the Evil Warriors and the Judas Priests use ancient clan conflict as an excuse to terrorize each other with all the instincts of a ghetto culture. There is no genuine basis for such hostility, other than some kind of raison d'ẽtre in a place without soul.

Here, I called a donga without any amenities home. There was no privacy as people came and went at all hours to accommodate whatever immediate need it was. Adults marched through and children sat and watched television as they soothed their scabby riddled bodies.

As I prepared my work, sweat dripped from my brow and insects gnawed away

with people who signify divine softness yet are accused of committing unspeakable acts of brutality. One defendant bit his wife's nose off when she refused him entry to her house; another defendant is said to have raped his girlfriend with a fishing knife ordinarily used to shell turtles; another is alleged to have gutted a bloke with a broken bottle as if he were a fish; and another beat someone to near death with a steel bar – she awaits sentence.

Allegations of sexual relationships with infants are all too frequent. This is the nightmare underbelly of those dysfunctional communities that have reached their lowest ebb.

Payback is a vexing issue. According to spiritual belief, every death is caused by someone and requires recompense by strict tradition exacted in the form of a spear thrust into the guilty party's thigh.

If it doesn't happen at the time required it can cause widespread social acrimony. So inimical is the process to cohesion, there has been instances where cultural sensitivity has allowed for supervised spearing with medical services and police on standby.

Many Aboriginal clients speak little to no English. The court system, despite best endeavors, makes absolutely no sense. Perhaps this explains why I continued to scrape sleeping clients, due to appear in court, from their cell floors. Gratuitous concurrence is an occupational hazard. Aboriginal people agree with everything. To obtain instructions or provide simple advice is just about impossible.

Academics assert that those dealing with Aboriginals should be sensitive to cross-cultural issues and world perspective differences. European concepts do not form part of Aboriginal language. Interpreters only amplify the problems. The few that are available are often not able to assist due to complex kinship structures linking them to either defendant or victim.

One by one, witnesses enter the witness box, barefooted and in awe of their surroundings. Getting to know each and every idiosyncrasy, while cross-examining an Aboriginal person, is a tough way to become acquainted with a 40,000 year old culture. Aboriginal people do not lie. I am not used to questioning honest people; I might just as well have left my armory of adversarial techniques at home.

The overall situation is monopolized by frustration and despair for everyone. The legal system dispenses justice in the name of general deterrence to those who do not understand or subscribe to European law. The arc of the universe does not always bend towards fairness. Further down the humanitarian track things might be better. After all, Australia is at an embryonic stage when compared to the timelines of other indigenous societies.

In the face of adversity with only pen and paper in hand, the people at the Aboriginal legal service (NAAJA) have much to be proud about. They are a random group of people who share a common purpose with huge hearts in the right place. A dear colleague of mine has this to share:

> I find the daily occurrence as a NAAJA lawyer can often wash over me. Then I realize how privileged I am to advocate on behalf of a client whose people, customs and spirituality are so deep and intricate they form part of the world's most oldest civilizations. I try hard never to lose sight of that duty and to execute it in a compassionate and sensitive fashion within a legal system that fails to accommodate Aboriginal people.

There lies a checkered but courageous history interwoven with the current futility of the Aboriginal plight. Alcohol, gambling, sexual abuse, domestic violence and petrol sniffing are all symptoms of a more complex cause, arising from paternalistic government policy. Missionaries, assimilation and self-determination have failed the people.

A simple story recited by Richard Trudgen in his book, *Why Warriors Lie Down and Die*, eclipses the historical lead up to today's status quo. It goes something like this:

> A long time ago there was a billabong. In the water lived some fish families. They were very happy and loved their home. Every morning the fish woke up and went about their work. The mother and father fish went off hunting for food, working hard all day. The young fish went with them, learning everything they could from their parents about all aspects of life. The young ones listened in awe to their wise counsel.
>
> In the evening the fish family came together and shared the different types of food they had found during the day and told stories about their activities. The fish went to bed early, tired from their day's work.
>
> The fish all shared responsibility for life in the billabong. They lived well and were very happy. They didn't depend on anyone else or leave their work to others.
>
> Then one day at about four o'clock in the afternoon, the fish saw a shadow fall across the water. Something stood near the billabong. The shadow threw something white into the water. After a while a couple of fish nibbled at it and then again and again until there was none left. All the fish then went back to their hunting and other work.
>
> The shadow came again and again at four o'clock each day. Now the fish grabbed the white stuff, trying to eat as much as they could because it was free for the taking.
>
> Slowly the life of the fish started to change. They waited for the shadow to come every afternoon. They stopped hunting because they didn't need to anymore. The fish found themselves bored at night. There were no more interesting stories and the fish weren't tired because they had done no work. They stayed up and found other ways to take up their time like drinking and gambling and things like that.

**The overall situation is monopolized by frustration and despair for everyone. The legal system dispenses justice in the name of general deterrence to those who do not understand or subscribe to European law. The arc of the universe does not always bend towards fairness.**

Trouble began to brew when the fish started to fight over the white stuff. Some fish got hurt which caused arguments between families. The old fish became very sad because the young fish had no respect anymore. It was all too hard to deal with and many old fish became so sad they died.

Then the shadow began to change. Sometimes it came later and sometimes it didn't come at all. This made the fish very angry because they had been waiting all day. They could not hurt the shadow because it was too powerful and lived outside the billabong where no fish had lived and only the shadow knew the source where the white stuff which they had come to depend on was from.

There was now a deep feeling of emptiness and shame within the fish. They didn't value or think about anything other than the white stuff. They lived badly and unhappily. Their lives became powerless and meaningless. They got sick, had no peace of mind and felt very insecure because they did not know what to do or where they belonged.

The natural state of Aboriginals as nomadic hunters and gatherers has been usurped by the rotting grip of welfare – sit down money. What is left is a level of dependency tantamount to a total loss of control. Self-esteem is a scarce resource to the mighty warriors of the past. Many communities have been struck with a form of societal depression.

I am not at all suitably placed to postulate a solution. I do think that a necessary starting point is for Aboriginals and mainstream Australians to better understand one another; think of strategies together; and teach each other. That age old tool of communication has a key role to play.

During this defining experience, I felt so white, so unqualified, so unprepared to take on the challenges that confronted me. At the same time, I am proud of the tiny contribution I made. I think of one case and I revel in my decision to work in this region of the country. With all the obstacles that only a course of history could dictate, my client was acquitted of raping a 'white girl'.

The sun always shines after a morning of fog…

ASHLEY HALPHEN

## THE ROAD TO (OR FROM) FREEDOM

**1** 480BC – Greek Fleet defeats Persian Navy at the Battle of Salamis – laying the foundation for western civilisation, individual rights and freedom of the person.

**2** 1215AD – King John signs Magna Carta at Runnymede. No free man shall be taken or imprisoned or be seized or exiled or in any way destroyed nor will we go upon him nor send upon him except by the lawful judgment of his peers or by the law of the land.

**3** 1689 – Accession of William and Mary and Passage of the Bill of Rights limiting the powers of the Executive.

**4** 1943 – Pastor Niemann arrested in Nazi Germany. He survived the war and left us his penetrating analysis of apathy ending with the sentence 'And then they came for me, and there was no one left to speak for me'.

**5** 1951 – High Court hands down its decision in the *Australian Communist Party v The Commonwealth* holding that the *Communist Party Dissolution Act 1950* is invalid, because (inter alia) its provisions do not prescribe any rule of conduct or prohibit specific acts or omissions by way of attack or subversion, but deal directly with bodies and persons named and described, the Parliament itself purporting to determine, or empowering the Executive to determine, the very facts upon which the existence of the power depends.

**6** 2002 – The Commonwealth Parliament introduces new sections 34D to 34F into the *Australian Security and Intelligence Act 1979*, to permit (limited) detention without charge and placing significant inhibitions on the common law rights of persons detained.

**7** 2003 – The Victorian Parliament passes the *Terrorism (Community Protection) Act 2003* authorising the making of preventative detention orders.

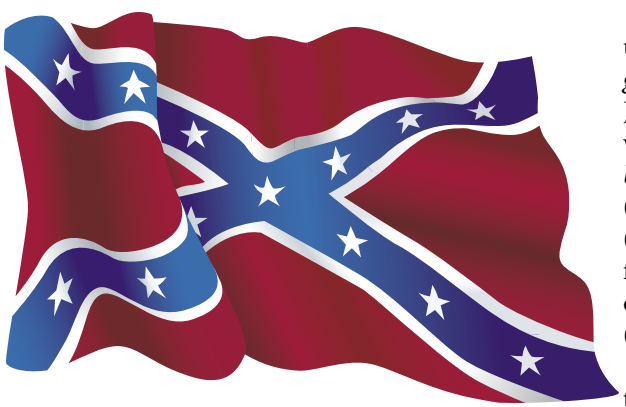
**8** 2004 – The High Court hands down its decision in *Al-Kateb v Godwin*, holding by a majority that the Executive may, pursuant to the provisions of the *Migration Act 1958* properly detain indefinitely a person whose deportation has been ordered and whose deportation cannot be implemented.

**9** 2007 – The High Court hands down its decision in *Thomas v Mowbray*, holding by a majority that the 'limited view' of the defence power taken in the Communist Party case 'is not reflected in the recent discussion in the joint judgment in *New South Wales v Commonwealth*...' and indicating that the defence power may properly be used 'against threats posed internally as well as by invasion from abroad by force of arms'.

# A BIT ABOUT WORDS

## *deadline*

The Winter 2007 edition of the *Bar News* did not contain a column about words. For the first time in 14 years I missed the deadline. More in despair than anger, I looked up *deadline* in the OED2. In its meaning relevant here: 'a time by which material has to be ready for inclusion in a particular issue of a publication', it is first recorded in 1920. The *Chicago Herald & Examiner* of 2 January that year notes a play called 'Deadline at Eleven' which was about to be produced. Not surprisingly, it was a play about a newspaper. Although this meaning of *deadline* is so recent, it is now the commonest use of the word. That is probably a good thing, because an earlier American use of the word was much more literal and threatening: during the American civil war, a *deadline* was a line drawn around the bounds of a military prison. Any prisoner who crossed the deadline was liable to be shot. In 1868 B J Lossing's *History of the Civil War* noted that: 'Seventeen feet from the inner stockade was the 'dead-line' over which no man could pass and live'.



It is possible, perhaps likely, that this usage of *deadline* was a contribution of Colonel WC Minor. Minor had been a surgeon in the Union army during the American Civil War. He was a schizophrenic who developed a paranoid delusion that Irish patriots were out to get him. This view was helped along by the fact that he was required to brand Irish deserters: this involved him burning a large D on the cheek of the deserters, a process which caused great distress to victim and surgeon alike. After the war, he went to London in pursuit of his literary interests and, whilst spending a late night in Lambeth, he shot a man who (as he imagined) was a Fenian sympathizer out to harm him. In fact, the victim was just an ordinary shift-worker on his way home to wife and family.

Minor was found not guilty by reason of insanity and was sent to the newly opened prison for the criminally insane at Broadmoor. Whilst there, he read an advertisement in the newspaper: one James Murray was calling for readers who could contribute examples of the use of various words in writings from the 11th to the 19th century, to assist his work in compiling a new dictionary. Minor became a regular contributor. Murray did not know until the verge of publication that his frequent correspondent was in a prison for the criminally insane. Murray's work became famous as the *Oxford English Dictionary*. Minor was its most prolific contributor. WC Minor's story is marvellously told by Simon Winchester in *The Surgeon of Crowthorn* (published in America as *The Madman and the Professor*).

Perhaps appropriately, the US Civil War also produced the word *skedaddle* (1861) 'to retreat or retire hastily or precipitately; to flee'. Or as we would now say: to cut and run. 1861 also saw the first recorded use of *rampage*, but in England rather than America. Its first recorded use is from Charles Dickens (*Great Expectations*). 1861 was the first year of recorded use of some other useful words, including: *billionaire, crappily, deceivability, dodgy, headlight* (on a train), *malingering, proletarianism*, and *Queenslander* (the style of house rather than the type of person).

The US Civil War (1861–65) threw up a few other new words: *Gatling gun* (named for its inventor, Richard J Gatling: it was the first American weapon of mass destruction), *Greyback* (a Confederate soldier), *Ironclad* (for the armoured ship), *Jay-hawker* (irregulars around Kansas – freedom fighters or guerrillas depending on where you stood), *moss-back* (Southern draft dodgers).

The US Civil War is reckoned as a time when the technology of war briefly outstripped the techniques of medicine. The fatalities from injuries and disease were horrific. In a rare display of American understatement, the war was later referred to as 'the late unpleasantness'. A person who was not able to adjust to the changed circumstances after the war was described by the newly minted adjective *unreconstructed*: 'not reconciled to the outcome of the American Civil War; hence generally not reconciled or converted to the current political orthodoxy'. This would be reckoned an understatement when applied to a secret group who were

not prepared to accept the abolition of slavery which was the legacy of the civil war. They took the Greek word *kuklos* (circle) as their name, which they pronounced *Ku Klux*.

An earlier war, the English Civil War (1642–49), gave us *Ironside*s (Cromwell's troopers – puritan warriors), *red-coats* (parliamentary soldiers, also called *roundheads*), and (arguably) *tory*. Although *tory* is first recorded in use in 1646, it is not self-evidently a product of the war itself. It is from an Irish agent-noun *tóraidhe, –aighe* 'pursuer'. The OED2 gives it as 'one of the dispossessed Irish, who became outlaws, subsisting by plundering and killing the English settlers and soldiers; a bogtrotter, a rapparee; later, often applied to any Irish Papist or Royalist in arms'. A *rapparee* was an Irish pikeman or irregular soldier (from *rapaire* the Irish word for a short pike).

The use of *tory* as a generally unfavourable term for Irish rebels transfered itself to those who favoured the idea of James, Duke of York (a Roman Catholic) succeeding to the Crown. In 1740 Roger North gave the history of the political use of the term in the Bill of Exclusion. He wrote:

> …led to a common Use of slighting and opprobrious Words; such as *Yorkist*. That did not scandalise or reflect enough. … Then, observing that the Duke favoured Irish Men, all his Friends, or those accounted such by appearing against the Exclusion, were straight become Irish, and so wild Irish, thence *Bogtrotters*, and in the Copia of the factious Language, the Word *Tory* was entertained, which signified the most despicable Savages among the Wild Irish.

A strange origin indeed for the word that now describes the Conservatives in government. If we are to be true to language, the true Tories in government at present are Senator Heffernan and Wilson Tuckey, with honourable mentions for Tony Abbott and Eric Abetz. Perhaps the rest of them are wild in other ways.

If *Tory* has insulting origins, *Whig* fares no better. It is thought to be a contraction of *whiggamore*: 'One of a body of insurgents of the West of Scotland who in 1648 marched on Edinburgh, their expedition being called the whiggamore raid'. Whether or not that connection is correct, its earliest received meanings are 'A yokel, country bumpkin' (1645); then by 1657 'An adherent of the Presbyterian cause in Scotland in the seventeenth century; applied originally to the Covenanters in the West of Scotland who in 1648 wrested the government from the Royalist party and marched as rebels to Edinburgh'. Later it was applied to 'the extreme section of the Covenanting party who were regarded as rebels'. By 1679, according to OED2, it was applied to the Exclusioners, who opposed the succession of James, Duke of York, on the ground of his being a Roman Catholic. It was the Exclusioners who branded the wild Irishmen *Tories* as an insult, and the exchange of insults between Whigs and Tories continues to the present day.

JULIAN BURNSIDE

# Farewell Ross Macaw QC

Outgoing chair of the Legal Assistance Committee of the Victorian Bar (VBLAC), Ross Macaw QC, was farewelled at a lunch attended by members of the VBLAC and the Board of the Public Interest Law Clearing House (PILCH) on 31 January 2008. The lunch was hosted by David Krasnostein, Chair of the PILCH Board, Head of Global Equity and Group Corporate Counsel at National Australia Bank Ltd. David thanked Ross for his outstanding contribution to the VBLAC and reflected on the substantial pro bono commitment of the Victorian Bar generally. Newly appointed Chair Alexandra Richards QC, who has served on the VBLAC since 2003, was also welcomed to her new role.

LEFT TO RIGHT Susannah Sage Jacobson (Manager VBLAS), Alexandra Richards QC, Ross Macaw QC, Kristen Hilton (Executive Director PILCH), David Krasnostein (NAB)

# Duty Barristers Scheme launch

On 16 November 2007 Chief Magistrate Ian Gray launched the Victorian Bar's Duty Barristers Scheme. The Scheme has the support of all the heads of the Victorian Courts, including Chief Magistrate, the Chief Judge, the President of the Court of Appeal and the Chief Justices of Victoria.

Justice Maxwell attended the launch hosted by the Chief Magistrate representing the Chief Justice of Victoria. The Attorney-General and Deputy Premier, the Honourable Robert Hulls, was represented by Mr Brian Tee. The County Court was represented by Judge Chettle.

Chief Magistrate Ian Gray has been instrumental in the establishment of the Scheme. He and Will Alstergren have met with the Chairman of the Readers' Course Committee, Ian Hill QC, on a number of occasions to establish the framework for the Scheme, and have recruited the invaluable support and help of Magistrate Leslie Fleming, not only an esteemed former member of counsel but also a member of the Victorian Bar Readers' Course Committee. The idea of a duty barristers scheme was put up to the Victorian Bar Council and was well supported. Thanks to General Manager of the Bar, Stephen Hare, a Victoria Law Foundation grant was obtained to fund a co-ordinator for the Scheme. Katie Spencer of the Victorian Bar Office was appointed. Ian Hill QC, Will Alstergren, Chief Magistrate Ian Gray and Magistrate Leslie Fleming had a number of meetings with Tony Parsons and Dominic Conidi of Victorian Legal Aid to ensure a well organized and cohesive partnership was formed.

The Duty Barristers Scheme began operation on Monday, 12 November 2007. On that day, the first three duty barristers were all women. Amelia Macknay, Amanda Wynne and Elizabeth Ruddle represented the Bar with distinction on this first occasion, giving advice to witnesses in protection, appearing for co-accused in a drug trial where legal aid had a conflict and attending to an application for variance of bail. Since that time the Victorian Bar Duty Barristers Scheme has enjoyed a great deal of success. It has, during the first two months of its operation, provided six barristers a week to the Melbourne Magistrates' Court, to appear on a pro bono basis for litigants who otherwise would not be represented.

## FIRST DAY OF THE DUTY BARRISTERS SCHEME

by Amelia Macknay

My first day as a duty barrister commenced with assisting two witnesses who had been summonsed to give evidence in a Work-Safe prosecution. The matter was quite serious and involved a workplace death, so the other duty barrister and I sought advice from a colleague who had expertise in the area.

My next task was to speak to the victim in a sexual assault matter who was giving evidence by remote video-link about a matter that occurred some 20 years ago. She needed advice about legal professional privilege in relation to family law proceedings that took place in the 70s when she was a teenager and had a children's lawyer appointed to her.

After that another duty barrister and I gave assistance to a self-represented man who was charged with various offences and had previously pleaded guilty to them. He wanted to change his plea to not guilty so we had to seek leave of the court and explain to the Magistrate why the accused wanted his pleas changed.

My first day was a fantastic experience and I would recommend volunteering as a duty barrister to any junior member of the Bar.

## IMPORTANCE OF THE DUTY BARRISTERS SCHEME

by Chief Magistrate Ian Gray

Whilst the services of the Victorian Legal Aid, PILCH and other organization have been vital in the administration of justice in Victoria and have done a great job in providing many Victorians with representation that they would not otherwise receive, the Duty Barristers Scheme provides another realm to this service. Despite the above organizations' best endeavours, there are still unrepresented litigants attending court on a daily basis. Those litigants are without resources and their cases would, on many occasions, have to be adjourned in circumstances where if they were given adequate legal advice on the day could have been disposed of both to the benefit of the litigant and of course to the court in its efficiency.

In the last 12 months and the last financial year, the number of criminal cases initiated in the Magistrates' Court is almost 140,000. The number of cases finalized by that court is just over 130,000. In any year there are at least 30,000 pending. However, 87.7 percent of criminal cases are finalized within the first six months and only 5.5 percent of criminal cases are pending for more than 12 months. During that 12 month period the Court of Infringements initiated almost 840,000, and 2,250, appeals lodged against conviction or sentence.

As part of the protocols of the *Magistrates' Court Act 1989*, Section 1(e) requires the Magistrates' Court to be managed in a way that it will ensure:

(i) fairness to all parties to court proceedings; and
(ii) the prompt resolution of court proceedings; and
(iii) the optional use made of a court's resources.

It is because of those above protocols that the Court saw the establishment of the Duty Barristers Scheme as being vital to the administration of justice in Victoria, particularly in the Magistrates' Court. As Chief Magistrate, I saw it as beneficial to litigants who are considering sentencing options, to the Court and the Court's efficiency, having litigants properly represented in circumstances where they would otherwise not receive legal representation, and the litigant benefited from bringing forward pleas and crystallising legal issues early. It provides an opportunity for litigants faced with the contest mention to know their rights and to be advised as to their options. It is a strategic benefit to each litigant to receive that kind of advice early on the proceeding. It may be that, properly advised, a litigant is better off adjourning the matter in order to seek further advice and/or to seek further material for, let's say, a plea. Alternatively, the benefit of getting on-the-spot legal advice and representation may be to bring the matter to an early conclusion.

Having seen the Duty Barristers Scheme since its inception and speaking to the Magistrates who have been assisted by the Scheme I am delighted with its progress and fully support both its establishment and its on-going existence in this court.

I thank the efforts of the Victorian Bar Council, my fellow magistrates, members of the court and particularly Magistrate Lesley Fleming, and the efforts of the Victorian Bar Council, its chairman and the Victorian Bar's Duty Barristers Scheme Committee chaired by Will Alstergren for their efforts in establishing what I believe to be a great scheme for the administration of justice in Victoria.

Will Alstergren interviews the Chief Magistrate

## PRO BONO LEGAL SERVICES

by Peter Riordan, Chairman of the Victorian Bar

The Victorian bar has for a long period of time accepted responsibility for taking work pro bono publico – for the public good. Sir Anthony Mason described this

Listening attentively

as rooted in our common humanity and professional ideal of service to the community. For a very long time barristers have, on an individual case-by-case basis often chosen to represent people in courts without fee.

The Duty Barristers Scheme launched today is the most recent and perhaps one of the more significant additions to the variety of ways in which the Victorian Bar's commitment, and the commitment of our members, to pro bono representation is now available. It does so to ensure more effective access to justice for more Victorians.

Individual barristers still choose to act without fee in individual cases. That is largely invisible because it is done quietly and without fanfare, but it is still a major contribution to access to justice in Victoria.

For more than ten years, the Victorian Bar Legal Assistance Scheme has offered free representation in an organized way. Since 2000, VBLAS has been administered by PILCH. PILCH has grown and developed into a one-stop shop for pro bono legal assistance through the professional associations and now administers both the Victorian Bar and the Victorian Law Institute Schemes. PILCH is openly accessible to all and provides a framework for the fair, equitable and systematic channelling of pro bono assistance, advice and representation. In the last financial year VBLAS has delivered in excess of 11,500 hours of pro bono work by barristers, valued, very approximately at $4½million.

The Duty Barristers Scheme now provides another challenge. The formal launch and celebration is this afternoon, but the Scheme began operations on Monday, and was in operation again yesterday. On Monday morning at 9.30am three barristers came to court with Will Alstergren, who chairs the committee that established the scheme: Amelia Macknay, Elizabeth Ruddle and Amanda Wynne. The three duty barristers announced their appearance to the court and were very soon assigned to advise and appear. All three barristers had experience as solicitors before coming to the Bar. Amelia Macknay had, as an employee solicitor, been seconded by Blake Dawson Waldron and worked for six months in a community legal centre, the Young People's Legal Rights Centre, doing appearance work as well as advising and policy work. Elizabeth Ruddle had worked at Holding Redlich. Amanda Wynne had practised on her own account for six years, working primarily in the areas of family law, family violence, child abuse and crime. They had literally hit the ground running and were all fully engaged for the day.

The Scheme we launched today has already proved its value. Unrepresented people who, in the opinion of the Magistrate, needed advice and support were looked after immediately. Victoria Legal Aid was able to refer some people to the additional resources of the three barristers on the spot.

In one sexual assault case the Magistrate considered that the complainant, who was giving evidence by video-link from a remote location, needed advice before she should continue her testimony. One of the duty barristers was able to give that advice immediately, and the matter was then able to proceed – a benefit not only to the individual witness, but also to the smooth running of the business of the court in a case with significant logistical difficulties.

In another case, Victoria Legal Aid represented one accused, and the additional resources of the two duty barristers provided representation for each of the two co-accused.

We achieved a degree of gender-balance in yesterday's duty barristers: two men, Douglas Shirrefs and Adam Segal, and one woman, Andrea Lawrence.

Victoria Legal Aid has, of course, been providing duty solicitors in the Magistrates' Court for many years. That Scheme is well-established and working well. The Duty Barristers Scheme began only on Monday, and is in its initial three months' pilot stage.

Will Alstergren and his committee will work to consolidate, develop and refine it.

Will Alstergren, Magistrate Lesley Flemming, Chief Magistrate Ian Gray, Paul Elliott QC

Peter Riordan QC

Chief Magistrate Ian Gray

If its first two days of operation are any indication, and I think they are, this will be a valuable and significant addition that will serve Victorian and the administration of justice in Victoria courts well, complementing the excellent work already done by Victoria Legal Aid.

Extension to the County and Supreme courts is in mind, and in the planning. I hope it will not be too long before we are able to make a start in those courts. With, in particular, the encouragement and support of the Chief Magistrate, of Magistrate Leslie Fleming, who is a member of his committee, Will Alstergren and his committee have made his idea and vision a reality.

I thank them. I thank the 100 barrister volunteers already committed to work in the Scheme. I thank the members and staff of the court who have worked with us. I also thank the Victoria Law Foundation, which made a grant to help fund a co-ordinator for the Scheme. I also welcome Tarni Perkel and Lois Erickson who are here representing the Foundation. I also thank Tony Parsons, the Managing Director of Victoria Legal Aid, for his cooperation.

Let me close with my favourite story about pro bono representation, one told to me by Judge Tony Howard. This was in the 1960s; Tony Howard looks young and dashing, but he knows stories from long ago.

Three silks and four juniors finished a case on circuit in Geelong early. It had been expected to go for a week. They finished it in two days. The weather was glorious. They decided to go to Lorne for dinner to celebrate. The next morning, they dropped into the Lorne Magistrates' Court just to have a look.

Perhaps out of fellow feeling, after their own slap-up dinner the previous evening, they decided to offer pro bono representation to an old lag charged with drunk and disorderly. A local solicitor was prepared to give them a backsheet, and communicated the offer to the old lag. Then seven suited samurai took their places at the small Bar table. The case was called. 'May it please your Worship, I appear with my learned friends Mr Silk, Mr Silk, Mr Junior, Mr Junior and Mr Junior on behalf of the defendant. The local prosecuting sergeant of police all but fainted, and asked for the matter to be stood down. The Magistrate adjourned the court, and the prosecutor was seen going to the Magistrates' chambers.

Upon the matter being called again, the prosecutor advised the court that he would not be leading any evidence. The charge was dismissed to the bewilderment of the old lag who was still decidedly worse for wear.

Our duty barristers aren't silks. They are, however, well qualified and experienced. Most, if not all, have experience as solicitors and have done appearance work. All have committed themselves to work as barristers, and have completed the three-month intensive Bar Readers' Course. All are committed to the Scheme, and to serving people and the court.

Your Honours, fellow members of the Bar, ladies and gentlemen, I thank you all for your attendance today at the launch of the Duty Barristers Scheme.

The new silks announce their appearance in the Banco Court.

# New Silks Ceremonies

The new silks on the steps of the Supreme Court. BACK ROW: Gavin Silbert SC, John Philbrick SC, John Dixon SC, David Brookes SC, Nicholas Robinson SC, Mark Moshinsky SC. MIDDLE ROW: Stephen McLeish SC, Peter Cawthorn SC, Jeffrey Gleeson SC, Ian Mawson SC. FRONT ROW: Ian Waller SC, Dr Ian Freckelton SC, Kerri Judd SC, Dr Karin Emerton SC.

A full bench of Federal Court Justices receive the appearances of the new silks.

The new silks – with Chairman of the Bar Council, Peter Riordan SC in the Federal Court.

# Women at The Bar

## Speech Night Celebrations, Report Cards and Doing Better Next Year

Address by the Honourable Justice Margaret McMurdo AC, President of the Court of Appeal, Queensland, to the Women Barristers Association annual Celebratory Dinner, Thursday 29 November 2007, The Essoign Club, Owen Dixon Chambers East.

Chief Justice, the Honourable Marilyn Warren AC and Mr Mick Healey, Chief Judge Michael Rozenes, Chairman of the Bar Council, Mr Peter Riordan SC, Convenor of the Women Barristers Association, Ms Caroline Kirton, distinguished members of the legal profession and guests.

How delightful to be with you at this Women Barristers Association ('WBA') Celebratory Dinner. We all, men as well as women, have a lot to celebrate tonight.

We meet on the traditional lands of the Wurundjeri and Boonwurrung people of the Kulin, who for thousands of years before British settlement, lived in this place of plenty, holding celebratory feasts not so very different from this. We are enriched by their ancient culture which they generously share with us and by their wise stewardship of this land over the millennia. Tonight we celebrate that we can walk together into a shared future.

Reflections on the past often provide reasons for celebration, especially for women barristers and judges. Remember that in ancient Athens, widely considered the birthplace of modern justice and democracy, women could litigate only through guardians.[1] The past provides plenty of reasons for men barristers to celebrate the present, too. Remember that until Pope Innocent III abandoned the practice in 1215, trial was not by judge or jury but by combat. English barrister, Sadakat Kadri, explains in his fascinating book, *The Trial*:

> The ritual required plaintiff and defendant to prove that [God] would take their side in a fight, and after weapons were blessed – to neutralize blade-blunting spells and the like – victory would go to whoever reduced the other to submission or death. There were subtle variations. Women, priests, and cripples generally had to hire professional fighters. German jurisdictions often found other ways to level the odds: a man might be buried waist-deep and armed with a mace, for example, and his female opponent allowed to roam free but given only a rock in a sack in which to avenge her armed but handicapped male opponent.[2]

Tales like these make us grateful we live in 2007 Australia, not 1207 Germany. There is no longer trial by ordeal despite the claims of some barristers about the behaviour of some judges.

Last Saturday we exercised our democratic vote in a federal election. Both past and future Prime Ministers spoke courteously about the other in election night concession and acceptance speeches. The newly elected Deputy Prime Minister, Julia Gillard, the first Australian woman to hold that role and a lawyer, graciously and authoritatively spoke, despite political differences, about former Prime Minister Howard's important contribution over 30 years to Australian public life, praising his leadership on limiting gun ownership and its positive community effect. We should celebrate tonight our good fortune to be born Australians, not because of the change of government, but because of our fine electoral system and democratic institutions which effected that change so seamlessly.

An integral element of those democratic institutions is that Australian citizens and, for the most part non-citizens, are subject to the rule of law, upheld by an independent legal profession and independent courts. For the last 100 years or so non-Indigenous Australian women have had, like non-Indigenous men, the right to vote and to stand for election. Similar rights for Indigenous Australians have been a more recent development. For about the same period, women have also had the right to be part of the independent legal profession and to contribute the female jurisprudential perspective to our democratic society. More recently, women have been appointed in numbers to the judiciary. This has enriched not just the women in our community but the community as a whole and the democracy in which it operates.

We all, men and women, have good reason to celebrate that here in Victoria the legal profession is led by Chief Justice Marilyn Warren. As Chief Justice and a former barrister, she enthusiastically supports the WBA and its purposes. That is not through some egotistical sense of wanting to see her clones succeed in the profession she loves. It is because she, like, I am sure, Chief Judge Rozenes, the Chairman of the Bar, Mr Peter Riordan SC, and

Judge Felicity Hampel QC, Magistrate Rosemary Carlin, Judge Irene Lawson and Michelle Williams SC

me, she wants the best for the courts, the legal profession and the community. A Bar where women barristers apprehend they belong and where they know their contribution is valued, allows them to give of their best intellectually and for the long term, to the benefit of the legal profession and the community.

In an address in May last year, Justice Ruth McColl AO expressed cautious support for a formal and thorough examination of the process of judicial appointments in Australia as a means of addressing the under-representation of women and other non-traditional groups in the law. Her Honour observed that she did not want her address to become 'yet another recitation of indigestible and depressing statistics contrasting the number of women graduating from law school with outstanding academic qualifications with the number of women in the profession, let alone on the bench. …[We]…could recite these statistics in our sleep.'[3]

Whilst I empathize with those observations, statistics do provide some yardstick by which to measure progress, or the lack of it. They help establish to sceptics the need for positive change. They provide a catalyst for a conversation about developing strategies to bring about change. They are an anchor point against which to measure the value of remedial strategies undertaken.

In Queensland, we do not have a woman Chief Justice. But we do have Premier Anna Bligh and Governor, Ms Quentin Bryce AC, a great supporter of and advocate for women in the law. And this year, my old friend, Queensland Federal Court Justice Susan Kiefel, joined Victoria's Justice Susan Crennan on the High Court of Australia. Thirty-three per cent of my wonderful Supreme Court colleagues are women. Eighteen point four per cent of District Court judges, including Chief Judge Patsy Wolfe, and 31% of magistrates, including former Chief Magistrate Di Fingleton, are women. Leanne Clare SC is the Queensland Director of Public Prosecutions. The President of the Queensland Law Society is Ms Megan Mahon, a thirty-something lawyer from country Toowoomba with two school-age children. Even by Victorian standards we are not doing too badly!

And then there's the Queensland Bar. In 2004–2005[4] there were 577 junior members of the Bar, of whom 85 (14.7%) were women, and 71 silks of whom one or 1.4% was a woman. That's what I call a super woman! Overall 13.4% of the Queensland Bar were women. Presently, it has 899 members, 808 juniors of whom 145 (17.9%) are women and 91 silks, four (4.4%) of whom are women. That means that currently, the Queensland Bar is comprised of 16.6% women. In four years there has been some, albeit slow, progress: 16.6% up from 13.4%. Why, at this rate it will take only another three decades to reach roughly equal numbers of men and women at the Bar in Queensland. Reason to celebrate? Well, I wouldn't bring out the vintage French!

But wait: there's more! This year, there were no (that's right, zero) women applicants for silk in Queensland. The Bar Association of Queensland ('BAQ') constitution requires that two of its Council

TOP LEFT Judge Susan Cohen with Justice Kevin Bell
ABOVE Judge Tony Howard QC with Solicitor-General Pamela Tait SC
LEFT Kerri Judd SC, Chief Judge Michael Rozenes QC, Judge Irene Lawson, Magistrate Rosemary Carlin

members must be women, two must be silks, two must be regional members, two must be members of between three and ten years' standing and one must be a member of less than three years' standing. This year 40 barristers stood for election; six or 15% of the candidates were women. Only two of the six were elected to the Council, representing 11.8% of Council membership, an even smaller proportion than the already small proportion of women at the Bar. Since I have been President, the Queensland Court of Appeal keeps records of the percentage of women in the total number of appearances by barristers. In 2004 a little over 16% of appearances were by women barristers. This year, less than 3% of total appearances were by women barristers. That is a more than 13% decrease in appearances by women barristers in Queensland's highest court over the last four years. Nothing to celebrate here.

One reason for this regression may well be that the small number of senior women at the Queensland Bar is regularly depleted through judicial appointments. Because they are so few, the depletion is proportionately high. But this is not a complete answer. There are simply too few women at all levels of the Bar. For those of us old enough to remember TV's first popular scientist, Professor Sumner-Miller, I ask: why is this so?

Unquestionably, a major reason is that recognized in the seminal study of the status of women at the Victorian Bar by Hunter and McKelvie:[5] even when barriers to entry to the Bar for women are absent, solicitors' briefing practices themselves present a variety of barriers to women's advancement.[6]

Professor Rosemary Hunter explains:

> Women barristers, like women lawyers everywhere and in all branches of the profession, tend to find themselves in the less prestigious and less remunerative courts, practice areas and cases (*Schulz and Shaw*, 2003[7]).[8]

In 2004, the Law Council of Australia, recognising that this is a general professional problem, not a women's issue, sought to address it through its Equal Opportunity Briefing Policy.[9] The policy has been adopted by the Bar Association of Queensland, together with a commendable 20 point policy on equal opportunities for women. It has also been adopted in Queensland by government, by many legal firms and by government agencies. It does

not require women to be briefed but that participants consider briefing women and regularly report on their efforts. Professor Hunter notes that such model briefing policies remain tentative and incomplete.[10] Anecdotally, reports to me from women at the Queensland Bar are that its widespread adoption has made little impact on the quality and quantity of work received. Too often, solicitors' firms pay no more than lip service to the policy, simply to claim compliance. Professor Hunter argues that model briefing policies do not deal directly with homo-sociality (the way in which men network, socialise and feel most comfortable with male peers). She contends that this is a significant contributor to women not being briefed in proportion to their numbers at the Bar, particularly as male solicitors in private law firms remain the greatest source of work for barristers. This, she contends, is the hardest factor to describe and to address. But she tentatively notes a cause for modest celebration: younger male solicitors do not seem to exhibit the same gender biases as their older colleagues.[11] Like Professor Hunter, I am optimistic about our young men lawyers.

In a recent survey of Queensland women barristers, the number one response as to why the proportion of women at the Bar remained low was 'children or family responsibilities'.[12] In one sense this is surprising. Once a barrister's practice is established, the Bar offers a degree of flexibility, albeit tempered by unpredictability, well beyond that available to an employee. It is important that we show women law students and young women lawyers that the Bar is also a woman's place offering her a challenging, exciting and in every sense rewarding life-long career.

I emphasize that solving the problem of low female membership of the Bar is not a woman's issue. Good-hearted, right-thinking men within the legal profession and in the wider community, and there are a lot of them, want the issue resolved and to be part of the solution. There is no easy or quick fix in making the Bar a place for women as well as men, and not just the pioneering minority of women who have so far done the trail-blazing.

The Victorian Bar has undoubtedly led the way in Australia in making women more welcome. Perhaps this was because of the early contribution of women such as Joan Rosanove, who was admitted to the Bar here in 1923. I was inspired by her biography when I was a young lawyer. By contrast, the first woman to practise at the Queensland Bar, Naida Haxton, was not admitted until 1966.

Caroline Kirton, president and convenor of the WBA, addresses the dinner guests

An even more significant factor behind the Victorian Bar's leadership in providing a woman-friendly environment, at least comparatively, was the Hunter and McKelvie report.[13] The report's credibility and effectiveness was enhanced by the support given to it by Justice Stephen Charles, then of the Victorian Court of Appeal. Justice Charles recognized that strong representation of women at the Victorian Bar was important for the strength and credibility of the profession generally and ultimately the community's confidence in it.

A third reason why the Victorian Bar is seen as relatively woman-friendly is the work of the WBA. This year's activities have included support of women in Timor Leste; awareness-raising of the evil trafficking of South-East Asian women and girls into Australian prostitution; forging links with Melbourne women law students; seminars on general CLE and gender issues, especially those affecting women barristers; the oral history project of past convenors and the related soon-to-be-released e-film; the touring exhibition, 'Women Barristers in Victoria, Then and Now'; and the industry partnership with Victoria University study of why barristers leave the Bar. The WBA has, over many years now, nurtured and supported women barristers and those who think they may like to be. We rightly celebrate the work of WBA tonight.

Durham University's Erika Rackley in a recent article[14] gives us cause for celebration. She first asks:

> Did you hear about the Law Faculty who refused a woman's application to become a student because her presence would 'distract the attention of the young men'? Or about the attempt to challenge a planning tribunal's decision on the grounds that the tribunal was pregnant? …Surely you must have heard about the US law student graduated third in her class and was offered a job in a top US law firm – as a legal secretary? …What about the stories about the justice minister who tried to introduce quotas in order to ensure a gender balance within his judiciary because there were simply too many female judges? …Or about the chief magistrate whose management style landed her in jail?[15] Did you hear about the judge, who, on her appointment to the bench, received the traditional honorary membership of the Tattersall's Club, Australia's self-proclaimed premier private members' club, only to find this hastily withdrawn once they realized she was a woman?[16]

Rackley, like most of us, prefers happy endings, new beginnings and reasons for celebration. She concludes with:

> Remember Belva Lockwood – the student refused entry to the University of Columbia's law faculty because her presence would distract the attention of young men – she went on to become the first woman to be admitted to practise before the US Supreme Court. And the top ranking student offered the job of legal secretary, that was Sandra Day O'Connor, the first female judge to sit on the US Supreme Court. You can't have forgotten about the female judge asked to leave the room after dinner so that her male colleagues could enjoy their port and cigars in peace – that was Brenda Hale, and she refused to go. How about the… attempt… to disqualify a… female judge… because [she was] pregnant… well, [it]… eventually failed as did the attempt to introduce quotas to redress the feminisation of the French judiciary. Incidentally, Diane Fingleton has returned to the legal profession as a magistrate in Caloundra, Queensland. … Finally, remember Tattersall's, the male members-only club who withdraw their invitation to a newly appointed judge on learning her sex…well, some things never change.[17]

Groucho Marx said two very funny things about clubs. One was, 'I don't care to belong to a club that accepts people like me as members.' But perhaps more apposite to the Tattersall's story is, 'I have a mind to join a club and beat you over the head with it.'

Rackley's stories, and many of us here have our own as good or better, remind us of how far the position of women, especially the position of women lawyers and judges has improved in recent years and how much we, both men and women, have cause to celebrate this tonight.

We are all grateful our society has positively evolved since ancient Athens when women could litigate only through guardians and from medieval Europe's trial by combat. I guess I'll just never know how I would have gone with my rock in the sack against David Jackson QC, buried waist-deep and armed with a mace. The full participation of women in an effective independent legal profession is to the benefit not only of women and girls but also of men and boys. A dearth of women barristers undermines the effectiveness of an independent legal profession in a democracy, and community confidence in it, so that ultimately it is a community concern. That is why the legislature is so eager to ensure that women play their appropriate role in the third arm of government, the judiciary. That is also why leading male jurists, including Justice Michael McHugh[18] and Justice Michael Kirby,[19] have often addressed the issue when speaking extra-curially.

My cursory report card of women at the Bar in Queensland is broadly representative of the position throughout Australia. Thanks to WBA and the Hunter-McKelvie report, the position is a little better here in Victoria. But all of us, men and women, recognize that we have plenty of work ahead to improve our profession and our society by ensuring that women can and do participate equally at the Bar. I congratulate the WBA on its stewardship in this area to date and encourage it in its efforts in 2008 and beyond. I remind the male leaders of the profession, those present and more especially those that are not, that this is not a women's issue. The under-representation of women at the Bar diminishes the whole profession and the community it serves. I have an invitation for the men of the Australian legal profession. I invite you all to join Justice Michael Kirby, and former justices Michael McHugh and Stephen Charles, and to be part of the solution.

## ENDNOTES

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11 Above, pp. 43–44.
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14 Erika Rackley, 'Judicial Diversity, the Woman Judge and Fairy Tale Endings', *Legal Studies*, Vol 27 No 1, March 2007 pp. 74–94.
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19 The Honourable Justice Michael Kirby AC CMG, 'Women in Law – Doldrums or Progress?', *Women Lawyers of Western Australia*, Perth, 22 October 2003; The Honourable Justice Michael Kirby AC CMG, 'Women Lawyers – Making a Difference', (1998) 10, *Australian Feminist Law Journal*, 125; The Honourable Justice Michael Kirby AC CMG, 'Women in the law – What next?' (2002) 16, *Australian Feminist Law Journal*, 148.

# Raising the Bar

Victorian barristers Helen Rofe, Ian Horak, Lisa Di Farari, Elizabeth Brophy and coach Will Alstergren attended the ABA advocacy conference.

In the last week of the January vacation 42 of Australia's keenest and brightest young barristers attended the second Australian Bar Association Residential Advocacy Course held at Macquarie University in Sydney. The course was the initiative of Justice Glenn Martin with the help of Phil Greenwood SC. The aim was to provide advocates who had already established careers at their respective Bars with the opportunity of a week's intensive workshop, honing and tweaking their skills as advocates whilst at the same time being part of great network of barristers around Australia.

The materials for the course were based on an English restraint of trade/breach of duty case. Each barrister was required to spend at least four to five days preparing. The week began with the coaches gathering at Phil Greenwood's house in Sydney, followed on the Monday morning by a coaches' workshop going through the exercises to be conducted for the following week.

Phil Greenwood SC and Edwin Glasgow QC led an impressive team of coaches that included former Commonwealth DPP Ian Temby QC, Justice Glen Martin SC, ABA President Stephen Eskcourt QC, David Boddice SC, Gail Archer SC, Julia Baird, Ken Martin QC, Paul Menzies QC, Ian Robertson, Chris Shanahan SC, Patrick O'Neal, Bob Wensley QC and Victorian Will Alstergren.

The course was conducted using a number of lecture and seminar meeting rooms at the Macquarie University with accommodation in the building next door.

After the initial coaches' meeting, the first day of the course was taken up with coaches working together to develop and practise the teaching methodology to be utilized, and discuss the course materials.

The days were long, commencing at 8.30am and concluding at 6.00pm with coaches and barristers joining together for lunch and in the evening for drinks and dinner.

Almost all the barristers and coaches had an opportunity to work together, and the high ratio of coaches to barristers made possible some of the unique features of the course, which were the repetition of critiqued performances by barristers and lengthy one-on-one assessment demonstrations by coaches as well as video reviews.

Each of the exercises to be conducted each day was demonstrated by a coach, and then the barristers were split up into groups and each group was assigned a court room. Each barrister had an opponent and appeared before one of the coaches sitting as judge. There would be joint session and then, not unlike our own Victorian Bar Readers' Course, each barrister was then taken into a breakout room for individual coaching on his or her style based on the performance that was being recorded by video.

The importance of videoing performances is paramount to this kind of exercise. Perhaps the best critic of any barrister's performance is the barrister him or herself who is able to pick up on the mannerism, an error, voice difficulty or stance they could improve. Barristers were also treated to significant professional help from voice and stance coaches.

The next exercise to be done during the week was leading evidence-in-chief. The interesting thing about this exercise was that so many barristers had had experience in cross-examination but, because many had been part of the commercial bar, which increasingly uses witness statements, many barristers had not had the opportunity to lead evidence from a witness. The first morning was littered with leading questions and interjections to the Bench. However, by the time that part of the course was over each barrister was able to hone their skills and establish a deep understanding of evidence-in-chief.

Ian Temby QC showed all the grace and charm of the direct advocacy approach to evidence-in-chief in demonstration. He looked at his witness with the steely gaze, and then said, 'Now, Witness, it is being put in the Statement of Claim against you that you breached your employment contract and divulged information to your future employer. What do you say?' (again spoken in a firm and unequivocal manner). The witness replied somewhat nervously, 'I didn't …' 'Thank you,' replied Temby, 'I have no further questions'.

When it came to cross-examination, the true characters of many barristers stood out. Like many other things in the law, some barristers' performances were short and concise, others long and probative and others simply aggressive.

Ian Glasgow QC said, when introducing

cross-examination: 'Don't be like Christopher Columbus and the early explorers when cross-examining. When they set off they didn't know where they were going, when they got somewhere they didn't know where they were, and when they finished they didn't know where they had been.'

According to Phil Greenwood SC, who runs the advocacy course in New South Wales, control is essential to cross-examination and thus keeping a witness guessing but also bringing the judge along with your case. I want a performance for the judge which is seamless, so that means I have to plan it so there are not going to be hiccups along the way that I can't control. As you rise to your feet the witness is looking at you, watching and wondering what the hell is about to happen? You don't want to disappoint them.'

Advocates were taught during the course that cross-examination was more about being a minimalist and creating a conversational style of communication between the witness and the judge. It is not a platform for the barristers to shine or pick argument or be obstructive. In cross-examination it is about coaxing the witness to self-condemn with their own words and prove your client's case, by asking short, direct and innocuous questions that lead them to a point from which they are unable to retreat, i.e. shutting the gate.

After a relatively sleepless night considering the devilishly clever points of cross-examination I was about to deliver in demonstration to be called upon the next day I was awoken at 5.45am by the rumbling next door. It appeared that as the sun was coming up over the green fields of Macquarie University, and the birds were waking, Ian Temby QC was intent on conducting the morning ritual, Temby's torture. Proving that his agility was not just a rumour spread by junior advocates, Temby led us up the hills towards the hockey field where 20 or so participants were made to bend, twist and contort themselves in an effort to become more flexible, all to the eloquent tones of Ian Temby's vigorous instructions. I wasn't sure whether it was the endorphins being raised by Temby's activities or some of the clarity of the coaching had suddenly sunk in but during my attempts to put my leg behind my head a vital point in cross-examination came to me.

Structure in advocacy particularly in cross-examination was of vital importance, something I wished to display to the class. That morning after a light breakfast, heart palpitations and still experiencing slight perspiration for someone who expended more physical effort than was perhaps advisable, I judged a moot class. The variety of cross-examination was startling, and most were effective. It was gratifying to see the coaching tips demonstrated the night before being put into play by eager barristers, despite the efforts of their class-mates sitting as witnesses to try and get out of difficult questions. I am delighted to say that I only had to find one witness in contempt of court for his actions and for the most part witnesses were well handled and in some places discredited.

Re-examination was again demonstrated to the barristers, however, in the words of Stephen Escort QC, 'If you have to re-examine you have probably lost the case anyway.'

That night one of the barristers said, inter alia, 'When I first decided to put my name up for this course in October last year it sounded like a good idea. As it got to November I became increasingly enthusiastic. By December I was concerned whether I had bitten off more than I could chew, and in January, lying on the beach I considered the idea of taking a week out of my holidays was not a good idea at all. However, after I arrived and saw the professionalism of the coaches and the level of teaching provided I knew I had made the right decision. This week has been fantastic for all of us.'

Another barrister who specializes in commercial law said, 'It was a great opportunity to improve one's skills, particularly in leading evidence-in-chief. I have a successful practice in commercial law but court work has become less and less frequent. To have a week on my feet being critiqued was invaluable.'

At the conference welcome

It is sometimes said that barristers are born to the job, but in reality most learn their skills by in-depth preparation and advocacy training. Once they leave the doors of readers' courses many barristers are left to their own devices. However, the Australian Bar Association provides opportunity for barristers to raise the bar again and improve their skills and receive invaluable help and experience in a sometimes punishing week before the start of the legal year.

We invest so much time and effort into

our practices, the very thing we desire to be good at is often left untested. To be able to have some of Australia's best senior advocates and judges critique and have professional speech coaches provide assistance on voice projection and stance proved to be invaluable for the 42 young barristers who attended.

The WA Bar Association's president, Ken Martin QC, in an article in the WA Law Journal, said, 'There are strong analogies between the role of the trial barrister and that of a stage actor. Both perform on the public stage. Both run on adrenalin. The performances are minutely and publicly scrutinized.' However, unlike the actor who appears in the same play throughout the long session night after night, matinee after matinee, the barrister really only gets one performance and has to get it right. Ken Martin when on to say, 'You have to pick a style that is right for you… You have a former High Court judge, Michael McKew, who is tall imperious and powerful; it is part of his physique. Or a Federal Court judge, Ray Finkelstein, who is a little bull terrier, who just went for the throat. Since I am small, I decided I would have to rely upon my charm.' However, as I was to discover over the week the key attribute required is control. Whilst it is a performance it is a highly disciplined controlled one.

In the same article Ken Martin said, 'In the good old days you were in court every day. You went on to the Magistrates' court, you did a bit of motor accidents, a bit of crime and you were beaten over the head by magistrates. They taught you the rules of evidence and procedure by simply bashing you. This has now stopped and in my view it is never going to come back.'

The ABA advocacy course reinforced three things. First, the value of preparation; second, the value of a clear understanding of your case; and third, how very lucky we are to be in such a great profession that allows the camaraderie and friendship it does.

On the final night the coaches and barristers assembled at the Terry Hills Golf Course and were addressed by the guest of honour, the Chief Justice of the High Court, Sir Murray Gleeson.

In Australia, advocacy training courses are becoming a key part of the readers' course. The Victorian Bar is leading the way in this and has for many years. Many

ABOVE Edwin Glasgow QC and Phil Greenwood SC
LEFT Lisa de Ferrari
BELOW Elizabeth Brophy (speaking)

Helen Rofe

Will Alstergren

Stephen Eskcourt QC

of the coaches who attended the course had been taught themselves by Professor George Hampel QC.

The ability to be able to be critiqued and sharpen one's skills in the week prior to the opening of the legal year is perhaps the best preparation any barrister could have. You come out of the gate full gallop after a long and well deserved holiday.'

Melbourne barrister, Helen Rofe attended the course and said:

> Trial preparation, cross-examination, examination in chief, case concept analysis – hardly the way to spend the precious summer vacation time. Such feelings intensified as the time for the advocacy course approached and I found myself the only one working in chambers in mid January, and on non-billable work at that!
>
> However, such feelings quickly evaporated once the course began and I found myself in the midst of a challenging, but rewarding week wherein I had little time to think of anything but the cross-examination of the next witness. Each performance was followed by the 'fun' of watching each performance on video with a coach reviewing both content and presentation.
>
> The course provided a unique forum to practice court skills, and to try new approaches without detrimental effect to a client's case. As hideous as I found the video watching experience, it did enable me to see improvement over the week, and also to see how others would see me in court.
>
> The intensity of the course was softened somewhat by early morning walking, yoga and pilates sessions led by Ian Temby QC. There was also the added bonus of meeting colleagues of similar seniority from other bars around Australia and getting to know them well through working in small groups and watching each other's performances, both good and bad.
>
> A huge thanks must go to the highly respected group of senior practitioners who also gave up their vacation time to act as coaches on the course.

The next course will be held in Sydney in July 2008 and is highly recommended. If interested please contact Phil Greenwood SC on <pgreenwood@wentworthchambers.com.au>.

WILL ALSTERGREN

# Restorative justice

Bringing justice and community together

Victim offender mediation and conferencing programs have emerged over the past 25 years as a dynamic alternative to criminal justice practice. Most commonly referred to as 'restorative justice' it is a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by criminal behaviour. In the last decade these developments have morphed into processes that can be used in schools and organizations.

In the last decade considerable academic interest has been generated in these processes, giving rise to a burgeoning number of publications and websites.

A number of programs have become associated with restorative justice because of the processes they use to respond to and repair the harm caused by crime. These include:

- Victim–offender reconciliation/mediation programs using trained mediators to bring victims and their offenders together in order to discuss the crime, its aftermath, and the steps needed to make things right.
- Conferencing programs that are similar to victim–offender mediation, but differ in that they involve not only the offender and victim, but also their family members and community representatives.
- Victim–offender panels which bring together groups of unrelated victims and offenders, linked by a common kind of crime but not by the particular crimes that have involved the others.
- Victim assistance programs that provide services to crime victims as they recover from the crime and proceed through the criminal justice process.
- Prison programs that provide services to offenders while they are in prison and on their release.

Like the alternative dispute resolution movement and other reform movements, restorative justice has grown out of the informal justice, victim and consumer rights and the restitution/diversion movements. As it has emerged and been put to greater use it has raised a number of legal issues related to its implementation. Among these are jurisprudential concerns, victims' and offenders' rights, and procedural issues. Also, restorative justice has many socio-legal implications related to its implementation. These and other issues will be explored at an upcoming conference hosted and organized by the Victorian Association for Restorative Justice (VARJ) on Wednesday 14 May 2007.

The Deputy Premier and Attorney-General of Victoria, the Honourable Rob Hulls MLA will open the conference and keynote speakers will include Dr Michael King, former magistrate and Senior Research Fellow in the Faculty of Law at Monash University; Margaret Thorsborne, pioneer in the use of RJ in schools and the Managing Director of Margaret Thorsborne & Associates and Transformative Justice Australia (Qld) and; Paul Ban, Family Group Conference expert. There will be a number of concurrent 'streams' in the program including research and practice, legal systems, and schools. The conference will be held at Storey Hall, RMIT, in central Melbourne.

Enquiries about the conference can be directed to VARJ President and Conference Coordinator Peter Condliffe at <pc@vicbar.com.au>; (Ph: 03 9225 6888). Further information can also be obtained from the VARJ website at: <www.varj.asn.au>.

PETER CONDLIFFE
Barrister Mediator

# Captain Paul Andrew Willee RFD QC RANR

## Farewell dinner

On 9 August 2007, members of the Australian Defence Force and friends gathered in the Essoign Club to acknowledge the contribution of Captain Paul Willee RFD QC RANR to the Australian Defence Force, and in particular to the Royal Australian Navy.

At that time Paul Willee had been a member of the Naval Reserve for almost 44 years. During that time he had accumulated an impressive, operational career in the Navy. He joined as a Seaman Diver while studying at university, and progressed through the ranks to become Officer in Charge of Australian Naval Reserve Diving Team 6 from 1969 until 1976. During this period he obtained invaluable operational experience in diving searches and underwater explosive demolition.

His naval duties have included service in HMA Ships *Sydney*, *Melbourne*, *Vampire* and *Voyager*. Seaman Willee enjoyed some considerable luck when he disembarked from HMAS *Voyager* only some four hours or so before the ship departed for its fateful final voyage on the night of 10 February 1964. Only his father, who was an RN telegraphist in HMS *Hood* and posted off the ship a week before it was sunk with great loss of life in World War II, matched this impeccable timing.

A graduate of the University of Melbourne's Bachelor of Laws and Master of Laws programs, Captain Willee has forged an equally impressive career as a naval lawyer. His forensic legal skills have been in great demand as an advocate in a number of trials, including the court martial of the ship's company from HMAS *Adroit* (1978) and the court martial proceedings following the grounding of HMAS *Darwin* in Hawaii in 1990.

He was awarded a Reserve Forces Decoration in 1985, and appointed a Defence Force Judge Advocate in the same year. In 1996 he was appointed a Defence Force Magistrate, and in 2000 he was appointed a Defence Force Discipline Act Section 154 Reviewing Officer. The last appointment involves the review of trials before Navy, Army and Air Force courts martial and Defence Force Magistrates.

LEFT TO RIGHT Brigadier the Honourable Richard Tracy, Lieutenant Commander John Winneke QC, Captain Willee, Judge Michael Kelly, his Honour Commodore Tim Wood, Captain Warwick Teasdale and Sir Daryl Dawson

Captain Willee's extensive legal and military experience has resulted in him being involved in a number of important Defence inquiries, and his advice has been sought not only by his native service, Navy, but by the incumbents of the office of Chief of Defence Force.

Captain Willee has played a very important role in the training of military lawyers, and was the founder of the Advocacy Course for Military Lawyers. In July 2001 Captain Willee was promoted to his current rank, and in 2002 he commenced his duties as Head of the Military Bar under an appointment made by the then Director-General of the Defence Legal Services. In this role he has led the development of an ethics code for military lawyers, and continued in this role until his retirement.

Commodore His Honour Judge Tim Wood spoke of Captain Willee's contribution to the Defence Force in moving a toast of thanks. In doing so, he referred to the praises of non-commissioned officers in recognizing Captain Willee's stature both below and above decks. In short, Paul Willee is highly regarded by all, and justifiably so.

Mention has been made of various trials that Captain Willee was involved in, the most notable of which was that of *Hembury* in which Captain Willee, before a bench of five members of the High Court of Australia, persuaded their Honours that the Judge Advocate at the trial (who equates to a Judge in a criminal trial before

TOP Gerald Purcell, Claire Purcell, Commodore Dacre Smyth and Jenny Smyth
TOP RIGHT Captain Peter Callaghan, Fabian Dixon and Jack Rush QC

Lucinda and Richard Udovenya, Judge Michael Kelly QC, Paul Willee QC, Justice Richard Tracey

a jury), the Courts Martial Appeals Tribunal (presided over by a member of the Federal Court), and the Full Court of the Federal Court, were all wrong in holding that it was immaterial in a court martial that members of the court (or jury) need not vote in inverse order of seniority.

For his outstanding contribution to the service of the Royal Australian Navy, Vice Admiral Shalders, Chief of Navy, on 13 November 2006 on the eve of Captain Willee's retirement, commended his service to our Navy in the following terms:

*Commendation*
Captain Paul Andrew Willee RFD QC RANR
Royal Australian Navy Reserve

I commend you for your outstanding service to the Royal Australian Navy.

You have been a member of the Royal Australian Navy Reserve during a lengthy and highly successful career spanning nearly 44 years. The early part of your career as a member of the diving community saw you progress through the ranks from Seaman Diver to become Officer in Charge of Naval Reserve Diving Team 6 from 1969 until 1976. The major part of your career has been spent as a member of the Melbourne Naval Reserve Legal Panel with you ultimately reaching your present rank in 2001.

Throughout your career you have displayed professional excellence, inspirational leadership and outstanding initiative. In particular, I commend you for the role you have played in the provision of legal advice to the Royal Australian Navy and the Australian Defence Force throughout your long career. You have also played a substantial role in the development of military justice as an advocate. Defence Force Judge Advocate, Defence Force Magistrate and more recently a Defence Force Discipline Act Section 154 Reporting Officer. Clear evidence of your strong commitment to the practice of military law is evidenced in your founding of the highly successful Advocacy Course for Military Lawyers, your leadership of the Military Bar and your promotion of an ethics code for Defence lawyers.

Your motivation, dedication and professionalism are of the highest order and are in keeping with the finest traditions of the Royal Australian Navy and the Australian Defence Force.

13 November 2006
RE SHALDERS
Vice Admiral, RAN
Chief of Navy

# The strange case of Andrea Yates and Dr Park Dietz

> It's not what he doesn't know that bothers me. It's what he knows for sure that just ain't so.
>
> WILL ROGERS

Andrea Yates is the mentally disturbed Texas woman who drowned her five children (of ages six months to seven years) in June 2001. Following her second trial she is currently detained at an institution for the insane. Dr Park Dietz is the celebrity expert witness who testified on behalf of the prosecution in Yates's first trial and through a monumental 'stuff up' ensured a 'guilty' verdict when he testified that shortly before the murders, an episode of the NBC *Law & Order* television series aired and the plot of the episode was of a mother killing her children and using a postpartum psychosis defence to gain an acquittal. There never was such an episode. Dr Dietz also incorrectly testified that Yates had informed him that she was a regular viewer of the program. Dr Dietz is a consultant to the series and the character of Dr George Huang played by the actor BD Wong is supposedly based upon him.

Dr Dietz's erroneous testimony was doubly damaging to the defendant Yates. Not only did it make the prosecution case but it also damaged the credibility of the psychiatrist called by the defence: how incompetent was that witness, Dr Lucy Puryear, who had failed to join the dots between the TV program broadcast shortly before the event and a mother's cold-blooded and premeditated murder of her children with the intent of sheltering behind a psychiatric illness? 'If you'd known that,' prosecutor Joseph Owmby asked of her in cross-examination, '… would you have investigated whether she got the idea somehow she could do this and not suffer hell or prison?'

Later it came to light that Dr Dietz had 'misremembered' the *Law & Order* episode, after the 'guilty' verdict but prior to the sentencing phase of Yates's trial. The Texas Court of Appeals allowed her appeal in January, 2005 solely on the basis of the 'mistestimony' of Dr Dietz. The other 18 grounds of appeal were not considered. It is an interesting comment on the Texas criminal justice system and the prosecution mentality that the reversal of her conviction and the ordering of a re-trial was appealed. Thereafter, at her re-trial she was found not guilty by reason of insanity in July 2006. An episode of *Law & Order: Criminal Intent* titled 'Magnificat' and partly based upon the Yates case was broadcast in 2004.

After their 'guilty' verdict the jurors were outraged to leam of Dr Dietz's 'error' and perhaps, to the enlightenment of the Texas citizenry who are required to serve as jurors, the trial judge refused the defence application to declare a mis-trial when the true facts came out. Not to worry, during the sentencing phase of the trial the prosecutor magnanimously informed the jurors that while he was not abandoning the death penalty previously sought by him he would accept their decision should they elect to bring in a lesser life sentence.

One must consider the expertise of the witness in a 'death penalty' case of his 'misremembering'. That the President of the US can commit such verbal monstrosities does not excuse the $500 per hour charged by Dr Dietz or the fact that the life of the criminal accused was wholly dependent on his expertise. Given the extreme consequences flowing from his failure to provide his usual expertise demands a high standard of care in discharging his duty to the criminal justice system and providing expert testimony. For a person who values his expertise so highly, this observer suggests we can require of him to fully investigate and research his conclusions rather than just 'winging it' in the witness box. After all, the time spent researching and confirming his conclusions would have entailed the meter continuing to tick over at $500 per hour.

In addition to the flaws exposed in the Texas criminal justice system, the case is an indictment on the US medical health insurance industry. Yates was no 'trailer park trash' mother; being married to a mid-level NASA engineer she had the benefit of generous employer-funded health insurance benefits. But her prognosis was always subject to the bottom line. That she had received so many hours of psychiatric consultation and counselling meant that she was to have no more. It didn't matter that the health professionals in charge of her case were concerned. The meter had run out – too bad, Mother Yates! Perhaps her health insurer should have been criminally prosecuted. I mean, the possibility of such corporate criminal culpability has never inhibited prosecuting attorney Jack McCoy of the original *Law & Order* TV series. Further, the parsimonious penny-pinching by her health insurer may have led to her condition being erroneously diagnosed, with the result that her prescribed medication exacerbated rather than relieved her psychiatric problems.

MMP

Sir Ian Menzies, the Right Honourable Sir Ninian Stephen and Paul Lacava QC

# Unveiling of Douglas Ian Menzies portrait

Address by the Right Honourable Sir Ninian Stephen on the occasion of the unveiling of a portrait of Sir Douglas Ian Menzies KBE, QC, Douglas Menzies Chambers, Thursday 14 February, 2008

Doug Menzies, as all the Victorian Bar of my day knew him, was not only widely regarded as the outstanding Australian barrister of his day but, not always a concomitant, also as a delightful individual whose wicked sense of humour could liven even the most tedious legal debate.

I first knew Douglas Ian Menzies when, as a very junior articled clerk at Arthur Robinson & Co, I delivered briefs to him, or more usually to his secretary, in Selborne Chambers in Little Collins Street, the then home of much of the Victorian Bar. That I knew him in any real sense in those early days is, of course, a gross exaggeration; rather, he was a familiar name and one to conjure with. Always in high demand, indeed in his day perhaps the most sought after of all Victorian counsel, he was at the same time completely unostentatious, not an attribute then shared by all leading silks. If one was lucky enough to catch him in chambers and not in conference, he would discuss with even a very junior articled clerk whatever case one brought up to him and even ask what one thought of its legal merits; something as terrifying as it was flattering.

Born in 1907 in Ballarat, the son of a Congregational minister, he spent his schooldays in Tasmania and moved to Melbourne in 1925 to study law at Melbourne University. There he had an outstanding career, winning several scholarships and becoming the Supreme Court prize winner. He graduated Bachelor of Laws in 1928, went on to gain his masters degree the following year and admitted to practice in may 1930. He then read in the chambers of Ted Hudson and, having signed the Bar Roll early in 1932, plunged into the life of the Bar and subsequently of the Bench, all of which he lived, enjoyed and excelled in for the next 44 years. He took silk in 1949 and was appointed to the High Court on the resignation of Webb J. In 1958. He sat as an outstanding member of the court for the next 16 years and died towards the end of 1974, having lived life in the law to the full.

Menzies' practice at the Bar was essentially in constitutional and commercial law and, appropriately enough, he became in 1939 joint editor of the then outstanding Australian volume on corporate law, O'Dowd and Menzies.

He spent the war years as secretary to the Australian Defence Committee and the Chiefs of Staff Committee and, on returning to practice at the Bar at the end of the war, for the next 29 years was a leading figure, first at the Bar and then, from 1958, on the High Court Bench.

The number of constitutional cases in the High Court in which Doug Menzies played a leading part were innumerable, indeed few if any have made a greater imprint upon Australian consitutional law than did Doug Menzies. He was as outstanding at the Bar as he subsequently became on the Bench

In my own early days on the High Court I had the opportunity of not only sitting with Doug Menzies but also of frequently travelling with him to the various capital cities of Australia for sittings of the Court. In those days the High Court, having no seat in Canberra, sat in each capital city in turn. So there was much travelling involved and no more entertaining travelling companion than Doug Menzies with which to share it. Our visits on circuit to the various states were made much more than mere sittings of the Court thanks to him. In each of the six states we invariably had annual dinners with the judges of the Supreme Courts, hosting these each alternate year, and it was Doug Menzies who organized these occasions when it was the High Court's turn. He had a fine singing voice and it was by no means unusual for him to enliven proceedings at those dinners by singing his favourite ballads from Gilbert and Sullivan.

When sitting in Sydney, as we did three times a year, we both stayed at the Union Club and would walk together from there down through the Botanic Gardens to the Court in Darlinghurst. He knew all the leading counsel and all the judges of the day in the various state courts so that for a very new member of the Court, as I was, he was the ideal companion and counsellor.

He died, as he had lived, in the heart of the law, at what I recall as a social gathering, the annual dinner of the New South Wales Bar Association in Sydney, where he had been sitting on the High Court.

There can be no more appropriate name, in the now quite long history of the Victorian Bar, for a set of chambers than that of Douglas Menzies.

# The Essoign Club Christmas Party

December 2007

Anthea McTiernan, Julie Davis, Gunilla Hedberg and Colin Lovitt QC

On a pleasant Wednesday afternoon in December about 100 members gathered in the Essoign club for the Essoign members' Christmas party. The committee, management and staff were proud to be in a financial position to host a Christmas party for the members who loyally support the club. It was the first Christmas party given by the club since moving to the new venue in 2003.

Chairman of The Essoign Club, Colin Lovitt QC, welcomed the members and more importantly thanked them for their ongoing support and patronage of the club. Colin also took the opportunity to thank and farewell our esteemed Bar Manager, Susie Bailey, who left our employ after three years at the helm on 29 February. We are lucky that we have been able to promote from within and she has been ably replaced by the popular waitress, Cassandra Bayldon. Please join me in farewelling Susie and congratulating Cassandra on her new appointment.

All in attendance enjoyed a selection of canapés and fine wines whilst listening to the dulcet tones of the Matt Day trio. With continued patronage we hope the Christmas party will become an annual event and encourage those members who were unable to attend last year to do so in coming years.

NICHOLAS KALOGEROPOULOS

David Beach, Kathryn Rees, Graeme Clarke and Gerry Butcher

Clive Rosen, Shane Kennedy and Darryl Burnett

Michael Colbran QC and Ray Perry

John Saunders, Andrew Jackson and Michelle Williams SC

Gavan Rice, John Goldberg and John Monoghan

Colin Lovitt addresses the multitude

## SPORT

# Sir Edmund Herring Trophy

The annual competition between the Bench and Bar and the Law Institute of Victoria was held at Kingston Heath Golf Club on 18 December 2007.

In fine sunny conditions the Law Institute team defeated the Bench and Bar team and won the trophy for 2007.

Twenty-six players contested the event. Over recent years the numbers have significantly reduced due to various competing golf events. Alternative dates have been considered and rejected. A proposal for the 2008 competition to be held in the morning was also considered. However, Kingston Heath Golf Club is not available for morning play for corporate golf days and the Law Institute has again booked Kingston Heath for the afternoon of Tuesday, 16 December 2008 for the next competition.

Leading scores were Gavan Rice and Ron Willemsen with a score of +8, Ian Glenister and Malcolm Howell with a score of +6 and Robert Sadler and Robert Shepherd with a score of +3.

Perennial winners Bryan Keon-Cohen QC and Robert Miller failed to produce their usual form.

Peter Lennon of the Lennon List and Tim Tobin SC won Nearest the Pin contests. Rex Wild QC visiting from Darwin also represented the Bench and Bar.

The Bench and Bar team looks forward to regaining the trophy in December 2008 and it is hoped that more players will compete so that this event may continue.

GAVAN RICE
Golf Coordinator

# Wigs and Gowns Regatta

20 December 2007

The 21st annual Wigs and Gowns cruise in company was held on the waters of Hobsons Bay on 20 December, 2007. The regatta was held in pelting rain, however that did not stop the cream of the WAGS attending what has now become the pivotal fixture for the squadron.

Yet again, the sailing committee, dignitaries and invited guests were catered for on Peter Rattray QC's Lacco Carvel hulled motorboat *Argo*. Following on-water achievements, skippers, crews, dignitaries and others retired to the Royal Yacht Club of Victoria for a barbecue lunch.

The fleet included Judge ECS Campbell's Oughtred designed canoo-sterned ketch *Rosa-Jean*, John Digby QC's mast-head sloop *Aranui* and Paul O'Dwyer SC and Julian Smibert in their 30ft Clansman sloop *Coranto*.

The Thorsen Perpetual Trophy was awarded jointly to both Judge ECS Campbell and John Digby QC, with the Neil McPhee Perpetual Trophy going to Paul O'Dwyer SC and Julian Smibert.

We hope to see you all on the waters later this year when for the first time motor boats will be invited to participate with the yachts.

JAMES MIGHELL QC

*Aranui* competing in Wigs and Gowns yacht race


The *Rosa Jean*
RIGHT *Aranui* competing in Wigs and Gowns yacht race.

ABOVE Julien Smibert and Paul O'Dwyer competing in *Coranto*.
BELOW Organisers, Peter Rattray QC and James Mighell, SC, centre, holding trophies with some of the competitors.

# The Bar retains sodden tennis trophies

With heavy rain falling on the morning of Thursday December 20, 2007, the chances for the annual contest between Bench & Bar vs Law Institute in the afternoon appeared slim. There was a drying-out period at lunch time, so that we were clear to start on the en tous cas courts at Kooyong with a slight, albeit very optimistic, chance that grass court play may have been possible later in the afternoon. However, such was not to be the case. Around mid afternoon the heavens opened, and there was a risk that the players huddled in the shelter at the far end of the Kooyong Tennis complex may have needed to swim back to the clubhouse, or at least require retrieval by boats.

Fortunately, neither was necessary as the rain did ease, but by this time the courts were flooded and no further play was possible for the day. A wash out was called, as not enough matches had been played to enable either side to claim victory.

Accordingly, the Bar, by default, retained possession of the JX O'Driscoll trophy, which it will be recalled, no doubt, had been won by the Bar in each of the three preceding years, and the Flatman/Smith trophy for the best performed pair, which had been won in 2006, in convincing fashion, by John Goetz and Ted Fennessy. These trophies will remain in the possession of the Bar for one further year at least.

It might be said that the rain on this occasion was somewhat fortuitous, as the Institute was building up a somewhat concerning lead of 9 sets to 4 when play ceased.

John Price and Andrew White for the Institute had set a cracking pace, winning three sets in no time flat, and leading in the fourth when rain mercifully intervened. Ted Fennessy and Ray Gibson started off in the same form that Ted had displayed a year earlier when he won the Flatman/Smith trophy, and no doubt they would have continued as a dynamic force for the Bench & Bar had the weather not cramped their style. Peter Wallis was also showing some encouraging form prior to the rain, while Patrick Montgomery and Andrew Fraatz were very competitive against tough opposition.

Hopefully this year in December we will get better weather and a similarly good turn up. Any keen players who would be interested in playing are welcome to contact me to discuss details. As always, despite the weather, the match was played in a friendly spirit, though still exhibiting the keen rivalry of previous contests. It is always a satisfying way to wind up a tough professional year, sweating the stress out on the tennis court against one's professional brethren.

CHRIS THOMSON

Patrick Montgomery in action.

Andrew Fraatz in action.

Richard Smith in action at Kooyong.

Christine Boyle competing at Kooyong.

RIGHT TO LEFT Richard Smith and Christine Boyle shake hands with opponents William Mulholland and Glenn Egerton.

## 'Change is constant…change…is inevitable'

CONTINUED FROM PAGE 7

The Bar Council met in a weekend conference in April to work on the recommendations of the Bar Strategy Committee chaired by Mark Moshinsky S.C. The overall objectives discussed included the Bar's role: in working for access to justice and the better administration of justice; in contributing to the public conversation; in meeting the needs of members (in particular, a framework ensuring the availability and provision of suitable chambers and clerking support); in striving for excellence in training, education and practice; in the position of the Bar in a competitive market; and in the Bar's administrative systems and processes.

Proust said in *Remembrance of Things Past* (*A la recherché du temps perdu*): 'The one thing that does not change is that at any and every time it appears that there have been 'great changes.' That is surely true of the situation the Bar finds itself now in. We must have a strategy; and we must engage with change if we are to influence the outcomes for the greater good.

PETER RIORDAN
Chairman

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## Justice Statement II

CONTINUED FROM PAGE 8

Over the next few months we will be developing a model that incorporates what we have learnt from therapeutic approaches that complement existing mental health services and other problem-solving approaches in the courts, to specifically address the mental health challenges faced by defendants.

We are also exploring the potential for greater use of restorative justice techniques in the justice system, especially in relation to young offenders.

The Justice Statement II will ensure the momentum for reform does not stall. It will outline a range of new initiatives that seek to address the problems faced by the vulnerable and disadvantaged in our society while at the same time making the justice system more accessible and affordable for ordinary Victorians.

*Anyone wanting to make a submission for consideration in the Justice Statement II should contact Mr Chris Humphreys on 8684 1305 at the Department of Justice, 121 Exhibition Street, Melbourne 3000.*

ROB HULLS MP
Attorney-General

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## David Maclean SC

CONTINUED FROM PAGE 23

David had four children: (with Lucille) Gillean and Archibald, and (with Jane) Patrick and Sylvia. He was proud of their achievements. To be close to David was to know of his great love for Jane. He was in awe of her talents and proud of her deep and broad expertise in the arts, particularly Australian art. He took great delight in the company of her colleagues. His chambers always contained several paintings which she had drawn to his attention.

David became ill at Christmas 2006. He spent a good deal of time in hospital and was never well enough to return to chambers. He bore his illness with singular courage; he never complained. He rallied to spend the last week of his life at the Windsor, resting and welcoming friends. He died at home, cared for by Jane, surrounded by every member of his family.

Rupert Myer completed his fine and affectionate eulogy of David as follows: 'He was highly perceptive, companionable; a distinguished man who led a full, good and loving distinguished life.' A perfect description.

May David rest in peace.

JOSEPH SANTAMARIA QC.

## Court in the Middle

by Andrew Fraser
Hardie Grant Books, 2007
Paperback 256 pages

The subtitle of Andrew Fraser's book *Court in the Middle* declares it to be 'A true story of cocaine, police, corruption and prison.' It is also sold in bookstores under the ever-expanding 'true crime' genre. Perhaps not strictly of this genre, Fraser's book is a first-person account of his arrest and subsequent imprisonment for drug charges.

Andrew Fraser is well known to practitioners of the criminal law, not to mention many of those who transgress it. The latter, especially those able to pay (Dennis Allen, Alan Bond and the Moran family), rate more than a mention.

Fraser's case in 2001 achieved widespread publicity. In December of that year Judge Leo Hart in the County Court in Melbourne sentenced him, along with his co-accused Roberts, Mohr and Urbanec, to seven years' imprisonment for being knowingly concerned in the importation of cocaine, trafficking in cocaine and possession of ecstasy, with a minimum of five years to be served before being eligible for parole.

Fraser regarded his sentence as massive. He launched an appeal to the Victorian Court of Appeal. That court dismissed all of the numerous grounds of appeal relied upon. That failure found Fraser, somewhat a connoisseur of the high life, if not the fast lane, spending the best part of five years in the Victorian prison system. A strong sense of being badly done by, if not outright bitterness, pervades his story. This is a fault for reasons that will be later explored.

Fraser's life inside gaol and how he survived it makes up the bigger portion of the book. It makes for interesting reading. Sadly, many long-term criminals would have amazing stories to tell from behind the walls but their tales will never be revealed due to a combination of illiteracy, and a world view that the barbaric nature of their lot is quite normal. Mark (Chopper) Reid, however, is a notable exception. Fraser might have talked the tough lingo with his clients when in practice, but he is obviously not in this camp. This, to his credit, he makes clear. In fact, his fear and anxiety in prison brought on chronic panic attacks.

The tough-talking, long-lunching criminal lawyer is reduced by his experience inside to be bent only on survival. This he achieves in small degrees – having newspapers sent in, getting a job in the prison garden (with Dupas), observing a regular running regime, and, like so many prisoners before him, doing the obligatory push-ups in the cells.

Beyond his personal survival strategy, Fraser has some strong words to say about the utility of life behind bars. In a nutshell, he says the system is a shambles. It is violent (we know this), young prisoners can and do get raped (we know this too), and the screws take out their little authority on the prisoners in arbitrary and insensitive ways (we've all seen *Prison Break*). He does, however, make some strong points about rehabilitation or the lack thereof, and the problem of drugs in gaol:

> Drugs in gaol are rampant. Anything you want you can have – provided you can pay for it. Officers bring drugs into gaol – end of story.

Fraser details how long-serving prisoners would extract Immovane, a strong sleeping tablet, from first timers who would be prescribed the drug to help them sleep. The attitude of some prisoners to sleeping off their sentences raised no official concern. When Fraser alerted a guard to one particular prisoner who was so loaded up with Immovane he crashed into some steel stairs he was told to 'Piss off'.

Fraser takes the issue further, arguing that there is widespread ambivalence about drugs in the community. If the use of narcotics is prohibited, the prohibition must be rigidly enforced, he argues. If it is a health issue, then the sanctions that now apply must be removed. It seems, he claims, to be a criminal offence for the poor and uneducated but only a health issue for league footballers. Perhaps he has a point here.

For all his criticisms of the system, the paradox is that by his own admission his period inside the gaol system has reformed him. Or, has he been reformed despite his experience in custody? He is no longer a rampant cocaine addict or casual trafficker to friends. His fall from grace has caused him to reinvent himself as a self-styled writer.

Judged as 'A true story…', how does Fraser's story rate? Although somewhat of a compulsive read, Fraser falls short on a complete account of the facts for which he was sentenced. The title and first chapter suggest he was lonely victim of circumstances both because of his addiction and the fact that he gave some advice to a mate who was going to import cocaine anyway. Additionally, he claims police conspired against him because he chose to make a complaint to the National Crime Authority in 1999 about corrupt activities of the Drug Squad. Although made in confidence, word soon got out to those who he had named.

Fraser seasons this specific account by emphasizing he was a constant thorn in the side of the Victorian police. In acting for Anthony Farrell in the Walsh Street murders of Constables Tynan and Eyre, Fraser gave some advice to Farrell in the City Watch House which was recorded by listening device. The recording received publicity. Fraser recounts the conversation which reads (in part):

> FRASER: Anthony, how are you mate?
> FARRELL: Not bad.
> FRASER: Bit of a silly question isn't it?
> FRASER: Mate, you've said nothing have you?
> FARRELL: No, just told them where I was when.
> FRASER: That's good, all right then. I reckon the way to do it…is just whacking in an application to the Supreme Court fucking straight away. Because these cunts have got nothing on you.
> FARRELL: Yeah I know. I know that, Andrew.
> FRASER: Yeah well, they've got nothing on you so if we whomp a Supreme Court file application fucking straight in, we'll flesh the cunts out.
> FARRELL: Yeah.

FRASER: They'll have to come up with it and they've got no fucking evidence.
FARRELL: Yeah, because Jason…Apparently they said…
FRASER: I don't give a fuck what they said about Jason either because if Jason's turned…Fuckin' dog…
FARRELL: Yeah, that's right. Victor would have been pinched by now.
FRASER: Shhhh.

Fraser suggests he was merely discussing tactics and advising his client of his rights albeit in colourful terms. Few would see it that way including the police, especially those investigating this horrible crime. If nothing else, this extract reveals how close to the wind he sailed.

Fraser does not argue he was set up, rather he advances a conspiracy theory to explain why police ultimately targeted him in bugging his office in order to obtain evidence. This does not hold up. Fraser pleaded guilty after all and accepted a detailed statement of facts presented to the court. He also offered to give evidence for the Crown against his co-accused, two of whom pleaded not guilty. By his admission, too, his cocaine use was rampant and hardly secretive. He regularly trafficked to his professional colleague, the psychologist Tim Watson-Munro, whom Fraser often briefed to prepare reports for his criminal clients. How long could these practices have remained undetected?

Perhaps most disappointing of all is that this account plays down the crimes for which Fraser was sentenced. The only evidence he claims against him was the content of a recorded conversation held in his office with Roberts. While not an inaccurate claim, this conversation none the less deeply implicated Fraser in the importation of 3.7 kilograms of pure cocaine from Benin using an unwitting 'mule' (Brand) in the process. Aggravating his crime was the fact that he utilized his knowledge, gained as a criminal lawyer, to advise his co-accused how to do it to avoid detection. Anyone interested in what Judge Hart found as the facts should read the judgment in the Court of Appeal (*R v Fraser* [2004] VSCA 147).

Some minor editing errors aside (Paul Coghlan QC, as he then was, has his name misspelt and his title is not given) this is a book for those who love the fall-from-grace tale. It does not hit the literary high points of Watergate burglar G. Gordon Liddy's *Will*, nor does it have the black humour of the Chopper series. As a tell-all, Fraser cuts a few corners. As a genuine page turner, however, *Court in the Middle* succeeds as a great read.

RAYMOND GIBSON

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## Administrative Appeals Tribunal, 2nd edition

By Dennis Pearce
LexisNexis Butterworths, 2007
Pages iii– xivii; 1–274; Appendix 275–380; Index 381-390

*Administrative Appeals Tribunal*, 2nd edition, by Dennis Pearce is an essential text on the Tribunal for practitioners and students alike.

The author's format is easy to follow and provides a step by step explanation of the functions, powers and procedures of the Tribunal with extensive reference to AAT and Federal Court decisions. The author has conveniently added an appendix containing the *Administrative Appeals Tribunal Act* 1975 and Practice Directions.

There is a comprehensive chapter on procedure at hearing, which includes general and pre-hearing procedural issues, guidance on evidentiary matters, publication and disclosure and documents. It considers the dichotomy between s.33 (1) (c) of the AAT Act, which directs that the 'Tribunal is not to be bound by the rules of evidence but may inform itself on any matter in such a manner as it thinks appropriate', and the rules of natural justice, which require the parties to have a fair hearing, with reference to the way in which the courts have restricted a wide interpretation of section 33 in such cases as *R v War Pensions Entitlement Appeals Tribunal; Ex Parte Bott* (1933) 50 CLR 228 at 256 and *Re Pochi and Minister for Ethnic Affairs* (1979) 2 ALD 33; 26 ALR 247 and their consideration of the application of the rule in *Browne v Dunn* (1893) R 67.

The author has also summarized rulings on evidentiary matters such as privilege, the parole evidence rule, the use of textbooks, policy statements, the opinion rule in section 76 of the *Evidence Act 1995* (Cth) and the effects of findings in other judicial proceedings. Practitioners will find this particularly useful when preparing for matters before the Tribunal.

This text is up to date and reflects the changes in the Act. It provides a road map for practitioners conducting matters before the Tribunal and has a clear explanation of the jurisdictional issues. It is a useful companion text to the 'Annotated Administrative Appeals Legislation' by Moshinsky and William, also published by LexisNexis Butterworths.

CJ KING

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## The Law of Rescission

By O'Sullivan, Elliott & Zakrzewski
Published by Oxford University Press 2008
Pages i–lxxiii; 1– 678; Index 679–699

Rescission is strictly speaking, putting to an end a contract as if the contract had never existed ('rescission *ab initio*'). A contract may also be brought to an end for breach or repudiation ('recission *in futuro*'). 'Rescission' is used (sometimes confusingly) to describe both these modes of contractual termination.

*The Law of Rescission* is only concerned with 'rescission' in the first of these two senses, that is, terminating a contract (or gift) *ab initio*. The grounds for such rescission are generally misrepresentation, non disclosure, duress and undue influence, and mistake, impaired capacity (*non est factum*) and unconscionable bargains. Each of these grounds is discussed in separate chapters, along with conflict of interest and third party wrongdoing as grounds for rescission.

Central to the notion of rescission is the restoration of the parties to their original positions (*restitutio in integrum*). The issues that arise in law and equity regarding this requirement are amply discussed, particularly in relation to the discretionary nature of equity to allow a practically just result, rather than exact restoration of the parties' original position. There is substantial discussion of this 'heretical' approach in allowing practical justice to be the yardstick in restoring the parties' to their original position. This 'heresy' includes several Australian decisions where a more generous discretion in equity has prevailed in regard to the requirement to restore the parties to their

precontractual position (see for instance *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 and *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102).

*The Law of Rescission* contains further chapters dealing specifically with factors that may cause the right to rescind to be lost, such as affirmation of the contract (whether by words or conduct), delay and estoppel, bankruptcy and contractual terms that purport to limit or exclude a party's right to rescind.

The final chapter deals with gifts and transactions effected by deed. One view, disputed by the authors, is that deeds cannot generally be rescinded at common law and therefore resort must be had to equity.

As the authors note in the Preface, rescission is complex, not least because it straddles the jurisdictional divide between common law and equity and can involve both personal and proprietary rights. The authors attempt to state the law in England and Wales, however, frequent and extensive reference is made to cases decided in other Commonwealth jurisdictions, particularly Australia and New Zealand.

*The Law of Rescission* is a scholarly work providing a comprehensive analysis of the law of rescission. Footnotes are relatively confined and paragraphs are individually numbered (as cross references in the Table of Contents and in the Index) with the result that the text is both readable and accessible. While the work focuses on the state of the law in England and Wales, *The Law of Rescission* will have an important place and be a valuable resource on the shelves of commercial lawyers and legal scholars in Australia.

P W LITHGOW

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**STEWART'S GUIDE TO EMPLOYMENT LAW**

By Professor Andrew Stewart
The Federation Press 2008
Pages i-xxx; 1–331; Index 332–354

Industrial relations, and in particular the issue of Australian Workplace Agreements (AWAs), were at the forefront of political debate leading up to the 2007 Federal Election. With the election of the Rudd Labor Government, changes to the industrial relations regime have been promised although both the detail and scope of the changes and whether the changes will in fact become law in the foreseeable future remain unclear. Despite these uncertainties, *Stewart's Guide to Employment Law* is an important contribution for practitioners and others interested in employment law and related issues.

Much of the text is relevant whatever the scope of changes that are made to the AWA and federally administered statutory employment regime by the Rudd Labor Government. Further, specific state-based legislation is considered wherever relevant.

The text provides a general overview of employment law and provides specific discussion on aspects of employment relating to contractors and special types of employment relationships such as casual and out workers, labour hire (agency) relationships and public sector employment amongst others. Other aspects of the employment relationship, in particular the duties of both the employee and the employer to each other, such as discipline, loyalty, confidentiality, out of work hours behaviour, post-employment obligations and pre-employment matters are discussed, including differences in approach arising from the nature or 'level' of a person's employment. The current position in relation to termination and remedies for wrongful or unfair termination are comprehensively dealt with, as are associated issues such as discrimination and victimization, workplace safety and industrial action.

Of course, with changes mooted, specific employment issues in the future will need to be analysed in the light of those changes, particularly in the federal sphere. However, *Stewart's Guide to Employment Law* will provide a sound basis for those seeking to get a general understanding of the principles, issues and practices of employment law.

The text is comprehensive, referring in short form to both cases and legislation in the text (without footnotes) and providing by way of an end note to each chapter a list of selected further reading. This enables the reader to clearly identify themes and trends in employment law while providing a base for further research by reference to the specific cases and the current text of relevant legislation. This book is sure to be of interest to lawyers, students, employers and employees and others with a general interest in employment law issues.

P W LITHGOW

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