VICTORIAN BAR NEWS

No. 145 SPRING 2008

WELCOMES FAREWELLS STATUTORY INTERPRETATION TODAY
REFLECTIONS ON PROGRESS IN EAST TIMOR PERSPECTIVES
POSTCARD FROM CHILE EVERY DOG HAS HIS DAY
A BIT ABOUT WORDS SYDNEY BAR V MELBOURNE BAR

ISSN 0159-3285

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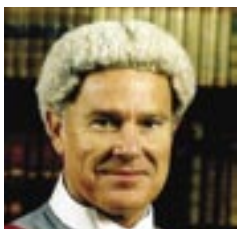
Cover: Sydney Bar v Melbourne Bar

Welcome: Justice David Beach

Welcome: Judge Christine Thornton

Welcome: Judge Frank Gucciardo



Farewell: Justice John Coldrey

Farewell: Judge Michael Strong

Farewell: Justice Heather Carter

Farewell: Magistrate Brian Wynn-Mackenzie

Postcard from Chile

Soccer: Sydney Bar v Melbourne Bar

Snowsports: 'Buller Bash'

An ill wind?

The winds of change are blowing gustily. This phenomenon has nothing to do with the changing season, or with errant weather patterns. The practising landscape is about to alter dramatically; for many, consternation arises because there is no apparent barometer with which to read – much less interpret – the road ahead in this environment. It might be said that the Victorian Bar could be facing its own internal crisis of climate change.

As will now be apparent to members of the Bar, the Victorian Law Reform Commission released a Civil Justice Review Report earlier this year, with numerous recommendations designed 'to improve access to justice'. It is likely that the government's response to these recommendations will form the basis of the Attorney-General's revised and updated Justice Statement (Mark II?) to be announced later in the year. Already, there is a raft of Bills before the State Parliament, some designed to give effect to some of the recommendations, others relating to the setting up of a Koori Court within the County Court and with criminal matters.

Key among the recommendations is a push to promote and develop judicial case management techniques requiring parties to disclose information earlier, so as more effectively to shape the scope of the intended litigation, or indeed to dispose of it. The topic of disclosure – the who, when, where, how and why – was a recurring and robust theme, giving rise to tension and contention at one of the seminars in a series being run by the Victorian Bar on the subject 'The Advocate's Duty to the Court'.

At these seminars, judicial officers and members of the Bar form a panel, speak briefly on an aspect of the overall subject, and then questions are fielded from the floor. It is obvious – certainly to those who have been receiving instruction in Bar Readers' Courses over the past two decades and indeed to most – that the advocate's principal duty is to the Court. Duties to clients, in the event of any conflict with an advocate's duty to the Court, must necessarily give way. Such has been the basis (or one of them, the other being public policy considerations) giving rise to the privilege known as advocate's immunity laid down by the High Court in *Giannarelli v Wraith*. However, there are those who query whether case management considerations should be embraced within the 'duty to the Court' which takes precedence over the duty to the client. Others, being perhaps more cynical than most, suggest that excessive case management designed to produce a cost-effective determination is not the best means of achieving justice; that justice is too fragile a product to be constructed on an assembly line.

The Bar ensures that every reader who signs the Bar Roll receives a copy of the Bar Rules. Indeed, these are also published, with commentary, in 'The Good Conduct Guide'. Nevertheless, there appears to remain some confusion abroad as to the scope and application of the Bar's existing rules, and how they will weather the brave new world of judicial case management. On the one hand, there is a view that the existing Rules are sufficient; on the other, that they are not and should be amended. Doubtless this will be agitated again before the current quota of seminars is exhausted.

Lest it be thought that the practising environment is presenting overwhelming challenges so as to become all too hard, giving rise to an apprehension that indeed fields might be greener elsewhere, a quick look at some Bar statistics is revealing about Bar composition over the past two decades. In 1988, readers called to the Bar mid year received Bar Roll numbers around 2300. Ten years later, in 1998, the numbering had reached around 3250. By 2008 mid year the numbers had reached 4300. So in 20 years, around 2000 readers had signed or resigned the Bar Roll.

However, the actual increase in numbers practising at the Bar was but a fraction of that. In 1988, there were approximately 1350 members of the practising Bar, both junior and silk. By 1998, the numbers were almost the same (1332); and by 2008, the numbers had risen to 1690. Therefore,

notwithstanding some 2000 members signing the Bar Roll in a 20 year period, the actual number of practising barristers in-creased by only about 350 or 17.5%, less than one-fifth.

Now there are doubtless many and various reasons for this (and would not results from a Bar exit survey make interesting reading?). But it serves to remind us that notwithstanding challenges and changes which have arisen in the past, the numbers at the Bar continue to grow, in spite of considerable attrition. Perhaps after all, like the cockroaches that manage to survive nuclear fallout (if the purveyors of apocalyptic movies are to be trusted), the profession will survive any new onslaught to its practices and traditions and may even thrive and prosper in a new environment.

THE EDITORS

Meltdown in cyberspace?

Following the problems in the sub-prime lending market in America, Northern Rock, Bradford & Bingley etc. in the UK, uncertainty has now hit Japan. In the last seven days Origami Bank has folded, Sumo Bank has gone belly up and Bonsai Bank announced plans to cut some of its branches.

Yesterday it was announced that Karaoke Bank was up for sale and is likely to go for a song, while today shares in Kamikaze Bank were suspended after they nose-dived. While Samurai Bank is soldiering on following sharp cutbacks, Ninja Bank is reported to have taken a hit, but they remain in the black.

Furthermore, 500 staff at Karate Bank got the chop and analysts report that there is something fishy going on at Sushi Bank where it is feared staff may get a raw deal.

Advances in indigenous participation at the Bar

On the occasion of the third National Indigenous Legal Conference recently held here in Melbourne, it is fitting to reflect on the important contributions over many years by many members of our Bar in the story of indigenous people and the law, in which this conference is a bright new chapter.

More than 35 years ago, in June 1972, a group of people in Melbourne, including the late Ron Castan and Ron Merkel, committed themselves to establishing the Victorian Aboriginal Legal Service – and they did. The Central Australian Aboriginal Legal Aid Service was established in 1973. Peter Faris went to the Alice in early 1974, and Geoff Eames in May that year. They were the first of many members of our Bar too numerous to name in this piece.

This year's Conference was opened by Gunditjmara elder Jim Berg with Deputy Premier and Attorney-General Rob Hulls and the Federal Minister for Home Affairs, Bob Debus.

Jim Berg was the first Koori employee of the Victorian Aboriginal Legal Service. In 1985, with Castan and Merkel, he founded the Koori Heritage Trust, to protect, preserve and promote the living culture of Aboriginal people in South-Eastern Australia.

Organized by Tarwirri, the Indigenous Law Students and Lawyers Association of Victoria, this conference brought to Melbourne, from every State and Territory, indigenous lawyers and law students, government and Aboriginal Legal Service officers, and people of good will from both cultures interested and concerned, and working to support the values, traditions and culture of indigenous people – and for the increase and support of the growing number of indigenous lawyers to speak for themselves and for their people in their own voice – in the law and in the wider public conversation.

The conference was titled *The Vision Splendid: Australia beyond Black and White*, and the substantial engagement and involvement of members of our Bar – both barristers and judges, practising, sitting and retired – reflected the spirit of that high aspiration.

Victorian indigenous barristers, Hans Bokelund and Brendan Loizou chaired respectively the sessions on the review of the Victorian Charter of Human Rights and Responsibilities by Justice Kevin Bell and on the review of the Northern Territory intervention at which Rex Wild QC spoke.

Victorian indigenous barrister Linda Lovett, currently on leave from the Bar and working as Principal Solicitor of the Goldfields Community Legal Centre in Kalgoorlie, spoke in the session on criminal and sentencing issues amongst indigenous communities, as did Justice Geoff Eames, in his statutory retirement, now of the Supreme Court of the Northern Territory.

Colin Golvan SC, who chairs our Indigenous Lawyers Committee, and Committee members Paul Hayes and Daniel Star also spoke and chaired a session: Colin in the area of intellectual property and the protection of Aboriginal and Torres Strait Islander culture, knowledge and heritage, in which area he has played a leading role; Paul on Sports Law and Social Justice; and Daniel chairing a panel session on issues facing indigenous law students – which panel included Jidah Clark and Ian Taylor who both participated in the Bar's newly established indigenous clerking program.

Julian Burnside QC spoke in the session 'Sorry Business: the Stolen Generation'. Julian's client in the South Australian Stolen Generation case, Bruce Trevorrow, was also to have spoken, but died not long before the conference. Sharon Barnes, an indigenous law graduate who was Judge Michael Strong's Associate before he left the Court, spoke about the personal impact on her mother, who was also a member of the Stolen Generation, and her family. As a student, Sharon received mentoring support from members of our Bar.

Bryan Keon-Cohen QC – who, with Jack Rush QC, argued the Northern Territory Stolen Generation case, and who, for ten years from 1982 to 1992, worked with the late Ron Castan QC in Mabo – attended and participated in the conference.

The Bar Office also supported the administration of the conference, looking after registrations for both the conference and the very successful National Indigenous Legal Ball in the Melbourne Town Hall.

What this conference has brought to into sharp focus is the importance of indigenous people themselves coming into the law – and in this, members of our Bar have played an important part.

The Indigenous Legal Ball a few weeks ago was named in honour of Brian Kamara Willis. Brian is believed to have been the first Northern Territory indigenous person to enrol as a law student anywhere in Australia. Geoff Eames met Brian in 1974 at the Central Australian Aboriginal Legal Aid Service, where Brian was working, and encouraged Brian's ambition to study law and qualify.

Brian died tragically and young in 1980 before completing his law degree at the University of Melbourne. There was not the support then that members of our Bar have, in the last nearly ten years, worked hard to put in place for indigenous law students.

Individual members of the Bar have represented indigenous people and their interests in court. The encouragement and support of indigenous law students has been the focus of the Bar's committee efforts – although initiated and organized by the committee, implemented, of course, by the personal commitment and efforts of individual barristers in the initial engagement in on-campus meetings and in the personal mentoring and summer clerking.

The Committee Colin Golvan now heads was established by Stephen Kaye QC in 1999 and then called the Victorian Bar Aboriginal Law Students Mentoring Committee. That Committee worked closely with the committee of almost the same name, the Indigenous Law Students Mentoring Committee, established by Justice Eames (Geoff was by then on the Victorian Supreme Court).

This is also the focus of the successor Bar Indigenous Lawyers Committee and of the Indigenous Barristers Fund established by that Committee with support from the Victoria Law Foundation, and launched last May by Professor Mick Dodson – also, of course, an indigenous member of our Bar. The Bar Committee has set up our Summer Indigenous Clerks Program, and we continue to encourage and support indigenous law students and indigenous lawyers in taking the Bar Readers' Course.

I encourage those in a position to do so to contribute to the Indigenous Barristers Fund.

I congratulate Aislinn Martin, the Co-ordinator of the Tarwirri Indigenous Law Students and Lawyers Association of Victoria, and everyone involved in putting together the September National Conference.

That conference is living proof of the remarkable advances to which this Bar and our members have contributed, the achievements of each indigenous lawyer and law student, and of the support in the profession and in government for the indigenous community

I have offered myself for re-election to the Bar Council, however this is the last *Cupboard* in my term as Chairman of the present 2007–08 Bar Council, and I thank all members of the Council and of the various Bar companies, associations and committees. The quality, the substance and complexity, and the sheer volume of your voluntary work for this Bar, and for all of us, is a matter of humbling astonishment and intense pride.

Temporising with Achilles

You know it's cold or you're old
when your feet feel like
an icy pole has been wedged
between the top of your socks and the uppers of your shoes.

You know your knees must be packing it in
when a three or four K run reduces you to a hobble
the day after.

You know you've got problems
when your Achilles tendon
feels like a chalk stick save the chalk is steel.

Time to take up
a low impact sport,
say, flying.

NIGEL LEICHARDT

Towards a national judicature

For over 25 years, distinguished legal figures such as Sir Laurence Street have been advocating the benefits of a national judicature. Following what was then the recent creation of a dual court system, with the emergence of the Family and then the Federal Court jurisdictions, Sir Laurence used a New South Wales Law Society address to suggest that the time was well upon us to develop more consistency and efficiency across the nation's court system.

His proposal was a creative one – a single Supreme Court of Australia with multiple Divisions that incorporated the jurisdictions of all Courts and which would eradicate what he termed the problems with 'jurisdictional interface'. Labelling the proposal as both provocative and constructive, Sir Laurence hoped it would lead the nation to a serious consideration of the kind of court system that would best serve Australia.

Nearly three decades on, it would appear we are still considering. Yet, as we move further and further into the 21st century and its increasing legal complexity, the benefits of a national judicial system seem all too plain.

Clearly our existing court structures are well entrenched and here to stay. This should not prevent us, however, from exploring potential unity across them. This is why, when the Federal Attorney-General proposed the creation of a national judicial complaints mechanism, I took one step further and suggested that the Standing Committee of Attorneys-General consider the development of a national judiciary.

I believe it essential that we promote greater consistency in the provision of judicial services in Australia – and that we facilitate the movement of judicial officers between jurisdictions. Such a step would result in a more proactive response to the use of judicial resources and, in my view, is the platform on which any other national judicial initiatives, including a complaints mechanism, should be based.

One way of achieving a more nationally integrated judiciary may be through the development of mutual recognition legislation between all jurisdictions, so that judicial officers appointed in one jurisdiction are qualified in equivalent courts in all other jurisdictions. Such a development would provide wider opportunities for judicial professional development and for consistency in terms and conditions, procedural rules and best practice standards in court administration. A nationally integrated judicial system would also be consistent with the national legal profession model and has the potential to provide a national approach to the litigation process.

Of course, additional advantages include greater potential for cross-jurisdictional use of Acting Judges. Court and judicial resources will remain finite while such issues as health, education and transport make demands on the public purse.

As anathema as this may remain to some of this readership, then, if Australian court users are to benefit from the expertise and energy of all of those qualified for legal office, we *must* continue to explore schemes such as this.

I will also continue to push for a system that harnesses the skills of candidates who may not at present feel able to accept judicial appointment because of factors such as caring responsibilities. A national judiciary may give us the opportunity to export such concepts as part-time judicial office, as well as provide us with a chance to open more avenues for court-led appropriate dispute resolution.

Obviously there are a great many associated issues – both legal and constitutional – to consider and the Standing Committee of Attorneys-General has established a working group to do just that. I look forward to reporting on the outcomes of this process in due course but, in the meantime, urge the profession to get behind the push for an optimum judicial structure for 21st century Australia.

The possibilities, after all, are many. With careful and sensible development, the benefits for court users will be too.

Apology

In its Winter issue, the *Bar News* published a letter written by Peter O'Callaghan QC. O'Callaghan's letter was a response to an article in the *Australian Financial Review* published on 4 July. O'Callaghan's letter was published in the *AFR* on 8 July. O'Callaghan's letter was a response to the article as published, because he considered that it constituted an attack on BCL and its Directors (of which he had been one, and the Chairman of the Building Committee for the Construction of Owen Dixon Chambers West).

Stephen O'Bryan promptly wrote to the *AFR* correcting aspects of the *AFR* article, and making it plain that he had no criticism of BCL and expressing his admiration for the work done by its Directors. His letter was published in *AFR* on 16 July.

When the *Bar News* accepted O'Callaghan's letter for publication, the Editors were not aware that the letter had already been published in the *AFR*. They were not aware of the inaccuracies in the *AFR* article. They were not aware of the correction contained in Stephen O'Bryan's letter to the *AFR*. The Editors regret publishing O'Callaghan's letter in these circumstances without having checked the facts with Stephen O'Bryan and Norman O'Bryan. The Editors, like the Directors of BCL, act without reward and in the interests of the Bar.

The *Bar News* apologises to Stephen O'Bryan for the embarrassment he suffered as a result of these matters. Stephen O'Bryan has no criticism at all of BCL and is grateful for what BCL does for the Bar.

Norman O'Bryan is critical of aspects of BCL performance, with which criticism O'Callaghan does not agree. This is not the place to comment on the merits or otherwise of those respective views.

However, Norman has never misrepresented what BCL does, and neither has he acted ungratefully: in fact, he moved into independent Chambers very early in his career at the Bar. The Editors acknowledge that O'Callaghan, the O'Bryans and the Directors of BCL have the best interests of the Bar at heart. The Editors of the *Bar News* regret that their republication of O'Callaghan's letter has caused offence where none was intended.

THE EDITORS

The Editors

I hope that the editorial entitled 'The Rights of Victims' in the Autumn edition of *Victorian Bar News* does not represent the views of the majority of members of the Victorian Bar. It ignores many years of jurisprudence aimed at giving appropriate recognition to the victims of crime at all stages of the criminal process. It ignores important provisions in the *Sentencing Act 1991* and the *Victims Charter Act 2006*. It ignores basic humanity that surely demands that society treats victims with sensitivity and dignity and allows their voices to be heard at appropriate times.

What is inappropriate about granting victims the right to be heard about their pain and anguish at the time the perpetrator of their sufferings is being sentenced? Is it wrong to allow the effect of the crime on the victim to be taken into account on sentence? Does this elevate a victim's position in the criminal justice system above that of a criminal?

According to the editors of *Victorian Bar News*, the rights of a victim 'are not relevant to the sentencing process'. Why so? If, as the editors concede, victims have rights, when and how and in what context, if not at sentencing, are those rights to be recognized and exercised?

The views of the editors of this journal are outmoded and insensitive. They should be rejected by all right-thinking people.

JEREMY RAPKE QC
Director of Public Prosecutions, Victoria

Editor's reply

There can be no question that the law provides for the use of victim impact statements. The legislature does require that the voices of victims be heard. That does not, however, mean that victims should have any say in the measure of punishment.

A system of criminal law which determines the appropriate punishment by reference to the consequences of a wrongful act, rather than by reference to the fault of the wrongdoer, has certain obvious ethical defects.

The fundamental issue for a sentencing court is to determine the appropriate punishment for the particular wrongdoer, having regard to his or her moral culpability. The courts have, in the application of the Verdins principles, clearly adopted this basic ethical norm. General deterrence and specific deterrence are also, in a pragmatic sense, valid criteria of punishment, as is the need for community protection.

In too many instances, however, we mete out punishment based on consequence, not on culpability. Insofar as we do so we are committed to a system which makes retribution, however disguised, a significant criterion in the determination of punishment.

To measure punishment by reference to the circumstances of the victim or by what will satisfy the victim's (or the community's) wish for retribution is neither humane nor ethically defensible.

GERARD NASH

Supreme Court

Justice David Beach

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Tuesday 9 September 2008

This occasion promises to be unique because for the first time in my career I am expecting to make a submission before Justice Beach for ten minutes without being interrupted. And I bet it will be the last time.

I am delighted to say that I appear on behalf of the Victorian Bar to welcome the appointment of your Honour to this Court. Your Honour has practised law for more than 25 years, nearly 24 years at the Victorian Bar. You have been an outstanding advocate and a leader of the Common Law Bar. You are quick and decisive – excellent qualities in a judge.

Of course, your Honour is not without weakness. You are a long-time passionate supporter of the Carlton Football Club. Fortunately this passion will not distract you during this, your first month as a judge. However, for the future, Carlton is a football club which historically has had difficulty understanding the true meaning of a salary cap. As a judge you may be uniquely well placed to assist the club with some practical advice, now that you will have first hand experience of a salary cap.

I get ahead of myself. I would like to go back, way back, to when your Honour was cute. You were educated at Trinity Grammar and while at primary school you won a music prize playing the flute. Of itself that sounds cute, but not as cute as when you and little brother Jonathan joined to play a duet of the music of Offenbach for the can-can, you on the flute and Jonathan on the trumpet. We must organize a repeat performance at the next Bar Dinner.

At school, as the elder of the duet, you were known as 'the front beach', presumably because you exuded the coolness and calm which one expects at a front beach. What that means for Jonathan, who was known as 'the back beach', is a matter we may have to explore on another day.

As is well known, you studied law at Monash University; but what is less well known is that you also graduated with a Bachelor of Science majoring in, of all things, computer science. I say 'of all things' because this is the man who did not have a computer until your instructors in the tobacco case sent you one. On seeing the contraption on your desk you exclaimed: 'What am I supposed to do with this?'

Nor, for years, did you have a mobile phone. I understand eventually John Dever gave you one. Unfortunately, it didn't work because you did not turn it on.

At university you achieved the distinction of getting the exhibition in handicapped billiards. After graduation, you served articles with Peter O'Bryan at Galbally & O'Bryan. You remained with the firm as an employee solicitor for another year-and-a-half, coming to the Bar in September 1984. You read with Bernard Bongiorno, now Justice Bongiorno, whom you now join in this Court.

At the Bar you quickly established the pattern of being a great voluntary worker. During your Readers' Course there was a practical demonstration of the breathalyser. Several slabs of stubbies were made available over the lunch hour for those willing to volunteer as subjects. Your Honour did not hesitate; and you applied yourself to the task of being a breathalyser guinea pig with your customary dedication.

Thus began 22 years of quite extraordinary service on a vast array of Bar Committees, including a total of almost 14 years on the Bar Council. You'd been at the Bar a little less than four years when first elected to the Bar Council in September 1988 in the junior 'not more than six years standing' category. You served as Assistant Honorary Treasurer for five years. For 22 years, you've served on more committees than one can shake a stick at. The typed list goes for pages and includes years on seriously hard-working committees, such as seven years on the Counsel Committee, nine years on the Professional Indemnity Insurance Committee and 12 years on Law-Aid – three of those as Chairman. You served 17 years on the Common Law Bar Association Committee.

You had no fewer than ten readers: Gerry Butcher, Neil Murdoch, Chris Winneke, Trish Riddell, Mary Anne Hartley, Paul Connor, Matt Collins, Sebastian Reid,

Nick Horner and Trevor Wallwork. All of your readers, and your juniors, talk of how much they learned: how generous you were with your time and attention; and in hospitality, drinks on the seventh floor; lunches at the legendary Num Fong in Swanston Street; and yours and Marea's famous Christmas parties at your home.

However, your outstanding contribution to the Bar was certainly as Honorary Treasurer, a position you held from 2004 to 2006. You oversaw the mutualization of the Bar and BCL, which has been of enormous benefit to the Bar.

It is fair to say that you were never a fan of long debates around the Bar Council table. How vividly I remember sitting around the Council table feeling the Beach stare in my neck as I stumbled over my third or maybe my fourth sentence. I have to say that in this relationship that stare may be even more disconcerting.

As an advocate you are renowned for your directness and brevity. Your junior recalls you had been brought in to lead in a part-heard case. You cheerfully declared that you would be back in Melbourne for lunch. As your opponent's submissions dragged on interminably, you were heard to whisper to your junior, none too softly: 'No wonder this case has taken so long. It's because they're all talking too slowly! Can't they speak faster?'

On another occasion, in the Court of Appeal, Justice John D Phillips (himself not known as other than a fast thinker and talker) interjected with: 'Mr Beach, slow down! You haven't got a train to catch.' Of course, you acceded to his Honour's request, but the transcript records the same judge, a few lines further down, saying: 'Get on with it, Mr Beach – we haven't got all day.'

Your Honour has been an outstanding and courageous advocate and any, even representative, list of your notable cases would be impossible in the time available to me today. However I do want to mention the tobacco litigation. The principles that underpin the Bar are much discussed at Bar dinners and other occasions but you have walked the walk. Through very difficult times, you upheld the cab-rank principle, and the principle that in our system unpopular clients with unpopular causes are entitled to proper representation. Unfailingly decent and with unerring judgment, you lived out the principles of the independent Bar.

A little over 30 years ago, on Friday the 21st of July 1978, then Bar Chairman, Frank Costigan, said this about your Honour's father at his welcome:

> The Bar is sorry to lose you, one of its leaders. Its regrets are tempered by the knowledge that the people of this state have the good fortune to see you bring to its Supreme Court the qualities of justice, judgment and ability which have, for more than a century, been its proudest boast.

On behalf of the Victorian Bar, I say the same to you, and have no doubt that, as your father did before you, you too are destined to make a great contribution to this Court.

County Court

Judge Christine Thornton

Address by Michael Colbran QC, Vice-Chairman of the Victorian Bar Council, on Tuesday 15 July 2008

I appear on behalf of the Victorian Bar to congratulate your Honour Judge Thornton on your appointment to this Court. The Chairman of the Bar Council, Peter Riordan, regrets that he is unable to be here today. He has asked me to pass on his congratulations and his respects.

Your Honour has served with distinction as a Magistrate for nearly 20 years, and brings that experience to your work on this Court. You were educated at the Star of the Sea Presentation College in Brighton and at Monash University, graduating Bachelor of Arts and Bachelor of Laws.

You served articles with Martin Bartfeld, then a solicitor in practice as Martin Bartfeld & Associates in Hawthorn. Martin Bartfeld QC, as he now is, has asked me to record his congratulations to your Honour. He is sorry that being overseas he cannot be here today. He remembers your Honour from the beginning of your legal career as diligent, perceptive, careful and reliable. But he tells me also that there was about you a sense of enthusiasm. Perhaps it was this last quality that led you to Europe for a year on a working holiday once clear of school, university and articles.

You returned to Australia and began eight and a half years with Legal Aid. You served as a Legal Officer with the Australian Legal Aid Office in those lost and lamented days when Legal Aid still covered civil cases. You practised in Geelong, Brunswick and Sunshine, doing civil work, family law and crime. You were Acting Officer-in-Charge at both Sunshine and Geelong. In 1981 you went to the Legal Aid Commission of Victoria in the General Law Division.

Ray Gibson, now a Crown Prosecutor, remembers his first assignment as a Legal Aid duty solicitor at the Prahran Magistrates' Court. In those days there were no such niceties as preliminary mentions and there were few adjournments. The Prahran Crime Car Squad, having worked all night, brought in the night's catch (many of them decidedly the worse for wear) with every expectation of having most of them dealt with there and then.

Ray's first image of you was that of a diminutive young woman, clipboard in hand, surrounded by three or four burly detectives – all six feet and more – all unsmiling, having worked all night, and obviously none too pleased at the interference from Legal Aid. His strong impression was of the steely resolve that your Honour added to the picture. It was clear who was in charge.

You were promoted to Senior Legal Officer. Then, in 1983, you became Section Head of the Children's Court Duty Lawyers Section. As Section Head, you were responsible for recruitment, training and supervision of ten Legal Aid Lawyers, as well as appearing in the courts daily yourself. Although all vulnerable, many of your young clients were already as hard as nails, or at least thought themselves so. Your empathy and concern was widely recognized. They were all referred to by you as 'my little lambs' – but perhaps not in their hearing.

Your Honour played a pioneering role in developing Legal Aid support for children and their families, in criminal proceedings, and in welfare and wardship proceedings. You took particular interest in women in prison, whose children were in care because of their incarceration.

But then we see that balance again. A lighter side in life was that you were an original member of the 1st Melbourne Scooter Squadron, a group of social eccentrics who would ride pneumatic-wheeled scooters in black-tie (and its female equivalent) from the Exhibition Gardens to the Italian Waiters' Club in a lane off Bourke Street. Other Scooter-Squadron activities included Christmas carolling at Champagne Charlie's; an annual ball at Merricks; and jazz at Woods' Lloyd's place. Through these activities, while still with Legal Aid, you prepared submissions to Professor Carney's review of Child Welfare and Practice on behalf of both the Legal Aid Commission and the Law Institute of Victoria.

Your particular experience in this area was recognized in your secondment from Legal Aid to the Victorian Attorney-

General's Department to work on the implementation of the Carney Report's recommendations.

The Policy and Research Section in the Justice Department was headed by Kevin O'Connor, now a New South Wales District Court Judge and President of the Administrative Review Tribunal. Others you worked with there include Neil Rees, now Professor Rees, and Chair of the Victoria Law Reform Commission; and Robyn Lansdowne, now Master Lansdowne of the Victorian Supreme Court. Your Honour had principal carriage on behalf of the Attorney-General of the reforms that became the Victorian *Children & Young Persons Act 1989*.

Jim Kennan SC was the Attorney-General. Jonathan 'Can't we do this yesterday?' Thwaites (later Deputy Premier) was Kennan's Ministerial Advisor. It may not have been completed 'yesterday' but it was completed and with great care and skill. Negotiations with the representatives of Community Services Victoria required all the resolve and dexterity you'd developed and displayed in your dealings with the Prahran Crime Squad detectives. A major issue was the CSV social-worker culture of intervention and care versus independent legal representation for accused persons who happened to be children, and in care-and-protection applications for their parents.

At least with the crime car squad, you knew your adversary. Beneath the veneer, the battles with CSV were no less cut-throat. The 1989 *Children & Young Persons Act* introduced major reforms which – and, I quote, 'worked really well'. So said Judge Coate (the foundation President of the Children's Court of Victoria) in a relatively recent speech, to the great satisfaction of Judge O'Connor, who had headed Research and Policy, and under whom you'd worked and to the great credit of your Honour.

When you left research and policy, you told people you were going into private practice. In retrospect, some people thought that could have been a discreet legal fiction because, very shortly afterwards, your appointment to the Magistrates' Court was announced. In fact, you had accepted a position at Slater & Gordon to replace Judge Grant, who had been a mainstay there, upon his appointment to the Magistrates' Court.

Your own appointment swiftly followed Judge Grant's and your former Legal Aid colleague, Stephen Myall, now himself a Magistrate, took up your position at that firm.

You were only the tenth woman appointed to sit on a Victorian court. Francine McNiff had been appointed to the Children's Court in 1984. Margaret Rizkalla (now Judge Rizkalla) and Sally Brown (now Justice Brown) were appointed Stipendiary Magistrates in 1985; and Lynette Shiftan was appointed to this Court in that year. Your appointment followed closely that of Judge Wilmoth earlier in 1988.

In those days Magistrates had to sit in turn on Saturday morning in the old City Court at the corner of Russell and Latrobe Streets. The story is told of your being teased by the Chief Magistrate, Mr Darcy Dugan. You'd had duty the previous Saturday. His Worship came in on the Monday and searched out your Honour: 'What's this I hear? A mate of mine was in court last Saturday. He reckons there was a 12-year-old girl on the Bench…but that she did all right!' Your Honour 'did all right' not only that day in the judgment of Mr Dugan's mate, but throughout the nearly 20 years you've sat as a Magistrate. My friend Mr Bourke will speak more about that.

It's that experience and record of achievement you bring to this Court. The community is fortunate indeed that the skills and qualities you have shown on the bench of the Magistrates' Court will now be deployed in this Court.

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

For your diary

This year the Bar Children's Christmas Party will be held on Sunday 14 December from 1.30pm to 5.30pm at St Vincent Gardens, Albert Park

County Court

Judge Frank Gucciardo

Address by John Digby QC, Vice-Chairman of the Victorian Bar Council, on Friday 6 June 2008

I appear on behalf of the Victorian Bar to congratulate your Honour on your appointment to this Court. The Chairman of the Bar Council, Peter Riordan, regrets his inability to be here today. He has asked me to pass on his personal best wishes. It is my very great pleasure, as a Vice-Chairman of the Bar Council, to speak on behalf of the Bar this happy occasion.

Your Honour was born in Rome, the Eternal City. You had your first five years of schooling at a public state school in that magnificent city. Your family then migrated to Australia in 1970, when you were 12. You spoke no English at this point. Years 6 to 10 of your schooling were at St Thomas More Christian Brothers College in Vermont, and years 11 and 12 at St Leo's Christian Brothers College in Box Hill.

St Thomas More was something of a rocky road, at least at the start. On the first day a considerate Christian Brother placed you next to a lad named Di Angelo, assuming this might bridge the language gap. Alas, Di Angelo spoke no Italian. All communications in the classroom were in English, and you did not understand that homework had to be done each evening, and the Homework Book signed by your parents and returned the next morning. The same Christian Brother, now less considerate, strapped you for your default. However, true grit and talent shone through and within three years your Honour was at the top of the English class.

You graduated Bachelor of Jurisprudence and Bachelor of Laws from Monash University and took the Practical Legal Training Course at the Leo Cussen Institute. You were admitted to practice in November 1981. You worked for a little over a year as a solicitor in the Legal Department of the Guardian Royal Exchange Insurance Company – now part of the Zurich Financial Services Group in Australia.

You began the Bar Readers' Course in March 1983 and read with the late Robert Kent (later Kent QC and a Judge of this Court), signing the Roll of Counsel in May 1983.

You immediately joined the Criminal Bar Association, and served on the Executive Committee of that Association in 2000 and 2001. Your interest in criminal law is scarcely surprising. Your father was a Chief Forensic Scientist and a prize-winning photographer. Indeed he headed that office for some 30 years before leaving to bring the family to Australia.

Your father retired with the highest non-commissioned rank of Mareshall Capo. He was also honoured by the award of Cavalieri of the Order of Merit of the Republic of Italy.

You have your father's love of photography and, on trips, are never without a camera in your hand, or to your eye.

I am very reliably informed, by a close source who fears exposure, that although your Honour is very proud of your Italian heritage, you have developed a personal conviction that you resembled the great French Emperor, Napoleon Bonaparte.

At the Bar, you soon established a substantial practice in the criminal law, appearing in a number of notable trials including:

- The *Perrier* drug importation case;
- The *Taché* repeat rape trial;
- The *Pierce* perjury case, arising out of testimony in the Walsh Street murders trial; and

- The *Salt Night Club* murder trial, which was one of the longest running murder trials in Victoria, lasting for about eight months.

You prosecuted the first trial under the Commonwealth legislation covering sex tourism, the case of *Marlowe* in 2000. You recently appeared in the *Mathey* case as junior to Paul Lacava SC, now his Honour Judge Lacava, who was sworn in and welcomed in this Court yesterday. It was a tragic matter in which the accused was charged with the murder of four of her five children. Remarkably, the Lacava/Gucciardo team argued – successfully – the exclusion of the entire portfolio of the Crown's proposed expert evidence, and the presentment was dropped without a jury ever being empanelled.

Unfortunately, your Honour has also experienced a great loss and sadness.

Your Honour, and your wife and family continue to live with the tragic death of your daughter Laura in her early teens as a result of a heart condition. I mention this painful topic because so many of your friends speak of the love and courage evident in the way you and your family have borne this tragedy. I also wish to mention the very large number of barristers who supported you and your family by attending the service at Our Lady Help of Christians in Eltham and note this clear reflection of the high regard and affection in which you are held by your colleagues.

You had one reader at the Bar, Arna Delle-Vergini. She is effectively on leave from active practice, raising young children – but is here today. I am told that Arna takes pride in the fact that she was the only one in her Readers' Course who retained the traditional terminology, and had a Master rather than a mentor. Perhaps this behaviour was associated with your Honour's Napoleonic demeanour?

You have taught as an instructor in the Victorian Bar Readers' Course since 1989. Most recently, you taught the key weekend workshops and examined in the assessment moots in the March 2008 Readers' Course. In 1996, you taught in the advocacy skills workshops for the trainees at the Legal Training Institute and for the National Legal Profession of Papua New Guinea. Other instructors in the 1996 Papua New Guinea workshops in which you taught were the late Robert Kent QC, who was the founder of the Bar South Pacific program; Justices Coldrey and Eames, then both of the Supreme Court, and Paul Coghlan QC, then the Victorian Director of Public Prosecutions, now Justice Coghlan of the Supreme Court.

For some ten years, you have been an instructor for the Australian Advocacy Institute, including in the training of the Securities and Futures Commission in Hong Kong last year.

Your Honour was also known to relax at the football, pursuing the World Cup to France in 2002. Your loyalties were sorely tested in 2006 when Italy played Australia. It is said that to overcome the problem you wore both jumpers and saw that as a sort of win/win.

Like many footballers, your Honour has also been known to be slightly superstitious. You owned two sets of elegant black and silver cuff-links, one set inscribed *guilty*, the other set inscribed *not-guilty*. You would always wear one set while prosecuting and the other set while defending.

Your Honour also taught trial advocacy in the Monash University course in Prato in 2006. In the middle of that course, you and a fellow barrister, teaching in the course, took a quick weekend trip to Dubrovnik, in Croatia, the Pearl of the Adriatic and at stages renowned for its enlightenment as the city-state which abolished slave-trading in the early 15th century, 400 years before the United Kingdom statute. Returning to get the ferry back to Italy on the Sunday afternoon, you were confronted with a queue of cars about three kilometres long. At the rate of progress in the queue, you reckoned you'd be lucky to get back to Prato by Wednesday!!! You were due to teach on Monday morning.

It has never been clarified whether it was your Honour (or the other barrister) who (in an act of mild civil disobedience) drove past the queue along the footpath. People flattened themselves against the walls of buildings, or leapt into the gutter as you careered at speed along that footpath! You reached the head of the queue – and an incredulous unsmiling, unimpressed group of police and customs officials. You got out of the car, telling your friend to sit tight and say nothing. Confidently and calmly you walked up to the police and said something your friend could not hear.

The police held back the traffic on the roadway and waved you through onto the ferry, saluting. It was your friend's turn to be incredulous. Not breaking the smiling gaze with which you held the policeman engaged, you whispered calmly and quietly to your friend: ('*Senti, siamo dottori*' – 'Listen, we're doctors'). I note that your Honour was committed to teaching for Monash, in Prato, again this year long before you were offered this appointment.

We understand you will sit as a judge for a week or so, but then shortly have to leave for a few weeks teaching in Prato. You will go this time with your new judicial colleague, Judge Hampel, with a senior District Court Judge from New South Wales, and with Professor, the Honourable George Hampel. Professor Hampel is in Court today to join with us in this welcome. It is to the credit of all, that your Honour is able to honour that longstanding teaching commitment.

However, the Bar and doubtless the Chief Judge and all the other members of this Court look forward to your return, and your service as a judge of this Court. The Bar believes you are eminently suited to your new role and responsibilities. On behalf of the Victorian Bar, I wish your Honour joy in your appointment to this Court, and long, satisfying and distinguished service.

Supreme Court

Justice John Coldrey

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Thursday 3 April 2008

In 1985, acting in your editorial capacity, you summarized the content of the welcome for Justice Vincent as 'the usual obsequious drivel'. I was so taken by it that I wondered what you might think about farewells. A little different, perhaps. Without the same concern about having to face the judge behind the Bench again, the approach could be a little less fawning.

If it was your Honour's welcome I could start by talking about your brilliant university academic record. But as it is your farewell, I can tell the truth. I am told that your Honour was not the keenest student – you were more interested in journalism. You resurrected *Summons* as co-editor. When you did attend lectures, you would be found in the back row writing limericks.

I am told the only gong you got during your law school days was for singing *Sweet Violets* on 3UZ radio auditions. In fact you got three gongs and one guinea – but it was not just you, there were eight of you – all students working at Halls Bookstore. Your Honour creatively named the group Hallichords. Each of you were entitled to one-eighth of a guinea, which Judge Frank Shelton (a fellow Hallichordian) remembers was two shillings and seven pence halfpenny, which he adds he never got. Don't be too concerned. By my rough calculations, the limitation period has probably expired.

In final year law, with articles and professional servitude looming, you explored teaching English part-time at Essendon High School. You decided at least to complete your articles and there fell under the spell of the legendary Ray Dunn. Then, as we've heard, you came to the Bar and read with Kevin Coleman.

You became a formidable defence lawyer – a defence lawyer to the core – and it was said that you never took the king's shilling. Your views about prosecutors were well known. They found voice to the tune of the *Gendarmes Duet*, in your 1974 Bar dining-in night ditty about prosecutors, which went:

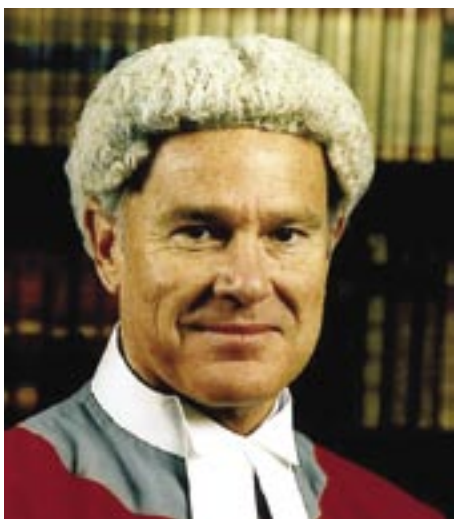
> We work in panelled, cushioned comfort
> With pensions when we all retire.
> But when we meet a helpless felon,
> A wretch the storms of life have wrecked,
> We prosecute, we prosecute!
> Put in the boot, put in the boot!
> …
> The thieving classes must be checked.

Your flexibility was demonstrated when you were offered the position as the Director of Public Prosecutions. You accepted. However, you maintained your disdain for the judiciary. In 1973, to the tune 'There's no business like show business', you had written:

> There's no judges like law judges,
> And they'll all tell you so.
> See their joy in hearing learned counsel's plea.
> They seem to listen attentively.
> Then they holler for the birch and six with three.

Another gem you attributed to the lips of an alter ego in the *Bar News* in 1981 was: 'I've met a few judges at that Bar cocktail party over the years. I've seen them sidle in from their sheltered workshops and try to be human for an hour or two. Some of them damn near succeeded.'

As DPP you incisively described judicial decision making as: 'Rationally isolating the issues in order to objectively bring one's prejudices to bear upon them.'



However, in 1991 you had another road to Damascus experience, which enabled you to accept the invitation to cross William Street and climb the stairway to heaven to judicial chambers on the first floor of this building.

Not everyone was convinced that your earlier writings had been entirely facetious, but we all hope your times with the gods in judges' chambers have been, if not heaven, at least a congenial workplace for the last 17 years.

But I have got ahead of myself. Becoming DPP, and then a judge, were not the first times in your professional career that you answered the call of duty. The humour and quick wit, the lightness of touch – in your after-dinner speeches, as well as in your ditties for dining-in nights – belie the utter seriousness and unsparing conscientiousness that you applied to your work in the law.

This is the obsequious bit.

In 1975 into 1976, you were junior to

Cairns Villeneuve-Smith QC as counsel assisting Barry Beach QC on the Board of Inquiry into allegations against members of the Victoria Police. Your close textual analysis found and exposed the repetition of particular phrases in confessions claimed by a particular police officer to have been made to him. Numerous and disparate people accused of different armed robberies each confessed, saying that, on being seen in the robbery: 'I took off with the speed of a thousand gazelles.'

And later each said to the same officer: 'Gee officer, you know I done it, but I can't say so.'

Nearly ten years later, as DPP, and through the reports of your Consultative Committee, you, in a way, completed the work you'd begun in the Beach Inquiry. As we've heard, this class of verballing was addressed by mandating the recording of police interviews in indictable matters. So intense was police feeling about the Beach Inquiry that a Law Institute, Bar and Police Liaison Committee was established to work on de-fusing the situation.

The Committee's first social function was a dinner at the restaurant at Russell Street police headquarters. Striving to ensure the success of the evening, the Committee selected the most humorous and entertaining after-dinner speaker it knew. At the dinner, upon your being introduced, the Police Association representatives, en masse, got up and very noisily walked out of the dinner. They missed a brilliant speech.

In 1977, you accepted Frank Vincent's invitation to join him in going to Alice Springs to represent Aboriginal defendants there. From vilification by police here, you went to vilification by the press in the Territory over the *Hucketter* case. Your instructing solicitor, Pam Ditton, was evicted from her flat when the landlord discovered she was instructing you.

For weeks at a time, you went up to the Territory in what you described as a 'time of very great racial prejudice' to the 'culture-shock' of 'Australians being treated, and living in the conditions that Aboriginal people experienced in Alice Springs and surrounding areas in 1977'. In 1982, you went full-time as Director of Legal Services for the Central Land Council, and took your family. Your friend, Frank Vincent, spelled out the risk to your professional future. This was not the time to go away – on the verge of being a credible applicant for Silk. Others at the Bar said it was madness. You went anyway, and for more than two years.

You said you saw the trial work you had been doing as 'band-aiding'. And went on, and I quote: 'The people really needed to get the land back, to get that sense of identity and self-esteem, and to get … an economic base from which they could properly decide their role in society.'

There's a great article by your successor at the Central Land Council, Bruce Donald, on the work of so many who worked to bring about the grant of freehold title of Uluru to its traditional Aboriginal owners. There are many Victorians, including: Geoff Eames, Ross Howie, Mark Hird, the late Ron Castan QC and, of course, you.

Your Honour sat with distinction on many occasions on the Full Court. The former Chief Justice Phillips recalls that the first sitting with him on the Full Court was not with as much dignity as others. Mr Justice Marks, who suffered from back pain, had overseen the installation of ergonomic, whiz-bang, gas-fired Bench chairs.

During the hearing of the appeal, your chair sprang a leak and started deflating and you started descending from view. It is not said whether your descent was God's answer to prayers of counsel appearing, to whom you were asking pointed questions at the time but the Chief Justice says he fought off the ignoble impulse to let events take their course, and called the fastest adjournment of all time, thus preserving your judicial dignity. Well that it should happen to your Honour, because you have never eschewed a little bit of drama.

On behalf of the Victorian Bar, I wish you and your wife, Karin, all the very best in your retirement. We hope to see a lot more of you at the Essoign.

The dark prince

Is Hamlet paralysed by indecision?
Or, as one critic suggests,
  is he just an angry young dickhead?
To be sure, his soul is finely calibrated.
Yeah, he is purposeful too.
But, for ****'s sake,
  why won't he do something about it?

NIGEL LEICHARDT

County Court

Judge Michael Strong

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on 30 April 2008

I do not know whether the expression 'knocking off work to carry bricks' means anything to your Honour but, as has been suggested by Dr Lynch, this farewell is a little unusual. In 2003 your Honour was somewhat more optimistic about what would occur on your retirement from the Bench when you sang, to the tune of 'Let the punishment fit the crime', from *The Mikado*:

> My life in the law at Bench and Bar
> undoubtedly has been charmed.
> In retirement, I hope to stay alert but not
> alarmed.
> I'll venture to the Grecian Isles, from which
> I'll never budge
> Though perhaps I'll make a comeback as a
> short term Acting Judge.

Your new position as Director of the Office of Public Integrity will undoubtedly be interesting; but like life on the Grecian Isles? I don't think so.

It is fair to say that throughout your Honour's career you have not tended to take the easy road. You came into the profession through the RMIT course, which required you to 'fit in' your legal studies while working full time. When you came to the Bar, there was no Readers' Course. One simply signed the Roll and went straight into pupillage.

On signing the Bar Roll your Honour was keen to join Foley's List and you had been communicating with Jim and Kevin Foley for some years since the end of your long articles. At that time there were new clerks added and the Bar Council strictly limited any additions to the large established clerking lists. Your first piece of advocacy in coming to the Bar was to persuade the Council to permit you to join Foley's List. You succeeded and your association on that list was long and productive.

Your Honour read with Doug Meagher, now QC, and at your welcome you spoke of his thorough and methodical preparation for trial, which you described as 'legendary' – and which skill and practice he passed on to you.

You continued that tradition with the four readers you took in the window of time you had before your early appointment to this Court: Damien Murphy (now Judge Murphy); Sean McLaughlin; Mark Dreyfus (now QC, MHR) and Christopher Howse.

Dr Lynch has spoken of your extraordinary work in connection with the planning and building of this magnificent Court – and of several Country Courts; but your involvement in planning building works began at the Bar.

You'd been at the Bar only a few years; and you were working to establish and build your practice. But you accepted appointment to the Board of Barristers' Chambers Limited. You served on BCL for more than four years, and played an important part in the establishment of Latham Chambers.

In a competitive time at the junior Bar, you established a busy civil practice, increasingly in personal injuries – but also shifting to prosecution work for the Corporate Affairs Commission in white collar crime. You were for the defence in the Caravan Conspiracy case, then Victoria's second-longest trial. In 1981, you were appointed a prosecutor for the Queen in the newly-formed Commercial Crime Group.

You returned to the Bar in 1984, concentrating on major commercial crime – for both defence and prosecution. Your practice broadened into the industrial arena. The breadth and depth of your practice at the Bar was foundational to your outstanding work on this Court, described by Dr Lynch.

However, if we were to believe, which we don't, the words of the song that you wrote after coming to the Bench, one might think that your elevation to the Bench was a difficult one. Your Honour sang (to the tune of 'The policeman's lot is not a happy one'):

> The chairman's words of welcome had just
> ended,
> When to causes at 11 I was sent.
> To begin, I hoped, with something
> undefended,
> Or better still an order by consent.

It's a building case my startled tippy uttered,
Six weeks they say the wretched thing will run.
As I wrestled with the file I weakly stuttered,
Oh, a judge's lot is not a happy one.
When a building case in cause's to be done, to be done,
A judge's lot is not a happy one.

It continues:

Escape at last, it's off to civil juries.
My colleagues said, 'Don't worry, it's a snack'.
They all settle, you just certify the Silks' fees.
And join McNab and Nixon at the track.
But the plaintiff said he'd plead his case in person,
Translated to the jury by his son,
I gagged and felt my hypertension worsen,
Oh, a judge's lot is not a happy one.
When a plaintiff's case in person's to be run, to be run,
A judge's lot is not a happy one.

However, there is no doubt that during the time on the Bench you have worked very hard. Routinely you worked weekends, and when your sons were young you sometimes brought them with you. In the old County Court, one weekend, you showed your son Josh and his friend the cells. While they were inside the cell, you pulled the cell door shut. If your plan was that you would lock them up to enable you to concentrate on your work, it was a dismal failure because during the three hours they were locked in the cells, they loudly and continuously communicated their desire for freedom.

Warders, with police escort, had to come in to open the cell door, which, as it turned out, had been jammed tight, but not actually locked. The warders and the accompanying police did not see the funny side.

During the monumental Higgins trial, you brought your other son, Ben, in one Sunday. Ben was then about 12. Your concentration was such that you didn't notice him playing with the electronic white board. Robert Redlich QC (now Justice Redlich) was leading the prosecution. His final address to the jury went for several weeks. He was using the electronic whiteboard to great effect.

On Monday morning, Redlich masterfully pressed the button to bring up a fresh screen. The jury was treated to a cartoon of Homer Simpson – Ben's clandestine Sunday afternoon effort. If your Honour intended to put your sons off the law by these exploits, you failed. Ben is now a lawyer in the Media Law Centre at Victoria University and Josh is serving articles at Wisewoulds.

We have them to thank for some stories of your finer moments as a judge – such as when you insisted that the witness stand to take the oath; before taking a closer look and realizing that the witness was not a man of great stature, and was already standing.

There was also the time when you returned from circuit and were unable to find your shoes. As a last resort you called the Circuit Court and were told that the cleaners had found your shoes where you'd left them – under the judge's bench.

I have made passing reference to your Honour's theatrical abilities but many outside the Court would not know that you have been able to apply these skills to advantage within the Court. A judge of this Court read somewhere that singing is a good stress reliever and asked you if you would take the judges for singing once a week. You said 'yes'. Every Tuesday lunchtime, like the Welsh miners in *How Green Is My Valley*, 15 or 20 judges trudged up from the coalface of their courts to woo the muse in song.

Nor did this remain at the level of private therapy. At the recent District and County Court Judges' Conference in Perth – at the Fremantle Yacht Club Dinner Dance – the Victorian judges gave throat to the tune of *Hey, Big Spender*, adapted to *Hey, Big Offender*.

The loss to this Court is substantial. Your dedication to Victoria in taking on what has to be the most thankless job on the planet is immense. You are indeed, in the words of Sir William Gilbert, a slave of duty.

On behalf of the Victorian Bar, I thank you for all you have done for the Bar and Bench, and wish you the very best in the Herculean task you have taken on as Director, Police Integrity.

Family Court of Australia

Justice Paul Guest

Address by Paul Lacava SC, Senior Vice-Chairman of the Victorian Bar Council, on Friday 2 May 2008

I appear on behalf of the Australian Bar Association – in particular, of course, on behalf of the Victorian Bar. Peter Riordan, the Bar Chairman, is in Court to honour your ten years' service on the Court and your very substantial service to the Bar in your 29 years in practice. He has, however, deferred to my close association in having shared chambers with you for 16 years.

I don't know how you managed to arrange this with the Commonwealth Attorney, but I do believe that the first announcement in Melbourne of your appointment to this Court was at the Victorian Bar Living Legends dinner. You were, of course, one of that very select company: SEK Hulme QC, the late Neil McPhee QC, Michael Dowling QC (now Master Dowling), Jack Keenan QC, Brian Bourke, Brendan Murphy (now QC) and Mary Baczynski. Hartog Berkeley QC proposed the toast to the Living Legends – and was at his witty and outrageous best.

You will be relieved to know that I have not been able to obtain the text of Hartog's brilliant and hilarious flights of fancy. Asked for his text, Hartog – in his inimitable accent – screeched: 'Notes??? No decent speech was ever given from notes!!!!'

The Solicitor-General has noted your nearly nine years' service on the Bar Ethics Committee; your 12 years as Chairman of the Family Law Bar Association; and the breadth of your practice extending beyond family law to complex murder and fraud trials. You served also on the Bar Law Reform Committee, Family Law Specialist Panel, the Human Rights Committee, the Portraits Committee, and were Chairman of the Foley's List Committee.

But there is so much more beneath the surface of your Honour's career at the Bar. In your 12 years as Chairman of the Family Law Bar Association, judges came to you personally, rather than to the Ethics Committee, about unacceptable conduct by a barrister. Similarly barristers with complaints about this Court came to you. And often you were able to achieve an acceptable outcome privately.

You read with John Greenwell and had six readers, two of whom are now judges of this Court: Justices Michael Watt and Linda Dessau. Murray McInnis has just returned to the Bar after seven and a half years as a Federal Magistrate. Judith Lord is on leave. Joan McIntosh and Pamela Darling are retired counsel. You were an excellent pupil master and taught family law advocacy in the Bar Readers' Course for many years. In the time that your Honour practised as a silk at the Bar you were acknowledged as the leader of the Family Law Bar in Victoria.

As with everything else you do, there was a degree of robustness in your assistance to your pupils – not a great deal of hand-holding. Justice Dessau recalls her very first Magistrates' Court crash and bash. She didn't know you as well then as she does now. She told you all she knew about the case, and what she'd thought through as to issues and strategy. You did not interrupt. You sat, attentive and focussed. Justice Dessau came to the end of her account. There was a silence. Then, 'Go get 'em, tige! You'll be great!' And that was it. You'd succeeded in instilling confidence – but your pupil was none the wiser as to how to achieve the promised greatness.

You were a strong and fearless advocate for your clients. Occasionally this got your Honour into trouble. I well remember having to appear as junior to John Hedigan QC (later Justice Hedigan of the Supreme Court) on behalf of your Honour before Justice Brian Treyvaud in this Court. Justice Treyvaud had suggested the previous day that you should be separately represented in argument before him the following morning to show cause why he should not deal with you for contempt. His mood is best described as not happy.

We saw a softer, gentler Hedigan that day. His opening words were, 'Your Honour, one of the hardest things any barrister has to do is to tell a judge that he is wrong'. Ever so gently, Hedigan then explained to Justice Treyvaud that he was quite wrong in his thinking as to the way you had behaved

as an advocate – which argument Justice Treyvaud graciously accepted. The gentle Hedigan had done an excellent job.

That day, all associated with extricating your Honour from a possible finding of contempt went to La Madrague, a classic French restaurant in South Melbourne for lunch which extended into dinner as well.

Occupying adjoining chambers with your Honour I well remember some of your famous trials, and the agonizing over forensic decisions, whether for this Court, the Supreme Court or the County Court. Your Honour was famous as a barrister for the painstaking preparation of a case. As practitioners in this jurisdiction well know, cases often involve complex accounting and valuation evidence as well as medical and psychological evidence. As a barrister you managed to master many fields in the course of preparation of a case.

As a silk your Honour also did this in other jurisdictions, not only in family law. Not many people would appreciate that your Honour took the Queen's shilling to prosecute a veterinary surgeon for murder or that you acted for an accused charged with fraud on the Commonwealth in the nature of medifraud. The latter case in the County Court was in fact a plea. You led Bruce Walmsley, opposed to the now self-declared Queen for banning things, Betty King QC, now Justice King of the Supreme Court. My recollection is that the plea lasted six to eight months, making it possibly the longest plea on record, a testimony to your Honour's ability to find things to say even when your client was guilty.

Your Associate, Elizabeth Cameron, was your secretary for more than 15 years. She came with you to the Court, and has been your Associate for ten years. Elizabeth joined your Honour and Tom Neesham (later Judge Neesham of the County Court now retired) and myself as our secretary in Aickin Chambers at 200 Queen Street in 1983. She has been loyal to your Honour as an employee through thick and thin, although mostly thick.

Your Honour always had well furnished chambers, conservative in style with antique furniture and Persian rugs. They always looked every inch the chambers of a successful barrister. You were a sucker for buying books. One series titled *Famous English Trials* was said to be hundreds of years old – but had, I suspect, only been reprinted shortly before being sold to your Honour. At the Bar your Honour was well known for reading passages from these reports over a glass of wine after court.

You always put a lot of thought into choosing the right words for a letter or note. Recently you wrote to me advising of your approaching retirement and to inquire about my new chambers, the Bar having returned en masse to Aickin Chambers more than 20 years after we first vacated the building. In the note you commented indirectly on the importance of having chambers that look appropriate for a barrister. This is what you said in your email:

> Good afternoon Paul.
>
> How are the new salubrious and grotesquely expensive new 'digs' going?
>
> I have put in my resignation to the GG and the AG effective at 'one minute past midnight' on 5 May 2005. Then, like the road runner, I am out of here. It's a strange feeling, after 44 years, but life is a gift and the road lies long and dusty to the grave.
>
> Important to my clearing out the past, do you know anyone that wants a mint set of the Authorized Reports to 1996 [the colour coded ones] and a complete set of the Commonwealth Law Reports bound beautifully to vol 218 and parts thereafter. Going very cheap. If any one wants some 'wall-paper', I have a set of Revised Reports with which one can plaster one's wall and provide the perception of 'learned counsel'. I always found them handy in helping the punters to liberate their funds in my direction.
>
> Let me know how things are with you and your family,
> As ever, Paul.

I should add that you forwarded that email to me before either of us knew that I would be making this speech!

Your remarks at your Welcome bear re-reading. You spoke of the importance of the independent Bar, and your pride in being and remaining 'of the Bar'. And what you said about the family law jurisdiction and about this Court is as immediate and thoughtful and important today as it was ten years ago. Your humanity, your intellect, and your respect and thoughtful concern for all who come before this Court shine in what you said. You promised to do your best as a judge.

I have practised only infrequently in this jurisdiction in recent years, but I know many who practise here full-time. A courageous and straight-shooting judge will not win universal praise for everything – particularly in this jurisdiction – not even from counsel, much less from disappointed litigants, some of whom have said directly to you in Court, and I quote:

- 'You are an absolute despot'.
- 'What you conduct is little more than an anti-father, feminist, fascist forum'.
- 'You have ensured that I have no more rights to my children than the drover's dog'.
- 'I am not prepared to allow my children to be sacrificial pawns in your twisted game of chess'.

You have been called dysfunctional, malcontent, evil and contemptible.

It almost seems that someone went to your favourite source of pejorative terms to describe the party you were opposed to – the Thesaurus.

For a balanced account, I would add that you also had admirers. No names, but one counsel appearing before you was handed a note by his client, the wife, informing him that she thought your Honour 'a spunk'. An observer in your Court to support one of the parties before your Honour copied you in on his letter of complaint about you to Her Majesty the Queen, in which he promised also that he would be taking the matter up with the Prime Minister, the Attorney-General, the Chief Justice and the Polish Consul-General. So as to avoid any possibility of misunderstanding, these expressions of regard are all from disappointed litigants, not counsel. All agree that you have certainly been a forthright and courageous judge.

You have been a good judge in a very difficult and stressful jurisdiction. I can think of no higher, or more fitting, praise than to record that you have kept the promises, and fulfilled the promise, of all that you and others said at your Welcome.

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

Family Court of Australia

Justice Heather Carter

Address by Michael Colbran QC, Vice-Chairman of the Victorian Bar Council, on Friday 18 July 2008

I appear on behalf of the Bars of Australia and in particular, of course, the Victorian Bar, to pay tribute to your Honour's many years of service to the community as an advocate in Victoria and Western Australia, and, for the last ten years, as a judge of this Court.

The President of the Australian Bar Association and the Chairman of the Victorian Bar Council regret their inability to be here today but each has asked me to pass on his warm regards and best wishes on your retirement.

You practised initially from 1972 as a solicitor in Victoria, first with Anthony Rose in Albert Park and later Colin Lobb in Mount Waverley. More will be heard about this from Mr Burke but I do note that it was Mr Lobb who gave you your wig when you were called to the Victorian Bar in 1978. It may be appropriate to note that your retirement may well mean the end of wigs in the Family Court as I understand you are the last judge to wear a wig in this Court and could be considered in this regard at least the last of the 'traditional judges'.

Your Honour came to the Victorian Bar in 1978, reading with Ron Merkel, later of Queen's Counsel and a Federal Court Judge, and Brind Zichy-Woinarski now of Queen's Counsel. You took chambers on the sixth floor of Four Courts Chambers, now Douglas Menzies Chambers. The floor was very congenial, with members such as Paul Elliott, David Brown, Elizabeth Curtain and John Hardy.

Each of you was passionate about being a barrister. As you said at your welcome, 'We re-lived each case, we dissected each case and indeed each member of the Bench.' But you also enjoyed yourselves and each other's company. A tradition which began as 'Friday night drinks after work' gradually became as, one of them has said to me, 'not just Fridays'. One of your number was Lord Mayor of Melbourne for a year. This provided the opportunity for use of the Mayoral car with its city flag and a black-tie Christmas party in the mayoral chambers.

But your Honour was described as the steadying influence: the one who would get us back from lunch at a reasonable hour.

As Mr Duggan has said, when you came to the Victorian Bar in 1978, there were hardly any women in practice as barristers. You were only the 45th woman to sign the Victorian Bar Roll – and when you came to the Bar in September 1978, there were only about 16 women in active practice. There are now nearly 400 women on the practising list – and 16 of those women are silks.

Although the Honourable Elizabeth Evatt and the Honourable Margaret Lusink had been appointed as Chief Judge and Judge, respectively, of this Court – both in 1976 – there were no women judges or magistrates in any Victorian State court – nor had there ever been. Much has been done to identify and address the inequalities in opportunities for women to succeed at the Bar but no-one pretends it's not hard now or that it was not harder then.

You appeared in a range of matters but mostly crime at all levels of the State courts. Family law also occupied part of your early days at the Bar and after about five years became your chosen area of specialized

practice, together with the law relating to de facto relationships.

By 1991 you had been at the Bar for more than 12 years and had developed a substantial practice but at that time your husband's career took you both to Perth. You had the opportunity of joining a firm of solicitors in a State with a fused profession with instant access to the clients of an established practice but your Honour was committed to the role of an independent advocate and so undertook the difficult task of establishing a practice at a very small independent Bar.

There was no system of barrister's clerks in Perth, no benevolent chamber's system, no real support at all for a new barrister in getting briefs. But you did it, built a practice from nothing and in due course you were appointed as a magistrate and

Registrar of the Family Court of Western Australia.

In 1996 you returned to Melbourne and swiftly re-established your practice here.

As counsel, your Honour exemplified the independent barrister presenting your client's case with determination, and giving no ground. It's hard cross-examining a grandmother who breaks down in the box. My family law informants know of no other counsel who managed the situation to great effect by saying: 'Stop your blathering – I'm a grandmother too.'

You are well known as a connoisseur of good food and wine, and happy to have lunch if the circumstances allow it. On one occasion when appearing before the late Justice Brian Treyvaud, and being second in the list and not getting on, his Honour said: 'It seems not today, you can go and have lunch,' which your Honour and your opponent duly did. This happened again on the second and third days. By the fourth day when his Honour said the same thing, your Honour remarked, 'We're getting fatter and poorer, so would your Honour rescind that direction.'

After only a short time back at the Bar you were appointed to this Court. In that time you were known as an uncompromising and feared opponent at the Bar. One senior barrister was heard to remark at the time of your appointment, 'Thank God they have appointed her, I will never have to be opposed to her again.'

Since taking up your position on this Court your dedication has been prodigious. Your Honour always started early and finished late. You were the first judge to arrive in chambers and usually the last to leave. Even the recently retired Justice Guest, who put up some show of competition in this regard, gives you the honours. You have been fair-minded and balanced. You never played favourites among counsel. You treated self-represented litigants with dignity, listened attentively, and assisted appropriately.

Even in the face of extraordinary provocation, you never lost your composure. You granted a seriously-contested adjournment to one self-represented litigant. You then began helpfully to suggest matters to which she might have regard before the matter came on again. The person interrupted, and said: 'You've granted the adjournment. I don't have to listen to this', and walked out. Even without what she then said – very audibly – as she went out the door, there was a contempt, which your Honour ignored. Seemingly the litigant did not appreciate that the adjournment did not take the matter out of your Honour's list. When the matter came on next, upon seeing your Honour was the judge, she stormed out again. Calmly, your Honour declared the matter undefended, and heard it.

The only criticism you have of those who appeared before you was if they had not done their homework. You expected competent, professional work and soon received it.

The Court hasn't had a defaulters' list for some years – but when it did, you were perceived as having the qualities best suited to motivate practitioners who had failed to comply with interlocutory orders – to put, so to speak, the fear of God in them. One barrister is convinced that, when displeased with his conduct of matters in your Court, you made sure to give him the hottest curry when he came to your house for one of the famous curry dinners of which Mr Burke will speak.

You were the first to volunteer for the duty list cases if your own case settled or for some other reason finished early. You were generous with your time to outside family law organizations, giving your extensive knowledge to research, to papers and to help in any way you could.

At the Bar not one of your Honour's clients left the Court without knowing that everything had been done to present their case in the best possible light, and on the Bench, while some with an unmeritorious case may have left disgruntled, they could not but know that they had had a fair and proper hearing.

You have been a fair, and conscientious, and hard-working judge, and will be sadly missed from the Court.

On behalf of the Australian Bar Association and the Victorian Bar, I wish your Honour a long and satisfying retirement.

Children's Court of Victoria

Magistrate Brian Wynn-Mackenzie

Address by Judge Paul Grant, President of the Children's Court of Victoria, on Friday 22 August 2008

It is my great pleasure to welcome you all to the ceremony to farewell his Honour Magistrate Brian Wynn-Mackenzie. The presence of so many at such an early hour is proof beyond reasonable doubt of the high regard in which Brian is held. I commence these proceedings by acknowledging the traditional custodians of the land the Wurundjeri people and I pay my respects to elders past and present.

There are a number of judicial officers who wished to be present today but are unable to do so because of their involvement in the country magistrates' conference. Those who expressed their regret at being unable to attend include the Chief Magistrate, Magistrates Martin, Kumar, Stewart, Gibb, Spanos and Hill and also her Honour Judge Coate. Before calling on those at the Bar table to speak I want to say a few brief words on behalf of the judicial officers, registrars and staff of this court.

Brian was appointed a magistrate in Victoria on 18 August 1992. He has given 16 years of outstanding service to the people of this State. In late 1998 the then Chief Magistrate advised Brian of his assignment to the Children's Court. He has worked in this court with distinction since 4 January 1999. Brian has shown all the attributes that are associated with the best of judicial officers: wisdom, fairness, compassion, independence and an understanding of the life experiences of those who appear in the court. Fortunately, neat, legible handwriting is not one of the requirements of a good judicial officer and your failing in that area, Brian, only proves that you are human after all.

Recently I received from a senior officer in child protection a copy of a letter that she had sent to Brian and it said this, and it's worth reading because in a sense it tells us the measure of this man:

> I write to indicate my appreciation for your consideration and dedication of time to the recent permanent care application that was heard before your Honour. I wanted to express my utmost thanks for the time you took to speak with the children and make such a significant event so memorable in their lives. Not only was this recognized by the children but your consideration touched the family, workers and solicitors present. My understanding is that the children are going to present their experience at show and tell and again I wanted to indicate my gratitude for your thoughtfulness in relation to such an important day and indeed order for these children.

There have been over the years of service in this court many other letters of commendation. Brian, you've been a dedicated and hardworking magistrate in this court for close on ten years. Your friendship, courtesy, knowledge and good humour will be greatly missed. May you and Karen enjoy a long, happy and healthy retirement.

A full bench of the Children's Court in Court 8 and a crowded courtroom farewell Brian Wynn-Mackenzie

Speech in reply by Magistrate Brian Wynn-Mackenzie

Before I commence, I also acknowledge the traditional owners of the land upon which we meet, the Wurundjeri people of the Kulin nation, and I pay my respects to the elders both past and present. I also acknowledge in particular the elders and respected persons who are part of the Children's Koori Court. Whilst I was a sceptic about the Koori Court at the outset, I am now a true believer in the Koori Court and its positive effects on Koori young people. I respect Aboriginal people and their culture.

I give special thanks to Anne-Maree Kirkman, the Koori Court legal officer, for her great support. I also thank you all for your attendance today, taking time out of your busy lives. In addition I thank you for all the kind words said by the speakers. I have in fact taken the precaution of having my defamation attorney Mark Dobbie from Middletons in court, just in case.

I wish to make a series of thanks and acknowledgments of individuals and organizations. Please forgive the Oscar night style, but I think on this last day proper recognition should be made. Where do I begin? First the man who made it all possible. Not my father, but Jim Kennan. Jim Kennan SC was the Attorney-General in 1992 who appointed me a magistrate. I hope that I have fulfilled the expectations of him in the work I have done as a magistrate in this State.

The late Mr Justice Brian at the Family Court was a friend, guide and mentor to me in both professional and personal life; his widow Joy and family are here today, as is Evelyn Poslopoulos, my study buddy from the law courts and long-term friend. Heather Bond, my former PA from Middletons, is still confused about her need to assist me when she doesn't work for me any more, all these years later. I also acknowledge Mark Dobbie, one of my former partners at Middletons and thank him for his friendship over the years.

Dr Patricia Brown and all at the Children's Court Clinic deserve thanks. The independent and impartial advice given to me by the clinic over the years has been of immense value and help. The child protection practitioners of the department are rarely acknowledged in the difficult role they have to undertake, a role that is often misunderstood in the adversarial setting of the court.

The lawyers from the Court Advocacy Unit, the private practitioners, Legal Aid and the Victorian Bar: your role remains a significant one, acting for parties before the court. The court is always assisted by legal representation of parties in any application. In Denmark they have a saying, 'Nobody mentioned is nobody forgotten'. So I do not intend to mention any of the lawyers again.

To the police prosecutors, I've always found the standard of prosecution to be of the highest integrity and fairness when dealing with young people of this court. I also acknowledge the work done by the police at the court in the management of young people in custody. To the Salvation Army: They say, 'Thank God for the Salvos'. So do I. The appearance of Vicki and her team always fills me with confidence that families at a time of most crisis have a supported presence in court.

The network personnel that assists in the court, the Youth Justice, Eddie Wilson and the team, thanks for the help and excellent reports over the years. Eddie, you'll be sorely missed when you do not hear me mention s.362 of the Act. To the convenors of the dispute resolution conferences, thanks for your important role in the dispute resolution process. As Ms Preston said, the future of this court is to detach the adversarial setting and get back to the issue of mediation and resolution without the savage integration of the court process.

Thank you to the Children's Court liaison officer, Janet Matthew for her help to me. She also has had a key role in detaining permanent care bears under lock and key to prevent me from giving bears to all

and sundry. I have extensive priors for grandiose allocation of bears to people who are not even involved in the case. To the tipstaffs Dianne and David I acknowledge all your help to me. To the entire Children's Court staff past and present I have been grateful for your help and cheerful spirit here in stressful times. The staff here is the jewel in this crown. To Leanne de Morton, the Principal Registrar, who leads, from the front a fine group of people: were it not for her extreme support of Collingwood I'm sure she'd be more advanced in her career.

Special mention also needs to be made of the two coordinators during my time here, Sue Higgs and Angela Carney. They have the most difficult and challenging job and it should never be underestimated the problems in their role. They do the job with style, grace and efficiency. I also thank previous staff, the Chief Magistrate and magistrates in other courts when I was a general magistrate. I'd also like to acknowledge today Ann McDonald, the late Ann McDonald and Frank Hinder.

A special thanks to the President Judge Paul Grant, the former President of the Children's Court Judge Jennifer Coate, and also to all my current and past colleagues at this court. Their support has been always appreciated.

Finally to my wife Karen whose love, affection, encouragement and wisdom has meant that I've been able to continue in this difficult role. While she has remained in Queensland in the sun today, she is looking forward to seeing the photos. She has suggested that tomorrow I get an extra seat on the plane back to Queensland to cater for my big head and my presents which I note have not yet been delivered.

The qualities required by a Children's Court magistrate or judge in this important role are balance, fairness, compassion, astute decision making ability and experience in both court and life. The focus at all times is and remains the best interests of the child. Children and young people are at the heart of all applications in this court and should never be forgotten. In my view all my colleagues possess these qualities and are a credit to the judicial system in this State.

Management experts say the best job is the one where you have supportive and friendly colleagues, satisfying and varied work, good leadership, life/work balance, doing something worthwhile with a passion, and making a real difference and being part of a successful team. I've been blessed with all those elements here.

Magistrates and judges who sit in this court hear many cases of abuse, neglect and deprivation of children and young persons. We are not immune from human emotion and empathy when we hear shocking and terrible evidence in court. Cases can and do affect us at times and get under the shield.

In any change there is a sense of loss, the loss is at its highest on this final day. The loss of support and comradeship of the staff and judges and magistrates. My respect for everybody is here as I speak. Janet Matthew said leaving here is similar to leaving a family. I agree. However in change comes the seeds of new future hope, an expansion into different areas of life. My decision to leave here with all its regrets is based on the best interests model, taking all matters into account.

My plans? I will first disconnect the intensity of the role. I will then sit. I will be quiet. I will relax. I will think. I will enjoy the life I have today. Those who know me well as Mr Dotchin has already alluded to will probably struggle with the idea of me being either (a) quiet or (b) relaxed. It has been suggested by a number of practitioners that I should write a book about my time here. The title has been suggested to me as (1) 'Life in Court 2 with only four boxes', (2) 'IAOs I have known', (3) 'Life at the coalface, short submissions only Mr Dotchin'.

My wife's view is that it should be a trilogy. The first volume should be Book 1 'Me', Book 2 'More about me' and Book 3 'Now back to me'. I intend after a break to pursue my interests in ADR mediation. I will also work in legal education both in Victoria and Queensland. I still feel I have something to offer in other roles.

Finally, all those who appeared over the years in Court 2 will know that I do not refer to higher authorities of either the High Court, the Court of Appeal, the Supreme Court or the County Court, but rely heavily on the maxims of 60s pop songs. So I will not disappoint you all with my final words which will come from Roy Orbison. Those people under 25 in the room can look them up on Google. My last words will be from the song, *Its Over*: 'Golden days before they end.' Thank you.

Statutory interpretation today

When I was a law student, we were taught the clear (and conflicting) rules of statutory interpretation. We learned about the 'literal rule', the 'golden rule' and the 'rule in Heydon's Case'.

I look back on those days as days of innocence. Today I believe that a court which seeks to apply any rule other than the literal rule, immediately involves itself in the making of value judgments. In recent years the courts have moved into a phase of interpreting legislation not by reference to its literal meaning but rather on the basis that, in the context in which the legislation has been enacted, the legislature 'must have intended…' or 'must not have intended…'

In *Project Blue Sky v ABA (1998) 194 CLR 355* McHugh, Gummow, Kirby and Hayne JJ said at [78]:

> [T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.…

The Court may depart from literal meaning even though there is no ambiguity. As their Honours said at [80]:

> If s.122(1) and (2) were given their grammatical meaning, without regard to the provisions of s.160, they would authorize the making of standards which were inconsistent with Australia's obligations under international conventions or under its agreements with foreign countries. However, the express words of s.122(4) and the mandatory direction in s.160 show that the grammatical meaning of s.122(1) and (2) is not the legal meaning of those sub-sections.

In the course of the interpretative exercise, the courts today start from one or other of two conflicting premises:

(i) The legislature could not, despite the precise words used, have intended to overturn a fundamental common law right.

(ii) The conflicting premise stems from the (not unreasonable) assumption that the legislature wished its legislation to be effective. Therefore, the court should interpret the legislation with a view to its efficient implementation.

The first approach is illustrated by the reasoning of the Court of Appeal in *DPP v Garde-Wilson [2006] VSCA 295* and the dissent of *Gleeson CJ in Al Kateb v Godwn (2004) 219 CLR 562*.

In *Garde-Wilson* the issue was whether the DPP had a right of appeal, pursuant to s.17(2) of the *Supreme Court Act 1986*, from a conviction for contempt of court. That section specifically provides:

> Unless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the trial division constituted by a judge.

Bongiorno AJA (with whom Maxwell P and Ashley JA agreed) said at [19]:

> On its face this section confers a general right of appeal to this court on a disappointed litigant (and relevantly interested non-party) affected by any determination – in any matter – of the trial division of the Supreme Court constituted by a judge.

However, his Honour proceeded at [20] – [24] to stress that such an appeal would be an 'anomaly' and (as illustrated by a number of High Court decisions) would be 'contrary to fundamental principle' or 'a departure from the general system of law'. 'Express authorisation of such an appeal by the legislature is required to displace the general presumption against the Crown enjoying a right of appeal, even in respect of sentence'. There was here no such 'express' authorization.

The second approach is illustrated by the reasoning of Dodds-Streeton JA (with whom Buchanan and Nettle JJA agreed) in *Garde-Wilson v Legal Services Board [2008] VSCA 43* where it was held that s.2.4.12(2) of the *Legal Profession Act 2004* did not prevent the Legal Services Board from making a determination to refuse to renew a practising certificate after the expiration of 60 days from receiving the application for renewal. That sub-section provides:

> Within 60 days after receiving an application for renewal of a local practising certificate, the Board must –
> (a) renew the certificate; or
> (b) refuse to renew the certificate.

Her Honour said at [79]:

> The operation of s.2.4.5(3) in a way which upholds the objectives of the Act and promotes the effective operation of the statutory scheme for renewal… depends…on the Board's retention of jurisdiction after the expiration of the 60 day period prescribed by s.2.4.12(2).

She said further at [83]:

> That construction does not deprive the word 'must' of all effect, or render it merely precatory…[I]t expresses a clear legislative intention that applications be determined within 60 days…[T]he failure to make the decision within the prescribed time may be deemed a refusal to make a decision pursuant to s.4 of the *Victorian Civil and Administrative Tribunal Act 1998*…and expiration of the 60 day period without a determination would found an entitlement to seek relief, including a review by VCAT.

There is a fundamental philosophical difference between the use of premise 1 and the use of premise 2 as a starting point. Premise 1 stems from a fundamental view of the legislative process which assumes that legislation is not designed to interfere with the rights of an individual except to the extent that it expressly says so. As Gleeson CJ put it in *Al Kateb*:

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

When the courts interpret legislation in such a way as to protect the rights of the individual, they are fulfilling their basic common law role and their basic constitutional role. The courts, in our system of government, are the only effective fetter on the power of the Executive.

Those who criticize courts which interfere with legislative policy as being 'unelected' ignore the fact that our elected representatives, and those of them who form the Executive, are required to govern according to law. If there is a loophole in legislation which enables a person to avoid conviction in circumstances where the community believes he should be convicted of an offence, the legislature can change the law to ensure that that does not happen in another case. It is not for the courts to close the loophole or criticize those legal practitioners who use it.

In *Sher v DPP [2001] VSCA 110* Brooking JA, delivering the judgment of the court, at [1] – [2] said:

> This is the latest product to come before the Court of a thriving minor industry, in which some lawyers seem to find full time employment, of keeping the streets safe for those who drive when they've had too much to drink. Much time and ingenuity are devoted to this.
>
> We are not at all persuaded that the results of all this activity are in the public interest.

Where the courts interpret the legislation in favour of bureaucratic efficiency, there is no power in the accused or in any other subsequent offender to go back and change the law in his or her favour

The movement to excessive control by the Executive is not a recent phenomenon. However, in the last 20 years the balance between the rights of the individual and the interests of the community has changed dramatically. Those who favour a tightly controlled community have received a considerable boost from the terrorist attack on the twin towers. The legislation which followed that event has given powers of control, arrest and detention which can only be described as horrifying. They are powers which historically we, in this country, have associated with right (or left) wing police states and as being foreign to *our* way of life.

In this context it is vital that the courts are scrupulous to ensure that the legislature acts within power and that uncertainties or ambiguities are resolved, not in favour of bureaucratic efficiency, but in favour of the retention of fundamental common law rights.

That there can be a clash between interpreting legislation so as to implement the apparent intention of the legislature and the duty of the court to ensure that a person whose behaviour is 'outrageous' is convicted only according to law, appears from the statement of Kirby J (dissenting) in *R v Tang [2008] HCA 39*:

> In a case such as the present, there is an inescapable dilemma in the operation of fundamental principles of human rights, reflected in the Code and in Australian law more generally. Protection of persons alleged to have been trafficked as 'sexual slaves' is achieved in this country in a trial system that also provides fundamental legal protections for those who are accused of having been involved in such offences. As is often observed, the protection of the law becomes specially important when it is claimed by the unpopular and the despised accused of grave wrongdoing.

GERARD NASH

No organization can maintain excellence without renewing*

Stephen Hare, General Manager of the Victorian Bar, explains the rationale for a consultant's review of the Bar and its operations.

ORGANIZATIONAL RENEWAL

To illustrate organizational renewal in action, one need go no further than this year's AFL Premiers, Hawthorn. Just over a decade ago, Hawthorn's fortunes and prospects were such that it entertained the possibility of a merger with Melbourne. Galvanized by the crisis, members rallied and installed new leadership, which then examined every aspect of its operations. The rest is now history.

As the stronger of the two clubs at the time, Melbourne did not embrace renewal – at least not on the same scale. A decade later, and galvanized by its own challenges, Melbourne has now also embraced renewal – from which (I hope as a Melbourne supporter) similar results will flow.

The concept of renewal has particular relevance to not-for-profit and membership organizations because of their strong focus on people. The term 'renewal' encompasses the need to keep faith with the values of the organization.

THE CASE FOR CHANGE

Recent survey work and other feedback have identified Bar members' primary concerns as:

1. Positioning the Bar to respond to significant shifts in the dynamics between barristers, solicitors and the courts – and the fragile state of Legal Aid;
2. Improving commercial decision-making;
3. Reviewing the policy framework to ensure it remains responsive to need;
4. Improving marketing of the Bar to attract more work;
5. Improving accommodation;
6. Improving clerking services;
7. Improving recoveries and fee collections.

REDEFINING 'ROLE IN THE MARKETPLACE'

The Bar Council engaged McKinsey & Co and PricewaterhouseCoopers during the year to expand its understanding of the changes affecting the professional environment in which barristers work: the Civil Justice System and Legal Aid fees paid to barristers in criminal matters.

CHARACTERISTICS FOR ORGANIZATIONAL SUCCESS

Redefining the Bar's role in the justice system is not easy. The Bar is an association of very diverse individuals in competition with one another, with different views often strongly held. Finding a common vision, and agreement on the structural unity to deliver it, has special challenges.

Focusing purely on how organizations achieve structural unity, some characteristics are common. They have small Boards with decision-making processes built on the certainty provided by a clear plan and policy framework, and administered by staff and volunteers organized into simple structures – and having clear roles and documented delegations and accountabilities.

To date, the Bar has been successful in compensating for its structural positioning by the extraordinary goodwill and commitment of its volunteers. However,

* Bob Waterman, co-author of *In Search of Excellence.*

the time taken and trade-offs involved to achieve consensus are severely tested by the type of rapidly changing conditions being experienced.

POLICY FRAMEWORK

Formulation of the Strategic Plan, and the related Strategic Review currently underway, have involved examination of the issues referred to in this article. The strategic plan implementation working group has been commissioned to expedite implementation of the Strategic Plan.

MARKET POSITIONING

Organizations working in the professional services sector strengthen their market position by investing in communications and business development resources to gain recognition for their specific competencies (and other differentiating features) and by building 'value adding' relationships.

In business-speak, the investment in communications and 'brand development' is necessarily long term and must be consistent. The same can be said of 'relationship building,' which also requires superior internal collaboration, networking and leveraging shared knowledge.

While individuality at the Bar is in a different class from the shenanigans of some AFL players, the point is made in the article by Dan Silkstone (*The Age* September 27) that individuality need not be subsumed by close management of communications and other organizational behaviours.

> Mr Hammond runs a Melbourne brand agency… He has surveyed the 'brand strength' of all 16 clubs… Surprisingly, he says that misbehaviour and larrikinism can improve club brands if they are dealt with appropriately… Mr Hammond now places Hawthorn as the second strongest brand.

Since the strategic planning workshop, the Bar has actively engaged with communications professionals as it develops its communications and marketing plan.

In the meantime, we are countenancing the appointment of a communications specialist, and plans are already underway to:

- upgrade the website to better target external audiences;
- upgrade the members' section of the website as member services are gradually increased – the first noticeable change will be the linking of *In Brief* to the website in the HTML format as other Australian Bars are doing;
- revamp and expand publications that the Bar will use to communicate with the public;
- develop more constructive media relationships;
- focus on internal relationships between Bar Council and specialist subject area Bar Associations and committees to target stronger external relationships.

One of the differentiating features of the Bar which can and should receive greater recognition is its social responsibility endeavours. The Bar has long-standing commitments to: pro-bono work and support for legal aid; recognition and protection of human rights; and support of indigenous lawyers and equal opportunity – and its support of the government's reform agenda, access to justice, and of judicial and other bodies.

MEMBER SERVICES – ACCOMMODATION

The Strategic Review is in progress. It will, amongst other things, report on the accommodation offerings of the Bar. Some observations are already possible.

Occupancy of the Bar's chambers has declined as a percentage of total accommodation to around 65%. Independent chambers offer variety and meet particular needs – as well as healthy competition. It is, however, a matter of concern that merits further investigation and better understanding that around 15% of practising barristers now operate without chambers.

While percentage occupancy of the Bar's chambers has declined over the last decade overall numbers have not declined.

The number of vacant chambers has settled at a lower level than previously experienced – to some extent this impacts on the flexibility to undertake large scale refurbishments.

Survey and focus-group analysis will no doubt identify reasons for member's choice of chambers – e.g. value, availability – and to what extent the allocation policy or marketing intensity of each set of chambers is influential.

Recognizing that what is occurring naturally is a good guide to preference, a characteristic of external chambers is their development of floor communities with amenities and secretarial services available on each floor.

Inclusion and communication with members will be fundamental to settling future policy.

STRONGER SERVICE ORIENTATION

In the last quarter, provision of telephone and IT services has effectively operated as a joint function of BCL and the Bar Office.

From this collaboration, real and potential gains are beginning to flow. We are reviewing how best to bring external chambers into the Bar's telephone network (Henry Winneke Chambers is already being actioned); and to improve data transfer speeds and introduce what the IT industry calls 'Unified Communications' i.e. the integration of fixed and mobile voice, e-mail, instant messaging, etc.

Advances in technology and software have greatly changed the way in which offices work and clerking services are delivered. Processing speeds and volumes have enabled efficiencies and improved service delivery not contemplated 20 years ago. These developments raise the possibility of up-scaling some functions to free up capacity in other areas.

It goes without saying that the Bar's role in this is as a resource – a source of information and support and collaboration with the clerks.

The perennial and vexed question of fees recoveries and collections is of obvious interest and concern to all, and one to which it would be good to bring the strength of collaborative thought and support, as quickly as is practicable.

In 12 months, the Bar Office has been transformed in terms of effectiveness, teamwork and service orientation.

New projects in which the Bar Office has played a major role this year include: the completion of consolidated tax returns; the introduction of the Professional Standards Scheme and the new National Mediator Accreditation Scheme; the Bar Council strategic planning conference and the Strategic Plan; servicing the needs of independent consultants (McKinsey's, PwC and Management Advisors); negotiating Bar offers such as LexisNexis, Thomsons,

etc; and an intensive review of the Bar Constitution.

The Bar Readers' Course began in 1980 and the Bar Continuing Legal Education program had its formal launch in 2002. Our initial 2002 CLE program was an extension of the Readers' Course, reinforcing and extending the instruction begun in that course. The NSW Bar's Continuing Professional Development Program no longer makes a distinction between the two.

The Bar Council has formed a working group to review the Bar Readers' Course and the Committee has given a strong indication that it should consider the merits of developments in other states, particularly New South Wales and Queensland, so that there is, where possible, commonality. This review is underway.

The maintenance of health and well being is a major focus for the Bar. We expect the recent *Well Being at the Bar* survey to help guide our actions and intend to circulate the survey regularly to monitor the results of this work.

In the meantime, several streams are coming together towards improving the health and well being offerings. The Health and Well Being Committee has been active in examining all available material and engaging with providers to guide future developments. Already it has conducted member seminars with more to follow. Behind the scenes, the Bar is providing specialized assistance to members.

Several months ago I wrote a Well Being Road Map, and since then have visited the NSW Bar to learn about its health and well being programs. There have been fruitful discussions with the Law Institute and the Legal Services Board and a robust collaboration is forming with potential funding for education and self-help tools which would be made available to the profession as a whole.

In conclusion, renewal facilitates the opportunity to take charge of the future by re-positioning the Bar in the marketplace and better responding to the needs of members. Neither the individuality and independence of barristers, nor the values that have sustained the Bar for 125 years, are at risk from embracing renewal. On the contrary, they are the foundations on which we now build for the future.

United Nations White Ribbon Campaign

The Victorian Bar will hold its second White Ribbon Campaign Breakfast on Wednesday 19 November 2008 at 7.30am. White Ribbon Day is the first day of the White Ribbon Campaign and is held on November 25 each year. Organizations including the Victorian Bar sponsor events near to that date to raise awareness of the White Ribbon Campaign.

The White Ribbon Campaign is designed to end violence against women in the world. It encourages men to take a stand (by wearing a white ribbon) and say that violence in any form is never acceptable.

The campaign has its origins in Canada in 1991 when a small group of Canadian men initiated a White Ribbon Campaign to encourage men to speak out against violence against women. The Canadian campaign arose from the second anniversary of a massacre of 14 women by a lone gunman in Montreal, Canada.

In December 1999 at the 54th session of the United Nations General Assembly, Resolution 54/134 was adopted declaring 25 November the international day for the elimination of violence against women. Since then, the campaign has spread to countries on every continent. Recently all Attorneys-General throughout Australia became ambassadors for the United Nations White Ribbon Campaign, along with the Prime Minister. It is a non partisan campaign and many of the ambassadors are drawn from all sides of politics and backgrounds throughout the Australian community.

The Victorian Bar recently sponsored, as part of the Continuing Professional Development Program, a seminar entitled 'Domestic Violence – The Court's Response'. By wearing a white ribbon on 25 November each year, men make a personal pledge that the wearer does not condone violence against women and is committed to supporting community action to stop violence by men against women.

According to a 2006 Australian Bureau of Statistics survey, 39.9% of Australian women report experiencing at least one incident of physical violence or sexual violence since the age of 15, with 29% of all women experiencing physical assault and 17% experiencing sexual assault. In a 2004 report, Access Economics has estimated that the total annual cost of domestic violence is 8.1 billion dollars in terms of costs to the victims, others affected by violence, and the whole community.

Details about the breakfast may be obtained from Ms Denise Bennett, Executive Officer of the Victorian Bar.

Further details about the White Ribbon campaign are available on the campaign website <www.whiteribbonday.org.au>.

MURRAY McINNIS
UN White Ribbon Ambassador

Changes to the Mediation Accreditation Standards – what all mediators need to know*

There is a change in the mediation standards that apply to existing and intending mediators, which took effect from 1 February 2008. A national scheme has been established and the Victorian Bar has become a Recognized Mediator Accreditation Body (RMAB) with authority to accredit barristers under the national scheme. Barristers presently practicing as mediators will be able to continue to mediate but unless they transfer to the new system will not be recognized under the national scheme.

Mediation accreditation has been largely regulated by the Bar and has been largely voluntary, in the sense that parties can select any person they like as a mediator without the requirement for a particular professional qualification. Now, a national mediation scheme has been brought in by NADRAC and will affect many mediators, in that it is expected that many court-associated and professional bodies will only select mediators who are accredited with the scheme. At present, accreditation is 'voluntary' but it is anticipated that in the next two years it will become 'mandatory' – which may have the result that non-accredited people will not be permitted to conduct mediations. Therefore it is strongly recommended that members become accredited with the scheme so that they are eligible for any work for bodies selecting 'accredited' people now, and remain eligible to conduct mediations in the future.

INTRODUCTION OF THE SCHEME

Historically the Bar has provided an accreditation regime for persons who are sufficiently experienced or qualified to act as mediators. Many barristers who have qualification or experience but are not formally accredited have conducted mediations. For some years a national body, NADRAC, has mooted the introduction of a national scheme and consistent accreditation and practice standards across Australia. National conferences took place in 2004 and 2006 which canvassed a variety of views about what was appropriate.

In 2006 the national conference adopted a proposal for a national scheme, which was referred to WADRA for further development. A further proposal for a national scheme was then developed, which could have imposed broad standards which were very strict and which required a very high level practical compliance, introducing such things as police checks for mediators and clinical supervision for family law/counselling type mediations. Very late in 2007 an information session on these proposals was held. Tony Nolan SC attended that session, having learned of it coincidentally. That session presented the move to bring in these standards as to some extent a *fait accompli* across the mediation community across Australia. The Alternative Dispute Resolution Committee responded with a lengthy and well-considered submission, largely put together by Tony Nolan SC with assistance from other members, to resist both the compulsory nature of the changes and the extent of the changes. The Bar Council approved that submission.

The submission was done in a very short space of time, with some consultation of existing accredited mediators by the ADR committee by email. By and large the ADR committee, and those barrister mediators who made comment, felt that the existing level of regulation and the existing system were adequate and that the new system was not required.

Whilst the submission had an affect of watering down many of the changes and giving the Bar a voice in the process, a national mediator accreditation scheme has come into place and the Bar faced the difficult choice of whether to submit itself to the new regime or not. It represented changes to the requirements which will apply to many mediators but, as noted by the submission, contained a great deal with which the Bar disagreed.

However, by then the system had been set up, with 'opt in' and 'commencement' dates having been fixed. Given that the system was by then inevitable, and it was important to continue having a voice (somewhat akin to the old adage 'It's better to be on the inside…out than the outside…in'), the ADR Committee recommended that the Bar become a recognized mediator accreditation body (RMAB) under the new standards.

The Bar has done so. The system is entirely voluntary. However, members are recommended to take it seriously and to

embrace it. Justice Kellam of the Supreme Court and one of the Federal Court Registrars were active movers in the accreditation system and it is apparent that lists of mediators approved by those courts and probably all other courts and, one expects, VCAT, will consist of mediators who comply with the national scheme.

BECOMING ACCREDITED

Accreditations under the old system ceased on 30 June 2008. Only mediators accredited under the new national standards will appear as 'accredited mediators' on the Victorian Bar website.

The Bar has also introduced a system of 'Advanced Accreditation' (see the Bar website at <http://www.vicbar.com.au/b.8.7. asp>). The new system does not have a category of 'advanced' mediators but the Bar is likely to introduce a voluntary category to that effect.

The new system has two avenues of entry. People may apply to become accredited if they are currently experienced and qualified mediators. They may apply if they are presently non-accredited and without experience if they complete an appropriate (five-aday) training course.

Accreditation will last for two years and mediators must seek re-accreditation every two years.

APPROVAL STANDARDS

All mediators seeking accreditation (or in due course, re-accreditation) must comply with the Australian mediator standards, 'Approval Standards', dated September 2007. They require that mediators have personal qualities and appropriate life, social and work experience to enable them to act as mediators. They are required to certify that they have (in summary):

(a) evidence of good character;
(b) an undertaking to comply with the ongoing practice standards and any other legislative requirements;
(c) evidence of insurance;
(d) membership of professional bodies;
(e) evidence of mediator competence.

The ADR Committee has determined that mediators applying for accreditation may self-certify that they comply with these various standards. Whilst members may be subject to audit, proof of compliance is not required upon application once the member has given the undertaking and certified for themselves that they comply.

Members must read and understand the Approval Standards before making that application. The Approval Standards are found on the vicbar website and relevant addresses are given at the end of this paper.

The requirements under the approval standards must be met by all applicants for accreditation *or* re-accreditation but should be relatively straightforward for most members of the Bar.

Under the heading 'Mediator Competence' applicants must certify that they are either 'experience qualified' or have completed the relevant training (see below).

Good character

Given that members of the Bar have to comply with a 'good character' and professional qualification regime in order to hold a practising certificate, it is sufficient to certify that the member is a barrister (by providing their Bar Roll number) and that they hold a current practising certificate. If the person knows of anything which makes them not 'honest and fair and suited to practise mediation' they should bring those matters to the attention of the committee. The person should show that they are 'without any serious conviction or impairment that could influence them as mediators' or if they have been disqualified or previously removed or suspended as a mediator. If any of those things apply, the person should bring them to the attention of the Bar upon application.

Undertaking

Any person applying is required to give an undertaking to comply with the practice standards, the approval standards and any relevant legislation.

Insurance

The applicant is required to give evidence of insurance. Given that to hold a current practising certificate, they must provide evidence of insurance, it should be straightforward. It is only if there is some difficulty with insurance that the matter should be noted upon the application.

Membership of professional body

Membership of a professional body is satisfied by a member certifying that they hold a current practising certificate.

Members should note that these comments apply to the non-blended mediation process, in which 'advice' is not given. Most barristers are familiar with the mediation process where they are not engaged to give advice. The normal form of process in which most barristers are engaged is to act as mediator and not in any way to act as an adviser. The Bar recommends that barristers continue their involvement in that process and be wary of involvement in blended processes such as conciliation, evaluative mediation or any process by which advice is given. The approval standards require additional steps to be taken, in that advice cannot be given without the written prior consent of the participants and that the mediator have appropriate expertise, such as minimum five years' experience in the field in which they are to give advice. In the event a member engages in that process and gives advice, they need to check for themselves that their insurance extends to them undertaking that role.

Mediator competence is divided into the two areas of either 'experience qualified' or those not experience qualified but having completed the relevant training course.

EXPERIENCE QUALIFIED

Members already accredited or working as mediators prior to 1 January 2008 who are able to satisfy the other practice and experience requirements may qualify as 'experience qualified'. The continuing requirements (which must have been met in the two-year period prior to the application) require that the member:

- has conducted at least 25 hours of mediation, co-mediation or conciliation (there is a discretion for the RMAB to reduce this to no less than 10 hours in certain circumstances);
- has completed at least 20 hours CPD, which can include representing clients at four mediations (up to 8 hours), attending professional development courses, seminars on 'mediation or related skill areas as referred to in the practice standard competencies' (anything up to 20 hours), presenting at mediation or ADR seminars (up to 16 hours), coaching, mentoring (up to 10 hours), role playing for trainees (up to 8 hours).

The applicant is also required to meet the practice standards and competencies described in the practice standards. Those

include competency in a range of matters set out in the practice standards, including understanding the need for any intake process (see below), an understanding of, and training in issues relating to power imbalance, confidentiality, impartial and ethical practice, and debriefing. The 'competencies' are set out in section 7 of the Practice Standards and require that the mediator have knowledge competencies including, but not limited to:

- the nature of conflict
- the appropriateness or inappropriateness of mediation (including dealing with power imbalances and that some disputes may not be suitable for mediation because of safety issues or power balances)
- pre-mediation preparation, screening and intake
- communication patterns in conflict and negotiation situations
- negotiation dynamics in mediation
- cross-cultural issues in mediation and dispute resolution
- the principles, stages and functions of a mediation process
- the role and function of mediators
- the role and function of support persons, lawyers and other professionals in mediation
- the law of mediation on confidentiality, enforceability of mediation agreements and liability.

The skill competencies include but are not limited to:

- preparation and dispute diagnosis in mediation
- intake and screening of parties and the dispute to assess suitability for mediation
- conduct and management of the mediation process
- appropriate communication skills, including listening, questioning, reflecting and summarising required for the conduct of the mediation
- negotiation techniques and the mediator's role and facilitating negotiation and problem solving
- mediator interventions which are appropriate for common difficulties in mediation
- potential responses to high emotion, power imbalance and violence
- use of separate meetings and shuttle mediations
- mediation agreements.

The applicant must have Ethical understanding in relation to:

- the avoidance of conflict of interest
- marketing and advertising mediation
- confidentiality, privacy and reporting obligations
- neutrality and impartiality
- fiduciary obligations
- supporting fairness and equity in mediation
- withdrawal and termination of the mediation process.

It would appear that the CPD may relate to mediation directly or to related areas, e.g. confidentiality or ethical CPD sessions.

Members must read the practice standards to ensure that not only their CPD requirements meet the practice standards but their personal skills and competencies fall within the requirement of the practice standards.

As said above, the Bar has a discretion to reduce the 25-hour mediation requirement down to 10 hours where there are circumstances such as 'family career or study break, illness, lack of opportunities', and so on. If members wish to take advantage of this opportunity they should say so in their forms and they will need to provide information as to why they should have that requirement reduced. The Bar may require top-up training or reassessment of applicants. The Bar is trying to be practical about the application of the standards and members are encouraged to make the application even if they feel they may not satisfy the need for a reduction in the hours. Each application is considered on its merits.

'NEW' MEDIATORS

Mediators who are not able to be experienced or qualified in the sense they are not previously accredited or have not worked as a mediator prior to 1 January 2008 must meet the training requirements:

- Applicants must have completed a training course that is conducted by a training team comprising at least two instructors (with a certain minimum level of experience).
- An applicant must complete a minimum of 38 hours excluding the assessment process, where the assessment process is to be a separate one-and-a-half-hour assessment including a written test.
- Each trainee participant is to be involved in at least nine simulated mediations and in at least three of them perform the role of mediator within a training course that provides written debriefing coaching feedback.

The requirement is therefore essentially of a five-day course presented by a competent and recognized institution with a sufficient level of instruction and where there is a separate one-and-a-half-hour assessment including a written test. It is anticipated that the existing training organizations will start to offer courses that comply with these standards. The training may be completed in a combination of courses, provided they are completed within nine months of each other.

Members who have completed a course recently should look very seriously and urgently at topping up their existing training. The courses that were commonly offered prior to the introduction of these standards may not comply and members may need to complete extra training to bring them within the required standards if the course they completed did not do so. Members who are in this situation are strongly encouraged to contact the ADR Committee. (If there are sufficient members who are within the nine-month window and who require top-up training there may be some value in conducting a course which provides that top-up training.)

ONGOING COMPLIANCE REQUIREMENTS

All of these training and experience requirements are ongoing. Whichever accreditation route people initially take, they are required to meet the standards, and to carry out 25 hours of mediation and 20 CPD points in each two-year cycle prior to re-accreditation.

PRACTICE STANDARDS

In broad terms the practice standards have been discussed above, in the context of the particular areas of 'competencies' which people must certify when making their initial application.

All members must not only read but actually comply with the practice standards. One of the big changes brought in by the practice standards is a need to 'ensure' that a full 'intake' process occurs in each mediation. The objectives of that intake may include:

- determining whether the mediation is appropriate and whether variations are required (e.g. the need for an interpreter, a co-mediation model and whether violence is an issue)
- assisting parties to prepare for the process
- ensuring every participant has information about the roles of each party, such as their lawyers, their support people and so on
- checking what information (such as documents and so on) needs to be exchanged or available
- settling preliminary issues such as what documents or notes will be kept by the mediator, confidentiality and/or authority to settle or to negotiate
- clarifying the terms of any agreement to enter into a mediation process
- settling the venue and timing.

In addition, the mediator should do the following with the participants:

- describe and explain the mediation process to be used
- discuss appropriateness, benefits, risks of the process and alternatives
- discuss confidentiality and its limitations
- advise how and when the parties or the mediator can suspend or terminate the mediation
- reach agreement about costs
- advise regarding any indemnity provisions of the agreement to mediate
- advise the parties of a mediator's role in the provision of advice. For most mediations that is going to require, where the mediator is a lawyer, the mediator to inform the participants that he or she cannot provide legal advice or represent any of the participants in related legal action. (Where a 'blended process' which permits the giving of advice is used, then a different process is appropriate. That is not covered in this paper and any members wishing to undertake that process should consult the practice standards for their obligations.)
- discuss or inform participants of aspects of the mediation including circumstances in which separate sessions may be held, how they may seek advice during the process, how they may withdraw from the process, that they are not required to reach agreement, that they may consult separately with their legal representatives, and outline circumstances in which people such as experts may be involved.

Mediation agreements should be in writing and if not the mediator should record the participant's understanding of the above matters. Mediators are to provide the participants with a copy of the practice standards or advise where and how they can be accessed (e.g. through a website).

The Bar website has a sample intake sheet and a sample mediation agreement, amended to take into account the practice standards. Members are encouraged to use those documents. If they wish to create their own mediation agreements and intake process they should ensure that they comply with the practice standards.

The standards require that the mediator ensure that the intake process has taken place, although the mediator is not required to do it personally. It appears to be sufficient for mediators to provide competent solicitors with the intake requirements then to ensure that the parties have understood them prior to the commencement of the mediation. This may require a longer personal intake process when meeting the parties and may mean that some mediators have to recast their introductory comments to the mediation to make sure all matters and the practice standards are covered. However the mediator is not personally required to interview the participants to ensure that each of the intake requirements is covered. The mediator would be advised to ensure that the mediation agreement has been signed by all parties, otherwise he or she is required to note the parties having read and understood these various intake requirements. Members should find the intake checklist provided by the Bar to be a very useful document.

In summary, before commencing mediations, mediators should send out to their instructors a covering letter which includes the intake checklist and the mediation agreement and refers to the Bar website, where the practice standards may be found: <www.vicbar.com.au/documents/FinalPracticeStanards200907.pdf>.

At the mediation, the mediator should check with the solicitors that:

- the intake process has occurred
- everyone at the mediation has a copy of the practice standards or knows the website address where they can be accessed
- the mediation agreement has been signed by all parties
- the mediation process has been explained to all attending and run through an overview of it, including those matters set out above.

ETHICAL MATTERS/ CONFIDENTIALITY

All members of the Bar should already be familiar (as mediators are required to be) with the obligations of a mediator to avoid conflict of interest by reason of their general ethical obligations.

Mediators must explain and clarify confidentiality. A confidentiality clause should be included in all agreements to mediate. The mediator must clarify the participants' expectations of confidentiality and address the confidentiality of any agreement reached at the outcome of the mediation as well as the confidentiality of the process including the main and any separate sessions. Mediators are obliged to inform the participants of the 'limitations of confidentiality, such as statutory, judicially or ethically mandated reporting'.

The obligation to warn of the limits to confidentiality is new. The mediator is obliged to inform the parties if he or she is subpoenaed or otherwise notified to testify or produce documents, and is obliged not to give evidence without order of the court or tribunal if the mediator reasonably believes that doing so would violate the confidentiality obligations. The standards specifically allow a mediator to include an indemnity provision in an agreement to mediate to cover any relevant costs of giving evidence.

With respect to confidentiality, mediators are not required to retain documents relating to a dispute, although they may retain the written agreement to enter into the mediation process, and some mediators may choose to retain their notes on any agreement as to the outcome where 'duty of care' or 'duty to warn' issues are identified.

OTHER PROFESSIONAL MATTERS

Mediators should also participate in professional debriefing sessions. This can be done informally and in groups. Members are encouraged to attend the Bar CLE events, and discussion groups run either

by the Bar or mediation organisations or on an individual basis with other barrister/s or mediator/s. They should also provide mentoring and coaching for junior mediators who wish to debrief or who wish to undertake training.

The professional standards require mediators to understand their obligation to promote cooperation in interprofessional relations (s.8 of the standards). Most members of counsel will have no difficulty with this but may need to remind themselves to resist the natural temptation to provide advice to the other professionals who are involved in the mediation process.

Mediators must be aware of their obligations to give procedural fairness. It is observed that the obligations as to procedural fairness probably mirror the ethical obligations already incumbent upon barristers. (These comments apply only to the standard model – a 'blended model', where advice is given, may require a higher level of procedural fairness but that is outside the scope of this article.)

The standards require that the mediator:

- not exert undue influence and ensure that any agreement reached is reached on the basis of informed consent
- provide each participant with an opportunity to speak and be heard
- suspend or terminate a mediation if the mediator believes the participant is unable or unwilling to continue
- encourage balance to negotiations and understand and avoid manipulative or intimidating tactics being employed by participants
- if a party needs information or assistance ensure that party has time and opportunity to access the sources of such assistance
- encourage participants where appropriate to obtain independent professional advice or information
- fulfil the duty to support participants in assessing the feasibility and practicality of any proposed agreement in short- and long-term and taking into account the interests of vulnerable stakeholders.

Mediators should not be giving advice to people about whether or not they should be entering into any particular agreement. However mediators may play 'the devil's advocate' by asking parties questions such as whether they are capable of meeting a payment they have agreed to make in the timeframe required, how the agreement is going to impact upon their lives or business in the future, how the agreement will impact on their lives compared with the possible outcomes of running a court case and generally promote discussion with the participant of their awareness of their interests and other peoples' interests affected by the dispute. The mediator should not provide legal or other advice.

The mediator is not to pressure participants into an agreement or make a substantive decision on behalf of any participant. Most of these requirements are quite subjective and it is going to be a matter of the mediator's good instincts as to how they are best carried out. These procedural matters might well be the subject of notes which are kept in case of problems if mediators detect difficulties in the process.

Mediators should be familiar with their obligations to provide information which may be information about themselves and their training and so on. For most mediations this is not going to be difficult.

Mediators are obliged to be aware of their obligations with respect to the termination of a mediation process. Section 11 of the standards provides that a mediator may suspend or terminate a mediation process if continuation of the process might harm or prejudice one or more of the participants. However they should also be alert to situations where parties or their advisers seek to misuse the mediation process (e.g. solely for the purpose of delay so as to conceal or dissipate assets; or otherwise not in good faith). The mediator may suspend or terminate a mediation if in the opinion of the mediator the process is being misused or its usefulness has been exhausted. However they should give reasonable notice to the parties that they are doing so.

A problematic requirement is that the mediator may withdraw where he or she believes that an agreement reached by the parties is unconscionable and if they do withdraw they are obliged to assist the parties in assessing further process options for dealing with their dispute. It was observed in the Bar submission that the provision is ill-conceived. In any mediation people may enter into agreements which affect their rights, unconscionable or not, for reasons best known to them or their advisers. The mere affecting of their rights does not itself create unconscionability or lead to a flaw in the process such that the mediator should terminate. The mediator is not acting for one of the parties or engaged to provide advice – therefore it is arguably inappropriate for them to take any steps simply on the basis that one of the parties has done something to enter into an unfavourable agreement. Obviously an agreement procured by coercion or violence breaches a number of the practice and ethical standards so it is difficult to see how this particular termination process may apply over and above that.

Section 13 of the standards provides for various guidelines with respect to the promotion of services. Those standards are generally consistent with barristers' obligations as practising barristers. In particular the mediator should refrain from promises and guarantees of a result.

Members who are currently mediating or anticipate engaging in the practice of mediation are strongly encouraged to read and comply with the approval and practice standards and to make application for accreditation as mediators so that they do not miss out on opportunities provided for mediation by those bodies who have or will require only mediators accredited to the national standards to be used.

The members of the Alternative Dispute Resolution Committee are happy to deal with further inquiries and will be conducting further training sessions during the course of the year to deal with various mediation-related issues.

USEFUL LINKS

The accreditation of mediators can be found at the vicbar website <www.vicbar.com.au>. Click on the heading 'Mediation' under the heading 'About the Bar' on the left-hand side bar. Click on the subheading 'Accreditation' for information about the changes to accreditation. Both the approval standards and the practice standards, as well as the information handouts from an information session conducted on 17 March 2008, are available as links on that website. The application forms are also available on the website.

*CAROLYN SPARKE

The views in this article are those of the author.

Opening of 16th floor Aickin Chambers

Barristers on the 16th floor at Aickin Chambers celebrated the opening of the chambers recently with approximately 280 guests. Among them were Federal and State justices, County Court judges and the Solicitor-General.

Murray Mclnnis welcomed the guests and then Justice Weinberg responded. It was noted that the 16th floor features a modern design including two mediation rooms. The two mediation rooms have been named after former Federal Court Justices 'Jenkinson' and 'Keely'.

The co-operation of Barristers Chambers Limited with the barristers on the 16th floor resulted in the development of modern chambers with outstanding facilities. Geoff Bartlett and Paul Anastassiou were among the guests. No doubt, in part, they attended the function to check on one of their more significant tenants who occupies two rooms.

The Essoign Club catered for the event and it was an outstanding success. Significant contributions to the design of the floor were made by Justin Bourke and Bill Guzzo in collaboration with the architects appointed by BCL.

Justice Ray Finkelstein and Justice Sally Brown

Norman O'Bryan SC (left) and Justice Peter Heerey (right) with a guest

Justice Mark Weinberg, Justin Bourke and Murray McInnes

Geoff Bartlett and Paul Anastassiou SC

Justin Bourke, Justice Mark Weinberg, Murray McInnes and Geoff Bartlett

Every dog has his day

Peter Anthony Lowe, Appellant and Auckland City Council, Respondent
Hearing: 19 March 1993
Counsel: Appellant in person
No appearance by or on behalf of Respondent
Judgment 12 May 1993

RESERVED JUDGMENT OF HAMMOND J

There is, in Auckland, a handsome German Shepherd called Ben. He belongs to the appellant. The appellant did not register his dog, contrary to s.39(l) of the *Dog Control and Hydatids Act 1982*. He was fined $100.00 and Court costs in the District Court at Auckland. He appeals to this Court on the ground that the sentence was manifestly excessive.

The learned District Court Judge (who on an appeal is blessed with an anonymity not conferred on me) filed the following memorandum as to his reasons for the sentence imposed.

MINOR OFFENCES

Your Honour may not be familiar with the manner in which 'Minor Offences' are dealt with in this Court. Notices of Prosecution for minor offences are surreptitiously placed in the Judge's 'In Tray' at frequent and irritating intervals, usually in his or her absence. They come in stacks or bundles and are usually accompanied by numerous other prosecutions instigated by Government departments, local and other statutory bodies. At or about the same time there will also appear, equally mysteriously, applications for Second Hand Dealers Licences, Auctioneers Licences, Sharebrokers Licences, Massage Parlour Licences, Immigration Removal Warrants and many others. Also not to be overlooked are stacks of Fines Enforcement files, applications for rehearings of minor offences such as overparking and all manner of similar misdemeanours. These are often carefully concealed beneath a pile of civil interlocutory applications and miscellaneous outpourings of our criminal, quasi criminal and civil system. The aforesaid offence of non-registration of a male German Shepherd cross of a greater age than three months is, of course, merely one particular example of a minor offence. The range of minor turpitude is enormous. To mention but a few – electrical wiring regulations, by-law breaches, underage drinking, failure to send child to school (truancy). (This one may now have been repealed.) Others may be found scattered like grains of wheat amongst statutes and regulations.

THE DISPOSAL THEREOF

The judge peruses the mountain of files with great care and then imposes whatever penalty he or she deems appropriate. No hearing is held. No defendant or counsel are present. No submissions are made. No tears are shed. No howls of derision are heard from the gallery. Fellow miscreants do not suddenly awake from slumber and bleary-eyed stagger drunkenly forward or in such other direction as their condition impels. No anxious mother suckles a fretful child. There are no sideways glances or rolling back of eyes from counsel's table and certainly no titters are heard to run round the Court.

The judge sits alone in his chambers and affixes his facsimile signature to the information sheet, perhaps muttering silent curses to himself as he does so. He does not deliver a condemnatory monologue, at least not one that is recorded or intended for the ears of others.

I hope this short memorandum may assist your Honour in dealing with this appeal.

The fateful moment for the hearing of this appeal arrived. The Court Crier and the Registrar duly attended on me in my chambers. In full High Court regalia we processed through several levels of the High Court building at Auckland. Other processions of bewigged and black-robed judges were likewise criss-crossing the building at 10.00am, sidestepping each other in a manner reminiscent of line-out drills for aged All Blacks. The Court Crier threw open the door of the courtroom and shrieked, 'Pray silence for his Honour, the Queen's Judge'. One enters with due decorum, hoping that this chorus of welcome has not caused too many in the crowded courtroom to faint in the excited anticipation of it all. But nobody faints in this case;

besides my procession, there is in the courtroom only the appellant, looking quite purposeful, and a woman companion. There is no counsel present for the Auckland City Council.

The case is called. The appellant steps confidently forward. He announces that he is prepared to proceed. I ask him if he has a dog called Ben? And if so, did he register it? Yes, and no. Why did he not register it? Because he is on an invalid benefit, the exact amount of which is so pitiful that I forbear to mention it here. I ask if he had mentioned his plight to the relevant city officials. The appellant says that he offered to meet the registration fee on a time-payment basis. This was summarily declined. He was summonsed, fined, and hence his appearance before me.

I gazed at the ceiling. Did you tell the District Court Judge of your problems? Yes sir, I did: *Nunc, vero inter saxum et locum durum sum*. (For the uninitiated – now, I really am between a rock and a hard place: the appellant says he did appear; the District Court Judge said he did not).

There are countless admonitions in the law reports abjuring judges in my position from tinkering with the sentences of judges in the Court below. And worse, I recall that it was only a matter of several weeks ago that in the High Court I delivered, in stentorian fashion, a judgment saying that in areas where District Court judges have greater expertise than High Court judges, one ought to be especially careful in interfering.

One wonders, in those circumstances, on what basis one could possibly interfere. The most far-flung possibilities flash across one's mind. The late Professor Davis campaigned tirelessly in his years as a law professor and Dean of Law at Auckland to end discrimination between cats and dogs. In his view (expressed in the august pages of no less than the *Modern Law Review*) dogs are rigorously controlled, whilst, if I may be permitted the expression, cats are entitled to ponce about town, completely unregulated. Was there something in the new New Zealand Bill of Rights that would end this shameful discrimination and assist Mr Lowe?

I began formulating an oral decision in my mind. Then I realised that I was mumbling aloud, and the Registrar was looking at me strangely, or perhaps more strangely than usual.

Pragmatism, some will say fortunately, took over.

The decision of the learned District Court Judge is quashed, and I substitute therefore a fine of $20.00. I urge upon the appellant the wisdom of the registration of Ben.

Cave canem (again, for the uninitiated, beware of the dog).

R G HAMMOND J

Reflections on progress in East Timor

Oxford University Society in Victoria, Thursday 11 September 2008.
Speech by the **Honourable Justice John E Middleton**

Ladies and Gentlemen, as you know from the invitation to this luncheon, I have recently visited East Timor.

The paradox which hits you on arrival in East Timor results from the disconnect between one's preconception of the country as a warzone, along with the expected destruction and chaos, and the reality, which is a country of great natural beauty at peace. A travel brochure would conjure up the stunning mountains, pristine tropical beaches and the beauty of the coral reefs, the cleanest water in the world, and 'the red fish' – the clown fish from the popular movie *Finding Nemo*.

Getting to Dili does not involve checking in at the First Class Lounge at Tullamarine, having a glass of Veuve and then being woken upon touchdown in Dili. It involves the best part of a day getting to Darwin, overnighting at the Star City Casino – itself an experience worthy of a luncheon speech, and then a 5am wake up for a 7am flight to Dili in a double propeller plane, complete with Snickers bars served for breakfast.

As you descend towards Dili airport, the plane banks steeply and you notice the unexpected natural rugged beauty of Timor. You fly over steep mountains which make up much of the land, and then the limited flat land on the coast, where most of the larger towns are. Dili itself is built on a long, curving stretch of beach, with the mountains on one side forming a spectacular natural backdrop and the ocean, lined with palm trees on the other. On one side of the bay is a Rio-esque statue of Jesus, standing atop a metal globe.

The Timorese people were, in my experience, gregarious, charming and positive. It was common for a young Timorese person to approach me or my associate and strike up a conversation. One even asked me to be her 'benefactor' for her University course, which I think requires nothing more than what I do for my own children, but with infinitely more gratitude.

It is important to understand some of the history relating to East Timor, as it helps us understand the situation today. Timor was first colonized by the Portuguese in 1520. The Dutch, who claimed many of the surrounding islands, took control of the western portion of the island in 1613. Portugal and the Netherlands fought over the island until an 1860 treaty divided Timor, granting Portugal the eastern half of the island.

In 1949, the Netherlands gave up its colonies in the Dutch East Indies, including West Timor, and the nation of Indonesia was born. East Timor remained under Portuguese control until 1975, when the Portuguese abruptly pulled out after 455 years of colonization. The sudden Portuguese withdrawal left the island vulnerable and, nine days after the Democratic Republic of East Timor was declared an independent nation, Indonesia invaded and annexed it.

Indonesia's invasion and its brutal occupation of East Timor, which was small, remote, and desperately poor, largely escaped international attention. East Timor's resistance movement was violently suppressed by Indonesian military forces, and more than 200,000 Timorese are reported to have died from famine, disease and fighting since the annexation.

After Indonesia's hard-line president Suharto left office in 1998, his successor, B. J. Habibie, unexpectedly announced his willingness to hold a referendum on East Timorese independence, reversing 25 years of Indonesian intransigence. On 30 August 1999, 78.5% of the population voted to secede from Indonesia. But in the days following the referendum, pro-Indonesian militias and Indonesian soldiers retaliated by razing towns, slaughtering civilians, and forcing a third of the population out of the province. After enormous international pressure, Indonesia finally agreed to allow UN forces into East Timor on September 12. Led by Australia, an international peacekeeping force began restoring order to the ravaged region.

On 20 May 2002, nationhood was declared. Charismatic rebel leader José Alexandre Gusmão (known as Xanana Gusmão), who was imprisoned in Indonesia from 1992 to 1999, was overwhelmingly elected the nation's first president.

The first new country of the millennium, East Timor was also one of the world's poorest. Its meager infrastructure was destroyed by the Indonesian militias in 1999, and the economy, primarily made up of subsistence farming and fishing, was in shambles. East Timor's offshore gas and oil reserves promised the only real hope for lifting it out of poverty, but a dispute with Australia over the rights to the oil reserves in the East Timor Sea threatened to thwart those efforts. The oil and gas fields lie much closer to East Timor than to Australia, but a 1989 deal between Indonesia and Australia set the maritime boundary along Australia's continental shelf, which gives it control of 85% of the sea and most of the oil. Under these terms, Australia was to receive 82% of the oil revenues and East Timor just 18%. Finally, after years of wrangling, the two countries agreed in May 2005 to defer the redrawing of the border for 50 years and to split the oil and gas revenues down the middle.

East Timor's capital, Dili, descended into chaos in early 2006, when the then prime minister, Mari Alkatiri, fired almost half the country's soldiers for striking. The fired soldiers, who had protested against low wages and alleged discrimination, then began rioting, and soldiers loyal to

the prime minister started battling them. Soon the violence had spread to the police force and the civilian population, causing about 130,000 to flee their homes to avoid the bloodshed. Australian troops were called in to control the unrest. In June 2006, Prime Minister Alkatiri resigned in an effort to stop the country's disintegration. In July Alkatiri was replaced by José Ramos-Horta, winner of the 1996 Nobel Peace Prize. José Ramos-Horta later became President, and Xanana Gusmão became Prime Minister, which is the situation today.

The recent political instability of the country reached boiling point in February 2008, with assassination attempts on both Prime Minister Gusmão and President José Ramos-Horta.

Turning now to the current position: the current political situation is best described as stable but fragile, notwithstanding that the government was democratically elected. There is still some level of pro-Indonesian sentiment amongst certain Timorese, as the Indonesians arguably did more to create infrastructure than the Portuguese. Although there is no contesting the horror that ruled at times under the Indonesian regime, there were some very real advantages under Indonesian rule – for example, I was told that rice was subsidised under Indonesian rule and cost US$1 a bag, rather than the US$14 a bag it costs today.

The Timorese soil is poor, and there is relatively little primary agriculture as a result. A lot of rice is imported from Vietnam or Thailand, and although it is still subsidised by the Timorese Government the higher prices now make it unaffordable for many Timorese, who get by on what they can grow as part of their subsistence lifestyles. There is another tier of society in Timor, however – expats and the educated Timorese. Most Timorese who can afford to eat in the limited restaurants or own cars were educated overseas – many in Melbourne – and now work for NGOs, international agencies or in the public service (which pays between US$100 and $400 a month).

The expats in Timor (with the exception of the UN) come generally from Portugal or Australia. Foreign aid workers, army and police are ubiquitous, and are composed mainly of UN workers, whose white Landcruisers would comprise roughly every second vehicle in Dili, the Portuguese GNR – a unit of the UN Police who spend a lot of time working on their bodies and tans running along the foreshore – the Australian Federal Police, and the Australian Army. The coffee shops in Dili were filled with soldiers casually resting their rifles against the tables.

The buildings in Dili are in varying states of disrepair. There is still some very pretty Portuguese architecture, but many of these buildings were gutted by the fires set by the Indonesians on their departure following the referendum in 1999. Many of them sit unused today. Some of the newer buildings are constructed by foreigners: many bars and restaurants owned by Portuguese and Australians, and some incredible embassies of mammoth proportions, notably those of China and the United States. The Chinese constructed a building recently with Timor's only elevator, but given Dili's unreliable electricity supply (which comes from a few old generators), the lift remains unused.

Nevertheless, the atmosphere was very calm, and ran in the face of my expectations. It feels in many ways like other south-east Asian cities, but the military presence tempers any 'holiday' vibe which might otherwise exist. Certainly there was no violence there during our visit, but it's hard to know whether the calmness exists only because of the Australian army officers drinking coffee with their rifles or whether the large numbers of military and UN officers are somewhat superfluous. Some of the potential sources of unrest include disaffection from the growing number of unemployed youth as well as supporters of political parties not in the current ruling coalition. The current government is about to embark next year on its Year of Infrastructure, during which it will spend some of the $US3.2 billion sitting in its coffers from its sources of oil and gas in the Timor Sea.

The government in East Timor also wants to ensure that it sets up appropriate anti-corruption law this year as part of its Year of Administrative Reform so that all building contracts created during its Year of Infrastructure are subject to proper governance and subject to scrutiny.

So East Timor is at a crossroads. It has the opportunity, with careful guidance and management of its people and resources, to become a prosperous democracy. It also, like many failed states before it, could become another Sudan or North Korea. Like the Australian bush in Summer, it is in a precarious position, and tensions could ignite at any moment. Players such as international aid agencies, foreign governments, multinational corporations, and of course the East Timorese government, will need to proceed with caution.

As for potential tourism, one has to be realistic about the island nation's ability to become a tourist mecca anytime soon. It first needs vital infrastructure to support such an industry. A lack of infrastructure is also holding up serious foreign investment in the country.

The government now has the $US3.2 billion in oil revenues I have spoken of tucked away in US Treasury bonds, which should provide the financial backbone to delivering new roads, electricity and improved port and airport services.

But Prime Minister Gusmão, on a trip to Australia recently to meet with politicians and senior business figures, was keen to find new sources of revenue by promoting East Timor's investment opportunities to foreign companies. Timor has a multi-billion dollar economy with a growth rate of around 8% a year with very low taxes, so opportunities are there.

My own view is that Timor is in a very good position to head down the road to creating a successful state. Its people, ministers and particularly its Prime Minister seem determined to use Timor's resources wisely and transparently, and to move forward at a pace which is practically achievable and which is economically sound. They realise that the time to act is now, and that their goals need to be clearly identified and documented. The fact that this year and next year have been designated as a Year of Administrative Reform and the Year of Infrastructure illustrates this.

So, what were my Associate and I doing in East Timor? In order to implement its anti-corruption law as part of its administrative reform, the Prime Minster of East Timor requested from the Chief Justice of the Federal Court of Australia, Michael Black, earlier this year some assistance from a judge and requisite support staff. It was arranged that I be the judge to provide the assistance, after much prompting on my part to have the opportunity to support East Timor's endeavour.

Our task was to assist the Prime Minis-

ter by advising on a possible format, and range of functions, powers and duties, of an anti-corruption body to reflect the desires of the Timorese government. Given that the precise nature of the body is still to be finalised (as the government is consulting with the Timorese people and agencies and Timorese institutions before implementing any anti-corruption measures), the advice I was to give needed to be malleable; that is, it needed to be in a form which could be implemented notwithstanding whether the relevant powers were to be exercised by, for example, a Commission, a Commissioner, or the Provedor (an office currently in existence and with, inter alia, human rights functions). I was instructed, however, that a non-negotiable feature of the laws was that they would be effective, broad and comprehensive. With that in mind, and with reference to the anti-corruption legislation in force in Hong Kong, Macau, Singapore, Indonesia, Malaysia, Western Australia and New South Wales, we went about drafting a document which set out what were considered to be the important functions, duties and powers of an effective anti-corruption body. The definition of corrupt conduct was wide, and covered the general notion of 'conduct involving the abuse of power or trust or violation of duties by a public official enriching or benefiting himself and/or a third party or causing damage to someone' as well as specific examples of corruption, including:

- official misconduct (including breach of trust)
- extortion
- nepotism
- embezzlement, or embezzlement of use
- favouritism
- bribery
- blackmail
- obtaining or offering secret commissions
- fraud
- theft
- perverting the course of justice
- illegitimate use of public force
- any crimes undertaken in the exercise of public functions.

The possible functions which an anti-corruption body might need to undertake include:

- to conduct research on corruption, the incidence of corruption, and related issues;
- to undertake preventative, educative and advisory action to prevent corruption;
- to direct, instruct, advise and assist any public agency or entity, public official or other person on ways in which corrupt conduct may be eliminated;
- to investigate any allegation or complaint regarding corruption;
- to examine the laws governing, and the practices and procedures of, public agencies and entities, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which may be conducive to corrupt conduct;
- to make and furnish reports and recommendations, and make findings and form opinions for this purpose and;
- to assemble evidence that may be admissible in the prosecution of a person for corrupt conduct.

The powers necessary to achieve these aims, as provided in other legislation, included public enquiries (which can be important for dealing openly with public disquiet, and putting any unfounded claims to rest quickly) and private examinations, and all the usual powers to summon witnesses and obtain evidence (including search and seizure powers). Included also were powers to freeze bank accounts, restrain travel and tap phone calls.

It was necessary to include reference to the mandated cooperation of the anti-corruption body with all public agencies, the Prosecutor-General and other integrity institutions. One of the practical problems we faced in terms of giving the legislation teeth is that there is a backlog of over 4,000 cases resting with the Timorese Prosecutor-General. Accordingly, to make sure that corruption cases were seen as of utmost importance, corruption cases will need to take precedence over other cases.

The drafting and passing of the anti-corruption law may have been the easy part – it is the implementation of the law which will provide the real challenges. The first and most obvious hurdle will be finding the people power and fiscal resources. Finding the number of sufficiently trained people to staff an anti-corruption body will be tricky in an underdeveloped country. If need be, I am sure that the Australian Government will give proper consideration to supporting an anti-corruption body for East Timor, to make sure that it is effective and sustainable. Secondly, even if the cases are investigated and presented to the Prosecutor-General, there is the further problem that the Prosecutor and Courts are under-resourced. Hopefully, prioritizing corruption cases will be some answer to this problem. Thirdly, as I alluded to earlier, the most appropriate body to fight corruption is a source of some disagreement. Presently, the Provedor has certain very limited anti-corruption powers, and there are some who argue that his or her role should simply be expanded. This view is countered by the fact that the Provedor has numerous other functions, including human rights abuses; the potential conflict of these functions with anti-corruption powers is obvious.

I am optimistic about the implementation of the proposed law, although, as I have said, the obstacles in its way will be the lack of human resources, both in number and technical expertise. However, the time is right for improvement.

Paul Collier wrote in his book *The Bottom Billion – Why The Poorest Countries Are Failing and What Can Be Done About It* (2007):

> Unfortunately…technical assistance in a failing state prior to turnaround has little effect on the prospect of a turnaround occurring. The experts come and preach and people listen politely, but not much happens. This is bad news for the agencies that do this and little else, and it is also bad news for failing states since pouring in big technical assistance would be pretty easy. However, things look dramatically different once a turnaround has started, or indeed if the state has a new leader. Technical assistance during the first four years of an incipient reform, and especially during the first two years, has a big favourable effect on the chances that the momentum of the reforms will be maintained. It also substantially reduces the chance that the reforms will collapse altogether.

Turnaround has commenced in East Timor. The country has a new leader. For Timor there is an open moment in history – these moments are most productive when leaders see into the future and seize opportunities. I am confident that is happening in East Timor.

Perspectives

'But the Emperor has nothing on at all' cried a little child.

Danish Fairy Tales and legends
HANS CHRISTIAN ANDERSEN

I had a call recently from Kevin Rudd. He said something to the effect that he had heard that I specialized in turnarounds and he wanted someone with that experience to look at how the country was going. Strangely enough, his spiel was almost exactly the same as that of many of the clients for whom I have acted over the years. 'Look, we are in pretty good shape and heading in the right direction but we thought it wouldn't hurt for someone to have a look at how we are going. There aren't any skeletons in the cupboard.'

I told him how I go about interviewing everyone on a confidential basis and it was obviously impossible to interview everyone in Australia. 'Hang on a minute,' he said. 'I don't want you going and interviewing the public but just some key people like the cabinet ministers etc.' 'I thought you wanted me to get an idea of how you are going. How can I get that idea if I only interview the people who are actually making the decisions. Surely they need to know how their decisions are impacting upon people?' Kevin paused for a while and said, 'You know; you are right! I will leave it to you.'

So I started to nose around. I got a few of my clients together and asked them what they thought were the major issues facing the country and they all replied, almost instantaneously 'climate change'. Everyone they spoke to was concerned about climate change and the effect that it was having or going to have on our lifestyle. Then they expressed concern about the high cost of money and the high cost of energy. Most were concerned about the consumption of fuel and the effect that it was having on the environment. Do you know, no one mentioned terrorism or Afghanistan or Iraq or Burma or Zimbabwe or the Middle East.

So where do I go from here? I decided that as the oil issue was pretty much a global issue, it would be better to start with something closer to home and so I thought that we ought to look at the cost of money.

When I made a cold call to Glenn Stevens at the Reserve Bank he wouldn't take my call so I had to get Kevin's secretary to organize an appointment. Glenn was pretty busy and he could only fit me in between 9.00 and 9.15am in three months' time which was way out of my time frame. I wrote a letter to Kevin and told him that I couldn't go ahead with the consultancy because of my inability to get in touch with Glenn. A day later I get a call from Mr Stevens' secretary. He discovered that he had a cancellation that afternoon and would be available.

I rolled up to the posh Reserve Bank of Australia building in Martin Place. (I had to check the address with the White Pages because their website didn't mention their location other than it was in Sydney.) I am ushered into a huge waiting room and offered coffee and then asked to wait. I picked up the *Financial Review* and on the front page was an article quoting the Governor of the Reserve Bank as saying that with the price of oil and its inflationary effect, there is a risk that interest rates would have to increase. On the second page was an article about how something like 40 per cent of mortgagors were behind with their payments and that housing repossession had reached alarming proportions. On the multi-screen panels on the wall there were reports from Bloomberg, CNN, etc. reporting that Australian miners had just negotiated huge increases in commodity prices with the Chinese.

Suddenly, a very sophisticated woman introduced herself to me as Mr Stevens' secretary and said that he could see me now. I was then ushered into an even bigger room and I almost needed binoculars to catch a glimpse of Mr Stevens behind his desk at the far end of the room.

He motioned me to sit down. I gave him the usual introduction about confidentiality and he said he wasn't concerned about confidentiality and was happy to be quoted on anything he said because he had nothing to hide and, in any event, he had already made statements to the market of everything that was pertinent.

I introduced myself as 'Lou' and he emphasized that his name was 'Mr Stevens'. So I started. 'Mr Stevens, I am evaluating Australia and having these conversations around the country to get a handle on just how it is shaping up. Several major issues seem to be on the mind of many Australians and they are: climate change; the high cost of interest and the high cost of energy. Many people are hurting at the moment, and I thought that it would be good to get your perspective at least on the reason for high interest rates.' Mr Stevens replied along the following lines. 'Well, I have explained until I am blue in the face the reason for high interest rates. We are faced with serious inflation and unless we get inflation down, we won't be competitive as a country and that is that.' 'But surely, Mr Stevens, the high cost of money increases the cost of running a business. Isn't this inflationary?' 'That is a simplistic approach to the problem. I have to deal with a multiplicity of factors that give rise to inflation which explains the reason for managing interest rate policy.'

I felt a bit of an idiot but had to ask the question 'Are all of these factors in the public domain?' 'Of course not, they are highly technical economic issues that many people wouldn't understand.' 'So, if you don't mind me saying so, Mr Stevens, all of your reasons for high interest rates haven't been explained to the public.' 'Is this an inquisition or a genuine attempt to talk about the issues confronting Australia?' was the irritated response. 'As

I am on this job, perhaps you could try me by explaining how high interest rates do not increase the cost of doing business. Before you answer that question could I explain that from my simplistic point of view, I have noticed that since the credit squeeze following the subprime meltdown, the cost of borrowing to the banks has increased and they have passed that cost on to the public. In addition, whenever the Reserve Bank increases interest rates, the banks increase the borrowing costs to the public. That does seem to me in a simplistic sort of way to increase cost. That is the reason I ask whether increasing interest rates is inflationary?'

Mr Stevens took a deep breath and looked at me in much the same way as my Latin teacher used to look at me when I gave dumb answers to his questions (having got 10 out of 100 for Latin, I developed great experience in being treated like a dumb idiot). 'Basically,' said Mr Stevens, 'if you keep on increasing interest rates they might not address inflation in the short term but there is a point where they do have that effect. History demonstrates that quite clearly.' 'Oh,' I replied 'I can remember how interest rates reached 22% in the late eighties and just about everyone went bankrupt and suddenly inflation fell through the floor.' 'That is exactly my point,' Mr Stevens replied. I began to see the light. 'So, you don't really know the cut off point when interest rates cause sufficient damage to drive down inflation and so you keep on increasing the rates until you find out?' 'That is simplistic and there is a lot more science than that in the equation but basically managing interest rates is an elastic science and we have to watch closely the consequences of our policies.'

I changed the subject. 'What do you see as the principal causes of inflation?' 'There can be no doubt,' replied Mr Stevens 'that the oil price is having a serious impact on the cost of everything from food to heating and cooling the household and the cost of getting to and from work.' Once again, I had to risk the dumb idiot look. 'That is what is worrying a lot of people out there. People take the same view as you that oil is the real killer and as the price of oil is not determined by the Reserve Bank but by market speculators, then the Reserve Bank can't do anything to bring down the cost of the commodity that is causing inflation.' Mr Stevens replied, 'What you don't understand is our booming economy is creating demands that increase the necessity to consume oil and unless we slow down that demand, the cost of oil will continue to be the ever-present threat to a healthy economy.'

'But surely, the demand for commodities is coming from overseas and not Australia, so increasing interest rates here will not reduce the cost of commodities.' Mr Stevens was getting quite uncomfortable and irritated and he looked at his watch. 'I really haven't much more time. Perhaps we can finish this off.'

'It seems, Mr Stevens, that the Reserve Bank does not want a booming economy where everyone has a job but it wants less than a booming economy where everyone doesn't have a job and a lot of people are in mortgage distress. If this is so, why can't you do an historical analysis and find the average interest rate that brings about this happy state of affairs so that people are not induced to borrow money when it is cheap and then get into strife when money is expensive? Just have the one interest rate that over time will do the trick of ensuring the economy is not in distress on the one hand but not putting lots of money in people's pockets on the other hand.' 'Have you any other questions?' asked Mr Stevens.

'I know that you are in a hurry but Mr Rudd will be upset if I don't get through some of the stuff I need to ask you.' 'Go ahead but be quick.' 'It seems to me that a major reason for the price of energy being of such concern is the extent of its use. If we could reduce our dependency upon fossil fuel, the cost of energy would not be so inflationary and it wouldn't be necessary to increase interest rates.' 'If you knew how to do that, we wouldn't be in this mess,' replied Mr Stevens.

'Well,' and here I took a really deep breath to summon all the courage needed to make this outrageous statement 'if, for instance, instead of legislating an increase in interest rates with all the problems it causes, we decided to eliminate interstate sport, thus reducing enormously the amount of air travel in Australia, and we decided to eliminate evening or night sport, thus eliminating the necessity to consume enormous amounts of electricity, and if we restricted people in major city offices from working beyond 5.30pm so that all the lights in the city could be turned off by 6.00pm and if…' Here Mr Stevens cut in and said, 'What are you getting at?' 'Well, all of these things would reduce our dependence upon energy and perhaps reduce the cost and that would drive down inflation.' At this stage, Mr Stevens nearly lost it. 'Do you want to wreck the economy; are you mad?' 'Sorry,' I replied, 'but that was what I thought you had in mind by increasing interest rates; you want to take the sting out of the economy; you don't want a booming economy but something less?' Mr Stevens looked exasperated. '1 really need to move on,' he said looking at his watch.

'Just one last thing,' I braved. 'In the past, wage pressures and the low value of the dollar have been mooted as principal causes of inflation. With a low dollar, the cost of imported goods increases and with wage pressures, the cost of running a business increases just as it does with the increase in the cost of money and energy. At the moment, we don't have wage pressures and we have an almost all-time high in the Aussie dollar. Aren't these guarantees against inflation?'

At this stage, Mr Stevens nearly lost it. 'Do you want to wreck the economy; are you mad?'

Mr Stevens had the last word. 'The only guarantee against inflation is increasing interest rates to the point where demand is reduced so that prices don't increase. It is as simple as that.' 'In the meantime,' I braved, 'people have to sell their houses and their cars and lose their jobs?' 'So be it,' replied Mr Stevens.

My report to the Prime Minister was short. 'Close the Reserve Bank.' He then called me and asked me if there was anything else. So I asked him, 'What do you consider to be the most serious strategic issue facing the country, if not the world today?' Guess what his reply was? You are

dead right, the same as that of my customers when I first started the project. 'Kevin,' (he actually asked me to call him by his first name) 'one of the things that I look at when I do a job is to cast my eye over some statistics. I will let you know what I have found.'

'For the year 2008/2009 the government has allocated $36.0 billion for defence. For the four years commencing 2008 the government has committed $1.7 billion for research into clean energy technologies including clean coal and renewables. It is going to spend $13.0 billion over ten years to save our waterways. In other words, Kevin, you are proposing to spend a bit less, than $2.0 billion a year on the most serious issue confronting Australia today while spending $36.0 billion on defence.'

'Kevin, I am a management consultant and not a politician. I am interested in outcomes. You have asked me for my advice and so I will give it to you. If I were you, I would tell the defence department that I wanted an urgent alteration in direction and that from now on, 80% of the defence budget will be directed to the defence of Australia's climate by researching, developing and installing renewable energy installations across the country so that within five years, Australia will be largely dependent upon wind and solar energy and no longer dependent upon oil from politically unstable regions of the world. You will find, Kevin, that external threats, to the extent they exist, will disappear and you will be rolling in money. You might even be able to export your defence technologies to other countries.'

'That is why you are a management consultant and I am a politician,' replied the Prime Minister. As neither of my main recommendations will be adopted I decided not to render a bill for my advice.

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The 'latest and greatest'[1]

Everything you didn't know you didn't know (in the Federal Magistrates Court).

Grant T Riethmuller

1 INTRODUCTION

The points of law and practice that 'you didn't know you didn't know' are the most dangerous points of all for any practitioner. I have included judgments in some areas which regularly come before the court as examples or refreshers on areas we are all familiar with, but where, as the saying goes 'familiarity breeds contempt'. Other judgments (for example those covering appeals from the Social Security Appeals Tribunal ('SSAT') present a window into a new area of law (albeit founded on well established principles).

2 CHILDREN'S ISSUES

2.1 Family violence: a relevance refresher

Since 2006, issues of family violence have become increasingly intertwined in the complex children's provisions. Brown FM provides a good summary of the principles that underpin considerations of family violence in *Abrams & Demars* [2008] FMCAfam 797 at paragraph 56 saying that allegations 'must be closely examined by the court, bearing in mind the serious consequences exposure to family violence may have for the child concerned.' His Honour also stated that such allegations are 'easy to make and difficult to refute', and that family violence is 'not homogeneous in its qualities' and that different types may have differing effect in the damage done to the child. However, his Honour also notes the objective aspect of the definition of family violence provided for in s.4 of the *Family Law Act 1975* that the 'fear or apprehension occasioned by the behaviour complained of must be *reasonable*'. Family violence is a real issue that needs careful evidence, not only to provide the best evidentiary foundation for proof of the violence, but also to allow a sophisticated assessment of its impact. As with any fact where there is no corroborating evidence, care must be taken to provide a detailed account from the party making the allegation.

2.2 'Parental responsibility': is the presumption a 'red herring' in practice?

There are now many cases where the presumption of 'equal shared parental responsibility' has been rebutted (see for example: In *M & A* [2007] FMCAfam 52), however, whether or not to order equal shared parental responsibility is still a real issue on the substantive merits of each case. *SDS & ACS* [2006] FMCAfam 678 is an

example of how, even if the presumption operates, it can be displaced if it is not in the best interests of the child.

2.3 'Substantial and significant time:' the child focus continues

The meaning of 'substantial and significant' was considered by Halligan FM in *KML & RAE* [2006] FMCAfam 528 at paragraphs 111–112. The judgment evinces a strong child focus in determining what 'substantial and significant' actually means in terms of time spent with a child. This strong 'child focused' approach was followed by Purdon-Sully FM in *Hailes & King* [2008] FMCAfam 102 at paragraph 175. When determining time, a focus on the needs and activities of the child is clearly more important than the counting of hours or days, to obtain substantive, not technical outcomes.

2.4 Unilateral interim relocations

It will be the unusual case in which an interim application for unilateral relocation will be sustained, usually where the respondent has failed to act quickly: see for example, *B & B* [2007] FMCAfam 82 and *R & R* [2007] FMCAfam 29. In *Robson & Johns* [2008] FMCAfam 721, Coakes FM carefully analysed unilateral relocation cases before declining to make the mother return. The parties separated on 1 May 2008 after eight years, with the mother moving from the central coast of NSW to a town near Port Macquarie with the parties' two-year-old child. The case demonstrates that there is no 'rule' about unilateral relocations, and that with careful preparation, return can be resisted in a small number of cases.

2.5 Legal Aid and ICLs

In *Lancet & Lancet* [2008] FMCAfam 525 the role of the courts with respect to legal aid funding allocation was discussed. The father had had a close relationship with the children, but then suffered what appeared to be a psychotic episode where he attacked the wife in her home at night with an axe. Despite an order for an ICL, Legal Aid had not appointed one. The parties sought repeat orders for the appointment of an ICL. It was pointed out (at paragraph 21) that:

> It must be noted that it is no part of the court's role to determine to whom or to what extent Victoria Legal Aid funds litigation. That is entirely a matter for the Victoria Legal Aid, which is responsible to the relevant Minister and parliament for the use of the funds disbursed for that purpose: it is an administrative function, not a judicial function: see *Re JJT; Ex parte Victoria Legal Aid* [1998] HCA 44; (1998) 195 CLR 184.

3 PROPERTY

3.1 Third party property provisions: a practical application

In *Ibbott & Ibbott & Anor* [2008] FMCAfam 38, Brown FM considered a case where the parties owed their private company substantial sums, and the company owed significant debts to others. The wife sought orders pursuant to s. 90AE(1)(a) that the husband be substituted for her and him as the sole director to S Pty Ltd. It was held at paragraph 197 that the company 'was a major contributor to the lifestyle enjoyed by the family, albeit that lifestyle was not a lavish one, certainly so far as the wife and children were concerned.' His Honour, at paragraph 205, disposed of the wife's application to be released from indebtedness of the company, holding that the FM has the responsibility:

> …to make some sort of assessment of the consequences of the third party order, which is sought by the wife, being made, particularly whether such order will result in the substantive rights of that third party being either negated or eroded. In particular I am required to assess whether 'it is not foreseeable' that such an order 'would result in the debt [concerned] not being paid in full' [section 90AE(3)(b)].

When turning to consider the likelihood of the husband repaying the debt if orders were made making him solely responsible, Brown FM concluded that it was unlikely that the husband would pay the debt in full, and therefore did not make the orders.

3.2 Binding financial agreements after section 79 orders

In *Poole & Poole* [2008] FMCAfam 835, Halligan FM considered the effect of entering into a binding financial agreement, after the parties had obtained orders for property division under s. 79 of the *Family Law Act 1975*. It must be remembered that the court can only make one order under s.79: see *Kowalski and Kowalski* [1992] FamCA 54; (1993) FLC ¶92–342. The only option open to parties after s. 79 orders are made is to rely upon the powers in s. 79A. The argument in *Poole* was whether the actions of entering into a binding financial agreement resulted in an implied consent to set aside the s. 79 orders, as described in s. 79A(1A). His Honour was satisfied, at paragraph 61, that:

> …the husband's conduct is so inconsistent with the continued operation of the property settlement orders that he must be taken to have consented to their being set aside. I am satisfied that if the wife can demonstrate that materially different orders should now be made in their place then, absent any other matter raised by the husband going to the exercise of the Court's discretion to set the orders aside, such as prejudice or hardship, the prior orders should be set aside. As no issues of prejudice or hardship were in fact advanced on behalf of the husband I proceed on the basis that if the wife demonstrates that materially different orders should be made then the prior orders should be set aside.

Thus, the ineffective financial agreement also brought down the previous property order.

4 CHILD SUPPORT

4.1 SSAT appeals

There have been only 18 appeals from the SSAT to date (nationally), however, there are a number of significant judgments of interest to practitioners. Importantly, appeals from the SSAT are limited to errors of law, and are not 're- hearings' in the sense that appeals lie from FMs and Judges to the Full Court. Below, some of the most significant cases and the principles which arise from those judgments have been highlighted.

In *LDME & JMA (SSAT Appeal)* [2007] FMCAfam 712 Halligan FM listed seminal cases on the meaning of the phrase 'error of law' from the Federal Court, drawing upon the jurisprudence with respect to errors of law from the Administrative Appeals Tribunal ('AAT'). His Honour also considered the start date of the jurisdiction of the SSAT, concluding that the SSAT has jurisdiction to review any decision made

after 1 January 2007 even if the application to the Child Support Agency ('CSA') was before that date. In this case, the objection decision was made after 1 January 2007.

In *CSR & MMB & DEJ (SSAT Appeal)* [2007] FMCAfam 944 the original decision related to the CSA accepting an estimate of income. On review, the SSAT approached the matter at large, making findings as though the application were under Part 6A of the Act. Sexton FM held at paragraph 32 that the Tribunal was required to confine its inquiry to that decision under review.

In *Humphries & Berry (SSAT Appeal)* [2008] FMCAfam 409 Slack FM dismissed an appeal against finding of the SSAT with respect to income amounts. Significantly, his Honour concluded at paragraph 25 that principles as to full and frank disclosure in the Family Court have the same weight as in administrative review hearings under the *Child Support (Registration and Collection) Act 1988* including review hearings by the SSAT.

4.2 The judicial review alternative

In *Chamberlain & Slade* [2008] FMCAfam 37 Brown FM considered applications to judicially review decisions under Part 6A. Whilst some decisions of the Registrar can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977*, care needs to be taken to check the Schedule of the Act if this course is to be pursued.

4.3 Enforcement

In *CSA & F & M Pty Ltd* [2007] FMCAfam 477 at paragraphs 41–44, it was found that the CSA could not enforce directly against a company, even if it were the alter ego of the debtor. It was also found that Part VIII of the *Family Law Act 1975* provides no assistance in child support cases, as it only applies to property division under the *Family Law Act 1975*.

In *Child Support Registrar & Cook* [2008] FMCAfam 599, Altobelli FM found a child support debtor had contravened an order that he pay specific amounts within 150 days. Altobelli FM imposed a sentence of two months, imprisonment suspended on condition that the contravener pay the sums within six months.

5 PRACTICE AND PROCEDURE

5.1 Litigation guardians

In *Oliver v Gall* [2008] FMCAfam 164, Wilson FM examined the practical issues that arise when an application is made for the appointment of a litigation guardian at paragraphs 55–59:

> In *Thompson v Smith* [2005] QCA 446 McPherson JA considered, at [7] that before appointing a litigation guardian there should be evidence on which a judge can confidently act that the person is not capable of making decisions required for conducing the litigation.
>
> …
>
> Not without some hesitation, I think the evidence as it presently stands is sufficient to persuade me that on the balance of probabilities the wife is not capable of giving adequate instruction for the conduct of these proceedings. In those circumstances fairness dictates that a litigation guardian be appointed, and I propose to so order.

5.2 Summary orders

In *Jacobs & Vale* [2008] FMCAfam 641, Jarrett FM considered the powers of summary orders in an application to set aside a binding financial agreement. The most significant point is that the power to summarily deal with an application in the FMC are significantly different to that in the Family Court as a result of s.17A of the *Federal Magistrates Act 1999* (see also Rule 13.10). Jarrett FM set out the applicable principles at paragraph 14, referring to Driver FM in *Vivid Entertainment LLC v Digital Sinema Australia Pty Ltd* [2007] FMCA 157:

- In assessing whether there are reasonable prospects of success on an application or a response, the Court must be cautious not to do an injustice by summary judgment or summary dismissal.
- There will be reasonable prospects of success if there is evidence which may be reasonably believed so as to enable the party against whom summary judgment or summary dismissal is sought to succeed at the final hearing.
- Evidence of an ambivalent character will usually be sufficient to amount to reasonable prospects.
- Unless only one conclusion can be said to be reasonable, the discretion under s.17A cannot be enlivened.
- The Court should have regard to the possibility of amendment and additional evidence in considering whether only one conclusion can be said to be reasonable. In that consideration, the conduct of the parties and the other circumstances of the case may be relevant.

Whilst Jarrett FM did not order summary dismissal in that case, such an order was made in *Wadsworth & Wadsworth* [2008] FMCAfam 140, relying upon the power in s.17A of the *Federal Magistrates Act*.

6 COSTS – AN INCREASINGLY IMPORTANT ASPECT OF PRACTICE

6.1 Costs and offers

Offers of settlement are made far less frequently than one would expect, yet remain the most effective method of obtaining a costs order. However, the conduct of the case must allow the other party to reasonably assess whether or not to accept an offer. In *Walden v Roman* [2008] FMCAfam 260, Sexton FM considered a case where there was a lack of disclosure which undermined the impact of the offer. Her Honour held at paragraph 29 that the husband's lack of full and frank disclosure 'deprived the wife of the opportunity to give proper consideration to the husband's offers of settlement'. In an interesting postscript, the husband was then ordered to pay the wife's costs of the costs application.

6.2 Costs when failing to participate in primary dispute resolution

In *Driscoll & Driscoll* [2008] FMCAfam 336, the impact of that father failing to participate in a Round table Dispute Management ('RDM') conference was considered in ordering that the father should meet the ICLs costs from the time of the RDM onwards. The clear message is that there is a real expectation that parties will comply with PDR orders, and cooperate with ICLs in attempting to resolve matters before trial.

6.3 Costs of poor material

In *Robson & Johns* [2008] FMCAfam 721, Coakes FM considered a case where the material was unnecessary or irrelevant, consequently making orders that the solicitors not charge professional fees for those parts of the affidavits struck out for reasons of irrelevance or inadmissibility. It

is a salutary lesson that there may be costs consequences for the solicitors if they do not focus on the real issues and provide relevant material.

7 CONCLUSION

The work of the court in family law remains varied and complex. A practical 'child focused' approach continues to be the strong theme of the parenting cases. The increasing community concerns about the costs of litigation, and the need for litigation in such a large proportion of family law disputes is being reflected in the court's more robust approach to procedural matters, and costs. The day-to-day work of the court in family law continues unabated. As the volume of work in the FMC continues to increase those practitioners who have not yet embraced the FMC litigation model will find practice increasingly challenging. For the astute practitioners the FMC provides an opportunity to provide clients with a timely and cost-effective service in the vast majority of cases.

NOTES

1 This is a revised version of a much longer paper presented at the Family Law Intensive in Melbourne on 23 August 2008.

2 Federal Magistrate, Melbourne. The views expressed in this paper are those of the author, and should not be taken to be the views of the court.

A bit about WORDS

Fancy words

I had a kind of epiphany when I read the results of the so-called *Washington Post* 'Mensa Invitational' which allegedly invites readers to submit invented new words with invented new meanings. The odd thing is that the 'Mensa Invitational' does not exist, strictly speaking. At least, the *Washington Post* did not invent it, nor did they invite entries: the entries just started arriving some time in 2005. It is all, apparently, an urban myth; a hoax: a fiction you hope is true.

The supposed rules of this excellent, but non-existent, competition are simple. You may take any word from the dictionary and change it by just one letter and invent a definition for the verbal chimera so produced. You may make the change by adding, subtracting, or altering a letter, but only one letter. At their best, they are brilliant. A few of my favourites:

bozone: The substance surrounding stupid people that stops bright ideas from penetrating.

glibido: All talk and no action.

Dopeler effect: The tendency of stupid ideas to seem smarter when they come at you rapidly.

ignoranus: A person who's both stupid and an arsehole.

And a few non-compliant entries:

abdicate: To give up all hope of ever having a flat stomach.

willy-nilly: Impotent.

lymph: To walk with a lisp.

This last entry makes no sense at all, but it works magnificently. (*Lymph* comes from the Latin *lympha*, and was adjusted to look like the Greek *nymph*. *Lymph* is the origin of *limpid*, and originally meant 'pure water').

When I saw the 'Mensa Invitational' definition of *lymph*, I did not experience an epiphany, but it was such a delight that *quasi-epiphany* is near enough. An *epiphany* is a revelation of a splendid or mystical thing. In its specialized use, with a capital, the *Epiphany* is the festival commemorating the manifestation of Christ to the Gentiles, said to have occurred 12 days after Christ's birth. In ordinary use, from about the 17th century, it means a manifestation or appearance of some divine or superhuman being. By transferrence, it is used to refer to any illuminating discovery or realization, or a revealing scene or moment. In all its meanings, the emphasis is on revelation. Anyone who has experienced an epiphany will agree that it is a remarkable phenomenon.

Since epiphany is rarely seen outside ecclesiastical or poetical settings, it comes as a surprise to learn that *epiphany*, *emphasis* and *phenomenon* all come from the same Greek root. And that they share their origins with *fantasy*, *fancy*, *diaphanous* and *sycophant*.

The common ancestor of all these words is the Greek *phainein* to show or reveal. A *phenomenon* (1576) is originally 'a thing that appears, or is perceived or observed'; later, 'an individual fact, occurrence, or

change as perceived by any of the senses, or by the mind; that of which the senses or the mind directly takes note'. Then it adopted its principal current meaning: 'something very notable or extraordinary; a highly exceptional or unaccountable fact or occurrence'. When *phenomenal* is used as an adjective, its meaning is heightened further: so, when Gary Ablett took a *phenomenal* mark you would be forgiven for thinking the commentators were experiencing an *epiphany*.

The emerging meaning of *emphasis* is more obscure. It is first recorded in the late 16th century, with two meanings. Its obsolete meaning was 'the use of language in such a way as to imply more than is actually said; a meaning not inherent in the words used, but conveyed by implication'. Its connection to the Greek is obvious. It may be the sense Peter Carey had in mind when he wrote:

> The declared meaning of a sentence is only its overcoat, and the real meaning lies underneath its scarves and buttons.
>
> *Oscar and Lucinda*, chapter 43

However at the same time *emphasis* was used to mean *vigour* or *intensity of statement or expression* in which the connection to *phainein* is not clear. Perhaps it signifies 'This will show them', but probably not.

A *sycophant* was originally an informer in ancient Athens. It means literally 'one who shows figs'. The connection with figs is a matter of unresolved speculation. One suggestion is that a *sycophant* was a person who informed against illegal fig-smuggling. The OED2 says of this that it 'cannot be substantiated.' It offers an alternative: 'It is possible that the term referred originally to the gesture of "making a fig" or had an obscene implication'. *Making a fig* is defined in OED2 as 'A contemptuous gesture which consisted in thrusting the thumb between two of the closed fingers or into the mouth'. A supporting quotation from 1579 is given, which coincides with the emergence of this meaning of the word in English. Johnson (1755) defines *to fig* as 'To insult with ficos or contemptuous motions of the fingers'. He defines a *fico*, in turn, as 'An act of contempt done with the fingers, expressing *a fig for you*' which completes the circle and leaves us neither wiser nor better informed.

At the same time, *sycophant* also meant 'an informer, tale-bearer, malicious accuser' and also 'a mean, servile, cringing, or abject flatterer; a parasite, toady, lickspittle'. That is its current meaning.

Lickspittle is a pretty good word, not much heard these days. As its form suggests, it refers to a person licking spittle. It is defined in the OED2 as meaning 'an abject parasite, a toady'. Francis Grose's *1811 Dictionary of the Vulgar Tongue* defines it as a *parasite or talebearer*. This is interesting, as it harks back to the original meaning of *sycophant*, as an informer: a meaning which OED2 does not recognize for *lickspittle*.

Other derivatives of the Greek root *phainein* include *fantasy*, the meaning of which has drifted progressively: 'a spectral apparition; delusive imagination; hallucination; inventive design; a supposition resting on no solid grounds; caprice, changeful mood; capricious or arbitrary preference; amorous inclination; critical judgement in matters of art or elegance'. *Fancy* is a variant of *fantasy*, and all of these meanings are shared by *fancy*.

While remaining a mere variant of *fantasy*, *fancy* has also taken on an independent existence. It means decorative or complicated, and can imply costliness. As a verb it also means to like or admire or want. Less commonly, *fancy* also means: 'the prize-ring or those who frequent it; the art of boxing; the art or practice of breeding animals so as to develop points of conventional beauty or excellence'. It does not share these meanings with *fantasy*. By extension a *fancier* is 'one who has a liking for, and a critical judgement in, some class of curiosities, plants, animals, etc'; for example, a *dog fancier* or *horse fancier*.

On 13 February 2008, the Prime Minister made a formal apology to members of the Stolen Generations. *Apology* is a word generally understood. Without any awkwardness we also refer to an *apologist*: a person who defends the position of another, typically another whose position is unpopular or discreditable. A moment's thought suggests that their origins are the same even though their meanings are very different: the *apologist* is not sorry for the position he defends: quite the contrary. *Apology* comes from the Greek *apo* + *logia*: away + speaking. Thus, originally, 'The pleading off from a charge or imputation; defence of a person, or vindication of an institution, etc., from accusation or aspersion'. Later, 'Justification, explanation, or excuse; An explanation offered to a person affected by one's action that no offence was intended, coupled with the expression of regret for any that may have been given; or, a frank acknowledgement of the offence with expression of regret for it, by way of reparation.'

Johnson recognizes the earlier meaning, and hints at the developing sense: 'Defence; excuse. Apology generally signifies rather excuse than vindication, and tends rather to extenuate the fault, than prove innocence. This is, however, sometimes unregarded by writers.'

Thus, an apology was originally a defence, but has come to mean an expression of regret. But *apologist* has not shifted: its original and current meaning is a person who defends another by argument. 'One who apologizes for, or defends by argument; a professed literary champion.' (OED2), and: 'A pleader in favour of another' (Johnson). So, all barristers are properly called *apologists* for their clients, but only sometimes need to apologise for them.

JULIAN BURNSIDE

Verbatim

St George Bank Limited v Quinerts Pty Ltd
Coram: Kennedy J
26 June 2008
Samantha Marks for plaintiff
Daniel Aghion for defendant

Her Honour: They're very helpful submissions.

Mr Aghion: Thank you.

Her Honour: I'm not sure if any of you are getting any sleep at the moment.

Mr Aghion: I'm told that I have a young child, your Honour.

Her Honour: Yes, I know the feeling.

Mr Aghion: I pity my learned friend. She has three children. She probably hasn't seen them in weeks.

Postcard from Chile

My contact with the Chilean Legal System did not begin well. The fool that I am, I was walking through what seemed to be a normal suburban area on a sunny day in Valparaiso, an attractive seaside city of colourful buildings and an interesting history on the coast of Chile. In such an attractive and colourful city I carried my big fat western camera – hereinafter referred to as 'bait' – around my neck. Lagging behind the group I became a prime target. Sure enough, the young man standing next to the light pole speaking on a mobile phone suddenly became, together with three or four other young men, my attackers.

They grabbed at me, the camera and the backpack slung over my shoulder.

I screamed – to no avail. They grabbed at the camera and backpack in several directions, knocking me to the road and dragging me along by my camera strap. They eventually got the camera, breaking my glasses but at least I kept my backpack, although no vestiges of my dignity. Oddly enough, then the panic started. Not me, but hordes of housewives streamed from their homes to yell at me in Spanish, no doubt such things as 'you foreign fool, what were you doing walking here with a camera around your neck at this time of day?'

My mother, who was travelling with me, had heard my screams and ran back. Fortunately she did not see the attack but was there to pick up the pieces and the remnants of my glasses and, with me being as blind as a bat, acted as my eyes for the next few hours.

The housewives brought me water and telephoned the police. School children also raced out of their houses. It was the school lunch break and many of them had come home for lunch. One young man spoke English. He explained that it was a dangerous area and if the locals had heard my screams they would not have come out of their homes for fear of retaliation from the young men. One young girl apparently saw the attack although my Spanish was not good enough to find out what she saw.

Eventually the police arrived, as bored as one could possibly imagine. They bundled me and my mother into the back of what passed for a divvy van, an old van with a broken seat and a sullen young man in the back – and that was just the policeman. They drove uphill to the nearest police station where after waiting for an eternity I gave a statement.

To say it was a statement is a joke. My Spanish is not great at the best of times but in the twitchy shock aftermath, what little Spanish I had deserted me. I resorted to pantomiming the attack to the slack-jawed disinterest of the policeman. Eventually he typed a few sullen things into the computer and printed out a form. I insisted on having a police report form so as to make an insurance claim. After printing out the form and asking where to sign it I tried to read it. This was hilarious in itself, as I had salvaged one lens of my glasses, through which I was trying to read as a sort of monocle! My Spanish isn't very good but even I could see that he had printed out the blank pro forma and was asking me to sign it. Whether he was ever going to fill it in or fill it in with some other story who is to know. He seemed astonished when I had the temerity to fill in the form. I started to write on it in English the description of my attack. He insisted that I simply sign it and give it back to him. I refused. I persisted in filling it out. I then asked for a copy. He refused. I found the word for 'insurance' and the relevant phrases in my phrase book but he shook his head vigorously. He eventually gave me a slip of a receipt which I could see actually listed in Spanish that my camera was stolen and my glasses were broken. I was astonished that he had been so cooperative!

By this stage my finger, which I then thought might have broken in the attack, was hurting a lot. I managed again to find the Spanish phrase for 'broken' in my phrase book and again the bored young policeman bundled me into the back of the van with the broken seat and we trundled off to the hospital.

The hills are so steep in this town that at one stage whilst we were climbing the hill the seat on which my mother was sitting fell sideways, the concrete which

Young boys in Santiago dressed up for a traditional dance

The spectacular church of San Francisco, Quito, Ecuador

LEFT A local family in Otavalo, Ecuador

was apparently used to weigh down the rear springs of the van slid across the door and it was everything the young sullen policeman at the back could do to stop the back door flying open and my mother flying out.

The hospital was extraordinary. It was as crowded as one can imagine. The waiting area was a sea of people, who spilled out into the driveway area. I did what must be one of the scariest things I have ever done – handed my passport to the official at the hospital and did not get it back. I was comforted by the fact that the whole time I was accompanied by the sullen young policeman, complete with automatic firearm. It was clear that I (and my passport) was going to get top-class treatment and he was not going to let me leave his sight until I had. Once they took my name and details (and passport) they waved me through the doors – no waiting room for me – straight into what I thought might be the consulting rooms. I was wrong. The big doors swung open to another sea of people crowding the corridors outside the consulting rooms, together with a security guard also carrying an automatic firearm.

They take their hospital very seriously in Chile.

I was eventually referred to an English-speaking doctor who was clearly efficient and well trained and did his best to diagnose me. He referred me to an X-ray which showed no broken bone. He diagnosed a sprain, gave me a splint and some painkillers and sent me on my way. The whole process took several hours and I was clearly getting shuffled to the top of every queue. Pity the poor Chileans with crying babies and broken legs who were waiting far longer than the arrogant westerner with a sprained finger. Pity also my poor mother, who was forced to wait in the waiting room for several hours, wondering where the hell I had vanished to.

Iguana, Galapagos. Iguanas spend their days looking mean and spitting (they spit out the salt water they take in during the day)

I returned to the apartment where my friends wondered idly where I had been. They had travelled with me before and knew that I was just as likely to be lost taking photographs somewhere or investigating some interesting sight. They were shocked with the tale I was to tell.

It all ended well. I was able to replace the camera and start taking photos again. Fortunately this was only on about day two of the journey so I lost just a few of my memories. The insurance company accepted the slip and all ended well.

Chilean opticians are not so good as they made a pair of glasses which bore no resemblance at all to my prescription, leaving me with the choice of salvaged lens monocle or 'old prescription spares' for a few weeks.

When you see me now I have a crooked finger, the legacy of a torn tendon which did not heal very well after being wrenched out of place by young Chilean thugs. Still, if that is the worst thing to happen to me during my travels I can still count myself lucky. I imagine the young sullen policeman is still rounding up young thugs (or not) but still probably not ferrying too many westerners to hospital.

I would like to show you photos of Valparaiso which is, after all, a pretty UN-Heritage listed town – but of course, they are all no doubt gracing the walls of some Chilean home…

The Regional Government of the Galapagos Islands… says it all, really

LEFT Galapagos turtles (Richard Boaden of counsel is the one in the hat…)

Revellers at the Inta Raymi festival – complete with a not-so-tradtional brew.

As for the rest of the trip: a stimulating and enjoyable journey. We travelled from Santiago to Ecuador, home of even more muggers (apparently) than Chile, but more relevantly, the access point for the Galapagos Islands. The rest of this article will be short, but we had a grand time sailing between the islands which make up the Galapagos, rich in birdlife and sealife, great for snorkelling and birdwatching, penguins – yes, warm-water penguins. Iguanas move remarkably quickly underwater, as do the seals on land (surprisingly, when one looks at the photos!).

One can see how Darwin learned so much from this low-slung set of volcanic islands. The Islands are forming over a volcanic 'hot-spot' in the ocean, then drifting with continental drift. As they drift, they age. Tall volcanoes erode and vegetation changes. Birdlife also changes, with the birds' beaks adapting to the food requirements of their particular island.

The downside is the tragic stories of the animals whose habitats are being, or have been, destroyed by the introduced goats and pigs. The Galapagos turtles, long-lived and slow-moving, are preserved essentially only on the furthest islands and in the Darwin station. As for the photos, you will see Mr Boaden of counsel among some truly massive turtles… he's the one with the hat.

On mainland Ecuador, we travelled to Otavalo market, a cross-road between the trading groups of central America, which probably has been for centuries. In this enormous bustling market in a market town, food, livestock large and small, handicrafts and different skin-groups all gather. A wonderful raptor sanctuary nestles in the mountains overlooking the town. Huge condors are a sight to see, although tragically confined to small compounds.

While we were there, we saw the festival of Inta Raymi, with regular vigorous, almost hypnotic, dancing in the street. I joined a circle at one stage, dancing and chanting along – and sharing whatever it was they were drinking – it was quite trance-like after a while. The festival is an Inca festival, but now timed to match the Christian festival called San Pedro (St Peter). I could not pretend to understand the complexities of a local festival intertwined with a Christian celebration. There was a procession in the street, which seemed to pay equal homage to a Christ figure being carried and to other traditions requiring the carrying of live chickens and strings of corn and other vegetables tied to poles. The 'Inta Raymi' figure is a masked figure with spikes coming from the head, wearing cowboy chaps. Children blow notes on animal horns and everyone is very excited. The festival has, as a central theme, the 'taking of the plaza': men wearing cowboy gear and making a lot of noise, together with women in traditional clothing, enter the plaza of the town and 'take over'. It was once apparently a genuine and violent 'taking of the plaza' in towns, by the indigenous people 'taking back' their traditional space in defiance of the conquering Spaniards.

From there we headed to Banos, hot on the heels of a volcano erupting, and travelled to the head of the Amazon river. My companions rode the train down the devil's nose and we headed on home via some ethereal high-country snow roads and a tipple or two at Concha y Toro winery in Chile – well, the country does have its good points…

Quite a trip!

CAROLYN SPARKE

Douglas James, Hamish Austin and Tony Klotz in defence

SYDNEY BAR v MELBOURNE BAR

6 September 2008

NSW and Victoria Bar players

On Saturday 6 September 2008, the Sydney Bar hosted the inaugural annual football (soccer) match against the Melbourne Bar.

Twelve players from the Melbourne Bar travelled to Sydney University on a cold, wet day. They were (in order of shirt number) Oliver Scoullar-Greig, Michael Biviano, Jim Doherty, Tony Klotz, Andrew Hanak, Hamish Austin, Peter Best, Peter Agardy, Philip Burchardt, Jim Fitzpatrick, Mike Kats and Doug James.

It had been raining all night, following a week of rain. The main ground, at St Andrews College, was closed and the cricket pitch was covered. Some race meetings in New South Wales were cancelled because of the 'big wet'. We played instead on the oval at St Johns. There were large pools of water, which presented a challenge for all. It also added to the fun. There were times when our most effective defender was the large puddle in front of our goal.

We started with a full team of 11 players. Our 12th man was caught in traffic and he arrived when the game was underway.

The Sydney Bar had almost two full teams, including two women players. The rules had been relaxed, so that there was unlimited interchange.

We survived an early onslaught by a capable Sydney team. The conditions slowed the game down, to our advantage. Our goalkeeper, Mike Kats, was valiant in some early physical encounters. He sustained an unfortunate injury early in the first half in a collision with the goalpost. He needed stitches above his right eye. He left the game with a clean sheet, with the sides locked at 0:0.

Sydney lent us a goalkeeper, John Harris. He was a good one too. Despite his best efforts we were 2:0 down by half time. The scorers for Sydney were Shereef Habib and Cameron Jackson.

At half time Sydney lent us another player, Jeh Coutinho, a fit young assistant clerk from tenth floor Wentworth Selborne Chambers. He proved to be a lifesaver for us, scoring one goal; and creating the second, which was an own goal off their keeper.

The referee was Nick Tiffen, who is the clerk of seventh floor, Selborne Chambers. He was assisted by his daughter, Hannah. Nick is a professional referee. He kept a firm control of the game but he did not lose his sense of humour. The referee handed out three yellow cards, all to Sydney players (mainly for back chat). These players, under our agreed rules, were each called on to pay $25 to charity.

The Victorian Bar Team (Standing from left: Oliver Scoullar-Greig, Michael Biviano, Jim Fitzpatrick (Captain), Jim Doherty, Peter Agardy, Douglas James, Andrew Hanak. Seated from left: Philip Burchardt FM, Michael Kats and Tony Klotz. Absent: Hamish Austin, Peter Best)

In the latter part of the game, with the match level at 2:2, Hamish Austin hit the cross bar. At the other end our adopted keeper was kept busy and made a few great saves. Michael Biviano cleared the ball off our line in the final minutes of the game.

The match finished at 2:2. Because there had to be a winner (to collect the trophy) there was a penalty shoot-out. Sydney won, after their keeper saved two of our penalties.

After the match we escaped the rain to the Grandstand Bar where ironically, they were setting up for a water polo dinner. We felt as if we had played some water polo ourselves. The ball was often stuck in a pool, with three or four players sloshing about, to the amusement of players and spectators alike.

At the presentations after the game we had drinks and finger food on the heated balcony. There were trophies and medallions. This was all funded by Suncorp, the sponsor of the Sydney Bar team.

Anthony Lo Sordo of the Sydney Bar introduced proceedings. Anna Katzmann, the New South Wales Bar Association President, spoke and presented the awards. Federal Magistrate Philip Burchardt responded with some fine words on behalf of the Melbourne Bar.

The Suncorp Cup went to the Sydney Bar. We plan to retrieve it in our next match.

The referee selected the best and fairest awards, one for each team. The winner for Sydney was Greg Watkins.

Our captain Jim Fitzpatrick received a trophy for best and fairest in the Melbourne team. This was a well deserved award for Jim's tireless efforts.

Every player received a medallion.

Despite the difficult conditions, and in a way because of them, this was a most enjoyable game. It was played in good sporting spirit. We were overwhelmed by the friendly and generous reception extended by the Sydney Bar.

Our special thanks go to Anthony Lo Sordo and Simon Phillips, who organized the event.

We look forward to continuing the tradition. The return match will be in Melbourne in late 2009.

PETER AGARDY AND
ANDREW HANAK

Victorian Bar in attack through Philip Burchardt FM

Jim Fitzpatrick, Victorian Bar best and fairest

The Sydney conditions

Anna Katzmann SC, NSW Bar Association President, presenting the awards

Snowsports Club 'Buller Bash'

The Victorian Bar Snowsports Club (VBSC) was established in mid-2005 by a committee comprising Michelle Florenini (President), Jack Rush RFD QC (Vice President), William Houghton QC (Secretary), William Alstergren (Treasurer), Andrew Ramsey, Ben Rozenes and Sara Hinchey (Members). In 2007 Bronia Tulloch was also welcomed onto the committee as a Member. We are delighted to have the Honourable Professor George Hampel AM QC as the club patron.

On the weekend of 13 and 14 September 2008 the annual 'Buller Bash' was held – a weekend of skiing at Mt Buller for barristers, their families, friends and instructing solicitors.

The frivolity commenced with welcome drinks at Pension Grimus on the Friday night. Blue skies and sunshine greeted us when we awoke on Saturday morning, and the group headed out for either a ski lesson or guided mountain ski tour. Lunch was held on the balcony at Koflers Restaurant. After a day of spring skiing we enjoyed après-ski drinks at the new Mt Buller wine bar 'Snow Pony'. On Saturday evening the festivities continued when we went to Kooroora Hotel where the Mt Buller Ski Instructors' end-of-season Wild West party was in full swing.

Simon Wood tackled and conquered the Summit run. He deserves a mention as the most improved skier. Robert Dyer is to be commended for his athleticism down the bumps on Wood Run and Powder Keg. Birthday boy Phil Skehan was seen to 'get some air' in the terrain park and later distinguished himself in the art of après-ski.

Thank you to all of those who participated in the weekend. We look forward to seeing you again next year.

MICHELLE FLORENINI AND
BRONIA TULLOCH

Little Duller Spur

Simon Wood and Michelle Florenini taking a break at the bottom of Wombat Run

Simon Wood and Rob Dyer at Koflers

Rob Dyer on Southside

Rob Dyer and Bronia Tulloch on Southside

Apres-ski drinks at Snow Pony: (L to R) Phil Skehan, his ski instructor Eva and Simon Wood

Simon Wood

The making of a lawyer: What they didn't teach you in Law School

By Geoffrey Gibson
Hardie Grant Books
323 pages. Indexed

The part-polemic-part-memoir-part-instructional-manual may be a literary genre whose time has come. *Fooled by Randomness*, the irreverent and scathing critique of financial markets by maverick trader/philosopher Nassim Nicholas Taleb, was a runaway hit and *New York Times* bestseller. As luck would have it I read that book about the same time as Geoffrey Gibson's new work. Both were full of the lively and unconstrained prose of independent-thinking, well-read men with a desire to express views about subjects close to their heart.

Mr Taleb states explicitly in the foreword to his book that he did no specific or extensive research in preparing his book, save to have drawn on what came easily to mind. One senses that Mr Gibson has also drawn on a lifetime of rich experience. Both authors illustrate their points with references picked, it seems effortlessly, from obscure corners of their literary and professional worlds, the dividend of a lifetime's reading. While neither work appears to have consumed too many blue editor's pencils, in the buttoned-down world of non-fiction and quasi-reference works, there is something refreshing about authors who go fearlessly where the mood takes them and make readability and pace a prominent virtue.

Turning to Mr Gibson's work specifically, I should make clear that it is carefully structured. This is appropriate, as it covers a good deal of territory. It starts with a broad-ranging and useful potted guide to the philosophies that underpin our legal system and its mechanisms. For me, this section helped put into a row various ducks that had, I admit, been flying around largely unattended since first year law school (the post-modernists were firmly in charge when I arrived). After that the work narrows to deal with particular important concepts such as logical process, language, and truth and falsity. Next, we rummage deeper in the workbag to inspect particular tools: there are chapter headings such as 'composition', 'grammar and punctuation', and, intriguingly 'style'. Then things broaden out again. Chapters deal with what it is to be a professional, the differences between barristers and solicitors (a subject about which the author is particularly well qualified to opine) and how judges do their work. The final chapter is the most autobiographical. It tells the story of the author's work on the AAT tax panel, and the circumstances of his departure.

Though the subject matter is at times complex, Mr Gibson's trademark informality and wit give things a readable quality. The meatier sections are toward the end where the author deals with what it is to be a professional and the need for independence. However, some will find the pithy explanations in the earlier 'reference' sections very useful. Observations on the lives of three judges singled out for special mention are necessarily brief, and do not do proper justice to three great figures in the common law. However, there are biographies of each available, and most readers will be inclined to forgive the depth of analysis that has been sacrificed to keep the work pacing along.

To my observation, Mr Gibson has never been shy about expressing his opinions, and he has not held back in this book. My late father sometimes remarked dryly about the satisfaction that comes of having one's prejudices reinforced. For those who think like Mr Gibson, there will be an amount of that exquisite pleasure in reading sections dealing with the need to appoint judges from the Bar and not elsewhere, judicial activism, the scourge of excessive footnotes, etc. However, not surprisingly for those familiar with the author, there are as many challenges to orthodox thinking as defences of it.

Overall, this work is a valuable collection of lessons, observations and insights from a thoughtful practitioner whose life in the law has been vivid and varied. Complex and important concepts are well summarized and discussed. For any young (or old) barrister unable to neatly define a syllogism (or harbouring similar dark secrets) I commend Mr Gibson's concise guide to some of the law's more practical mysteries.

ANTHONY STRACHAN