VICTORIAN BAR NEWS

No. 146 SUMMER 2008/2009

Farewell Sir John Young

WELCOMES CRIMINAL BAR ASSOCIATION DINNER PRO BONO AWARDS
BAR HOCKEY READERS' COURSE REVISITED A BIT ABOUT WORDS
WBA MEET AND GREET NATIONAL INDIGENOUS LEGAL CONFERENCE

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VICTORIAN BAR NEWS

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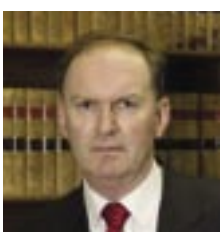


Welcome: Master Simon Gardiner

Welcome: Judge Mark Taft

Criminal Bar Association Dinner

National Indigenous Legal Conference

Pro Bono Awards

WBA meet and greet

Bar Hockey

Farewell

COMMITTAL PROCEEDINGS

On Saturday 15 November last year *The Age* reported that the DPP was calling for the abolition of committal proceedings on the basis that they no longer serve their original purpose and that they are, effectively, a waste of money and resources.

It appears that the DPP considers that the present procedure provides an ineffective filter in that only a small number of committal proceedings do not result in committal for trial and, in any case, the DPP has power to present a person for trial even though a magistrate has refused to commit. Since the filter, therefore, only removes a small percentage of persons charged from the flow of the criminal process, it should be abolished.

There appear to be three objections to this proposal.

(i) It cuts across the accepted principle that the accused should have an opportunity to cross-examine Crown witnesses before trial: see *Barton v R* (1980) 147 CLR 75 at 105–106, the views in which are reflected, effectively, in the 'Basha' inquiry and in the enactment of s.11 of the *Crimes (Criminal Trials) Act* 1999;

(ii) It will by reason of the 'Basha' principle and the operation of s.11 add considerably to the work of trial courts – in effect, it will remove the committal to the County Court or Supreme Court;

(iii) It assumes that the cost, anxiety and stress of individual accused, who under the present system would be discharged at committal, is of little or no importance.

The experience of those who rely on rainwater tanks is that if the filter is not working properly, the normal remedy is to replace it or fix it. Seldom is the removal of the filter seen as the desirable remedy. If magistrates at committal proceedings are not adopting a sufficiently rigorous approach to the Crown case, if accused persons who should be discharged at committal are being committed for trial, the remedy lies in a tightening of the legislative requirements for committal or a more liberal exercise of the *nolle prosequi* power.

ABOLITION OF 'DOUBLE JEOPARDY'

At the same time as the DPP talks about abolishing committals, the Attorney is making noises about abolishing the 'double jeopardy' principle.

One has to ask why there is this thrust to abolish the rights of the individual. It is all done, of course, in the interests either of efficiency or 'protection of the community'. It would seem that in the eyes of those who would 'reform' the law in this way the community is not composed of individuals but is some mindless conglomerate quite separate from the 20 million Australians who live in this country. Alternatively those who are charged with criminal offences are somehow outside the ambit of this concept of 'community'.

To abolish the principle of double jeopardy would mean that any person who has at any time been charged with, and acquitted of, an offence would have the possibility of conviction for that offence hanging over him or her for the rest of his or her life. It would mean that the Crown could have a 'dry run' trial to ascertain the ambit of the defence and the defence evidence and then run its real trial at a later time.

Big brother is big enough already – in fact too big. Every time our law reformers refer to the interests of the community, at least one of the editors sees, superimposed upon that reference, a fascist symbol.

Where the law does not stand between governmental power and the individual, it is left only with the function of enforcing conformity, ensuring that the minority comply with the wishes of the majority and settling arguments between individuals. It would seem, this is where our 'reformers' are heading.

THE DUTY OF COUNSEL

While it cannot be disputed that counsel's primary duty is his or her duty to the court or that that duty must prevail over the duty to the client, matters recently raised in CLE lectures seem to suggest that case management considerations should prevail over the duty to the client. This may be a mistaken impression, but if it is not, it

represents a very clear departure from the principles of adversarial litigation.

Cases do take too long, not only because untenable points may be taken, but also because of inefficiency in preparation and the inability of some advocates to argue concisely or limit examination or cross-examination to the matters in issue. This is not, however, a problem to be solved by moving gradually to an inquisitorial system or by restricting counsel to the 'best points' of the party's case. Often points seen by counsel as secondary end up providing the basis for the ultimate decision.

There is much to be said rather for the use of written briefs in the form used in the United States, a docket system as used in the Federal Court and judicial intervention in the course of running, to indicate that a point is regarded as prima facie untenable or prima facie accepted at an early stage in the proceeding.

DEPARTING THOUGHTS

As readers probably know, each of the editors takes it in turn to write the Editors' Backsheet. The editor writing this backsheet proposes to retire after this issue. There are three reasons for this. (1) Ultimately one runs out of ideas. It is time for a fresh mind or minds and new thoughts and new ideas to propel *Bar News* forward. (2) The work involved in producing *Bar News* takes up a considerable amount of time and other priorities now prevail. (3) Although many members of the Bar appreciate the content of the journal and express that appreciation to the editors, their number is exceeded by those who refer only to the defects – and there are defects. Sometimes this detracts very much from the job satisfaction of producing the journal.

Amongst the criticisms we receive are mistakes in captions. It is common for a particular group to ask for a photographer to attend their 'party' but then not to produce any script to go with the photos. Even when the script does arrive, in many cases it is left to the editors to try to identify people and provide captions for the photos.

There are those who say there are 'too many articles about women barristers'. This is because, on the whole they provide us with the material to print. There are others who indicate that the thrust of *Bar News* is anti-feminist.

In respect of the publication of a letter in a recent issue of *Bar News*, one of our correspondents took us to task saying 'Even the *Herald-Sun* checks its facts before publishing'.

A driver who has in excess of 1,200 people sitting in the back seat, only half of whom can refrain from giving advice, will eventually, and inevitably, get out of the car, shut the door and say 'you drive it'.

Editing *Bar News* has been fun and interesting. It is now time for a new driver or, perhaps, some new drivers.

GERARD NASH

A FAREWELL

It is hard to believe that you will do anything for as long as 22 years. Even today it is hard to believe that I have been an editor of the *Bar News* since 1986. The years blur into one, just like the 30 years of being a barrister.

It is time to hand over the reins to someone younger, fresher and full of new ideas and enthusiasm. It is not as if over the 22 years there have been queues of barristers anxious to take on the mantle of editor. But now is the time.

In 1986 David Byrne QC (as he then was) and David Ross QC decided to give the editorship away after putting in a great deal of work. I was a youngish barrister on the Committee and it came my way – a bit out of the blue.

After one editorial on my own Peter Heerey QC (as he then was) was appointed joint editor. The magazine began to change.

David Wilken, a former editor of the *Law Institute Journal*, was appointed publisher and following a commercial decision (not approved by all) to be in charge of advertising to offset the increased cost of a larger magazine. Over the years, until David's untimely death two years ago, there were inevitable disagreements over the design and content of the magazine, its size, the number of photographs and the increased use of colour. These debates resulted in the present format. We all worked well together.

After Peter Heerey's appointment Gerry Nash QC was appointed joint editor in 1991. The close relationship I experienced working with Peter Heerey has continued with Gerry.

Finally Judy Benson was appointed third editor in 2000. Many thought that the appointment of a female editor would cause some problems for two male editors somewhat set in their ways. But quite the contrary. Judy, through her background in legal publishing, brought forth ideas and enthusiasm to the magazine. The triumvirate has been a success. There has not been a deep philosophical disagreement between the editors.

Much of the work of the editors is mundane. Much time is taken up chasing copy. Strangely there are not many barristers who volunteer to write, and even when nailed down, getting an article written for the deadline is often difficult. Photographs arrive from unknown functions without words, and writers and names for captions must be found.

The *Bar News* and its editors have come in for criticism over the years. Some of it was justified – a lot was not. There have been problems with proofreading, and, yes sometimes the person in a photograph is not who the caption says he/she is. But what is certain is that much more thought must be given to anything that could be said to be controversial. A quick look at the editorials of the magazine over the last 22 years shows that exchanges of views and ideas which may have been acceptable, would not be tolerated today. Anyone who witnessed the 1984 Bar Theatrical Review would know that much of the satire and humour of that show could not be reproduced today.

That is a sign of the times. Perhaps the *Bar News* should avoid controversy. Perhaps it should simply become a 'trade magazine' reflecting the Law Industry. That is for the new editors to decide, and it can only be hoped that the new editors remain as unpaid members of the Bar, and not 'professional editors' or persons drawn from the ranks of the Bar bureaucracy.

The *Bar News* is an official organ of the law. It has a statutory responsibility to print the outcomes of the Legal Practice Board and its relevant orders under the *Legal Profession Act 2004*.

It is the only tangible object a barrister receives for the ever-growing Bar subscription. A tiny and niggardly section of the Bar thinks it costs too much – but they are in the minority.

And so the three editors have decided to resign. It is not out of anger, or because of any particular thing. We just feel it is time to go. Perhaps some of the fun has gone. But being editor has meant meeting so many brilliant and interesting people and being given the opportunity to write and edit about the great profession which is the Victorian Bar.

PAUL D. ELLIOTT

IT'S TIME

When Robin Brett QC, then Chairman of the Bar Council, patiently and persistently induced me to the view – using his not inconsiderable powers of persuasion – that 'it was time' to accept the invation to join the editorial duumvirate of *Bar News*, thus making it a triumvirate, the thought did, albeit fleetingly, flicker across my mind that this might be acceptance of a poisoned chalice. I was entirely wrong about that. The cup runneth over for seven years instead with a great deal of pleasure, fun times, immeasurably long hours spent on each issue, and generally hard work, but the ultimate reward of making a real and lasting contribution to the Bar and achieving an insight into what goes on at it – not that we could ever publish even a fraction of the intelligence that we gathered. I was astonished to discover how much went on behind the scenes of what we know as life at the Bar: how many members of counsel devoted themselves unstintingly to good causes, whether it was gathering computers and equipment to send to impoverished schools in remote Papua New Guinea, or setting up a duty lawyers scheme, or volunteering for work out of hours at community legal centres, to pick three examples from many at random. The social life of the Bar, along with its sporting prowess and achievements, has been well documented. Not so obvious are the follies, foibles and vanities, the many phone calls and emails complaining about a comma after a name instead of a full point, requests for numerous copies of one's photo for friends and relatives, complaints that a photo did not capture one's best side… Oh well, we are only human. And fallible.

It would be true to say that when I took on the editorial role I really had no idea what would be involved, though with two decades spent in the publishing world prior to coming to the Bar I felt pretty confident that I could deal with whatever was tossed up. The reality of course is very different when one compares a full-time position in a publishing house with a demanding deadline-driven job which is overlaid on what has principally been, in my case, an appearance practice, much of it spent in country Victoria. My colleagues – who welcomed me into their orbit and who were pleased to have an extra pair of helping hands and source of ideas – were wonderful to work with. However we have become increasingly overwhelmed by the demands of the editorial role, the lack of resources to support us, and the time we have to devote to it outside our practices, not to mention the fact that others do not appreciate the reality of a deadline as much as we do.

So again it is time, this time, time to move on and let the task renew and refresh with other voices and other ideas. It has been a great ride and the view has been unforgettable.

JUDY BENSON

Our strong Bar will face significant challenges in 2009

THE STRATEGIC PLAN AND THE STRATEGIC AND OPERATIONAL REVIEW

I begin by acknowledging the substantial contribution of Peter Riordan SC in his term as Chairman. I single out two projects because of their importance and potential long-term effects and benefits. Peter oversaw the development by Mark Moshinsky SC and his Committee of a comprehensive Strategic Plan for the Bar. He also initiated the Strategic and Operational Review of the Governance and Administrative Structures of the Victorian Bar and Barristers Chambers Limited.

The implementation of the Strategic Plan is underway and initial decisions have now been made by the Bar Council in relation to the key recommendations in the Strategic and Operational Review.

BARRISTERS' CHAMBERS LIMITED

There has been much in the press about BCL, and some comments have been critical of BCL's performance over the years and questioned the benefits of the BCL business model.

BCL has always been devoted to providing affordable and accessible accommodation to barristers at a competitive rate, and in doing so has been benign landlord. It is through BCL and its provision of chambers that this Bar has acted in seeking, to the degree it can, to constitute itself a Bar without barriers to entry – economic, social or based on connections.

I think the BCL product is a good one and I believe that the majority of our members will continue to see the benefits of taking chambers through BCL.

The Council has decided that BCL should continue to be run by an independent Board mainly comprised of barristers, and that BCL should engage a Managing Director to report to that Board. The Council has resolved to clarify the policies it seeks to have BCL implement and work toward. The Bar Council is also developing protocols covering the Bar Council's relationship as the governing body of the Bar as a whole with BCL.

THE INDEPENDENT CHAMBERS COMMITTEE

The Bar Council has established an Independent Chambers Committee to ensure that the perspectives and views of barristers who have chosen accommodation in chambers outside the BCL system are fully appreciated and appropriately acted upon. This new committee has met regularly and will continue to do so.

CHANGES IN THE CONSTITUTION OF THE BAR COUNCIL

There has been substantial change in the constitution of the Bar Council in 2008. In May, Paul Lacava SC, who had been Senior Vice-Chairman in the previous Bar Council, was appointed to the County Court. In June, Martin Grinberg, who was a member of the previous Bar Council, was appointed to the Magistrates' Court. The Bar thanks Paul and Martin for their substantial contributions to the Bar Council and the Bar; congratulates them on their appointments; and wishes them all the best in their new judicial careers.

I would also like to acknowledge the commitment and contributions to the Bar Council and the Bar of Terry Forrest QC, Fiona McLeod SC, Jenny Davies SC, Justin Hannebery, Tony Burns, Daniel Crennan, and Miguel Salas – all of whom left the Council in October 2008.

It is my pleasure to welcome the new members of the Council: Paul Anastassiou SC, Cameron Macaulay SC, Paul Connor, Matt Walsh, Kim Knights, Simon Gannon and Kim Southey.

BAR OFFICE STAFF DEPARTURES OVER THE LAST BAR COUNCIL YEAR

I acknowledge, and express the Bar's gratitude to, the Bar Office staff who have left over the course of the last Bar Council

year: Pamela Dempster, Elizabeth Rhodes, Katie Spencer, Ross Kennedy, Barbara Walsh, Mei-Leng Hooi, Debbie Jones and Deborah Morris.

I would like to add particular thanks to Barbara Walsh and Debbie Jones, who each served the Bar for 20 years, and to Deborah Morris who served for a total of eight years.

Barbara Walsh joined the Bar Administration as Readers' Course Co-ordinator and became Manager, Legal Education. Barb managed Continuing Legal Education seminars and the transition into Compulsory CLE. With the late Robert Kent, Barb was the driving force in the establishment of the Bar's Advocacy Training in the South Pacific – and, from then on, its continuation and growth. Debbie Jones began as Ed Fieldhouse's Secretary and was, for 17 ½ years, the Investigations Officer, then Manager, of the Ethics Committee. Deborah Morris ran the Readers' Course in recent years, and was of enormous assistance to me personally as the immediate past Chairman of the Applications Review Committee.

THE NEW SILKS

One of my earliest ceremonial functions as newly elected Chairman of the Bar Council was to represent the Council and the Bar in accompanying those barristers who had been appointed Senior Counsel in and for the State of Victoria as they announced their appointments at the ceremonial sittings of the Supreme Court, Federal Court and Family Court. This is the first year that, in Victoria, this ceremonial has been extended to include the Family Court – a very welcome addition.

On behalf of the Bar, I congratulate the new silks and wish them well in their future practice as members of the Inner Bar: Ross Middleton SC, Philip Jewell SC, John Dickinson SC, Craig Harrison SC, Joshua Wilson SC, Douglas Trapnell SC, Maryanne Loughnan SC, Michael Tinney SC, Caroline Kenny SC, Samuel Horgan SC, Adrian Ryan SC, Michael O'Connell SC, Sturt Glacken SC, and Christopher Townshend SC.

MEETING THE CHALLENGING AND CHANGING ENVIRONMENT OF PRACTICE TODAY

My personal agenda and aspirations this year are to work with the Bar Council to better position the Victorian Bar in the challenging and changing environment of the practice of law in Victoria and in the developing national profession throughout the country. Those challenges include a legal landscape in which legal firms are competing with barristers in areas of work where barristers were formerly much more heavily involved – for example, in the development of case concepts and the structuring of litigation, in drafting and settling pleadings, in settling witness statements and in pre-trial appearance work. We, as counsel, bring to every task the highly developed legal skills and experience of the specialist independent advocate. We are cost-effective and competitive.

LEGAL AID FUNDING AND FEE SCALES

Another particular challenge is the crisis in Victorian criminal law legal aid funding, and in overall Commonwealth funding to Victoria Legal Aid.

COMMONWEALTH FAMILY LAW LEGAL AID FUNDING

The Bar joined with the Law Institute earlier this year in serious representations to the Commonwealth – and, indeed, to every Victorian Senator and Commonwealth member – and in public statements at a media conference – over the serious inequities in Commonwealth funding to Victoria Legal Aid. VLA cuts in Family Law grants include wholly eliminating funding for any independent children's lawyer to attend court to instruct counsel – seriously disadvantaging children most marginalised and disadvantaged, who are, by definition, incapable of giving instructions to counsel and who are probably most in need of representation.

CRIMINAL LAW LEGAL AID FUNDING

'In Crime', the PricewaterhouseCoopers independent report commissioned by the Bar, was publicly launched last month at the Law Council of Australia National Access to Justice and Pro Bono Conference in Sydney. That report documents the inadequate legal aid scale fees for counsel in criminal matters, and the decline in Magistrates' Court scale fees by 40%

against the Consumer Price Index over the last 15 years. The Report documents the extent to which criminal law barristers have been subsidising the criminal justice system in Victoria, and the understandably sharp decline in the number of barristers undertaking predominantly criminal law work. This is an access to justice issue – an issue that has the capacity seriously to compromise the administration of criminal justice in this State – all clearly matters of Government responsibility, both State and Commonwealth.

Jointly with the Law Institute of Victoria, the Bar spoke out on this issue at a public meeting on the forecourt of the County Court towards the end of November.

COMPETITIVE EDGE, THE READERS' COURSE, CPD AND HEALTH AND WELLBEING

The practising list of the Bar is now over 1,700. In the current environment, individual excellence is not enough – the Bar as a whole needs to have, and be seen as having, a competitive edge.

To that end, the Bar Council is reviewing the Readers' Course – looking towards a degree of consistency with at least the Eastern States on the principle of legal practice being increasingly national – while maintaining and increasing a Victorian competitive edge.

We are also working to build Continuing Professional Development offerings in the increasingly necessary skills of building and managing a practice at the Bar.

Barristers need not only training but support. Philip Priest QC and Dr Michelle Sharpe are working on developing the Bar's Health and Wellbeing support structure and activities.

JUSTICE STATEMENT 2 AND CONSULTATION WITH GOVERNMENT

The Victorian Attorney-General has recently issued his Justice Statement 2, and the Bar looks forward to a continuing role in consulting with the Justice Department, including making what contribution we can to the Attorney's work in this area.

Philip Priest QC, Dr David Neal SC, John Champion SC and other members of the Criminal Bar Association have for years been members of the various Justice Department working groups on trial and appellate aspects of Criminal Law and Procedure. Members of the relevant subject area Bar Associations continue to review and comment on proposed new legislation.

PROPOSED AMENDMENTS TO THE BAR CONSTITUTION

The last Bar Council began work on reviewing the Bar Constitution, and Vice-Chairman Mark Moshinsky SC is finalising that work.

The proposed amendments are, for the most part, harmonising the existing Constitution with the *Associations Incorporation Act 1981*, the *Legal Profession Act 2004* and current practice.

A clean copy of the Constitution incorporating the proposed amendments; an explanatory memorandum; and, so as to identify the proposed textual changes, a tracked-changes version of the present Constitution will be posted on the Bar website in February to provide members with an opportunity to make any comments or suggestions before the Bar Council finalises the proposed amendments.

THE SPECIALIST BAR ASSOCIATIONS

The specialist subject-area Bar Associations have long been the foundation of Bar Continuing Legal Education – now mandatory Continuing Professional Development – and of consultation in their respective areas of practice with government and law reform agencies. The Criminal Bar Association has long had its own website, and is even separately incorporated under the *Associations Incorporation Act 1981 (Vic)*.

The Commercial Bar Association, CommBar, launched its own website in November, 2008, thanks to CommBar President Peter Bick QC and his team, in particular Maryanne Loughnan SC and William Lye. The website showcases what the Association and its members have to offer.

CommBar is also working with the Bar Council to improve awareness, particularly amongst corporate and government counsel, of the Bar's special attributes of independence, expertise and commercial competitiveness.

PRO BONO WORK AND LEGAL AID

Our Bar has a proud record of very principled and generous pro bono contributions to the justice system and the Victorian Community. As the PricewaterhouseCoopers Report shows, those conscientiously committed to legal aid criminal law work do so to an unreasonable and disproportionate extent.

Both through the Victoria Bar Legal Assistance Scheme and independently, most members of this Bar would, I suspect, be doing more pro bono work than the 35 hours per annum that is the aspirational goal of the independent National Pro Bono Resource Centre for every legal practitioner.

I would like to see a formal commitment from all members of the Victorian Bar to an annual pro bono effort. This would probably have the effect of increasing the already very substantial pro bono contribution of our Bar and would also enable the Victorian Bar to more accurately quantify its contribution to the community in this regard.

JOHN DIGBY
December 2008

Changing the court process

This year we celebrate the 25th anniversary of Victoria's public prosecution service – the first of its kind in Australia truly independent of Government. As some readers may have heard me remark at the commemorative dinner, of course, much has changed in the legal system since the birth of the DPP. The number of prosecutions has grown dozen-fold and resources in similar terms; crime has become more complex, with laws evolving in response; better police resources and developments in technology have affected the nature and number of prosecutions; and reforms encouraging victims to speak up are all factors rendering prosecution work unrecognisable to earlier days.

Over the last nine years, in particular, Victoria's courts and criminal justice system have undergone unprecedented change – the face of the judiciary transformed, the most sweeping review of our criminal law framework ever undertaken and a record $198.3m in this year's Budget alone targeted directly at delay; to name but a few. This is all part of the progression that recognizes that human behaviour, the law that regulates it and the system that applies that law will always continue to evolve.

As I've stated, however, legal culture has failed to evolve with it, soothed as it is by its adversarial comforts. Yet the law is designed for the benefit of the community and should not be a parlour game for those more interested in ritual than reform. It's time, then, to look beyond old boundaries that cannot reasonably be expected to house the complexity of 21st century

demands – to embark not on evolution but on a *revolution* in the way that justice is delivered.

Essential to this revolution has been the Justice Statement process. Only four years old, all of the first Justice Statement's initiatives have been or are being delivered, with victims prioritized; problem-solving jurisdictions expanding; and national firsts, such as the NJC and the Charter of Human Rights and Responsibilities, in full swing. Having righted significant wrongs and fashioned a framework for a fairer Vic-toria, however, we have come now to an important crossroad.

The choice before us is this: we can continue to work issue by issue or we can use the lessons of recent years to tackle the way the law operates as a system, and this need for systemic reform heralds the next stage in the revolution: Justice Statement 2 (JS2).

Reducing the cost of justice and creating an engaged and unified court system are its themes, the first acknowledging that we must resolve disputes in a more cost efficient and appropriate way. From enabling judges to better prevent abuse of process; to protocols that encourage ADR prior to litigation; through expanding neighbourhood mediation; an ADR Pledge by firms committing to mediation as a first port of call, rather than the fist on the table as prelude to inevitable litigation; to greater use of judge-led mediation – these are just some of the projects the JS2 will explore.

Further, under the banner of JS2 the Government also intends to develop a clear and consolidated *Victorian Courts Act* to provide statutory vision, consistent structure and procedures; while we will also consider Crown Counsel's report on a Single Criminal List that could see resources pooled and systems streamlined, with court users the beneficiaries.

Speeding up processes and reducing cost and delay; seizing more control of litigation; dispensing with the ego of epic advocacy – these are all examples of the cultural changes that can occur in both the civil and criminal context to make every wheel in the machine run more smoothly. It is all part and parcel of shaping a mechanism that functions as a genuinely unified system – of discarding the silo mentality

and the suspicion that the law is the personal fiefdom of those privileged enough to practise it.

Well, with privilege comes responsibility – an obligation to embrace and imagine better ways of serving the law. This means that, while changes at the prosecutorial end are essential, it is just as vital that we keep people from entering the revolving legal door in the first place. This may mean harnessing the power of peer pressure that so often gets kids into trouble to get them out of trouble instead. It may mean specialist intervention in the area of mental health, justice acting as a gateway through which people can access treatment, rather than be lost to alienation.

It means thinking creatively, rather than resorting to the call for mandatory sentencing to which some are so readily reduced. It also means recognising that, though crucial, resources are not the cure all – despite the default position of those who think that any issue can be resolved by throwing more judges in its direction.

Victorians – those for whose benefit the system exists – deserve better and they know it. Quite simply, vision is what is needed – yet without cultural change, the vision cannot be implemented. Government can drive reform but the engine must be fuelled by an equal determination from those at the coal face – those who apply the workings of the law every day. The role of Government is simply to provide adequate resources and the legislative framework – the tools for a better system. It's for the trade's practitioners to seize them and craft better results for the population they are engaged to serve.

This, then, is where we all have a role to play – whether as leaders of the profession, as members of the judiciary, as people who are passionate about the law and its place in the life of a democracy. I encourage readers to examine the JS2, to engage with its possibilities, to stand up to those who would deny the need for reform and to embrace the potential of a better way of doing justice for all Victorians.

A Boat Licence issued out of the Wollongong Office of NSW Maritime, being a 'licence to navigate at speed under the Water Traffic Regulations NSW', bears the following notation:

OPERATING RESTRICTIONS:
This licence does not permit the licensee to operate a personal watercraft (PWC) at any speed.

For Young Adult licences additional restrictions apply. Please refer to the current NSW Boating Handbook.

Gratis licences must only be used for official purposes.

OPERATING CONDITIONS:
Any variations to medical condition (including eyesight) or partial total deafness, colour blindness, or other physical disability likely to affect your efficiency to navigate a vessel must be advised direct to the NSW Maritime immediately.

Supreme Court

Master Simon Gardiner

Address by John Digby QC, Chairman of the Victorian Bar Council, on Thursday 13 November 2008

I appear on behalf of the Victorian Bar to congratulate Master Gardiner upon his appointment as a Master of this Court.

The occasion gives me great pleasure.

I also note that this appointment is the first appointment of a Master since the Victorian Government's recent reforms to the role of Supreme Court Master.

Master, you served articles and then worked as a solicitor with Ellison, Hewison and Whitehead. Thereafter, you were an associate to his Honour Judge Dixon in the County Court for a further 18 months. You have practised as a barrister, in many facets of that great profession, for 25 years.

You have also served on the Law Council of Australia, Insolvency and Reconstruction Law Committee, and the Dever List Committee for ten years, and you are an experienced mediator.

You bring this substantial foundation of experience in practice to this Court.

But let me begin at the beginning. You were born in 1956. You were the sixth child of Dr John, and the late Marcelle, Gardiner. Your father was a physician in general practice, a special level of medicine.

Thorough research has revealed that all five of your siblings have excelled. And the variety in their vocations is notable:

- Your brother John is an agricultural scientist who has spent 40 years working to improve Indigenous Affairs in the Northern Territory and Western Australia;
- Your brother Paul is a biochemist working in research and development with the Commonwealth Serum Laboratories;
- Your brother Philip is a veterinary surgeon in Warrnambool;
- Your brother Andrew is an accountant; and
- Your sister Janet is in the diplomatic service, and has served as Australia's ambassador to Syria and Portugal.

Your aunt Clare is in the Loretto Order and your uncle Paul is a senior Australian Jesuit. He is the 'Postulator' in the process towards the canonization of Blessed Mary MacKillop.

The Bar believes that it is fortunate for the Law and for this Court, that – in the rich variety of vocations pursued by your conspicuously talented family – you, Master, chose the Law.

You were educated at St Roch's Parish School in Glen Iris; at St Kevin's College in Toorak; and at Monash University – from which you graduated Bachelor of Economics in 1977 and Bachelor of Laws in 1978. You returned to earn a Graduate Diploma in Commercial Law in 1982, and later a Master of Laws degree. One might note a strong academic side to you, Master.

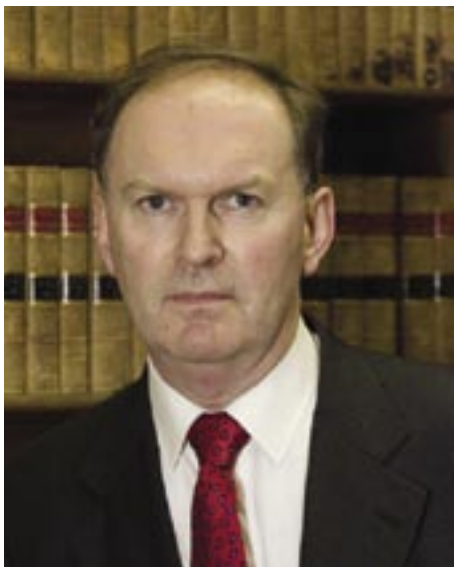
You were President of the Monash Law Students' Society. However, the Bar's best efforts have failed to uncover anything controversial during your Presidency.

You served articles at Ellison, Hewison and Whitehead (now, Minter Ellison).

As mentioned, at the conclusion of your early career at Ellison Hewison and Whitehead, you became the associate to his Honour Judge Dixon of the County Court.

In addition to the quality of your work, Judge Dixon recalls with pleasure that you shared a healthy interest in certain aspects of viticulture.

As well as oft affirming his Honour's axiom that, 'Life is too short to drink bad



wine', you passed on to the Judge your keen appreciation for another of life's special things, the Peugeot motor car, apparently something of a passion in your former life.

Alas, you no longer drive a Peugeot. Some of your more perspicacious friends see a connection between this abandoned passion and an incident on the freeway in which the Peugeot you were driving burst into flames.

You read with Gerry Nash – who was a Professor, and Dean, of the Monash Law School when you were a student.

More recently enrolled barristers should understand that Professor Gerry Nash QC is the distinguished colleague who walks the corridors of our Bar bearing a strong likeness to Merlin the Magician.

Master, you will well recall that your first chambers were in Four Courts – now re-branded 'Douglas Menzies Chambers'.

Upon the opening of Owen Dixon Chambers West, you applied for a modest, some would say sensible, internal room on the 13th floor.

Your move to a place which accommodated more silks appeared to pay off. One can imagine your joy at receiving a call from Allan McDonald QC, soon to be Justice McDonald of this Court, at the height of his practice.

Apparently, the conversation went like this:

'Gardiner?'

'This is Simon Gardiner.'

'McDonald here.'

'Yes, Mr McDonald.'

'I see you've applied for a very small internal room on the 13th floor of Owen Dixon West.'

'Yes, I have – and I'm really looking forward to the move.'

'Well…ah…that's why I'm ringing you. I was wondering how committed you were to that internal room…it's very small, you know…and the fact is,…well…I need it for a photocopier.'

Not exactly the collegial welcome and encouragement you had hoped for. You were, however, not deterred and remained on that Floor in Owen Dixon West thereafter.

From that modest, some would say sensible, room you established a substantial commercial practice, specializing, in the last 15 or so years, in insolvency.

It is noteworthy that you have now relinquished practice in the only area which one could be confident will thrive during the current economic troubles.

I now return to your academic bent. Few barristers make time to pursue part-time graduate academic work – mostly by course-work related to their areas of practice.

However, your 1990 Master's degree, was pursued via a major thesis titled: *The Role and Jurisdiction of the Coroner's Court*, the research degree that serious legal academics take.

You had done mostly sciences at school. Your combined degree had been in economics and political science. Your Master's thesis was essentially jurisprudence and legal history.

Of course, Master, you have other attributes. It is reported that you are a true bushman. In the preparation of today's welcome, I have been shown photos, including a photo of the Enoch's Point, Big River, fishing hut which John Pilkington's father built in 1937.

Apparently, your wife, Helen, worked with Pilkington on designs for the beehive shaped wood-fired oven which has produced much pleasure over the years.

Pilkington says he *thinks* you actually caught a fish there a couple of years ago.

That is not to demean your serious outdoor zeal: the Hatter Lakes; the Menindie Lakes; the Australian Alps; re-tracing the footsteps of Burke and Wills – the Dig Tree, Cooper's Creek, the Birdsville Track; Mount Poole; and near Pilkington's Hut, Mount Terrible. You are a bushman – and so are your wife, Helen, and children, Eric and Astrid. Your love of the Peugeot has been replaced , I am told, by your affection for your 4-wheel-drive Land Cruiser.

Another of the Master's attributes is culture. You are passionate about the music of Johann Sebastian Bach (particularly the cantatas) and seriously knowledgeable about choral music.

For a time, you had your own music program on 3MBS – *Morning Melody* – at 6 in the morning each Saturday. I have to say, a 6 o'clock Saturday mornings 'on-air' start sounds to me even less attractive than the comforts of Pilkington's fishing hut.

You also have the attribute of humour. You are said to be master of the acerbic one-liner: the unnerving, no come back quip, like: 'I see you've ironed your own shirt today.'

Another example is reported to be when some years ago, people on the 13th floor were discussing the upcoming inaugural meeting of the Women Barristers Association, and George Beaumont QC, well known member of the Victorian Bar, announced that he had been invited. Master, you apparently responded: 'What, as an exhibit?'

Master, your sound foundation of 25 years practice at the Bar, good sense of humour and bushman's capacity to rough it, hold more than some promise of a distinguished, long and satisfying service as Master of this Honourable Court.

The Bar wishes you satisfaction and happiness in your new role.

County Court

Judge Mark Taft

Address by John Digby QC, Vice-Chairman of the Victorian Bar Council, on Monday 13 October 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 cannot be here today and has asked me to pass on his best wishes.

It's my very great pleasure, as Vice-Chairman to speak on behalf of the Bar this morning.

Your Honour had a vocation to service from a young age, however, it took some time for this attribute to be applied to the Law. You were 38 years old when, in 1988, you were admitted to practice. Victoria's recently departed former Chief Justice Sir John Young was Chief Justice at the time.

You took silk in 2006, and have now practised law for close to 20 years.

You are a leader of the criminal bar, and join a number of strong criminal law silks who now serve as judges on this Court.

Your Honour was educated at Camberwell High School, then at Monash University.

Initially, in the late 60s, you enrolled in Law/Arts. However, Ian Turner, a family friend teaching in the History Department, told you that doing law was, and I quote: 'a waste of time'.

'I've got a law degree', he said, 'I've never used it – and nor would you.'

Your great influences at Monash then were Professors Ian Turner and Geoffrey Searle in History – and Professor Herb Feith in Political Science – sadly, all now dead.

Your father, who is here today, came to Australia as a refugee from Nazi Germany. Remarkably, Herb Feith also came, with his parents, as a refugee from Nazi-occupied Vienna.

Herb Feith was a humanitarian, an internationalist and a peace activist. In the 1950s he alone did what is now done by an institution known as the 'Australian Volunteers International'.

Professor Feith's oft expressed statement to his students inspired them, including, we expect, your Honour. The Professor's statement was:

> I was expected to make the world into a better place…I grew up thinking that it was important to learn things and search out the truth – but also, and really more importantly, to do practical things with the knowledge one got.

In 1971, you completed an Honours Arts degree in History and Political Science – and you went into the world to do practical good.

You were, for some years, Executive Director of the Western Region Council for Social Development and served on the Western Region Community Health Centre Board.

The Western Region Council worked with nine municipal councils. It established, for example, the Footscray Arts Centre. It led the way in establishing Women's Refuges for victims of domestic violence.

It was not until 1983 that you returned to Monash to study law.

You came back to a very different Monash.

In the late 60s and early 70s, Monash students were politically active and passionate.

You had been co-editor with the late Philip Hetherington, of the renowned student magazine, *Lot's Wife*. Tony Howard

was the layout artist. Julian Burnside was the photographer.

In those days, the difference between the true radicals and the moderates at Monash was said to be that the true radicals would call for the Student Administration Building to be burned down in protest – the moderates were content to occupy it. Your Honour was, in that sense, a moderate.

In 1983, when you returned to Monash, there was virtually no student activism. You worked in the Economics Faculty and you worked your way through the law course.

You knew you wanted to be a barrister. You took the Leo Cussen Practical Training Course, got admitted, and came straight to the Bar.

You knew also that you wanted to do crime. Robert Richter QC moved your

admission. You read with Tony Howard, now Judge Howard of this Court.

You began in the Magistrates' Court, but also did some industrial work – briefed in that by, amongst others, Julia Gillard – then at Slater & Gordon.

The industrial work paid a lot better – but your interest was in crime.

You had five Readers: Peter Matthews, Karl Brandon, Frances Dalziel, Rebekah Sleeth and Sascha Gelfand.

All are still in practice at the Bar. All praise your dedication as a mentor – your personal generosity, and your willingness to devote hours to working with them – and your ongoing interest and ongoing support.

You also served on the Legal Education and Training Bar Readers Subcommittee for nine years, and taught in the Readers' Course. You did the weekend workshops; you did criminal law moots.

You served on the Executive of the Criminal Bar Association – this year, as Vice-Chairman.

By all accounts your Honour has made a very substantial contribution to the important work of this Association and the achievement of its goals. One very significant example is your work with Dr David Neal SC of our Bar, in relation to the PriceWaterhouse Report dealing with the ongoing serious inadequacies in relation to legal aid fees in criminal matters – and the very considerable extent to which barristers at our Bar, particularly junior criminal barristers dedicated to representing the underprivileged in our society are involuntarily subsidising the administration of justice in Victoria.

Your Honour helped identify and substantiate the detrimental effects on the criminal justice system which arise in the absence of adequate and appropriate remuneration for those seeking to defend impecunious accused persons.

Your Honour worked to identify and substantiate the serious capacity such funding shortfalls can have in compromising the administration of justice and compromising those who practise as barristers in such a system.

Your Honour has conducted a number of high-profile criminal trials for the defence. You have prosecuted in professional disciplinary tribunals. Your Honour has been involved in weighty and very stressful trials relating to alleged terrorism.

You tell the story of a conference with a well-known Australian convert to Islam. Your learned leader, Lex Lasry, gave certain advice to the client, which you respectfully supported.

The client asked whether he could seek another opinion. Visibly taken aback, your learned leader said, 'Well…of course'.

To your joint astonishment, the client prostrated himself on the floor, facing in the direction of Mecca. Muttering in Arabic, he rose and fell a number of times.

This went on somewhat interminably. The tension in the room was palpable.

Finally, the client arose and said he would follow your advice.

Your learned leader was visibly displeased at being second-guessed in this manner.

You were, it's said, gently amused.

You did, in earlier times, prosecute for both the State and Commonwealth – for example, in the long-running prosecution of the notorious Frugtniet family.

You were the constant in the prosecution – led first by Jeremy Rapke QC before he was appointed a Victorian Crown Prosecutor, then by Tony Howard QC, and finally by Lex Lasry QC.

Your three sons – David, Will, and Matthew – all won selective entry to Melbourne High School. All are now at university.

You and your wife, Ann Tregear, have made a substantial contribution to Melbourne High School.

You served on the School Council for six years – as President of the Council for two of those years. In 2006–07, you were Council President, and your wife Ann Tregear was President of the Parents and Friends Association.

Your Presidency covered the School's Centenary Year celebrations in 2005; also the search for, and selection of, a new principal following the untimely death of the long-serving, visionary and much-loved principal, Ray Willis; construction of the School's new Art Studies Centre; and a series of delicate negotiations with government ministers and advisors.

And you have continued to serve as a Director of the Melbourne High Benevolent Foundation.

As one of your Readers has said of you: 'Mark takes a robust view of most things, and is fond of characterising his submissions "robust"… and he's humble – well… as humble as a silk can be.'

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

Farewell Sir John Young

On 16 October 2008, a State Memorial Service was held to commemorate the life of a great Chief Justice who over a period of some 17 years stamped his personality and ethos on the Supreme Court of Victoria. An erudite man, a civilised man and a simple man, he represented all that is best in the common law system of justice. His personal attributes were many and are summed up in the eulogies given at St Paul's by two of those who knew him best.

Eulogies at St Paul's Cathedral, Melbourne, on 16 October 2008 at the State Memorial Service for The Honourable Sir John McIntosh Young AC KCMG.

Michael Collins Persse

John Young was sceptical of the word 'eulogy'. Scholar that he was, he took its Greek roots seriously, with the implication that a eulogist must speak only well of the departed. Quite what was a better term we couldn't decide. The opposite is presumably a kakology, such as one English politician of dubious morals but residual Christianity demanded, leaving instructions that at his funeral he should be excoriated and all his faults exposed. I can't, however, in either whimsy or honesty, move even an inch in that direction, for John was so patently a good man – one possessed of such a rare nobility of character – that any reservations about speaking anything but well of him are unthinkable. So a eulogy it is, with all my heart.

Born as he was late in 1919, the year of the Treaty of Versailles that for good and ill set the pattern of his world, and the year too of the great influenza epidemic, he was the first child – with sisters, Nora and Evelyn – of a Scottish father, George David Young, and a mother, Kathleen Mildred (known as Kay), also by birth surnamed Young, from a family with roots in the Scottish end of Ireland, the North. *Semper juvenis* was his appropriate motto, and Scotland was ever-present in the weather of his soul, along with the Australia, particularly Victoria, to which the shipping industry had brought his father in 1912. To many, John seemed English – some said 'more British than the British' – but he became, I believe, a citizen of that polis which transcends nationality. At the same time he was especially, and more or less equally, at home in Australia and the United Kingdom. In his being, quite as much as in anything he did, he represented the best of what we have inherited from the British Isles: and, while this was partly the result of his years at

Oxford and in the Scots Guards, it was also, I would say, at the core of him from childhood on.

Semper juvenis: always young. He became learned, and wise – and knowledgeable, as any great judge must, in the ways of the world. But the innocence of childhood remained: the essential kindness, growing into compassion for those in trouble; an instinct for the good in even the most unpromising places; an intense desire for the truth – truth that includes the often unpalatable facts but also the kernel from which something better may emerge. He was anything but naïve, and when, recently, we discussed optimism and pessimism he declared himself a pessimist – which I took to mean, in John, not so much one for whom things can only get better as one who expects, and sees clearly, the evidences of fallen human nature but does not accept them as final: one who will work and pray for the restoration of unfallen nature: the regaining of that innocence (very different from ignorance) that is the ideal, if not the actual, condition of humanity.

Geelong Grammar School provided some of the prime influences in his life – most particularly James Darling, who at the age of 30 began his long headmastership in the same month, February 1930, as John, newly ten, began eight years there as a boarder. In 1937 he was one of the two school prefects chosen to lead a new House, Francis Brown (named for Jim Darling's predecessor), to which John, hitherto after Junior House a happy member of Perry, transferred his loyalty and, with Dick Lefroy, the Senior Prefect, devoted himself wholeheartedly. He was also a Cadet Lieutenant and secretary of the Chapel committee, and as a younger boy had represented the school in athletics. Those eight years saw tremendous growth and regeneration in the school as Darling – himself quite pink in politics – stirred its social conscience and found work for many of the unemployed, not least in a large building program, and brought in the various arts, including music and drama, from the peripheries of the curriculum to the centre of the School's life and consciousness. For all his idealism, Darling was also a realist, and to those who left school in 1937 he predicted a dark world, very likely to be engulfed again in war. He had excited them with his own vision of greatness, and challenged them to high endeavour and public service, while leaving them in no doubt that the tasks before them would be huge ones, requiring great effort from them to supplement and channel the divine grace in which he strongly believed.

In 1995 John stood where I stand now to pay tribute to Sir James Darling in the eulogy at one of the four memorial services held for Jim in Australia and England. There were several eminent Geelong Grammarians and others who could fittingly have done so, but John was the pre-eminent spokesman for Victoria on that occasion. To Geelong Grammar School his loyalty and affection remained ever-strong, and, as well as other service generously given including speeches on important occasions, he was a member of the School Council in 1974 – briefly because of his becoming a judge that year, indeed Chief Justice of the Supreme Court of Victoria and Lieutenant-Governor of the State. It gave him and others great pleasure when his son, Tim, served on the School Council for nearly a decade recently; and great pleasure, too, that Tim and Anne's two daughters and son – Georgie, Kate, and Islay – all followed their father to the School, where John loved seeing them – as well, of course, as seeing them in other places, and seeing his other grandchildren – the children of his elder daughter, Jenny, and Nick Dawes – Caroline, David, Susie, and Christopher. To Clyde School, too, John was important, and he was the chosen speaker in 1975, his daughter Trish's last year there, at its final Speech Day before amalgamation with Geelong Grammar School.

Well instructed before 1930 at Miss McComas's Glamorgan, John developed as a scholar through the Latin teaching of Kay Masterman, the Greek of John Ponder, and other influences. He obtained Leaving honours in Latin and French, helping him to go on to Darling's and Masterman's own University of Oxford – indeed, to Masterman's own college of Brasenose (or BNC) – in October 1938, after spending some months in Germany, learning the language, in deference to his father's expectation that he, too, would go into shipping. It was a tense time to be there. Late in 1938, accompanying his Geelong friend Graham Brown to visit the family of Dr Edward Twining at Manchester, John met his future wife, Elisabeth, though courtship was to come later and marriage not until 1951. John was grateful that he had had this and a later opportunity to get to know Dr Twining, who worked at the Royal Infirmary in Manchester, and who was to die unexpectedly in 1939. Only a day or two after war was declared on the third of September that year, when John had finished his first year of law – the Honour School of Jurisprudence at Oxford – he enlisted in the horsed cavalry and was told to await call-up, but that, because he was only 19, there would be a delay and he should return to Oxford. He made an attempt to join the Australian Army by going to Australia House in London, but found that he could do it only by returning to Australia at his own expense. Shipping and money were alike unavailable, and in the event a second year at Brasenose followed, where he became close to the Principal of the College, William Stallybrass, known affectionately to virtually everyone at BNC as Sonners from his former surname of Sonnenschein, which had been changed to that of his paternal grandmother in 1917 when many others that were German-sounding (including Saxe-Coburg-Gotha and Battenberg) were also changed (the Sonnenschein family from Austria had in fact been domiciled in England since 1848). Rather as Darling had done at Geelong, Sonners bestrode the College and knew every one of its members, most of them very well, and took as much interest in their characters as in their studies. John retained a lifelong affection for Oxford in general and Brasenose in particular, and it gave him and others great pleasure when, in 1981, the College bestowed on him its highest honour by electing him an Honorary Fellow. He also did so much for Oxford in Australia, persuading others to support it financially and in other ways, that he was named by the University a Distinguished Friend of Oxford; and he joined three older Geelong Grammarians, General Sir John Hackett, Sir Alexander Downer, and Sir Vincent Fairfax, in being honoured with Vice-Presidency of the Oxford Society.

The last great corporate influence in John's life before that of the law, of which Clive Tadgell will speak (as of his later public service), was the army. During his second year at Oxford, the adjutant of the Oxford University OTC persuaded him

to apply to join the Scots Guards, where he was accepted, in his own words, 'on the basis of my school and those whom I already knew in the Regiment'. S. M. Bruce, the former Prime Minister of Australia, then our High Commissioner in London (and later Lord Bruce of Melbourne), helped expedite John's call-up, and he went to Sandhurst at about two days' notice, thus avoiding the usual entry for prospective Guards officers through the Guards' Depot at Caterham. 'This is why,' said John, 'I never did learn to polish my boots properly,' since even Officer Cadets at Sandhurst had people to do it for them – though I must say I always found John's footwear to be immaculate. His habitual punctuality undoubtedly owed something to his military training: he told me that he learned then to be always ready 'seven minutes early', to allow for emergencies.

After four months at Sandhurst he passed out early in November 1940 and, after two weeks' leave, was posted, like all newly commissioned officers in the Scots and Coldstream Guards, to the Training Battalion of the Regiment at Pirbright in Surrey. He was there for most of a year except for a six-week interlude at a house near Aldershot, Mytchett Place, where he was one of five subaltern officers detailed to guard Rudolf Hess, Hitler's deputy and successor-designate, who on 11 May 1941, to the general astonishment, had landed by parachute in Scotland, near Glasgow. Apparently Hess was confident of securing a 'compromise peace', his precondition to which was the fall of the Churchill government – which, needless to say, withstood the challenge. John's German no doubt helped, but so far as I know Hess was already rather depressed and not very forthcoming, though he did try to escape.

From Pirbright John was posted to the Third Battalion of the Regiment, which almost immediately on his arrival was moved from Chigwell in Essex to Tilshead on Salisbury Plain and, to John's dismay, converted to armour as part of the newly formed Guards Armoured Division. His dismay is understandable, for – apart from his love of the time-honoured, the traditional – he also loved horses and riding: a love later encouraged by him in his children. At the very end of his life he was proud that his grandson Islay had become captain, as he is this week during competition in Perth, of the Victorian Under 21 Polocrosse team.

The Guards Armoured Division had lengthy training for the 'Second Front'. For a time John was transferred to Brigade Headquarters and was in charge of Headquarters Tanks, with the temporary rank of Captain. With a reorganization of armoured divisions, the Brigade became the 6th Guards Tank Brigade, equipped with Churchill Tanks, and in July 1944, when the 21st Army Group had established a bridgehead in Normandy, the Brigade, having crossed the Channel and landed on the beaches, had its first battle at Caumont in the break-out from the bridgehead.

Like so many who served in it, John – who was mentioned in dispatches for his service in North-West Europe, and received the certificate of the Commander-in-Chief for good service in France – spoke little of his war, but his succinct account of what followed is worth quoting:

> After that battle the front opened up a bit, the Guards Armoured Division led the advance to Brussels and Nijmegen, and our Brigade, after some heavy fighting, was left at about the line of the Seine. I obtained permission to follow the war and was able to enter Brussels on the day of liberation and occupy a comfortable hotel bed which I was told had been occupied by a German Officer the night before. Our Brigade came up in due course and we were digging in for Christmas 1944 at Eindhoven when von Runstedt's advance into the Ardennes required us to look south again. We spent a cold wet winter in Holland, with some fighting, and then eventually we crossed the Rhine at Wesel. From there the Brigade advanced fairly rapidly, on a line through Muenster and Hanover, to the Elbe. When we reached Muenster my turn for leave occurred, and I went back to England for two weeks' leave. It was then discovered that I had picked up pulmonary tuberculosis, and so, instead of returning to Germany, I was incarcerated in a military hospital at St Albans and a sanatorium in Midhurst for most of the rest of the year. I was actually discharged from the Army on 1st January 1946, and returned to Australia in April 1946 in the aircraft carrier HMS Victorious.

John's TB was to recur more than once, latterly, after more than half a century, some two years ago, thereby – with pain and fragility from other sources – overshadowing the last stage of his life, and – what I think he minded most – impairing his ability to read with concentration. He was typically gallant in such adversity, and did all he could to prevent its weighing unduly on others. His family, I know, are deeply grateful for the good care he had from doctors and nurses, and from professional carers and devoted friends – a sequel, as it transpired, to the loving and unceasing daily care he himself had devoted to Elisabeth during the last years of her life when her own need, in dementia and disorientation, was great.

Clive will deal with John's legal studies and career once he was back in Melbourne. I cannot myself finish my own eulogy without acknowledging the supreme importance to John of his marriage and family. Elisabeth came to Australia in 1951, to be married to John on October 18, after war work herself in the Wrens. A talented photographer, she had made pictorial maps of the Normandy coastline in preparation for the D-Day landing, and then gone to Ceylon and Singapore as part of Mountbatten's headquarters. Medical photography, particularly for teaching purposes, followed at East Grinstead, where the great New Zealand surgeon Sir Archibald Macindoe was performing near-miracles in skin-grafting and plastic surgery and restoring self-esteem to wounded pilots and others; and then at the Westminster Hospital. Elisabeth was deeply influenced by the dedication she had witnessed. After years of devoted motherhood, bringing up her and John's children, she felt free to spread her own wings and rediscovered her early love of acting, going on to appear in productions with one amateur group or another and in a film – always, once John became Chief Justice, under her maiden name of Elisabeth Twining. Of her and her talent for creating beauty wherever they were, and her services to the National Gallery of Victoria, and as his wife and great support in his official duties, John was intensely proud of her. It was a wonderful marriage, and together they enhanced and brought intelligence and fun to innumerable occasions. I remember hearing from both sides in 1985, after they had been host and hostess to the Prince and Princess of Wales at Government House during one of John's times as Acting Governor or Administrator of Victoria, how special a

time it had been for them all. Above all, they were loving – and greatly loved – parents and grandparents, and our most heartfelt thoughts are with their family today. We think, too, of close relatives in the Hurley, Young, Beischer, and other families, and of friends such as the family of Lawrence and Margaret Stokes, for whom, in her time of need, John did so much in really helpful ways like taking her dog for its daily walk.

Elisabeth's sister, Joan, married Robert Carr (now Lord Carr of Hadley), Home Secretary in the Heath government, and with them and their family she and John had happy times in England, Portugal, and elsewhere. John remained close to many Geelong, Oxford, and Army friends – those from the Scots Guards, including Archbishop Robert Runcie and the Deputy Prime Minister William Whitelaw, having a special camaraderie and giving John a great welcome whenever he went to England ('I will assemble the troops,' Willie Whitelaw would say). The joy given to John's friends by his company and conversation, and by his letters, was very great.

He was profoundly reflective. As a boy, when not at school, he attended with his parents their parish church of St John's, Toorak, and listened attentively to Dr Law. As his friend Henry Speagle has written to me, 'He was deeply read in the English classics, biography and history. He once told me that the big thing in life was to seek wisdom, implying its Biblical connotations of facing the mystery of human life and seeking keys for its understanding.' John's classical training at Geelong Grammar helped form a habit of mind that could detect unerringly what was bogus, and a style of speaking and writing at once incisive and felicitous. That style had both the strength and precision of Latin and the grace and flexibility of Greek. John was a natural aristocrat not only in appearance, bearing, and demeanour but, more importantly, in having that quality of soul – which can exist at any level of society or in any walk of life – the possession of which fits its bearer pre-eminently for the mingled service and leadership of others. It would have been unthinkable to let John down. Modest and understated, indeed possessed of true humility, pure in heart, self-sacrificing, and devoted to the public good, John McIntosh Young through a long life gave to all the communities to which he belonged, and to Victoria as a whole, a generous and whole-hearted service that reflected his own quality of soul, an exemplary life, and his quite exceptional goodness.

The Honourable Robert Clive Tadgell

We are come to honour and to praise, and to give thanks for, an uncommon man – uncommonly *good*.

Lest you should think my choice of the word *good* underpowered or unduly bland, I take leave to remind you of a serviceable exposition of the word by a rarely-noticed nineteenth century poet in a piece entitled simply 'What is Good':

What is the real good?
I asked in musing mood.

Order, said the law court;
Knowledge, said the school;
Truth, said the wise man;
Pleasure, said the fool;
Love, said the maiden;
Beauty, said the page;
Freedom, said the dreamer;
Home, said the sage;
Fame, said the soldier;
Equity, the seer.
Spake my heart full sadly:
The answer is not here.

Then within my bosom
Softly this I heard:
Each heart holds the secret:
KINDNESS is the word.[1]

Those lines will perhaps evoke, for some, a few of the qualities which, along with many others, radiated from John McIntosh Young. I am not sure that kindness necessarily springs to mind as an ingredient of the popular definition of a lawyer. In him, however, kindness was innate: it shone through his public and his private life and will remain, for me, an indelible memory.

Sir Owen Dixon, his inspiration and exemplar, used to say that John Young was especially tender towards the very old and the very young. Those of us fortunate enough to sit as pupils in the chambers of John Young, the fashionable junior barrister (there were but four of us over the years), fitted neither of those extreme categories. Even so we were privileged to receive tutelage of a rare order – not confined to, but reaching to embrace, the bald chat of life at the Bar.

Michael Collins Persse has sketched something of the breeding, nurture, training and experience that helped to mould the character of the man who handed on so much to us as pupils and, I must say, to the countless others who, in many varied walks of life, learned from him simply by being with him or near him. He had an effortless presence.

After due discharge from the Scots Guards in 1946 at the age of 26, having been mentioned in dispatches, Captain Young returned to Australia to take a law degree at Melbourne, supplemented by his Oxford MA.

I dwell upon the *due* discharge because, by the time of his return, he had achieved a curious, if unwanted, fame on account of the early wartime adventure on which Michael has touched. Years later John was to relate his part in the affair to the Boobooks Dining Club in a paper entitled (with becoming modesty) *How I nearly got a bowler hat for letting Hess escape*.

The bizarre trip to Scotland in 1941 by the Deputy Fuehrer, Rudolph Hess (if in truth it *was* Hess), remains to this day shrouded in a degree of tantalising mystery leavened, one gathers, by a measure of comedy. This is not the place to enlarge upon it. Indeed, I mention it only by way of admitting two tiny, touching, adventitious glimpses of our subject. First, the Messerschmitt fighter-bomber conveying the eccentric visitor from Germany crashed and burned in a farmer's field near Eaglesham, a small village in Renfrewshire south of Glasgow, a spot (as John Young subsequently noted) '...where I believe my ancestors were yeoman farmers in the 17th century.' It was a small world even then! Secondly, Rudolph Hess's agonising survival, in Spandau Prison, near Berlin, until 1987 at the age of 93, produced the result that potentially revealing files in the British Public Record Office are destined to remain closed for the statutory period of 30 years after his death. As to that embargo, John recently noted with resignation, referring to competing puzzled theories about the affair, that 'the really irritating thing from my point of view is that we shan't know the answer until 2017, when it is in the highest degree unlikely that I shall be here!!!' *Sic transit gloria*.

Having served short articles of clerkship with Mr A.R. Lobban, a member of the doughty firm of Blake & Riggall (as it was then styled), John Young was admitted to practise by the Supreme Court of Victoria on 2 August 1948. Blake & Riggall or their predecessors had then practised in William Street, at or near the south-east corner of Bourke Street, for the best part of 100 years. Directly over the road, in St James's Building, stood John Sanderson & Co., long-established wool merchants and shipping agents, of which John's father had long been a partner. In those days of the five-and-a-half day week – and perhaps on account of the historic and geographic coincidence of the two firms – John Young as articled clerk, and later as fledgling barrister, found himself instructing or instructed on many a Saturday morning at the Melbourne Court of Petty Sessions, in routine prosecutions under the *Merchant Shipping Act*, of merchant seamen who, the night before, had been apprehended as revelling deserters. Thus he cut his teeth for a career in the courts that, one way and another, was to span some 43 years.

He signed the Bar Roll on 4 February 1949, on the same day as his close friend Keith Aickin, his senior by nearly four years, who had served as Sir Owen Dixon's associate, and whom he was to succeed in that position.

John Young regarded Sir Owen Dixon as one of the three men in his life. His period as Dixon's associate must surely count as an intimate feature of his education, providing enduring benefits and lifelong friendship. Again, I shall not dwell on it and stay to mention only that he was wont for the rest of his life to refer with pleasure and defer with satisfaction to Dixon's precepts, principles and distinctively elevating and amusing extra-curial *obiter dicta*.

Following his time as a judge's associate, John Young read as a pupil in the chambers of Mr H.A. Winneke, whom a quarter of a century later he was to succeed as Chief Justice. Those intervening 25 years at the Victorian Bar were crowded not only with an assiduous concern for clients (as you would expect) but with strenuous and extraordinary voluntary service to the Bar itself. A description of the almost infinite width and variety of his flourishing and rewarding practice is not called for here, but I should mention particularly his dedicated voluntary contribution. In his second year at the Bar, 1950, he was appointed honorary secretary of the Bar Council, a post he held for a decade. It was no sinecure, for in those days the Bar had no full-time staff, as now, and the load he shouldered was exceedingly heavy. During this time a recurrence of his debilitating wartime legacy, pulmonary tuberculosis, confined him to bed for most of a year. During that period he devoured for his intellectual stimulation, as he told me, no less than the last fifty years' issues of the *Victorian Law Reports* – despite which he managed, happily, to recover, at least until very recent years. In his latter years as junior counsel he found or made time to take up the role of independent lecturer in company law at the University of Melbourne and jointly authored an authoritative textbook on the subject.

Letters Patent conferring the rank of Queen's Counsel in and for the State of Victoria issued to John Young in 1961, and similar appointments in other jurisdictions followed. In the meantime began a second substantial period of service to the Bar with his election in 1969 to the Bar Council, appointment to the Ethics Committee – some would say the most important aspect of the Bar's functioning – and chairman of that Committee in 1971. Most notably, he was soon recognized as, and remained, an authority on professional ethics. Two lectures that he delivered on conduct and etiquette at the Victorian Bar were printed and were for very many years routinely issued to all newly-called barristers.

John Young cared very much about the manner in which professional people behaved themselves. He was a member of the Board of Examiners for Barristers and Solicitors and concerned himself, in particular, with the affairs of the Medico-Legal Society of Victoria, of which he was Honorary Treasurer for ten years and President in 1968.

I very well remember a paper delivered to that Society, during John Young's close involvement, by Sir James Darling (of whom we have heard much this morning) and bearing the beguiling title 'On Being Reasonably Honest'. Sir James referred to a problem which, as he said

> … seems to me to be common to almost every profession, namely the acceptance of more work than one can honestly perform. This seems today to be a weakness common to all professional people in a way which was not the case even thirty years ago. It is tied up, of course, with high income tax… but it is also tied up – dare I say it? – with the urge to expect more out of life in the way of rewards in standards of living and comfort and luxury than our fathers thought necessary. Its result is a lower standard of service to the patient or the client, longer delays and even perhaps perfunctory treatment. If the prime purpose of a profession is to serve and the

provision of a livelihood only a secondary objective, then perhaps the work volume accepted should be the subject of conscientious enquiry.

Those sentiments might very well have been voiced by John Young. One may be sure that he embraced them; and, if they were valid in 1968, how much more emphatically so a further ten, twenty, thirty and forty years on?

Notwithstanding what was to some a conservative mien, John Young was during his later years at the Bar responsible for substantial changes in its organization and administration. It was later perceptively said of him that one of his strengths as a reformer was that he neither looked nor sounded like a reformer: those who had a liking for reforms liked the reforms he prepared; and those who had no liking for reforms tended to be persuaded because it was he who put them forward.

You scarcely need to be told, having regard to his spacious achievements, that John Young was remarkably efficient with time. He was generous to accommodate others, but used his own time to best advantage. I always assumed that his wartime military discipline contributed essentially to that capability and to his manifest administrative flair.

As Chief Justice of Victoria from 1974 to 1991, John Young made conspicuous and lasting contributions to the administration of justice in the State. Continuing his already proved capability for achieving necessary and useful revision, a series of imaginative procedural reforms under his leadership drew the Supreme Court of Victoria into an era of exceptional distinction.

He understood very well the nice distinction between the verb *to have* and the verb *to be*. He preferred always to *be* and to *do* rather than to *have* and to *take*. He was in many respects a minimalist, and practical and definite, tending to know what in a given situation needed to be done and knowing how to get it done with minimal fuss.

John Young's thoroughness was legion. He subscribed to the view that until you know a thing right to the bottom you should not speak as though you did. I recall that during one long vacation he took his associate (then the splendidly faithful 'Skip' Shelton), with a large bunch of keys, on a journey to visit and enter every room in the Supreme Court building, of which there must be hundreds, so that he might himself know where and what it was, how it was used (if at all) and what might best be done with it.

Sir John's own innate sense of right and wrong forever controlled him. His courteous elegance of manner combined with an accurate and well-turned facility of exposition to produce a model judge. It was a pleasure to appear before him and to sit with him on the Bench, as it had been to appear with him and against him at the Bar. He was wont to take the trouble to explain the use of a word in what he called its 'ancient and proper sense'. He tended also, I think, to expect or hope from others a similar approach to the use of language. I suspect that he would have inclined to the view that people who cannot distinguish between good language and bad, or who ignore the distinction, are unlikely to think carefully about other things.

He was a servant of the rule of law. What is the rule of law? It is commonly tossed around as an indispensable precept but more often than not left undefined or ill-defined. For John Young there was nothing especially intricate or complicated about it. He took the central tenet of the rule of law to require – nay, demand – that, where the rights, duties and liabilities of citizens are concerned, like cases should be decided alike, and preferably decided by properly constituted courts equipped by judges in every respect independent of the executive government. At the time of his appointment as its 9th Chief Justice in 1974, the Supreme Court, as the superior court of Victoria, had jurisdiction (with very limited exceptions) 'in all cases whatsoever'.[2] Justice was done and, in general, could be seen to be done, according to the rule of law. During his chief-justiceship, however, jurisdiction which previously belonged to the Supreme Court was conferred upon other bodies and individuals who, however distinguished, were not obviously independent of the executive. Parliamentary and subordinate legislation combined increasingly to allow the practical application of the rule of law to be whittled down. He regarded that as a retrograde development, and said so, but he did his best to nurture his ideal. In doing so he attracted loyalty because, above all, he was himself intensely loyal to his colleagues and to his ideals.

I cannot pretend to do justice today by way of elaboration upon the energetic attention and disciplined enthusiasm that John Young bestowed on a multitude of appointments, organisations and institutions outside the Supreme Court. Apart from the office of Lieutenant-Governor, which he held for over twenty years, I merely refer to a few – in particular the Boy Scouts Association, the Oxford Association, the honorary appointments with service corps, some of which are represented here, and the universities of which he held honorary degrees. It is a measure of his commitment that he retained his association with many and indeed most of these long after he retired as Chief Justice at the age of 72; and then took on the substantial role of Chairman of the Police Board. Is it not little less than miraculous that he managed to achieve so much? – and with a staff that was, by present-day standards, very small.

When I last saw John Young, a few days before he died, he said, not for the first time, 'I have been extremely lucky. My luck began in 1919 when I was born'. If that was so, we have been fortunate that he has shared his luck with us and given us his example. His motto was on his bookplate: *Semper juvenis* – always young. He was nothing less.

Though his voice be stilled, his example 'remains fresh to stir to speech or action as the occasion comes by'; and, again with Pericles, his legacy 'abides…without visible symbol, woven into the stuff of other men's lives.'

He put his stamp, gently but firmly and with ease, on all that he did. So I invite you, in celebrating and giving thanks for a life fully and finely lived, now to look forward as well as back. As we have otherwise been reminded:

> And not through eastern windows only,
> When daylight comes, comes in the light.
> In front the sun climbs slow, how slowly,
> But westward, look, the land is bright!

NOTES

1 John Boyle O'Reilly (1844–1890)
2 *Constitution Act 1975*, s. 85.

Philip Henry Napoleon Opas OBE QC

Born on 24 February 1917, Philip Opas was educated at Melbourne Grammar School and the University of Melbourne. In the Great Depression, he left school at the age of 15 and began work as a law clerk with Roy Schilling, studying by correspondence at night to complete matriculation.

Phil Opas began long articles with Roy Schilling in 1937, but went on to complete the LLB at the University of Melbourne in 1939. In 1975 he obtained an LLB from Monash.

On the outbreak of war in 1939, he enlisted in the RAAF. In 1942, on leave from active service in New Guinea, he was admitted to practice. He later served in Vietnam and was Judge Advocate General in the RAAF, attaining the rank of Air Commodore.

In 1946, after the war, Phil Opas came to the Bar. He read with R.V. Monahan (later, the Honourable Sir Robert Monahan, of the Victorian Supreme Court). He established a wide and varied practice which included constitutional law and local government. He took silk in 1958.

In 1966, Opas defended Ronald Ryan, who was ultimately convicted of murder and hanged – the last person hanged in Victoria. Phil was convinced that the shot which killed the warder for whose murder Ronald Ryan was hanged was not fired by Ryan. After the conviction, Opas's brief from the Public Solicitor was withdrawn, and he publicly appealed for an instructing solicitor for Ryan's appeal to the Privy Council. Called upon to show cause why he should not be struck off for unprofessional conduct, he was defended by Richard McGarvie QC and Ivor Greenwood. He was honourably acquitted.

The Privy Council appeal, in which the late Allayne Kiddle acted as his junior, failed. Ryan was hanged and Phil was devastated. He left the Bar as a direct result.

Four years later he returned to the Bar. He served as Deputy President of the Victorian Administrative Appeals Tribunal and Chairman of the Planning Appeals Board. He retired in 1989.

Ryan's execution never left him. The conviction that Ryan was innocent persisted throughout his life and there appears to be credible forensic evidence to support his belief. He was a concerned man and a passionate man, an honourable lawyer and a congenial colleague. His conduct of the Ryan case represents the finest traditions of the Bar. We shall miss his passion and his zeal.

John Mathew Edward Sutton

Jack Sutton died on 14 October this year at the age of 80. He is remembered fondly by all older members of the Bar.

Jack was a practising member of the Bar for only a brief period of three years from 1996 to 1999. But most of us knew him well in his other incarnations.

Jack who started his working life as a school teacher, was admitted to practice in 1975. He worked as an employee solicitor with K.E.G. Cranage in Malvern with whom he had served articles. From there he moved to the Victorian Crown Solicitor's Office, where for nearly ten years he briefed in their junior years many who have now attained judicial office or are senior silks. As an instructor he was thorough, helpful and hard working. These characteristics were superimposed upon a fine intelligence, a strong grasp of legal principle and an educated mind. He was a pleasure to work with.

In 1985 Jack was appointed Senior Associate to the then Chief Justice, Sir John Young, and, when Sir John retired, he continued on as Senior Associate to Chief Justice Phillips. He was an erudite and broadly read man, and must have made a very congenial associate for both Chief Justices.

In 1993, after serving as Senior Associate to the Chief Justice for a period of seven years, Jack, then aged 65, was employed by the Bar as a corporate solicitor. In 1996 he read with Peter Kistler and, at the age of 68, signed the Bar Roll in November 1996.

Jack was a good lawyer but, more importantly, he was a civilised man, a quietly spoken congenial man, a good companion and a first-class human being.

All who knew him regret his passing.

Daniel Julius Pollak

Daniel (Danny) Julius Pollak was born on 6 September 1979, to parents Cynthia and Peter Pollak. His sister, Renee, was born two years earlier.

Daniel grew up in Camberwell, but his family moved to North Caulfield in 1994 to be closer to the Jewish community.

Daniel undertook most of his schooling at Mount Scopus Memorial College. He moved to Liebler Yavneh College at the start of his year 11 studies, and graduated in 1997. Daniel was involved with the Mizrachi organization and attended the B'nei Akiva Jewish Youth Movement whilst he was at school. At the conclusion of year 12, he went overseas on a year-long study program with B'nei Akiva. On his return, he became a leader of the youth movement. He was a leader of the youth movement for three years, and the treasurer for one year.

Daniel commenced a Law/Commerce Degree at Monash University in 1999, and graduated with Second Class Honours in 2003, He was awarded the Tress Cocks and Maddocks prize in 2002, and the Alec Masel prize for best student in Civil Procedure in 2003. He undertook articles at the Office of Public Prosecutions in 2004 and was admitted on 25 April 2005.

Daniel married his high-school sweetheart, Shelley Grynberg, on 19 June 2005. They purchased their first home in North Caulfield shortly afterwards, and their daughter, Noa Batya, was born on 25 March 2007.

Daniel spent approximately three years at the OPP in the General Prosecutions team. He tendered his resignation from the OPP in early 2007, to come to the Bar. While waiting for the September Bar Readers' Course to begin, he undertook a three-month project with the Human Rights and Equal Opportunity Commission. He commenced the Bar Readers' Course in September 2007 and signed the Bar Roll in November 2007. He read with Will Alstergen.

After coming to the Bar, Daniel was briefed on a number of both civil and criminal matters in the Supreme Court, County Court and Magistrates Court. He appeared for and obtained an injunction against the AFL on behalf of a 14-year-old girl who wanted to continue to play mixed football. He also appeared in the Racing Tribunal on behalf of the stewards. He was also starting to develop a practice in WorkCover, appearing on behalf of plaintiffs in serious injury and weekly payment matters.

Daniel was awarded a scholarship to undertake his Masters at Melbourne University. At the time of his death, he had completed three subjects, with a High Distinction average.

Shelley, Noa and Daniel Pollak

Daniel was heavily involved in the Jewish Community, particularly in the United Jewish Education Board, a body which provides Jewish education to students who cannot afford Jewish education. He started as a leader on one of their educational camps and quickly became involved in "developing the educational program. He joined the Board approximately seven years ago, to ensure that he had a voice in assisting those who were otherwise unable to receive the Jewish education that he had received. He worked hard to ensure that others in the community knew about and assisted with the cause.

Daniel was diagnosed in February 1999 with hemangioendothelioma (HE). HE is a composite term for blood vessel cancers. From 1999, Daniel underwent various bouts of chemotherapy, radiotherapy, a number of procedures and operations, and at least 50 blood transfusions. He had, for the past five years or so, been medicated with an experimental treatment. He was under the care of the Peter McCallum Cancer Institute.

More information about HE can be found on the website, <www.heardsupport.org.> The website, created as The Hemangioendothelioma (HE), Epithelioid Heman-gioendothelioma (EHE), And Related vascular Disorders (HEARD) A support group website was developed by Daniel's mother, who dedicated most of the last ten years to research into the little known disease, and to developing a registry of people diagnosed with rare forms of cancer, in order that they could share their knowledge and treatments from around the world.

Readers' Course revisited

Interview between **Ian Freckelton SC** and **The Honourable Professor George Hampel QC** and **Ian Hill QC**

IF: The Victorian Bar Readers' Course is about to have its 30th anniversary. With your long involvement in advocacy training, you must both have seen many changes in the course since the heady days of 1979?

GH: We have indeed and of course ours was the first in Australia and it took me years to persuade our New South Wales colleagues that they should start one. They laughed at the proposition in the beginning, saying that barristers don't need advocacy training – you've either got the gift or you haven't. Finally they saw the light and started their own course about ten years after ours began. Our Readers' Course is generally acknowledged as the best around, and in recent years we thought we should review how we can keep it that way.

IH: Issues being canvassed in the review of the course are whether there should be entrance examinations and whether people should be able to start the course straight after completing articles or Leo Cussen.

IF: Are there restrictive trade practice issues about that?

IH: There may well be but you can't get a full practising certificate as a solicitor before you've practised for 18 months after articles and more for after Leo. We are allowing people who could not practise in their own right as a solicitor to practise in their own right as a barrister. Now I know there are differences with trust accounts which we don't have but all those things are being examined. We are looking afresh at the content of the course, examinations at the end, and assessment during it. Part of the professionalisation is utilising George Hampel's *Advocacy Manual* (written with Elizabeth Brimer and Gabriel Kune).

IF: How does the book come into the course reassessment?

IH: The book is a very good resource for readers but there is more than that in terms of further professionalising the course. We are looking at better educating our instructors so they can teach better and assess in a way which gives effective and fair feedback to the students.

GH: The focus on instructors is very important. There is a misconception in just about every field of skills training that because you are good at what you do therefore you can teach. That just isn't right. We want to train our instructors in the same way that instructors in other places, including universities, are trained these days.

IH: We are looking at certification for instructors at different levels. That might mean that some of those who can teach may not be permitted to assess. There are different skill sets for which there need to be different levels and kinds of proficiency.

GH: One option is to learn from developments in the United Kingdom. Since we introduced the training concept there in the mid '90s they have come a long way. One of the things they do very well is to be very strict about training their teachers and they don't permit people to teach unless they are satisfied that they are at a particular level. They grade them and teach them and have their teaching proficiency reviewed every two or three years. In that respect they have an edge on us.

IH: I have just read the Attorney-General's column in the recent *Bar News* suggesting that perhaps chambers should provide an income for readers as they do in England at about the minimum wage for a legal executive.

IF: What do you think of that idea, Ian?

IH: We are looking into it but I don't think it will happen here. There are significant differences between England and here. We have a very low cost Readers' Course ($3771) if you compare it with higher education costs at university. To do one subject in a Master's degree costs much the same as to pay for the Readers' Course.

GH: It shouldn't be forgotten, too, that we provide a place for an indigenous reader and for up to four readers from the South Pacific region. We currently have four from Papua New Guinea.

IF: That has been one of the real achievements of the course – to stretch out a helpful hand to our neighbours.

IH: Yes. I think the Victorian Bar is very well respected in the South Pacific. In fact we have had contact from Fiji wanting us to go there to put on an appellate advocacy course.

IF: There's a growing awareness of appellate advocacy, isn't there. There's been a recent book by Blank and Selby about that subject which seems to have been well received so far, but it's been one of the neglected areas until recent times.

The Honourable George Hampel QC

GH: Yes, that's right because I think that most advocacy training has to date or almost to date been treated as for beginners. There's been a culture in the legal profession that once you've done your basic training that's all you need to do. But we are now developing much more into ongoing education across the board in law, but including in advocacy. Just a couple of months ago we did the Bar cross-examination workshop for the English Bar in London and we did one in Darwin just recently. So there is a lot of that coming along but it's only a fairly recent development. We are hoping to introduce a bit of that culture to our Bar. One of the things that we might look at as part of the review is whether there should be either as part of or as an addition to the Readers' Course an obligation to do a supplementary course of short duration after people have been in practice for, say, 12 months or two years.

IF: It's interesting, isn't it, that we have mandatory attendance now at continuing professional development lectures but for most of us our real stock in trade is advocacy and there's no mandatory ongoing professional development in that regard.

GH: The main attendance at the Advocacy Institute courses for barristers is at the more senior level. I couldn't tell you the numbers with precision but over the years we have had some 60 or 70 silks overall attend them. We have had teachers like Gleeson, Kirby, Jackson, Bennett, Burnside, Felicity and myself. It works and that's really terrific. So that's what I'd like to encourage in terms of changing the culture at all levels of our Bar.

IF: Looking at the changing times then, what are the main elements of change in advocacy styles that you have both noticed in the courts over the duration of our Readers' Course?

IH: Well, I think when I first came to the Bar, we used to shout at witnesses and we used to rough them up and it was sort of war. Now it's more subtle and more effective.

GH: It's much more issue driven now. Judges, and I think juries, don't want to waltz around. They want to get to the point. There is a greater focus on conceptualising your case, getting to a case theory, and going for it. That has made a vast difference because people are actually forced to think about what they are going to do, in advance, instead of waiting to see what happens.

IH: It is also very handy before a jury because not only do the jurors know what the issues are but you get a chance to lay it out and impart your defence.

GH: And it enables a judge to better decide admissibility and relevance issues as they arise. The trend is apparent in the appellate courts too where the judges will say: 'What's your best point?' And there's also the trend towards more and more paperless trials. That is going to keep on growing. Even in the last five years or so there have been a number of trials where everything has been up there on the screens. The Victorian Law Reform Commission Report on Civil Justice is looking to facilitate such developments too.

IF: I've observed greater use of written submissions across jurisdictions.

IH: Certainly. I've been noticing that in crime in particular, where written submissions are becoming much more common than they used to be. Counsel will start by handing up an outline of written argument, be it to a magistrate or a judge, and then speak to the written outline. I'm sure that that is being found helpful by the Bench but it requires different skills than those in traditional oral advocacy.

IF: In terms of style, do you think we'll move to usage of multimedia in closing and opening addresses using PowerPoint and similar? That would be another shift in our longstanding dependence upon oral presentation.

GH: We all keep saying that a picture is worth a thousand words but so far we are using forms of presentation that are not oral in only certain situations. We use diagrams and charts, simulations and re-enactments. That must evolve further.

IH: I agree. We are starting to use aide-memoires and summaries and chronologies much more now than we used to. Why can't they be used electronically?

IF: If there is going to be more use of computer-generated images in court, this will impact on advocacy skills. It will need to be part of the advocacy training of the future.

IH: Bearing in mind that most of the readers that we see now have been through university in more recent times, and as a result are computer literate, that has to be so.

GH: There's a fair bit of work being done at the National Institute of Trial Advocacy in the United States about that. We haven't started doing that yet but the concepts are the same; it's the application that's differs somewhat. It's long overdue in the sense

Ian Freckelton SC

of the need to start thinking about things beyond the traditional areas that we have taught. Nonetheless, everyone has to have the basic skills and one of my worries has always been that you constantly encounter advocates without them. If you haven't got the basic skills, it's hard to build on something further.

IF: What are some of the developments in thinking about advocacy training?

GH: One of the issues recognized internationally is the need for a statement of the basics so that you get a new teacher or any teacher or any pupil to a point where they have a good grip of the fundamentals.

IF: And how does your *Advocacy Manual* lock into those issues?

GH: The Manual attempts to create the sort of basic structure that everyone must have. It's the minimum that everyone needs, from which more can be built. It is really a combination of what everyone has been thinking over the last 35 years.

IF: What about its use outside the Readers' Course?

GH: Well, concert pianists go through their scales before they play their pieces. It's not a bad thing to do. Tennis players hit out before they play their complex shots. It has an application in the context of refreshing what experienced advocates may have forgotten. Someone asked me how long it took. I said: '25 years plus 18 months'. One of the things that I am happy about is that we actually put into the book material about advocacy teacher training. So any person who teaches our readers can go to the chapter and find out what they should do when giving feedback to readers and what they should do when reviewing a video exercise. It's a start.

IF: Ian, if you had a wish list for the future of the readers' course, what different things would you like to do?

IH: I would like more time to start with.

IF: Does that mean you would want the course to be longer?

IH: No, I don't think that would go down very well but it would be nice to have more time for people like me to devote to the Readers' Course because a lot of it needs re-writing and that takes time. I would like to help to teach the instructors better because I think they really need to be trained. But on the other hand, we have a difficult balance. We can't make it too onerous for the instructors because we rely upon their voluntarily giving up their time. We have to strike that balance. The other thing that I think needs to happen is more computerisation of the course. At the moment we hand out nearly all the exercises in hard copy which means someone has to photocopy them. We need to move to doing it on-line. Still many of the readers are saying that they prefer the material in hard form, but that will change.

GH: In New South Wales and in England and in other courses that I have seen, the culture has changed so Fred will take a week off, given six months notice, and will

Ian Hill QC

say for three days or whatever be devoted to teaching at the Bar. It is no longer a question of whether you can spend a hour here or there. Our current system is a nightmare for those administering the Readers' Course. At the moment there are two types of teachers in the course – the skills teachers and those who come along and give the lectures. For the latter, arguably, teacher training isn't needed. But the skills teachers, those who take the readers through their performance, need to be well trained and consistent in their approach.

IH: I must say, I am always impressed by the number of members of the Bar who are prepared to give up their time.

GH: It's fantastic – about 100 every course.

IH: We went to Papua New Guinea in July and there were seven barristers there and there will be another seven in Fiji. At the moment we try to assess readers' advocacy skills about three weeks before the finish of the course. That gives us some time to take those aside who are not progressing as well as they should and offer them some further instruction or encouragement. We have found that without exception the ones given that extra help come up to what we would consider a pass mark.

GH: I think we are slowly getting rid of the thinking that advocacy can't be assessed because it's impressionistic. There are so many different things that are assessable, providing the assessors know what they are doing and work to a set of criteria that the readers are told about. Formulating criteria that are objective and can be consistently applied takes a little bit of training, but that has been done at universities for some time where students at undergraduate and postgraduate level have to be graded into distinctions, credits, passes, etc. for courses in advocacy. My experience is that assessors are generally within 5 per cent of one another in doing such assessments.

IF: It's not that sort of assessment you are looking for in this context, though. Isn't it simply a matter of needing to identify people who haven't yet achieved a basic level of competence?

IH: Exactly. And George's book has a role to play in this.

IF: So do we assume that you and your team have started work on the advanced advocacy manual now?

GH: No. Advanced advocacy is more for actual personal teaching rather than a manual. The basics are assumed and from then on the feedback that can be given is likely to be so diverse that it would be very difficult to standardise it. I don't think we should even try to do so.

IF: I wonder if we met in fifteen years time whether we would say something different because what you are saying about advanced advocacy is what people said 30 years ago about advocacy.

GH: Probably.

IF: That's probably a good note on which to finish. Thank you, George and Ian, and good luck to you and your team, George, with the *Advocacy Manual*, which is available at all good legal bookshops and online at the Australian Advocacy Institute.

Stolen

An edited extract of **Julian Burnside's** speech to the National Indigenous Legal Conference on 12 September 2008

On 13 February 2008, Prime Minister Kevin Rudd formally apologised to the stolen generations and their families. That day the nation shifted perceptibly. The apology was significant not only for marking a significant step in the process of reconciling ourselves with our past: it cast a new light on the former government. It resonated in the community to an extent which no one had predicted. And I think it reminded us of something we had lost: a sense of decency.

Most of the worst aspects of Howard and his mob can be explained by the lack of decency which infected their approach to government. They could not acknowledge the wrong that was done to the stolen generations; they failed to help David Hicks when it was a moral imperative – they waited until his rescue became a political imperative; they never quite understood the wickedness of imprisoning children who were fleeing persecution; they abandoned ministerial responsibility; they attacked the courts scandalously but unblushing; they argued for the right to detain innocent people for life; they introduced laws which prevent fair trials; they bribed the impoverished Republic of Nauru to warehouse refugees for us. It seemed that they did not understand just how badly they were behaving, or perhaps they just did not care.

One of the most compelling things about the apology to the stolen generations was that it was so decent. Suddenly, a dreadful episode in our history was acknowledged for what it was.

Unfortunately, when announcing that the Government would apologize to the stolen generations, the Prime Minister also said that the Government would not offer compensation. Let me explain why I think that was unfortunate.

First, let us look at the realities of the stolen generations and the attempts of some of their members to achieve recognition of what was done wrong and compensation for the harm which resulted.

There have been a few attempts to recover damages by members of the stolen generations. Actions in the Northern Territory and New South Wales failed. In August 2007, an action brought in South Australia succeeded.

BRUCE TREVORROW'S CASE

In the South Australian case, the Plaintiff was Bruce Trevorrow. Bruce was the illegitimate son of Joe Trevorrow and Thora Lampard. They lived at One Mile Camp, outside the tiny township of Meningie, on the Coorong. They had two other sons, Tom and George.

They lived at One Mile Camp because in the 1950s it was not lawful for an Aborigine to live closer than one mile to a place of white settlement, unless they had a permit.

When Bruce was 13 months old, he got gastroenteritis. Joe didn't have a car capable of taking Bruce to the hospital, so some neighbours from Meningie took him to the Adelaide Children's Hospital where he was admitted on Christmas Day 1957. Hospital records show that he was diagnosed with gastroenteritis, he was treated appropriately and the gastro resolved within six or seven days. Seven days after that he was given away to a white family.

The family lived in suburban Adelaide. They had a daughter who was aged about 16 at the time. She gave evidence at the trial as a woman in her late middle age. She remembered the day clearly. Her mother had always wanted a second daughter. They had seen an advertisement in the local newspaper offering Aboriginal babies for fostering. They went to the hospital and looked at a number of eligible babies and saw a cute little girl with curly hair and chose her. They took her home and when they changed her nappy they discovered she was a boy. Such was the informality with which Aboriginal babies could be given away in early 1958 in South Australia.

A short time later, Bruce's mother wrote to the Department asking about Bruce. The magnitude of her task should not be overlooked: pen and paper, envelope and stamp were not items readily obtained in the tin and sackcloth humpies of One Mile Camp, Meningie. But Thora managed to write a letter which still exists in the State archives. It reads:

> I am writing to ask if you will let me know how baby Bruce is and how long before I can have him home as I have not forgot I got a baby in there and I would like something defenat [sic] about him this time trust you will let me know as soon as possible.

The reply is still in existence. It said:

> (Bruce) is making good progress but as yet the doctor [unidentified] does not consider him fit to go home…

He had already been given away.

The laws relating to fostering required that foster mothers be assessed for suitability and that the foster child and foster home should be inspected regularly.

Although the laws did not distinguish between white children and Aboriginal children, the fact is that Bruce's foster family was never checked for suitability and neither was he checked by the Department to assess his progress. However, he did come to the attention of the Children's Hospital again when he was three years old: he was pulling his own hair out.

When he was eight or nine years old, he was seen a number of times by the Child Guidance Clinic and was diagnosed as profoundly anxious and depressed and as having no sense of his own identity.

Nothing had been done to prepare the foster family for the challenges associated with fostering a young Aboriginal child. When Bruce was ten years old, he met his natural mother for the first time. Although the Department had previously prevented his mother from finding out where Bruce was, the law had changed in the meantime and they could no longer prevent the mother from seeing him.

The initial meeting interested Bruce and he was later to be sent down to stay with his natural family for a short holiday. When the welfare worker put him on the bus to send him down to Victor Harbour, the foster mother said that she couldn't cope with him and did not want him back. His clothes and toys were posted on after him.

Nothing had been done to prepare Bruce or his natural family for the realities of meeting again after nine years. Things went badly and Bruce ended up spending the next six or eight years of his life in State care. By the time he left State care at age 18, he was an alcoholic. The next 30 years of his life were characteristic of someone who is profoundly depressed and who uses alcohol as a way of shielding himself from life's realities. He has had regular bouts of unemployment and a number of convictions for low-level criminal offences. Every time he has been assessed by a psychiatrist, the diagnosis has been the same: anxiety, profound depression, no sense of identity and no sense of belonging anywhere.

The trial had many striking features.

Announcement of Senior Counsel for 2008

On 26 Novenber 2008 the Chief Justice of the Supreme Court of Victoria, Marilyn Warren, announced the appointment of senior counsel for Victoria for 2008.

They are:

- William Ross MIDDLETON
- Philip Anthony JEWELL
- John Paul DICKINSON
- Craig Warwick HARRISON
- Joshua Douglas WILSON
- Douglas Andrew TRAPNELL
- Maryanne Beatrice LOUGHNAN
- Michael Harry TINNEY
- Caroline Majella KENNY
- Samuel Richard HORGAN
- Adrian James RYAN
- Michael Glennon O'CONNELL
- Sturt Andrew GLACKEN
- Christopher John TOWNSHEND

The Chief Justice said the successful applicants were appointed after a long and wide consultative process. 'I have personally met with the Chairman of the Victorian Bar, other leaders of the various specialist bars, the heads of the relevant courts and tribunals, judges and many others. In addition each applicant was required to nominate four judicial referees. The process has been extensive,' Chief Justice Marilyn Warren said.

There were 92 applicants, including seven women.

The new silks were formally announced in the Banco Court at 9.15am on Friday 5 December 2008 at a ceremonial sitting, at 10.30am in the Federal Court of Australia and at 11am in the Family Court of Australia.

Photographs will appear in the Autumn issue of the *Bar News*

One was the astonishing difference between Bruce – profoundly damaged, depressed and broken – and his brothers, who had not been removed. They told of growing up with Joe Trevorrow, who taught them how to track and hunt, how to use plants for medicine, how to fish. He impressed on them the need for proper schooling. They spoke of growing up in physically wretched circumstances, but loved and valued and supported. They presented as strong, resilient, resourceful people. Their arrival to give evidence at the trial was delayed because they had been overseas attending an international meeting concerning the repatriation of indigenous remains.

The second striking feature was the fact that the Government of South Australia contested every point in the case. Nothing was too small to pass unchallenged. One of their big points was to assert that removing a child from his or her parents did no harm – they even ventured to suggest that removal had been beneficial for Bruce. This contest led to one of the most significant findings in the case. Justice Gray said in his judgment:

> [885] I find that it was reasonably foreseeable that the separation of a 13 month old Aboriginal child from his natural mother and family and the placement of that child in a non-indigenous family for long-term fostering created real risks to the child's health. The State through its emanations, departments and departmental officers either foresaw these risks or ought to have foreseen these risks. …

That finding also accords with commonsense. We all have an instinct that it is harmful to children to remove them from their parents. It was based on extensive evidence concerning the work of John Bowlby in the early 1950s, which showed that it is intrinsically harmful to remove a child from his or her parents, in particular when this occurs after nine months of age.

The harm of which the Prime Minister spoke when he said 'sorry' was harm which Governments knew in advance would result from their conduct.

At the time Bruce was removed, the Aborigines Protection Board of South Australia had already been advised by the Crown Solicitor that it had no legal power to remove Aboriginal children from their parents. One of the documents tendered at the trial was a letter written by the secretary of the APB in 1958. It read in part:

> …Again in confidence, for some years without legal authority, the Board have taken charge of many Aboriginal children, some are placed in Aboriginal Institutions, which by the way I very much dislike, and others are placed with foster parents, all at the cost of the Board. At the present time I think there are approximately 300 children so placed. …

After a hard-fought trial, the Judge found in Bruce's favour, and awarded him a total of $800,000 plus costs.

There are a few things to say about this. First, Bruce's circumstances are not unique. There are, inevitably, other Aboriginal men and women who were taken in equivalent circumstances while they were children and suffered as a result. Although they may seek to vindicate their rights, the task becomes more difficult as each year passes. Evidence degrades, witnesses die, documents disappear.

Second, litigation against a Government is not for the faint-hearted. Governments fight hard. It took Bruce's case eight years to get to court, and the trial ran from November 2005 to April 2006. If he had lost the case, Bruce would have been ruined by an order to pay the Government's legal costs.

The third thing to note about Bruce's case is that the same facts would not necessarily have produced the same result in other States. The legislation concerning Aborigines was not uniform in all the States and Territories.

The Prime Minister's apology makes no difference whatever to whether or not Governments face legal liability for removing Aboriginal children. But it acknowledges for the first time that a great moral wrong was done, and it acknowledges the damage which that caused. The most elementary instinct for justice tells us that when harm is inflicted by acts which are morally wrong, then there is a moral, if not a legal, responsibility to answer for the damage caused. To acknowledge the wrong and the damage and to deny compensation is simply unjust.

From this point, events can play out in a couple of different ways. One possibility is that members of the stolen generations will bring legal proceedings in various jurisdictions. Those proceedings will occupy lawyers and courts for years, and will run according to the circumstances of the case and the accident of which State or Territory is involved. The worst outcome will be that some plaintiffs will end up the way Lorna Cubillo and Peter Gunner ended up eight years ago: crushed and humiliated. Or they might succeed, as Bruce Trevorrow did. Either way, it is a very expensive exercise for the State, and a gruelling experience for the plaintiff.

A second possibility is a national compensation scheme, run by the States, Territories and the Commonwealth in cooperation. The scheme I advocate would allow people to register their claim to be members of the stolen generations. If that claim was, on its face, correct then they would be entitled to receive copies of all relevant Government records. A panel would then assess which of the following categories best describe the claimant:

(a) removed for demonstrably good welfare reasons;
(b) removed with the informed consent of the parents;
(c) removed without welfare justification but survived and flourished;
(d) removed without welfare justification but did not flourish.

Compensation could then be awarded acccording to the category appropriate to the claimant. Such a scheme would help repair the consequences of the past.

Bruce Trevorrow was proud and gratified when he listened to the Prime Minister's apology. He watched it on TV because he was not able to make the journey to Canberra. He died four months later, on 20 June 2008. He was 51.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READERS' COURSE September 2008

1 URE, Sam
2 TESTART, Marc
3 TOMLINSON, Justin
4 LIONDAS, Paul
5 ROSEWARNE, Sam
6 CASH, Daniel
7 BAKER, Cameron
8 WALLIS, Daniel
9 McKILLOP, Mark
10 STEPHENS, Kerry
11 CLARKE, Tom
12 KORMAN, Jonathan
13 STAFFORD, Sam
14 DOWNIE, Andrew
15 HILL, Adam
16 BANDT, Adam
17 COLLINGWOOD, Nicola
18 WATSON, Elissa
19 GRATION, Douglas
20 PARTOS, Zero
21 HOLLINGWORTH, Cecily
22 NEHMY, Christopher
23 DAVERN, Rebecca
24 LEANE, Tamara
25 GOLDTHORP, Anna
26 HAM, Marita
27 SHANN, Ruth
28 GALBALLY, Dawne
29 MELIS, Christine
30 HOLT, Eliza
31 KOI, George
32 BRENNAN, Amy
33 MEAGHER, Andrew
34 GOLDBERG, Evelyn
35 BARBAYANNIS, Andrew
36 STOILKOVSKA, Val
37 McGANN, Diarmaid
38 POULTER, Samantha
39 SHERIDAN-SMITH, Natalie
40 BIDAR, Daniel
41 SMITH, Naomi
42 HANNAN, Daniela
43 TAAFFE, Maggie
44 KOULOUBARITSIS, Aphrodite
45 GILLIES, Katrina
46 O'BRIEN, Moya
47 MALISO, Howard
48 UMBU, Isaac
49 ALAMPI, Luisa
50 MARSHALL, Sharon

Nick Parmenter and Colin Golvan SC

National Indigenous Legal Conference

Alexandra Squarci and Jill Prior

The Bar has hosted the welcome event for the National Indigenous Legal Conference at the Essoign Club. The event was attended by about 150 conference delegates, and was addressed by Bar Chairman Peter Riordan SC.

The Conference was held in Melbourne for the first time and featured keynote addresses from Justice Michael Kirby, Julian Burnside QC and Rex Wild QC. Other Bar members participated in conference sessions, including Indigenous members Hans Bokelund, Brendan Loizou and Linda Lovett, as well as Colin Golvan SC, Paul Hayes and Daniel Star.

A highlight of the event was a Conference Ball, named in honour of the first Indigenous law student Brian Willis, held at the Melbourne Town Hall, at which Geoffrey Eames QC spoke about Brian and the work done by various Victorian barristers, including now Justice Frank Vincent, Judge David Parsons, and John Coldrey QC, in the 1970s and 1980s in getting land claims accepted.

In addition to hosting the welcome event, the Bar provided administrative support in processing over 250 applications for the conference, and obtained a grant from the Law Foundation to assist the Conference in setting up an information website.

Jacki Turfrey and Hans Bokelund

Jim Gurry, Leon Filewood, Cassie Lang, Alfred Sing, Cindarella Cronan and Margarita Escartin

Will Bon, Munya Andrews and Chrissy Franks

Lyndon Ormond-Parker, Trish Rigby-Christophersen and Kaylene Hunter

Colin Colvan SC addresses the reception

Peter Riordan SC addresses the reception

Criminal Bar Association Dinner

On 20 August 2008, the Criminal Bar Association held a dinner at Matteo's Restaurant in North Fitzroy in honour of the Honourable John Coldrey QC who retired from the Supreme Court earlier this year. Coldrey was an inaugural committee member of the Criminal Bar Association and Victorian Director of Public Prosecutions (the second after the Honourable John Phillips QC). The dinner, attended by 160 people, was presided over by Colin Lovitt QC, who introduced a long list of invited guests and honorary members and who made the following remarks about Coldrey:

As DPP, John exuded humility, decency, and never went looking for a fight. It is not outrageous to say that the number of Director's appeals – that are so popular now – were not always viewed as the way to respond to public disapproval of one sentence or another. And once on the Bench he, whilst always judicial, popular, fair, frank and courteous, and with a wealth of experience at the coalface was, interestingly, almost invariably right. I personally can recall few successful appeals from his Court. He also, of course, brought a sense of humour onto the Bench; and, more particularly, out of Court – a trademark impish sense of self-satire and wicked wit which has for many years been legend around the Bar. Legal bodies literally queued up for his services as an after-dinner speaker. On one occasion, in 1996, when he performed at the conference dinner at the Sixth International Criminal Law Congress, I had great difficulty convincing the New Zealand contingent, which included several High Court Judges, that he was indeed whom I had introduced him as, namely a Supreme Court Judge. They were convinced he simply must have been a professional comedian!

The Honourable John Coldrey QC, retired judge and CBA life member John Hasset; Mick Dodson, Magistrate Charlie Rozencwajg

Lovitt also sang 'The Magistrate', written by Coldrey in 1971 to music by Sir Arthur Sullivan for the *Mikado's* 'I've Got a Little List':

1.

I refuse to be impeded by the principles of law
For I'm a magistrate – a near celestial state
And daily I declaim against excesses I abhor
With wisdom that's innate. I'll detail what I hate.
There's defendants who relieve themselves on pavements after dark
Or menace kind policemen in the toilets of Queen's Park;
And wretches who in language quite revoltingly impure
Liken noble constables to a female aperture
Or publicly abbreviate the verb 'to copulate'
One cannot tolerate in this Victorian state.

Refrain

I must eliminate the linguistic deviate
Whom we cannot tolerate in this Victorian state.

2.

There are rogues who flash their 'nasties' in the carriages of trains
And on the Toorak line – undiscriminating swine!
Or fairies in the gardens who delight in 'daisy chains',
I'd flog them till they whine, it beats a simple fine.
Then there's demonstrating students quite unable to resist
Assaulting with their head and trunk a hapless policeman's fist,
Or photographers of nudity who emphasize the bust
Evoking in the Vice Squad a debilitating lust
And those worshippers of Eros in St Kilda's streets and lanes,
I'd take the utmost pains, to relieve their sexual strains.

Refrain

I'd flog them with birch canes, I'd flog them with birch canes,
And I'd castrate what remains, I'd castrate what remains.

3.

There's solicitors and barristers who charge outrageous fees,
Their affluence conveys the message that 'crime pays'!
They introduce red herrings such as points of law and pleas,
I thwart their devious ways, I send them to the 'jays'[1]
There's women with conditions that psychiatry asserts
Makes them convert tins of fish paste, paper plates and coloured skirts
And kiddies blessed with habits that I simply must restrain
Who are no sooner off the pot they're on the pot again.
Or cunning drunken drivers who automatism plead
With near excessive speed their licence they concede.

Refrain

This nation shall be freed, from crimes of lust and greed
For it's purity we need, in every word and deed.

From so-called expert evidence I hold myself exempt
For I'm a magistrate – A Herculean state.
I call all doubts unreasonable and treat them with contempt
For I'm a magistrate – my wisdom is innate.
Of dishonestly in policemen I have noticed not a sign,
I see them on and off the bench, they're drinking friends of mine.
All legal machinations I wholeheartedly disdain
For officers won't charge a man unless his guilt is plain.
The only vital learning is to learn just what to hate
To purify the state when you're a magistrate.

Refrain

I will eliminate, the social reprobate
To purify the state, for I'm a magistrate.

Judge Jane Patrick, Susan Borg, Ray Lopez and Nicola Gobbo

A tribute was paid by the Honourable Justice Frank Vincent. The following is the speech delivered by Coldrey:

Well, first of all I'd like to thank (Justice) Frank Vincent very much for his kind words. It's a matter of regret that the organizers saw fit to limit his time. I am deeply humbled for the honour the Criminal Bar Association have done me tonight in holding this function. I'll always treasure the friendship of those of you who've been my colleagues at the Criminal Bar.

I'm also very grateful for this event because I've been feeling a bit paranoid and depressed. I recently received a letter from the Assistant Honorary Secretary of the Bar Council stating that the Council had 'resolved that your name be transferred from Division B11 (Judges) to Division C1,

(Retired Judges and Other Judicial Officers) as from the 29th February 2008'. Now, I found this a tad disconcerting since I didn't retire until the 4th of April 2008. I would be the first to admit that my post-February judgments were not very substantial But that's not really a satisfactory reason because the same could be said for my judgments that preceded that date.

There is a temptation on occasions such as this to reminisce. Unfortunately, I have succumbed to it.

The start of my career at the Bar was not auspicious. My first encounter with a police witness was not in a Magistrates' court, but on the way to it. I was running late for the Footscray Magistrates' Court and I drove through a red light. Having been intercepted, I duly informed the policeman that I was a barrister on my way to court. At that time, in Owen Dixon folklore, this was supposed to have a beneficial effect. On this occasion, however, the grizzled senior constable reached for his pen with the comment, 'Well, this will be another court appearance for you'.

I did about five years almost exclusively in the Magistrates' Court. It was a wonderful venue to develop your capacity to cross-examine. It also had the virtue of multi-skilling. I could easily have got a job as a Melbourne taxi driver, orientating myself by the various Courts of Petty Sessions.

At this time, Frank Vincent and I lived in Oak Park – in separate dwellings. It is hard to describe Oak Park, but I like to think of Toorak as being the Oak Park of the South. Across the road was the less desirable suburb of Glenroy. Come to think of it, there were no oaks in Oak Park and not much parkland either. But if you liked Scotch thistles, this was the place to be!

On one occasion, we were both driving our cars down Pascoe Vale Road. We each had the windows wound down because that was the only form of air conditioning we could afford. When the vehicles stopped side by side at the traffic lights, Frank called out, 'Are you in court today?' After I replied in the negative, he said, 'How would you like to do an assault occasioning at Port Melbourne?' When I said, 'Very much', he tossed me the brief through the open car window before driving off. I was thrilled, particularly as he only wanted a modest commission!

In those days, there were a number of magistrates who espoused the legal philosophy that defendants should not only be done, they should appear to be done and if they didn't appear, they should be done in their absence. On reporting one perceived injustice to my master Kevin Coleman, I was met with the sensitive response, 'Son, there's so much injustice in the world, a little more doesn't make any difference'.

I commenced spasmodic appearances in the County Court in fraud summonses. Initially, I appeared before Judge Trevor Rapke, Jeremy Rapke's father, who – I had been told – had never made an order on a fraud summons in his whole judicial career. Nonetheless I launched into cross-examination of the hapless debtor, suggesting that he give up such luxuries as food and beverages in order to do the decent, just, and compassionate thing by the Readyloan Finance Company. At the end of my cross-examination, his Honour asked, 'Do you really want me to make an order?' On being informed, in effect, that at this moment in my life, this was my principal desire, his Honour retorted, 'Those who live by the sword die by the sword', promptly found a technical defect in the process, and struck it out.

After three weeks of this sort of thing, I determined that if the Bar offered nothing better, I would leave it. My clerk, obviously aware of my discomfort, thereafter arranged, with a certain lack of sensitivity, for me to be briefed in a number of ejectment applications.

Eventually I was entrusted with jury trials, but usually as the junior. As junior to Phil Opas QC in a manslaughter trial, I vigorously cross-examined the police witnesses. On leaving the court, Phil slapped me on the shoulder and remarked, 'Well done – it just goes to show, in these courts, the bludgeon is just as effective as the rapier'. (I took this as a compliment.)

Forensic disasters tend to remain with you over the years. One of my worst experiences was before Mr Justice McInerney. My client had been charged with the attempted murder – by stabbing – of an 80-year-old lady. The prosecutor, Alan Dixon QC (Jane's dad) was to call her to confirm the stabbing but that she had absolutely no idea who did it. A frail little woman was helped up the steps into the witness box in the fourth court by her 50-year-old daughter with the encouraging words, 'You'll be alright, Mum'. Alan duly put to her that she was unable to identify her assailant whereupon she paused, pointed to my client, and said, 'He did it, he did it' while making stabbing motions into her chest.

There was a dull thud as my jaw hit the bar table. In the course of the subsequent unprepared cross-examination, I believed that I had got the lady to admit that the information about the identity of the stabber had been suggested to her by her daughter. Mr Justice McInerney was not so sure. However, our discussion on this matter was interrupted by a crash as the lady collapsed in the witness box. The jury watched fascinated as several burly policemen gently carried her frail form into the fourth court anteroom. It was at that point that Justice McInerney leant forward and uttered the then chilling words, 'Mr Coldrey, perhaps you should consider your client's position. A year and a day hasn't elapsed since the stabbing'.

There was, however, a happy ending. The lady lived and justice was done – my client was convicted.

Another highlight in my career as a barrister was appearing in the Northern Territory. Here, I achieved a notable double. I lost the last murder trial in the historic old Alice Springs Supreme Court and I lost the first murder trial in the modern luxurious new Alice Springs Supreme Court.

In those days, many murder trials were settled for manslaughter pleas. One such case involved Diamond Turner, who had killed his wife with a tomahawk. I first met him on the bed of the Todd River where he was scooping handfuls of spam from a tin. The setting sun, catching the fat globules in his beard, which was even more magnificent than that of John Smallwood, transformed it into a sparkling fairyland. Perhaps that was why he was called Diamond.

I thought that my plea before Justice Gallop was progressing well and I turned towards the dock to see if Diamond was appreciating this flow of eloquence. Unfortunately he wasn't there. His brother had answered to the name Turner when it was called outside the court and duly pleaded guilty. A truly wonderful example of brotherly love!

In the Northern Territory, police investigations and interrogations involving Aboriginal suspects are subject to the judicially created Anunga Rules. One rule re-

The Honourable Justices Buchanan and Vincent

Judge Smallwood and John Carmody

Justice Curtain, The Honourable Geoff Eames QC and Chief Magistrate Ian Gray

Justice Vincent

quired the presence at interrogations of a 'prisoner's friend' – being someone who knows or is known to the suspect and whom the suspect has apparent confidence and by whom he or she will feel supported. I was appearing for an Aboriginal accused in a rape–murder trial who instructed me that the police had threatened to 'cut his cock off' if he failed to tell the truth. This informal surgical procedure was to be performed without benefit of anaesthetic using an office guillotine. His brother, who was the prisoner's friend, gave evidence that the police had treated the accused well. Nonetheless he agreed in cross-examination that the threat of summary amputation had been made. 'How can you say that the police treated your brother well?' I queried. He gave me a look of part-exasperation, part-pity, before responding: 'Because they didn't do it'.

On this day, 29 years ago, the trial of the Huckitta Five took place in Alice Springs. Frank Vincent has mentioned that. I'd like to finish by talking about it because it involved some of the icons of the Criminal Bar. The facts are fully stated in *Collins & Ors v. R* (31ALR257) – you might like to jot that down on your serviettes. As will become apparent, not all the facts I will refer to appear in the report.

Three Aboriginal children, Mark Collins, 12, Kevin Stewart 13, Joylene Williams, 14, together with two Aboriginal women, Josephine Woods (who had the mental capacity of a child) and Janice Edwards, stole a panel van and items including a Winchester .22 rifle and ammunition from the Amoonguna settlement near Alice Springs. On New Year's Eve 1978, they drove the panel van 175 miles to the Huckitta cattle station which was operated by the elderly Quentin Webb. He was one of three brothers, the others being Kilmot and Bennett, who held vast pastoral releases in the Northern Territory and Queensland.

On arrival, the panel van had two flat tyres and Quentin Webb radioed for a

replacement tube. It would not arrive until evening so the group had to wait.

At about 1.00pm, Janice Edwards went with the only other person on the property, a station hand, to a nearby dam to check some baits. On their return, some 45 minutes later, they found Quentin Webb dead. His death had been caused by a single shot from a Winchester rifle, which had penetrated his chest as he sat reading on a tank stand. By this time the other members of the party had already fled the scene in the station Toyota. They were eventually intercepted by police, in possession of the Winchester rifle, which had fired the fatal shot.

Ultimately, the crown case was that 12-year-old Mark Collins had fired the fatal shot, having been persuaded to do so by his companions. The role of Janice Edwards, so it was alleged, had been to lure the station hand away from the scene of the shooting. If this was so, her companions had callously deserted her. Evidence of the circumstances of the shooting could only be gleaned from the suspects themselves. This was in the form of records of interview and photograph re-enactments. The admissibility of this material was challenged by the defence in a *voir dire* which occupied six weeks.

The solicitor of the Central Aboriginal Legal Aid Service, Pam Ditton, briefed Frank Vincent for 14-year-old Joylene, myself for 13-year-old Kevin, Dyson Hore-Lacy for Josephine and John Dee for Janice – the lady of the dam. Mark Collins, the alleged shooter, was to be represented by a South Australian barrister named Peter Waye.

Our fee was $1400 per week. Pam Ditton informed us that Peter Waye had agreed to that fee, although he was normally an $800 a day man; $800 a day for a criminal barrister in 1979 constituted riches beyond belief. On receipt of this news, we immediately christened Peter Waye 'the Golden Larynx'. This was a touch unfortunate as, unbeknown to us, he had a slight speech impediment. Given this circumstance, he could be excused for referring to us thereafter as 'the Melbourne Mafia'.

John Dee had a fear of flying. Soon after we took off for Alice Springs, he ordered three cans of Fosters and three glasses. Frank and I protested that 9.40am was a bit early for us. 'Not to worry', said Dee. He proceeded to pour minuscule amounts of beer into two of the glasses and then demolished the three cans. However, the flight was not long enough for him to make a serious attempt on David Boon's record.

In Alice Springs, we were accommodated in a Legal Aid property. Vincent and Dee being the most senior had their own rooms. I had to share a bedroom with Dyson, (though not the bed). Within a short time, Vincent and I began referring to our accommodation as Hepatitis House – but since you are all still eating and drinking, I won't, as equity lawyers would say, 'condescend to details'.

It was John Dee who was very keen to give us nicknames. I think Frank already had the nickname 'Blue' but that was reinstated by John. Dyson was called 'Wishbone', who apparently was a cook in some TV series. And for reasons that I find very hard to understand, he referred to me as 'Short Arse'. In turn we referred to him as 'MTB' – Municipal Toilet Block.

All of us, apart from Dee, flew out to view the scene at Huckitta station. We were met by Kilmot and Bennett Webb. They were impressive men, both polite and gracious despite the fact that we were to defend the persons charged with murdering their brother.

Back at Hepatitis House, Dyson was drafted as cook. He was very adept at grilling steak, fish and chicken, but unfortunately his favourite vegetable was boiled, shredded cabbage. One night as a special treat, he prepared lobster mornay – that is, lobster mornay with boiled shredded cabbage.

As you all know, Dyson gives 110% for any client – and that's when he's not

Judge Katherine Bourke and the Honourable John Phillips QC

Carolyn Burnside and Judge Gullaci

feeling well! One manifestation of this was his endless playing of the tapes of his client Josephine's record of interview as he lay in bed around midnight. 'Listen to this, Coldrey,' he would urge, 'I think the coppers have stopped the tape'.

'Dyson, I couldn't give a stuff if they stopped the tape – I just want to get some sleep!' Eventually Greg Levine, now a Victorian magistrate but then a Legal Aid lawyer in Alice Springs, lent me some Woody Allen tapes. With earplugs in, I was Dyson-proofed, and it looked as if I was listening to my client's interview – although it must have seemed odd to be chuckling at his damning admissions.

At that time, Frank Vincent was training for the Melbourne marathon and each Saturday would run about 22 kilometres west towards Standley Chasm. Rather selfishly, he declined to run back and we were rostered to pick him up. In the case of rosters, there's always the potential for human error and on one occasion, by the time I reached him, he was crouched under a spindly acacia tree practising the art of dehydration.

Dee on the other hand was vigilant to keep dehydration at bay. On one evening, having had one or two for the road and several to fortify himself against the cold of an August evening in Alice Springs, he became disorientated on the way home to Hepatitis House. Finding himself beside the Todd River, he decided to rest. The police located him propped up against the back wheels of a road train still nursing his briefcase. Politely, they dusted him down while warning him of the dangers inherent in his choice of resting place.

At this point, some confusion enters the account of events. Certainly the story circulating around Alice Springs the next day was that a barrister named Peter Waye had been found sleeping under a road train. Dee's explanation, which I accept unequivocally, was that the police must have misunderstood him when he asked them 'the way'.

One of our challenges to the re-enactment was that the police had conducted a dress rehearsal of it prior to the arrival of the prisoner's friend in the afternoon. This they denied.

In the middle of the *voir dire,* Peter Waye had the brilliant idea of flying out to Huckitta to revisit Kilmot Webb. He had been at Huckitta station on the relevant

Chairman of the CBA John Champion SC

Justices Vincent and Osborn

morning, and if any such rehearsal had occurred, he would have witnessed it.

Waye explained the situation to the old man. Shrewd as ever, Kilmot Webb asked him: 'If that happened, it wouldn't be good for the Crown case, would it?' Waye admitted this was so. 'Well,' said Webb, 'It did happen'. Waye informed him that the defence would have to call him as a witness.

As he was about to fly out, Kilmot Webb said to him, 'Haven't you forgotten something?' 'What?' queried Waye. 'You haven't got a signed statement from me'. To his eternal credit, Waye replied, 'I wouldn't insult a man of your honesty and integrity by asking you for a signed statement'.

Kilmot Webb came to court, he gave his evidence and he was unshaken in cross-examination.

In the result, the trial judge refused to admit the records of interview, but curiously, allowed the re-enactments into evidence. At the time he gave no reasons for the latter ruling. Nonetheless, hundreds of pages later in the transcript, he referred to the reasons he had already given. It strikes me that this is a very clever judicial ploy which, if adopted, could save trial judges hours of additional work.

In the end, all of those present at the time of the shooting were convicted of murder. They each received a sentence of nine years and two months, with a non-parole period of four years. John Dee's client, Janice, was acquitted. She should never have been charged.

On appeal to the Federal Court, Justice Brennan ruled that the re-enactments had not been shown to be voluntary and were therefore inadmissible. He pointed to the conduct of the police in taking the appellants back to Huckitta without their consent; leaving them at the scene for many hours without informing them of the reason for their presence there; providing a prisoner's friend who was unknown to them and who virtually acted as a police agent; and requiring them to perform re-enactments without any adequate caution. At no time were the children's parents notified of their predicament.

But Justice Brennan was in the minority. Subsequently, after a two-day hearing, a High Court bench of five refused leave to appeal.

At a social event immediately following their decisions, Justice Lionel Murphy remarked to us: 'That was a very courageous decision of Gerry Brennan. They were so obviously guilty'. It struck me at that time that at least in this country, the expression by a judge of a legal opinion is not appropriately described as courageous; and further, that it is not enough that a person be guilty; his or her guilt needs to be determined according to law.

As Frank has said, in the course of the Federal Court appeal, he and I, filled with idealism and shiraz, prepared a criminal law credo which Frank duly delivered to the Court. I would like to conclude by quoting parts of it.

> A man has been killed. There is no suggestion in any of the material that there was any justification or even a sensible reason for his death. For practical purposes, the only evidence against the four people who are involved in some way in the events that led to that death is to be found in this confessional material, and that poses for the legal system a very real challenge. On the one hand, it can be said that justice must be done, and that the perpetrator or perpetrators be convicted. On the other hand, justice must never be achieved at the cost of the integrity of the system upon which we all depend.
>
> Rules of voluntariness and principles of fairness underlying the exercise of discretion can be viewed as obstacles in the path of achieving what is seen to be justice in individual cases, to be removed or avoided by restrictive interpretation or sophisticated fact-finding processes. But I need hardly remind this Court that the common law has taken a long time in its development, and its wisdom and philosophy must be viewed in that same long range.
>
> It is simply a truism that part of the cost of living in a society where there is a fundamental right against self-incrimination is that there will be occasions when perpetrators will avoid the processes of law. But it must be remembered that it is law which they would avoid and not the exercise of arbitrary power.
>
> The Courts must never permit themselves to become a part of conspiracy which authorizes and justifies such power because it suits the short-term ends in a particular case. They must never combine with others whose duty it is to enforce the law to effectively deny fundamental rights and protections to members of this community.
>
> The police agencies must never believe that the real cost will be a judicial reprimand in a generally unread page of a law report, and that they will be forgiven their unlawful or unfair behaviour when the circumstances of the crime are serious enough. It is sufficient to say that the Courts must adhere to the professed ideals and values of the common law if that system is to retain any legitimacy…
>
> It is always easy to want to find in favour of the clearly innocent. It is always easy to want to find in favour of the beautiful. It is a far more difficult task, it requires a far higher degree of honesty at all levels in our system, to say, irrespective of what the situation appears to be in the short term, the wisdom of the common law requires that the fundamental relationships between people, and the society in which they live, be maintained.

We wrote and said more – we'd had rather a lot to drink – but we still regard those principles as vital to the operation of the criminal justice system.

I've said enough. Thank you all very much for coming tonight.

Verbatim

Lee v Omni Leisure Operations Pty Ltd
16 July 2008
Coram: Byrne J Philbrick SC & Charrington for plaintiff
Aghion for defendant

Aghion: With Mr Lee residing in Tasmania, and indeed a relatively remote part of Tasmania, there may be some time in getting Mr Lee to an appropriate specialist, be it a Tasmanian specialist or a Victorian one.

Philbrick: My wife is Tasmanian. She would take issue with the suggestion that Port Arthur is remote. It might have been for the first inhabitants, but it's not a great ride from there to the airport, a few hours.

His Honour: No, that's right. We'll pass that off as the ignorance of the mainlander.

Pro Bono Awards

On 11 November 2008 in the Supreme Court Library, the Victoria Law Foundation announced its awards for 2008

Since 2003, the Victoria Law Foundation has made awards to recognize distinguished pro bono service in the legal community. In past years the Foundation has been partnered by the Federation of Community Legal Centres (Vic) Inc (2003), The Institute of Legal Executives (2004), The Victorian Bar (2006) and Tarwirri (Indigenous Law Students and Lawyers Association of Victoria), the Victorian Aboriginal Legal Service and the Department of Justice Indigenous Issues Unit (2007).

This year, one award was presented to Will Alstergren, a barrister at the Victorian Bar and Member of the Victorian Bar Council, for work with the Duty Barrister Scheme.

In 2007, Will assisted with the establishment of a pilot project to run a Duty Barristers Scheme. Under the Scheme, junior barristers volunteered to act as pro bono 'duty barristers' to promote access to justice and provide legal representation where it would otherwise be unavailable, whilst gaining valuable court experience. In accepting the award Will said: 'The duty barristers' scheme has completed its three month pilot and has been a great success. The benefit to the community by the scheme's pro bono representation has been in the order of at least $200,000 and will commence shortly on a permanent basis.'

Speaking at the awards ceremony, the Honourable Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria gave the speech that follows:

Lawyers have long known the benefits and rewards of pro bono service. In the profession there is a tremendous proclivity to helping the disadvantaged. Without a willingness to provide legal representation on a pro bono basis, our legal system would fray. Each person has a right to legal representation and it is our obligation to adequately facilitate this need. As a profession our duty is to promote and serve the legal system with the highest of integrity. This duty is never waived. We like to think that a person does not become a doctor unless they wish to help the sick. So too, we should think a person does not become a lawyer unless they wish to help the needy and disadvantaged in the community.

In Victoria law firms are significant contributors to the administration of justice through their pro bono work. We know that firms who receive work from the Victorian Government spent $7.7 million of their own money that way in 2006–2007.

The Honourable Chief Justice of Victoria, Marilyn Warren AC with Will Alstergren, an award recipient

Amanda Jones, Senior Solicitor Corporate Advisory, Clayton Utz; Andrew Jones; Sue Polites; Deborah Polites, Melbourne Pro Bono Coordinator, Clayton Utz; and Joh Kirby, Executive Director, Victoria Law Foundation

In addition, firms provided pro bono services equivalent to 15 per cent of their revenues from the Government.

Nationally is it estimated that law firms and individual lawyers contributed $250 million worth of pro bono work in 2007.

Without doubt, the pro bono services given by law firms, individual lawyers and barristers provide the oil to keep the justice system on track. Without their contribution, the system would crack and delays in courts would be exacerbated.

The Victorian Bar Legal Assistance Scheme has over 400 participants who have offered their service for no fee or a substantially reduced fee to people in need of legal representation. This scheme, as highlighted by the Victorian Bar, is not a substitute for Legal Aid. Rather the scheme works to complement, if you like, the Legal Aid framework. The scheme provides an avenue for cases which are meritorious in their content or which highlight difficult legal principle, that without adequate finance, would never be heard. It is the work of the Victorian Bar, such as the Legal Assistance Scheme and the Duty Barristers Scheme, that illustrate the great willingness of Victorian barristers to help the disadvantaged.

Heather Pelly; Russell Robertson, Partner, O'Farrell Robertson McMahon; Michael Robertson; and Irene Robertson

Recognition, however, for this work is not so often given. Continued concern relating to the cost of justice, fails to take into consideration the dedication and diligence of hundreds of legal professionals who are providing a service to our legal system and to a greater degree, our state.

Alexandra Richards QC, Barrister and Board Member of the Victoria Law Foundation

Access to justice is a vital matter. Ben Schokman, a lawyer with the Human Rights Law Resource Centre, said in *The Age* earlier this year that the lack of recognition of what Victorian barristers do for our legal system is continually devaluing and contradicting the actual work done by so many.

Mr Schokman asserted that without the Victorian Bar's contribution to our legal system by offering pro bono services 'many Victorians would find it impossible to navigate a highly complex legal system and realise their legal rights.' This piece was published after the assertion that barristers' fees prohibit access to justice. The contribution of the Victorian Bar and the profession should be praised. Without it the system of justice in this state would be in serious difficulty.

Earlier this month, the National Pro Bono Resource Centre released its survey data into the pro bono work provided by barristers in Australia – the first national survey of its kind. Some 355 barristers were surveyed, 154 of them Victorian, representing approximately 9 per cent of the State's barristers. 136 of Victorian barristers' surveyed had undertaken pro bono work in the previous twelve months.

The survey revealed the mean number of hours Victorian barristers dedicated to pro bono work in the last twelve months was 51–70 hours, compared with the national mean of 41–50. It is findings such as these that should make the Victorian community proud.

The pro bono work done not only by barristers but also firms has long been overlooked. The firms, some represented here tonight, have shown excellence in the pro bono service they offer to our community. It is a service that uses the resources of their respective firms and helps promote our legal system. Without this, our legal system would be ineffective in being able to adequately deliver justice to the community. The firms who make it their responsibility to offer support to individuals, disadvantaged in some way, are providing our community with the ability to achieve access to representation.

Court proceedings are often financially burdensome to many individuals and organisations. It is therefore pivotal to the effectiveness of our legal system to have barristers, solicitors and firms who are acting to enhance an individual's ability to gain representation. Without legal professionals offering such a service, we would be seeing an even larger number of unrepresented or self-represented litigants before the court. Indeed not withstanding the increase in pro bono service, this has been a trend in recent years. The challenge for the self-represented litigant is that he/she often has little to no experience of the legal system. The flow on effect of this is a significant increase in the hours spent in court by judges to adequately facilitate such parties representing themselves. A limited knowledge of the system, court processes and procedures and to an extent, the law, ultimately leads to a draining of resources. As well, the inability of self-represented litigants to clearly articulate the real issues in their case could possibly result in injustice, particularly where the opposing side has legal representation.

As a State and as legal professionals we can be very proud of the work that has been done on our behalf to help people of disadvantage. The hundreds of Victorian barristers who offer their time to help members of our community who find themselves isolated and bewildered by the system, are proving that our profession has at its core a true sense of social responsibility. This feeling of responsibility to our society, for some, and we hope most, was the catalyst for pursuing law as a career. It is those dedicated people, many of whom are here tonight, who have provided Victoria with the ability to champion the rights of our state's most victimised and vulnerable. We have more to do, but we must also acknowledge the tremendous and inspiring work that has already been done so far. Tonight's awards provide the chance to recognize and applaud the selfless generosity of Victorian barristers and lawyers.

Other recipients of awards were:

Allens Arthur Robinson
for work with the Human Rights Law Resource Centre

Blake Dawson
for partnership with Youthlaw

Clayton Utz
in recognition of the diversity of its program

Corrs Chambers Westgarth
for partnership with the Victorian Association for the Care and Resettlement of Offenders

DLA Phillips Fox
for partnership with the Environment Defenders Office

Minter Ellison
for its Indigenous Outreach Program with Darebin Community Legal Centre

Russell Robertson, partner of O'Farrell Robertson McMahon
for work with Bendigo Health Outreach.

Portrait of Sir Daryl Dawson

On 25 September 2008, Justice Alex Chernov delivered the following speech on the unveiling of the portrait of the Honourable Sir Daryl Dawson AC KBE CB QC at a ceremony at Owen Dixon Chambers.

It is a great honour to have been asked to unveil the portrait of Sir Daryl Dawson, but I now wish that I had paid more attention at such events to the intricacies involved in actually unveiling the portrait without making it fall off its stand. The hanging, however, comes later.

At the outset, I want to congratulate the Bar on its foresight in continuing to hang portraits of its distinguished members who have given outstanding service to the law, the administration of justice and the community so that the current generation of barristers can be reminded of this fact through those portraits and, thus, have a greater appreciation of the tradition of the Bar, more particularly the obligation to serve the community.

As I understand it, the unveiling of a portrait is a relatively formal occasion. Nevertheless, and without intending to be disrespectful to the subject of the portrait, I will lapse into some informality and will refer to Sir Daryl simply as Daryl or Daryl Dawson – partly because many of you here this afternoon are his long-time friends, but mainly because the Bar has a proprietorial attitude towards him. Whatever position or office he held, he was always referred to at the Bar, affectionately or in awe, as Daryl Dawson.

It is said that a person's genes play an important role in the development of his or her health, brainpower and so on. Of course, one cannot take this too far and claim, for instance, that genes have been the cause of his or her impugned conduct, if for no other reason than, if it were otherwise, every plea in mitigation of sentence would begin: 'It is the fault of his genes, Your Honour. It's the genes!' But in Daryl's case, I suspect that genes were an important fact in the development of his intellect, his independent mind and his keen sense of service to the community.

The Honourable Alex Chernov QC

Guests at the unveiling ceremony, Sir Daryl in the foreground

Sir Daryl was born in Melbourne where his father Claude Charles (Dick) Dawson was a journalist with *The Argus*, when that paper's reputation for informed reporting and fine writing was at its peak. Mr Dawson, who was a theological graduate, completed his MA in philosophy at the University of Melbourne where Sir Daryl's mother, Elizabeth, also took out an MA.

In 1938, when Daryl was four years old, the family moved to Canberra. His father had taken up the appointment of press secretary to the Prime Minister, Mr Lyons. Mr Dawson worked closely with the Prime Minister, writing most of his speeches, and was with him when he died in April 1939. Upon Mr Lyons' death, the new Prime Minister, R.G. Menzies, appointed Daryl's father as his press secretary. Later, under Prime Minister Curtin, and as the person in charge of the Information Office, he went first to New York and then, in early 1944, he opened and ran the Australian News and Information Bureau in London, while Mrs Dawson lectured on the Australian war effort.

Sir Daryl's father was a brilliant speaker, but his passion was writing. He was offered a permanent appointment in the public service, which he declined. Although the position was much coveted, his independence was such that he chose to earn his living as an independent political journalist. Unfortunately he died at the early age of 43 when Daryl was 12 years old. In the result, Daryl was no stranger to hard work and to close family relationships.

It was also in Canberra where young Daryl first became involved with the law. In the 1940s and early 1950s the footpaths in Canberra were not exactly packed with pedestrians, yet young Daryl somehow managed to get himself arrested during this period on a cold winter's morning for riding a bicycle on a footpath with his hands in his pockets. It is said that it was from that moment that he developed a passion for seeking to understand the rationale that underpins our laws.

Sir Daryl studied law at the University of Melbourne, where he took out a first class honours degree. That Daryl excelled at the university shows that he was able to overcome the huge mistake that he made when he first moved there from rural Canberra, namely, sharing accommodation in Ormond College with John Barnard and Snoz Angel. His then more sophisticated colleagues led him astray in the early days, but it was not long before Daryl did not need his friends' help to do that.

It is well known that Daryl and Barnard in particular became life-long friends. Despite the frivolity of university and college life, Daryl became an enlightened and active member of the Students' Representative Council and, as a resident of Ormond College, took part in a variety of activities at the university and his college. Later,

Sir Daryl Dawson and the Honourable Alex Chernov QC admire the portrait

The subject and the launcher with the Chairman of the Bar Council, John Digby QC

Daryl Wraith, Sir Ninian Stephen and Lady Stephen

whilst at the Bar, he was resident tutor at Ormond.

Towards the end of his studies in Melbourne, Daryl was awarded a Fulbright Scholarship to Yale and he travelled there in style – on an ocean liner, no less! As it happened, there was on board another Melbourne law graduate, who had a justifiable reputation for enjoying life to the full, and who was also off to the United States, to the University of Michigan. It was none other than Jack Hedigan! One probably need say no more about this trip – you can gather for yourselves the general picture of their ocean voyage. I would only add this – I have it on good authority that there were about 800 people on the ship, broadly made up of 200 men and 600 mostly single young women.

After completing his LLM at Yale in 1956, Daryl returned to Melbourne where he entered into Articles with Pat Kennedy of Coltman Wyatt and Anderson. He was called to the Bar in 1957 where he read with B.L. (Tony) Murray, later Solicitor-General for Victoria, and then a judge of the Supreme Court. He took silk in 1971.

At the Bar, he developed a very large practice, principally in commercial and constitutional law and was much in demand as counsel in Australia and the Asia Pacific region – an exceptional achievement at that time – appearing there and elsewhere in numerous important and often high-profile cases and enquiries. Importantly, Daryl also appeared in a number of difficult criminal cases.

Daryl was a penetrating cross-examiner, and some of you may have heard the story of one particular experience he had in that regard. Nevertheless, I think that it is worth repeating. It illustrates that even the greatest cross-examiner can be unlucky and have the wind taken out of his or her sails. On the occasion in question, Daryl was conducting a complex commercial case in what was then British North Borneo, and was cross-examining with some force an elderly Chinese gentleman. It was a very effective cross-examination but, just as Daryl was about to move in for the kill, the judge leant over the Bench and exclaimed to Daryl: 'Would counsel please show more respect for witness. He is uncle of Judge!'

It is apparent enough that Daryl was one of the busiest barristers in Australia and the Pacific. What is less known, however, is that he was sometimes briefed for reasons that were totally unrelated to his forensic skills. Take, for instance, his appearance in a mining case in Papua New Guinea. He was briefed by an English solicitor whom he had not met until he arrived at Port Moresby. When he asked him why he had been briefed, the solicitor told him that he had heard that there were good barristers at the Victorian Bar so he rang Daryl's clerk and told him that he wanted a barrister who was tall and thin and could get down a mine shaft!

The extent of Daryl's popularity and the high esteem in which he was held is reflected in the fact that he had 11 readers, including: Justice Goldberg of the Federal Court, Justice Hansen of the Supreme Court, the late Jack Strahan QC, Daryl Wraith and Geoffrey Gibson. I also had the good fortune to read with Daryl. His pupils found that they had a master with an extraordinarily clear and logical mind and an ability to express his thoughts with great precision and brevity. It would have been a very intimidating experience but for Daryl's patience, goodwill, sense of humour and friendship.

In 1974, Daryl left his burgeoning practice to serve as Solicitor-General for Victoria, taking over from Tony Murray who, as I have mentioned, was appointed to the Supreme Court. Daryl occupied that office until his elevation to the High Court in 1982.

The office of the Director of Public Prosecutions was then not in existence in Victoria so that, as Solicitor-General, Daryl had the difficult task of fulfilling that role as well as dealing with civil law, both in the appellate courts and as principal legal advisor to the government. But he enjoyed the criminal law and the opportunity to analyse and argue it at appellate levels. Thus, it is unsurprising that his enormous contribution to the establishment of important principles of criminal law began in earnest while he was Solicitor-General. It was in this field that Daryl left an enduring legacy and, when he was appointed to the High Court, Daryl was the most experienced criminal law barrister on that Bench.

Daryl was also involved as Solicitor-General in arguing in the High Court, numerous important constitutional cases, many of which were concerned with the rights of States and the operation of federalism. Time does not permit a full analysis of those cases. I will mention but a few. One was the important *Seas and Submerged Land Case* and he was heavily involved in what became the *Offshore Constitutional Settlement*. He also advised on legislation

that became *The Australia Act 1986* (Cth) and he persuaded the High Court in the *Commonwealth v Hospital Contribution Fund* (1982) CLR 69 that there is no requirement under the Constitution that federal jurisdiction should be exercised only by full-time judges with security and tenure and minimum remuneration. This decision resulted in the High Court overturning some of its earlier pronouncements in this area. As I have mentioned, this is but the tip of the iceberg in terms of Constitutional cases with which Daryl was involved as Solicitor-General.

Notwithstanding his extremely busy period at the Bar and as Solicitor-General, Daryl somehow managed to find time to serve on number of important public and other institutions, particularly giving service to many from which he had benefited in the past. Essentially, he followed Mother Teresa's dictum that if you want to keep the lamp burning, you must replenish it with oil. Thus, for example, he was the inaugural lecturer in Introduction to Legal Method for the Council of Legal Education and taught that course for many years. He was a member of the Victorian Bar Council and many of its important committees, including its Ethics Committee, which he chaired. Outside the law, Daryl served as member, and then Chairman, of the Ormond College Council, a member of Convocation, and later the Council, of the University of Melbourne. He was also for many years a member, and then Chairman, of the Australian Motor Sport Appeal Court. In those and like capacities, Sir Daryl gave his time generously and made lasting contributions to those bodies.

As I have mentioned, in 1982, Sir Daryl was appointed to the High Court, from which he retired prematurely on 15 August 1997. During his period on the Court, Daryl personified the very essence of a distinguished and wise judge and jurist. Like the late Sir George Lush, he was economical with words when sitting on the Bench and when formulating his reasons for judgment. He had been similarly economical when he appeared as Solicitor-General before the High Court.

Daryl's reasons for judgments reflect his disciplined mind, and are models of clarity and cogency. Importantly, they also demonstrate his thorough knowledge and understanding of the law, the reasons for it and its place in our community. For instance, his unrivalled understanding of the criminal law, the trial process and the law of evidence is apparent from cases such as *Whitehorn v R* (1983) 152 CLR 657; *Giorgianni v R* (1985) 156 CLR 473; and *Shepherd v R* (1990) 170 CLR 53. A like observation can be made about his contribution to other areas of the law, including Constitutional Law. But, first and foremost, he was completely independent in articulating the law and in deciding the case. *The Dams Case* and the *Mabo Case* are good illustrations of his adherence to principle and his independence in arriving at conclusions based on principle. Not surprisingly, his influence on the High Court's thinking was, and remains, considerable.

Daryl may not thank me for this but, surprisingly, a succinct and apt description of his qualities as a judge is to be found in *Justinian*, regarded by many in the legal world as a mere gossip sheet. The particular publication listed, over a couple of pages, the names of a number of judges under the heading 'Worst Judges'. This was followed by a few pages of criticism or, as it said, 'insults', that were referable to those judges but not juxtaposed to any one of them. The reader was invited to match each insult to one (or perhaps more) 'Worst Judges'. The exercise was fun!

The publication also had a list of 'Best Judges' with a caption 'Spot the Difference'. It is in the latter context that there is reference to Daryl in the following form:

Dawson, Sir Daryl Michael…High Court

1. Brilliant legal brain and the only judge to take a stand against trendy, left-wing, politically correct, so-called legal doctrines that pervade the High Court.
2. Unfailing courtesy to the profession, a delightful sense of humour, genuine erudition on matters of law and especially legal history, and a remarkable capacity for 'getting it right…'.
3. He is principled, and has legal soundness and commonsense. He is not unlike Owen Dixon in legal intellect and approach.

It is a very good summary, I think, of Daryl's qualities as a judge.

Daryl's contribution to the administration of justice continued after he retired from the High Court. For instance, he became a member of the final appellate court in Hong Kong, and conducted, amongst other enquiries, the Royal Commission into the Longford Gas Explosion – one with which he dealt like a hot knife through butter. He also conducted the important enquiry into the *Trade Practices Act*. He remains an arbitrator *par excellence* on the national and international stage.

But Daryl's interests have never been limited to the law. He is extremely well read and versed in a range of subjects which include philosophy, religion, the political process, literature and higher education. He played sport when time permitted it and I can vouch for the fact that he was a formidable opponent on the squash court, where he took no prisoners, albeit playing within the rules. He is still a regular attendee at the Beaurepaire Gymnasium at the University.

Notwithstanding his achievements and the recognition bestowed on him, Daryl has been a very private person, and has shunned the spotlight and eschewed aloofness. His reserve, however, has not masked his good sense of humour, his loyalty, his kindness to others or his level of tolerance for the opposite point of view – all of which he demonstrated at the Bar, as Solicitor-General, on the Bench and privately. He was even a model of courtesy to the well known litigant, Mr Sykes, who once appeared before Daryl but declined to have his case heard by him and walked out of the courtroom because, he said, in his judgments, Daryl split the infinitive.

In summary, Daryl has made an outstanding contribution to the Australian community in a variety of ways within and without the law. His 15 years on the High Court were particularly lonely and difficult, during which he carried the onerous burdens of office and commuting as High Court judges must do. His task was made easier, however, by the support given to him by his wife, Lady Dawson, whom Daryl married in 1971.

It is therefore appropriate that Sir Daryl's portrait hang in the principal entry to the home of the Bar for all to see in recognition of his great public service, which included service to the Bar, the administration of justice in this State and this Country, and to the community generally.

It gives me great pleasure to unveil Sir Daryl's portrait.

Investment and superannuation for barristers

The financial difficulties that have recently arisen in Australia and elsewhere are profound. They have caused many barristers to question their investments and to enquire to what extent they themselves are affected.

However, the present time is not one for precipitous action. On the contrary, barristers should follow carefully the conservative methods of saving and investment that are ordinarily appropriate. These methods are effective despite the propensities of markets to rise and fall.

It is proposed to discuss here some of the investments that are particularly important at the present time.

First, many barristers are concerned – some gravely concerned – by the poor performance of superannuation funds during the past year. This difficulty has arisen because equity markets (and especially stock markets) have fallen sharply. Yet one of the least wise steps that a barrister might take is to reduce superannuation commitments.

Superannuation funds – and especially general funds such as the Victorian Bar Superannuation Fund and industry superannuation funds – have the characteristic that over a substantial period members' accumulations increase impressively, not least by reason of the effect of compounding. Here there may be recalled what accountants refer to as the rule of seventy-two. If one divides a rate of interest or of return into seventy-two, the result is the approximate number of years in which there is a doubling of capital. So if combined income and capital gains equal ten per cent, in approximately seven years there is a doubling of capital. In 14 years the capital quadruples, and in approximately 20 years it is eight-fold the original capital.

Accordingly superannuation offers the facility of making annual contributions – the earlier the better – whereby a large capital sum is eventually received.

Indeed, recent changes to the taxation of superannuation provide unique and remarkable advantages. When a member's rights are (broadly, after he has retired) converted into a pension, the assets that generate the pension become free of all income tax (including capital gains tax). Additionally, all consequent payments of pensions are themselves entirely tax free. This very generous position has been brought about deliberately, in order to encourage self-provision, as opposed to reliance on governmental welfare. It is a position that ought to be freely availed of. However, the annuities and pensions granted by insurance companies are often unacceptably low. Hence persons taking advantage of taxation concessions should generally at least be persons who have their own personal superannuation funds, where the capital may be invested in a range of satisfactory investments. Where investment difficulties are encountered, such as through a lack of investment skills, these may be overcome by acquiring shareholdings in listed investment companies, such as Australian Foundation or Argo Investments, which have records of good returns over many decades.

As with superannuation, so with other avenues of investment, timing is particularly difficult. For practical purposes, barristers should accept that they and their financial advisers are unable to determine the maximum points and minimum points of markets. A qualification is that in the past those who have invested at times of recessions have fared particularly well, since recessions have been followed by what are referred to as market bounces. Some may take the view that on this basis the current time is a particularly suitable time for investment

Secondly, negative-gearing is permitted by the taxation legislation and is regarded as entirely legitimate. It should be considered by barristers in regard to the purchase of realty (for the purchase of shares, negative gearing has greater practical dangers). As a simple example, if a person purchases a house for $500,000 and provides a deposit of $100,000, that person may borrow $400,000. Initially the house may be let out at a small annual loss (which is fully deductible from other income). However, with inflation, rentals rise, and ultimately the investment breaks even and goes on to be profitable when the rental income exceeds outgoings. At this stage the house is worth, say, $1 million. In effect the initial $100,000 equity has become a $600,000 equity. This consequent gain is moreover a capital gain. If one sells the house, only half of this consequent profit is taxable.

Thirdly, great caution should be shown in regard to exotic tax-minimisation arrangements. Those who participate in such arrangements often find that on the one hand they do not obtain the taxation deductions that they seek and that on the other hand there is a commercial failure, so that their financial contributions are wholly or partly lost.

Finally, when I was Chairman of the Bar Superannuation Fund (I subsequentally left the Bar in order to become the Editor of the *National Observer*) I spoke with large numbers of barristers and advised them generally that in purchasing realty, the nearer the realty was to the centre of Melbourne, the better. This advice still applies. It is particularly true of houses, as opposed to apartments, since more and more houses in inner suburbs are being demolished in order to be replaced by apartments.

Professor Ian Spry QC was for many years Chairman of Trustees of the Victorian Bar Superannuation Fund and advised barristers on their savings and superannuation.

A bit about WORDS

Odd sounds

Some English words sound odd. Some sound funny, some sound grim, some sound cheerful. I am not sure what characteristics determine what is a normal sounding word and what is an odd or funny or grim sounding word, but they are easily recognisable. Probably it is a reflection of our sense of phonaesthesia: the feelings associated with particular sounds. Some consonant sounds come to have an association with related ideas: *crash*, *bash*, *flash*, *dash*, *hash* and *splash* are examples. Likewise *slip*, *slap*, *slop*, *slide*, *slunk*, *slinge*, *slither*, *slurp*, *sleazy*, and *slippery*.

This sense is said to underpin onomatopoeia: the creation of words which describe things with a sound that echoes the thing itself. So: *cuckoo*, *tick-tock*, *crunch*, *smooth* and *sludge* are all onomatopoeic. Onomatopoeia imitates nature, but phonaesthesia is a response which does not call on the natural world at all. Some sounds seem to gather a crust of associations about them. For example, consider the words (not many in number) which end with:

-inge (about 100 unique words) or
-unk (about 70 unique words)
-ither (about 15 unique words)

I started thinking about this when a person wrote to me lamenting that *mither* is not recorded in the dictionary, and is not used any more. He noted that it is 'still commonly used by the everyday folk in North Derbyshire, North Staffordshire, South West Yorkshire, and the South Cheshire and apparently in certain areas of the North East of England. The word has never appeared in a dictionary since the 1700s.' Actually it can be found in the long version of the OED2, in the entry for *moider* which has *moither* and *mither* as variants. But it is obsolete. And it got me thinking that not many words in current use end with *–ither*. Leave aside *either* and *neither*, in which it is not pronounced with a short *i*. Consider the list:

anither to bring down, lower, reduce, humiliate
blither v. to talk nonsense; n. nonsense; and one who makes blithe; a gladdener
dither v. (originally) to tremble, quake, quiver, thrill. Now in general use: to vacillate, to act indecisively. Also as a transitive verb: to confuse, perplex, make nervous.
mither (*moither*) To confuse, perplex, bewilder; to worry, bother, fatigue: so, a fair synonym for the transitive sense of *dither*.
slither n. Loose stones lying in great quantities on the side of a rock or hill; a slipping or sliding; v. to slip, slide, glide, esp. on a loose or broken slope or with a clattering noise.
smither n. a smith or hammerman; agile or active (as smiths have to be)
swither v. to be or become uncertain; to falter; to be perplexed or undecided; to hesitate; n. a state of agitation or excitement; a flurry, fluster adj. the right hand side;
hither adv. to or towards this place
thither adv. to or towards that place
whither adv. to or towards what place

The only really current words in the list are *dither* and *slither*. *Hither*, *thither* and *whither* would be understood by most people, but used by few. *Blither* is at the edge of extinction and the rest are gone.

The interesting thing about the list is the common sense which links *anither*, *blither*, *dither*, *mither* and *swither*, and a very useful sense at that: perplexity, uncertainty, indecision. How odd that all but *dither* have disappeared, and *dither* is now weakened, because it is used only intransitively. *Blither* survives only in the participial form *blithering*, and even in that form it sounds pretty dated.

Hither, *thither* and *whither* are close to obsolete now. They retain the original Germanic construction in which *-her* signifies movement towards a place, and they vary only in the place of reference (here, there, where). *Hither* and *thither* is still heard as a tired ornamental phrase, and occasionally hither and yon (for *yond* – which means on (or to) the farther side of, beyond). *Whither* was very useful for people with a fixation about terminal prepositions: *whither* are you going? was (for them) to be preferred over Where are you going to? Tastes vary.

Another oddly evocative sound is *-inge*. What an exotic collection of words share this little syllable: *abstringe, accinge, beswinge, circumcinge, compinge, constringe, dinge, dringe, effringe, elinge,*

fulcninge, ginge, harbinge, impinge, justninge, linge, minge, prestringe, restringe, scringe, sedinge, sickinge, slinge, springe, stinge, swinge, syringe, and *valdinge*. It sounds like a riff from the Goon Show.

And a few familiar words have the sound: *binge, cringe, fringe, hinge, singe, tinge, whinge*. Apart from these seven words, it is hard to find a current English word with *inge* as its dominant syllable. A good thing too: it sounds odd.

Any word in which *unk* is the dominant syllable is likely to be evocative but not in a good way. Consider some of them:

Alitrunk (an insect's thorax), *begunk* (to delude), *blunk* (to turn aside, to flinch), *chunk, clunk , crunk* (a harsh cry or croak), *dunk, flunk, forswunk* (exhausted with labour), *funk, gunk, insunk, lunk, plunk, punk, runk, skunk, slunk, spelunk, sprunk, swunk, thunk*, and *whunk*.

In addition, there are the more familiar *bunk, drunk, hunk* and *junk*. None of these words sound good: they sound clunky.

Many of these words are obsolete. But it is not surprising that *runk* is out of use: it never had a chance. It meant to whisper or murmur. It is an ill-sounding word for such a meaning. Other words with the same meaning were better suited: *brum, buzz, hone, hummer, hurn, insussurate, muss, mustle, sussur, sussurate, whimper* and *whist*.

Others rank with *runk*, as words whose sound does not suit their meaning. Other words meaning whisper or murmur include some real shockers: *channer, chunter, gruntle, grutch, hoine, mork, murgeon, nipper, repine, yammer,* and *yorner*. These are all anti-phonaesthetic words, by which I mean words whose sound seems contrary to their meaning. Anti-phonaesthetic is a good illustration of its opposite: it sounds ugly, but it is describing words which sound ugly, which raises a paradox: anti-phonaesthetic is phonaesthetic.

It is not easy to find words whose meaning is so badly served by their sound, but here are some that spring to mind. *Turdiform* (relating to a thrush); *pulchritude* (beauty); *effulgent* (radiant); *concinnate* (referring to language: of studied elegance); *compt* (elegant); *venustity* (gracefulness); *mensk* (to render graceful); *sacricolist* (devout worshipper); *albedineity* (whiteness) and *flosculation* (an ornament of speech).

I would be happy to receive other examples of anti-phonaesthetic words.

JULIAN BURNSIDE

Mo' justis

the law of defamation in Texas

Having previously brought readers a criminal case from Texas, *Bar News* now looks at the civil side

We again bring you a strange but true tale from Texas. As is well known, defamation law in the US favours the tortfeasor in that the First Amendment to the US Constitution [see also Article 1, Section 8 of the Texas Constitution] supports robust debate and freedom of speech and the press. That is not to say that a defamed plaintiff cannot win in the US – it's just that much harder to do so – witness the efforts made by the defendant Dow Jones to have plaintiff Joe Gutnick's case transferred out of Victoria to the US.

It all began back in late October 1999 when 13-year-old Christopher Beamon, a seventh-grade student, was assigned to write a 'scary' story for Halloween. He wrote a story about the killing of a teacher and two students and received extra credit from his teacher. However, the Ponder High School principal contacted juvenile authorities to have the student removed from the school. Lest readers think this a bit over the top, in defence of the principal we remind readers that this incident took place some six months after the Columbine High School shootings in Colorado. So little Chris comes before Juvenile Court and Judge Darlene Whitten and Bruce Isaacks, the local District Attorney. Judge Whitten ordered Beamon to be detained for ten days at the Denton County Juvenile Detention Facility. Another judge ordered his release after five days when a media savvy lawyer, acting *pro bono*, tipped off the news media and the ensuing publicity convinced DA Isaacks not to proceed with prosecuting the kid. The incident attracted widespread media attention, including Australian news reports. In response, Rose Farley of the

Dallas Observer wrote a satirical article, 'Stop the madness' [November 11, 1999, pages 11–13; the original article is available at: <http://www.supreme.courts.state.tx.us/historical/2004/…sep/030019app.pdf> or <http://search.dallasobservercom/1999-11-11/news/stop-the-madness/> viewed June 4, 2008].

As satire, Ms Farley's article was a doozy – she had a fictitious six-year-old Cindy Bradley who had written a book review of Maurice Sendak's *Where the Wild Things Are* (1963). In Farley's story, Judge Whitten detains six-year-old 'Cindy' for presenting a book report about 'fanaticism, cannibalism, and disorderly conduct.' Cindy is placed in ankle shackles and handcuffs, and District Attorney Isaacks considers prosecuting Cindy as an adult. The story also uses fictitious quotes, such as a fabricated quote from a county bailiff who comments on having tiny, child-size handcuffs and shackles on hand from Beamon's recent detention. The article included a 'mug shot' of the cute little six-year-old terrorist holding a plush toy monkey captioned: 'Do they make handcuffs this small? Be afraid of this little girl.' The article then describes Beamon's actual arrest. Additionally, the judge was quoted as saying, 'It's time for you to grow up, young lady, and it's time for us to stop treating kids like children.' Denton County District Attorney Isaacks is quoted as saying that he had not yet decided whether to prosecute Cindy and that 'We've considered having her certified to stand trial as an adult, but even in Texas there are some limits.' The then Texas Governor (and on his presidential campaign) George W Bush was quoted as saying that he had not read the book, but was 'appalled that such material could find its way into the hands of a Texas schoolchild. This book clearly has deviant, violent, sexual overtones.' Further, 'Parents must understand that zero tolerance means just that,' the Governor said. 'We won't tolerate anything.'

One of the reasons cited as necessitating Cindy's detention was her prior history, which included reprimands for spraying a boy with pineapple juice and sitting on her feet.

The last word in Farley's article was left to the six-year-old detainee and suspected terrorist: 'I don't get why everyone's so mad,' Cindy said in a phone interview from the detention center. 'Just 'cause I like how Max told his mom he wanted to eat her up and ran away in his mind and did a rumpus with the monsters doesn't mean I would do those things.' Cindy scoffed at the suggestion that *Where the Wild Things Are* can corrupt young minds. 'Like, I'm *sure*,' she said. 'It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French.'

Not all of the *Observer*'s readers, however, were aware that Farley's article was a parody. A radio talk show host and the University of North Texas school newspaper both reported the parody as real news. Whitten and Isaacks received angry letters and criticism following the *Observer*'s story, and some letters called for Whitten's resignation. Whitten and Isaacks asked the newspaper to apologize and retract the story, but the *Observer* pugnaciously responded by ridiculing Whitten in its November 18, 1999 'Buzz' column. The column also referred to its readers who did not get the joke as 'cerebrally challenged.' [see <http://www.dallasobserver.com/1999-11-18/news/buzz/> viewed June 5, 2008.]

Following the failure of the paper to apologise and retract, the judge's husband, attorney Michael J Whitten, filed on her behalf [thus extending the old saw to include the wife as the foolish client and the husband as an even bigger damn fool!]. Governor Bush, perhaps receiving better advice back then than more recently, did not seek to litigate. Nor did the other public officials who had had false quotations attributed to them. Thus started five years of litigation during which the paper continued with its belligerent stance. The defendants sought summary judgment (on the issue of press freedom) which was denied by the trial judge and thereafter by the Texas Court of Appeals. Next, the Supreme Court of Texas reversed the Court of Appeals. Finally, in 2005, the US Supreme Court denied *certiorari* to the plaintiffs.

The case is of interest for two reasons: First, can the defendants rely upon the right of free speech to shield them from their untrue (and thus defamatory) statements regarding the plaintiffs when the free speech protection is dependent upon the absence of malice on their part and absence of malice can be negated by the defendants' knowledge of the falsity of their statements? After all, the very gist of satire and parody is the falsity of the parody, despite its mirroring of reality.

Secondly, how is one to assess parody when the prior acts of the plaintiffs lend credibility to the untrue assertions contained in the parody? Can the plaintiffs argue that the 'average reader of ordinary intelligence' is unable to distinguish fact from parody when their own prior acts lend credibility to the false statements published in the parody. Can the plaintiffs rely on their prior conduct to clothe the outrageous assertions in the parody with a veneer of verisimilitude when those outrageous assertions are but an echo of their own prior conduct? Conversely, can the defendants rely on the incredulity of the 'average reader of ordinary intelligence' when prior reports of the plaintiff's conduct may have imparted credulity to that average reader? To quote from the newspaper's November 18, 1999 'Buzz' column:

> A few people apparently were fooled, but if our satire was too close to reality, then the problem is with reality. If some people find it believable that a juvenile court judge would jail a six-year-old girl for writing about a children's picture book, it's because that same judge jailed a 13-year-old boy.

The Supreme Court of Texas decided both these points in favour of the defendants. Of course, the *Observer* was not magnanimous in victory and reported the ultimate outcome of the case under the heading: 'Neener, Neener, Neener: Texas Supreme Court sides with satire and the *Dallas Observer*' (September 9, 2004). Thereafter the Texas Supreme Court denied the plaintiffs' petition for rehearing (see 2004 Tex. LEXIS 1159, Nov. 5, 2004) and the US Supreme Court denied *certiorari* (545 U.S. 1105, 125 S. Ct. 2557, 162 L. Ed. 2d 276, 2005 U.S. LEXIS 4538, June 6, 2005).

MMP

Kaye Hall, Judy Benson, Mary Sevdalis and Sue Kee

WBA meet and greet

The Women Barristers Association again hosted its annual meet and greet function at the Essoign Club on the 11 September 2008. The night has become an annual event and is co-hosted with Victorian Women Lawyers. As the name of the function suggests, it is an evening designed for female barristers to 'meet and greet' other female lawyers, principally solicitors from various legal firms. The function itself is sponsored in part by LexisNexis, and delegates from that fine organisation were on hand to provide assistance with respect to their products.

This year, as in past years, the night offered a move away from the traditional type of cocktail party function. Instead, those lucky enough to be assembled there were provided with the uproarious offerings of our own home grown (Melbourne) comedian Rachel Berger who had us in stitches with her clever brand of humour and wit. What a talent!

Laughter was infectious on the night and its mix with champagne and wine left no one in doubt that WBA functions still enable (mostly) women at the Bar (but also a few brave men!) and solicitors to get together and just have fun.

JOYE ELLERAY
Convenor, WBA

Susan Aufgang and Munya Andrews

Rachel Berger – comedian

Rohan Hamilton and Julie Davis

Carmel Morfuni, Jacinta Cullum and Dr Elizabeth Brophy

Fiona Ryan and Kaye McNaught

Joyce Elleray, convenor WBA, and Rachel Berger

Measures adopted by the Bar to assist parents

The Bar has developed a number of practical measures to assist members taking parental leave. Barristers and their support staff are reminded of the following services available for parents at the Bar.

PARENTS' ROOM

A parent's room is available for use by members and staff of the Bar for feeding and changing children. It is located on the Ground Floor of Owen Dixon Chambers East, immediately to the south of the steps leading to Owen Dixon Chambers West near Dever's office. The room can be accessed by obtaining a swipe card from any of the clerk's offices. The parents' room has a refrigerator and microwave. The room may be used by a carer who is minding children of a barrister or support person.

PARENTAL LEAVE POLICY / CHAMBERS RENT SUBSIDY

The Bar Council will underwrite the rent payable by a barrister ('the underwriting') who is a financial practising member of counsel; and

(i) who has the substantial full-time personal responsibility for the care of a child less than 12 months old or an adopted or foster child under school age immediately following the date on which the child comes into the care and custody of the barrister; and is not engaged in and available for work as a barrister more than 16 hours per week during the period of the subsidy; or

(ii) by reason of pregnancy will not be engaged in and available for work as a barrister more than 16 hours per week.

The underwriting of rent is subject to the following conditions:

(a) the period of underwriting will not exceed six months;

(b) the period of underwriting shall commence not more than six months before the estimated birth of the child nor more than six months after the birth of the child;

(c) the barrister first applies in writing to the Bar Council setting out the period for which the barrister seeks the underwriting;

(d) if the application is approved, the applicant is advised in writing by the Bar Council who forwards a copy of the approval letter to BCL as authority for the Bar to be charged with the amount of the subsidy. For the period of the underwriting the barrister pays to Barristers' Chambers Limited 25% of the monthly rental otherwise payable in respect of those chambers;

(e) if the application is not approved, the applicant is advised in writing by the Bar Council.

CONTINUING PROFESSIONAL DEVELOPMENT

As a general rule, the Continuing Professional Development Committee will grant partial dispensation on application for persons taking parental leave. The extent of the dispensation will be tailored to meet the circumstances of the individual barrister. Qualifying barristers will be required to fulfil their remaining CPD requirements by listening to a podcast or viewing a DVD of a Bar CPD activity. One (1) CPD point per hour may be claimed by a barrister listening to a podcast or viewing a DVD of a Bar CPD activity. DVDs may be obtained from the Bar Office.

SHARING CHAMBERS

A barrister to whom a room has been allocated may apply to BCL to share his or her chambers with another nominated barrister.

TELEPHONE SYSTEM

The Victorian Bar telephone system enables calls placed to chambers to divert directly to the barrister at home or on his or her mobile phone. Alternatively, barristers' clerks can divert calls directly to a barrister.

REMOTE INTERNET ACCESS

A member may obtain a Vicbar email address at a small cost which can be accessed either in chambers, or remotely, whether or not the member maintains chambers.

ACCESS TO LEXIS NEXIS / ONLINE LEGAL RESEARCH

Members of the Bar may have access to free online legal research facilities at the Bar Library on the 1st Floor, Owen Dixon Chambers East. Some clerks also provide this service free to members on their lists at the clerks' offices.

BAR SUBSCRIPTIONS

Any barrister taking parental leave may apply for a 75 per cent rebate on that barrister's Bar subscription fees.

TEMPORARY OFFICE SPACE / MEETING ROOM

The Bar has provided a dedicated meeting room which members taking parental leave may access for the purpose of conducting meetings. The room is furnished with bookcases, a desk and chair, a computer with internet access and a telephone. Members may book the use of the room by contacting the Bar Office and may obtain a key from the Bar Office.

ANNA ROBERTSON

Bar Hockey

In 2008, the Bar Hockey Team for the first time ever lost both its games. While statistically obviously the year was a washout, we in fact played very well.

Our first game on 18 October was played at the picturesque Kyeemagh ground. This ground is very close to Sydney airport and has the great advantage of being immediately beside a thriving league club, which provides both changing and showering facilities but more importantly ample supplies of refreshments.

We were unfortunate to lose both Clancy and Michael Tinney at the last moment from the side, thus robbing us of a centre half and centre forward. These losses were keenly felt.

We started well against the NSW Bar and throughout the game we must have had 70 to 80 per cent of the play.

Unfortunately, however, we got 0 per cent of the goals and they got 100 per cent of the two that were scored.

With Wood performing heroically at centre half (occasionally spelled by me), we attacked throughout the entire first half and were unfortunate not to convert any of the numerous short corners that we obtained. Their few attacks were dealt with extremely competently by Sharpley in goal.

Right on half time, however, they got their only short corner, and Ganasan Narianasamy managed to flick the fourth take of the corner into the net. Gunny is of course the former Victorian, a former Fijian International and a player even in excess of 50 with an astounding vitality to go with a considerable skill base.

We attacked relentlessly again throughout the second half but were unable to score.

Inevitably the NSW Bar had a rare break away and my desperate effort to stop the attack proved instead to be a perfect pass to their left winger who easily beat Sharpley.

Those who played all played very well. They were Sharpley, Burchardt, James, Brear, Wood, Luxton, Gordon, Morgan, O'Neill and Robinson.

We were greatly assisted by Kathleen Chua and Robby Thorburn who turned up and assisted us by enabling us to put out a full team.

Particular thanks are perhaps due to Morgan who absconded from a conference to play a significant part in the game.

We have never previously lost to the NSW Bar and it is to be expected that the celebrations in their equivalent to *Bar News* will be extravagant and gloating. I have been strongly reminded of my remarks some years ago about the relative age, speed and weight of the two teams. Those observations will doubtless return to haunt me.

Against the Law Institute on the following Thursday, we were fortified by the return of Tweedie and Parmenter, together with Trish Riddell and Frances Gordon, our first new female recruit for many years, and very welcome she was, too.

Robinson was unable to play and once again unfortunately Michael Tinney was a late withdrawal.

In the first few minutes, my impression was that we were going to be wiped out. The solicitors had fielded an extremely young team of whom it turned out only one was 35 or over (and I suspect he was 35 and one day). In addition to our usual nemesis, Ben Schokman, they had a number of other skilled and more importantly very fit young players.

To my surprise they took until the quarter hour to score and we then continued to hold out very well.

With Tweedie playing outstandingly at centre half and Parmenter utilising his skills very effectively at right inner we were able to force a number of telling attacks and although the LIV Team scored again, we pulled one back through Parmenter shortly before the interval. The goal was no fluke, being well engineered by Wood and excellently finished.

Unfortunately, or arguably not, I was knocked to the ground by an overly enthusiastic LIV forward and was unable to play any significant part in the second half. Nonetheless, as in Sydney, all who played played extremely well. Sharpley had a fine game in goal, James and Wood did very well on the back line after my departure, and Tony Elder belied the years with a sterling performance at left half. Likewise, Luxton on the right played extremely well, as did all the forwards.

It is not a measure of any failings by those on our team who played, but rather a measure of the disadvantage in terms of age that the solicitors were able ultimately to win 5 – 1, although their last two goals came in the later minutes when our team had plainly run out of legs.

The umpires, led as ever by Tony Dayton, awarded the Rupert Balfe-Lycester Meares Trophy to Nick Tweedie, a very well deserved award and one which breaks Schokman's previous stranglehold.

The LIV will retain the Scales of Justice trophy for at least another year, and failing serious injury or debilitation on Schokman's part we are not likely to regain it until he either comes to the Bar or gets old enough to be no longer the same force.

Rabbles R Us

Andrew Scotting, the NSW captain, with cup

Tweedie accepts the Rupert Balfe plate

It would be fair to say that the average age of the solicitors was well under 30 where as the average age of the Bar Team is now around about 40. That explains the result.

Nonetheless, the game as ever was played in an excellent spirit, and was thoroughly enjoyable.

Those who played were Sharpley, Burchardt, Wood, James, Luxton, Tweedie, Elder, Riddell, Frances Gordon, Ross Gordon, Parmenter, O'Neill, Morgan, Brear.

I acknowledge a considerable debt to Richard Brear who coordinated the photography in both games and who took it upon himself the not insignificant task of transporting the Rupert Balfe-Lycester Meares Trophy to Sydney. They will have to bring it down here again for the same fixture next year.

PHILIP BURCHARDT

The Chinawoman

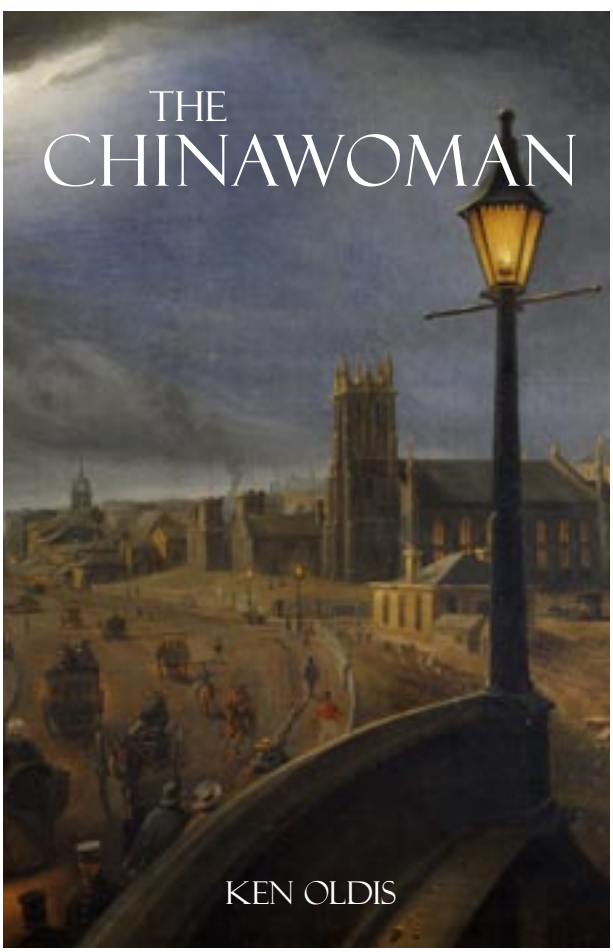
By Ken Oldis
Australian Scholarly Publishing Pty Ltd
Paperback, $34.95, 259 pp

The Chinese are so much a part of the fabric of Melbourne society it is difficult to envisage a time when they were outcasts and held with deep suspicion by leading members of the Melbourne establishment. Indeed, the penetration of Chinese-born people into Australian life is best exemplified by the first directly elected Lord Mayor of Melbourne, Dr John Chun Sai So; re-elected in 2004 and widely popular. The latter came to Melbourne when 17 years of age from Hong Kong, lured not by gold but, no doubt, the promise of good education.

The unearthing of a miscarriage of justice involving two Chinese men tried and convicted of murder in the Supreme Court of Victoria is the vehicle for a revealing insight into the history of Chinese race relations in the nascent Victorian colony during the Gold Rush.

Like all good true crime stories, this one begins with the crime – the murder of an English prostitute, Sophia Lewis, dubbed the China-woman, on 1 December 1856. Despite widespread anti-Chinese racism in the Victorian colony, the deceased shut her door to no one, least of all her large Chinese clientele. Thus, when she was found with her throat cut in her boudoir, which ran off her cigar shop-front situated in Stephen Street near Chinatown (now Exhibition Street), a Chinese culprit was quickly suspected. The mixture of race, murder and sex threw the colony's press into a feeding frenzy that would make latter day readers of the now defunct *Truth* blush.

The police investigation headed by Chief Detective Nicholson (who would feature in the Ned Kelly investigation) was a shambles – even an average modern criminal lawyer would have a field day here. That it was outcome driven is clear from the start. In an era before crime scene photography and fingerprints (not to mention DNA analysis), it is revealing how rudimentary investigations were. The body of Sophie Lewis lay on her death bed until the coronial inquest, held the following day, had concluded. The jury tramped from a nearby inn, where the inquest was held, to view the gruesome scene.



Two Chinese men were charged following the inquest – Hang Tzan and Chong Sigh. The chief weapon in the armoury of the prosecution was alleged admissions to informers and possession of some item of jewellery, said to belong to the deceased.

In his telling of the tale, Oldis offers the historically minded reader tasty morsels in both the text and his extensive footnotes. For example, the Chinese witness Fook Shing took his oath to tell the truth not by swearing on a holy book but by intoning: 'I am Fook Shing. I must tell the truth. If I do not tell the truth may thunder kill me and fire come from heaven and burn me up.'

Ken Oldis

The deceased and her young neighbour, the dazzling Jane Judge, a Crown witness and prostitute who was clearly mixed up in the murder, are perhaps the most interesting characters in the book. The latter's colourful life is perhaps a book in its own right. Sophie Lewis remains less explored, no doubt due to the fact that she lived in the shadows of Stephen Street plying her profession and her life was snuffed out early. Few official details as to her colourful life would exist. History being written by the winners, the records that Oldis diligently traces have meant that others, who made a stamp on public life, receive more attention. One of those is Sir Redmond Barry who Oldis describes as 'the hanging Judge'.

Oldis, an amateur Ned Kelly scholar, harbours an undisguised contempt for the trial judge and his handling of the case.

'The Supreme Court of the Colony of Victoria sat on the northwest corner of two streets abutting the Melbourne Gaol,

an edifice sited on a slope above the city and dominating its skyline. A jumble of weatherboard buildings beside and behind the courthouse ruined the impression of its two imposing storeys of bluestone. The Old Court was the venue for the judicial theatre featuring the murderers of Sophia Lewis. Redmond Barry, a vain, pompous "hanging judge", presided.'

Of course, whether champions of Ned Kelly or not, few legal historians now claim that Ned Kelly received a fair trial for the murder of a police trooper for which Barry hanged him (see Phillips J, *The Trial of Ned Kelly*).

The same must be said of this trial. The trial occupies two chapters. The outcome – two guilty verdicts – is a foregone conclusion. As the death penalty applied, both men were hanged and it is this moment that is genuinely moving in the book. The finality of such a penalty means that any disquiet and distrust of the verdicts is purely academic.

Oldis writes his account with clarity and economy. As a history of the early Victorian colony revealed through the trial of the two accused, the book succeeds admirably.

The publishers might have considered a list of characters, as some of the Chinese names in the early part of the book required me to backtrack; however this may reflect my own limitations with Chinese names. For those curious as to the fate of some of the notable characters, there is a lengthy epilogue containing condensed biographies.

This scholarly, readable and interesting work is a valuable addition to the rather neglected history of the early beginnings of the criminal justice system in Victoria.

RAYMOND GIBSON

UNDERSTANDING AUSTRALIAN CONSTRUCTION CONTRACTS

By Ian Bailey QC and Matthew Bell
Lawbook Co 2008

Some years ago, it fell to this reviewer (in his role as in-house solicitor for a well regarded and long established building industry association) the thrilling task of sorting through some very old and very musty document archives for the purpose of document discovery.

There was nothing particularly memorable or interesting about undertaking such a task, save for one particular find among the cobwebs and the dust.

It was a standard form construction contract. It was an orange document of some six or so pages, was dated around 1965 or '66 and was for the construction of the association's new headquarters. It was unaltered, save for one small change to a clause that had been made in royal blue ink and in a style that bespoke considerable forethought, not to mention admirable clarity and brevity of expression. The project was undoubtedly costly and yet the contractual framework was concise.

Where, you may well ask, have we gone wrong (contractually speaking) in the succeeding 40 years, when commercial construction contracts are invariably of *War and Peace*-like proportions and, frankly, about as comprehensible as the loan documents that underpin the project.

Well, that particular question is not for this review to attempt to answer. What can be said without question is that Professor Bailey QC and Matthew Bell have rendered an invaluable service to the construction industry in general and to the legal profession in particular with the recent publication of their splendid handbook entitled *Understanding Australian Construction Contracts*.

The book covers the four most widely and commonly used commercial construction contracts and analyses in minute detail the clauses in those documents that deal with particular aspects of the project delivery, such as insurance, liquidated damages and service of notices under the contract. The arrangement of the text may therefore be said to follow broadly the progress of the project and the performance sequence of the contract.

The busy practitioner can now look to a specific section in the text when a specific issue relating to the performance (or more usually, the lack of performance) of the contract comes up for consideration. For that, the authors are to be congratulated.

The book is easy to use and easy to navigate through. There is a refreshing absence of footnotes (footnotes, at least in this reviewers opinion, often assume a life of

their own, which detracts from the text) and helpful further references are given at the end of each chapter. The book also contains many useful comparative tables of key aspects of each contract.

This is a reference book in the truest sense and should be on the shelves of all practitioners who work in or about the construction industry.

The book does, however, contain within its covers an irony: while the commercial construction industry is the beneficiary of this and many other learned and significant texts, the domestic building industry is not – which is strange when one considers that domestic construction projects affect more people in arguably more significant financial respects than is the case with commercial projects.

Perhaps this is a future publishing task that the learned authors may wish to undertake.

NEIL MCPHEE
Solicitor

Admiralty Jurisdiction – Law and Practice in Australia, New Zealand, Singapore and Hong Kong

By Dr Damien J. Cremean
The Federation Press 2008 (3rd Edition)
pp (i)-(lii), 1-508.

The third edition of Dr Cremean's significant work on Admiralty Law and Practice comes at a very convenient time. Someone who borrowed my second edition has failed to return it. I suspect it was a Judge of the Federal Court.

It is not difficult to see why Dr Cremean's work is worth acquiring; for both regular and occasional practitioners in the Admiralty jurisdiction. It is a complete text concerning and annotating the provisions of the *Admiralty Act 1988* (Cth) and the regulations and court rules made in respect of that statute. An important and convenient extension of the book by this third edition is to include the statutes, applicable rules and practices in New Zealand, Singapore and Hong Kong. The extension into the Asian countries allows the reader to draw on both court decisions and the experience of the application of laws and practices in those jurisdictions. For my part it would have been useful to have known of the decision of Justice Barnett in the Supreme Court of Hong Kong in *The Sea Empire* [1992] 1 HKC 357 at the time of arguing *The Boomerang 1* (2006) 235 ALR 554 before Justice Finkelstein (see page 185 of the text). It would not have made any difference to the decision, but would have been nice to have discussed the matter with the Judge.

Comity and consistency in the application of Admiralty laws around the world is important for two reasons. Firstly, most of the significant developments in Admiralty law occurred in England between the 17th and 19th centuries, and most trading nations have enacted laws and maintained practices consistent with those developments. Secondly, most modern trading nations have developed and applied laws in relation to arrest as a consequence of adopting the 1952 Brussells Convention on the Arrest of Sea-Going Ships. Thus, a work which brings together the law in Australasian and Asian jurisdictions will ensure consistency of practice in these jurisdictions. In that sense the book is an invaluable reference on the procedures in the Admiralty jurisdictions in Australian and New Zealand and the English adopting Asian jurisdictions.

Recent important Australian decisions discussed at length in this new edition include *Comandate Marine Corp v Pan Australia Shopping Pty Ltd* (2006) 157 FCR 45 (on jurisdictional issues and anti-suit injunctions) and its 'sister' case *ASP Holdings Ltd v Ship Boomerang 1* (2006) 235 ALR 554 (on the intersection of admiralty and insolvency) and *Scandinavian Bunkering AS v Bunkers on Board the Ship FV Tarhman* (2006) 151 FCR 126 (on what might be the subject of an arrest).

The *Admiralty Act 1988* has been one of the great successes of Commonwealth legislative design. It rose out of a reference to the Commonwealth Law Reform Commission in 1982 and culminated in the Law Reform Commission's Report No. 33 on Civil Admiralty Jurisdiction published in 1986. The 1998 statute is notable for not having been amended and for its ease of application by the courts. Dr Cremean was an initial researcher and a consultant to the Law Reform Commission that produced the statute. From at least this beginning to the present day Dr Cremean has accumulated an encyclopaedic knowledge of the Admiralty jurisdiction in Australasia and in Asia and has provided the benefit of that extensive knowledge by this third edition. It is a thorough and easy to use text which I recommend to both occasional and regular practitioners in the Admiralty jurisdiction. Perhaps if everyone got their own copy of the third edition, my copy would remain safely on my shelves.

S.R. HORGAN

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