VICTORIAN BAR NEWS

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Farewell

The Honourable Chief Justice Michael Black AC

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VICTORIAN BAR
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A Broad Church

The Editors

From J.B. Box, real tennis champion and the Bar's first Chairman, and Joan Rosanove QC, the first woman to sign the Victorian bar roll, whose now famous photograph appeared on the cover of a 1951 issue of People Magazine, through to more recent luminaries such as High Court Justice Susan Crennan and the recently retired Chief Justice of the Federal Court, the Hon Michael Black QC, the Victorian bar roll contains amongst its members a rich and varied list of characters. The Victorian Bar is not a firm of solicitors or chartered accountants or similar corporate entity. It is a society of advocates – individual lawyers who have made the choice to practise law independently, sharing a common set of values embodied in the bar's rules. Effective advocacy requires not only legal intellect, judgment and mental agility, but also perseverance, presence, flair, courage, confidence and sometimes, a sense of humour. These personal attributes are found in varying measures amongst the members of our bar, whether they be young or old, outgoing or reserved, or hail from toffy Toorak or the people's republic of Brunswick. From the cut and thrust flamboyance of criminal counsel to the diligent and acerbic endeavour of the equity whisperers, it is the breadth and diversity of these personalities which inform the famed collegial spirit of the Victorian Bar.

Victorian Bar News has always been a magazine produced by barristers, about the bench and bar, for barristers. Sometimes, it has included more serious 'legal' content, but principally, *Victorian Bar News* has chronicled the professional life of the Victorian Bar. Columns such as Portia Woods (who makes her final appearance in this edition of *Victorian Bar News*), or her earlier predecessor Clive Penman, allow us a moment or two not to take ourselves too seriously and collectively giggle at those mistakes and insecurities which are typical in the day to day grind of being a barrister. Deep down, we suspect there is a little bit of Portia or Clive in all of us, as many so far have identified with and been entertained by these amusing fictional characters.

As the Victorian Bar is becoming a larger and more geographically spread out institution, our Quarterly Counsel column gives our members (especially newer counsel) a chance to get to know a little about some of our current great personalities. This edition, we feature leading criminal silk Robert Richter QC.

The recently retired Chief Justice Black of the Federal Court of Australia is another marvellous personality and a colossus of the Australian legal system. As a member of our bar, it is our great privilege in this edition to reflect upon his achievements.

The rich and varied personalities of members of the Victorian Bar are on full display in this 149th edition of the *Victorian Bar News*, be it on the high seas at the annual 'Wigs and Gowns Regatta', in Queensland at the Australian Bar Association's annual advocacy course or in chambers, in our regular 'Habitat' column which in this edition focuses on the accommodation issues facing the bar's newest personalities, the readers.

Also in this edition, we introduce a new regular column authored by former Supreme Court Justice, the Hon John Coldrey QC who in his debut column shares his hilarious reminiscences of his first days on the bench.

In the immortal words of the great Mahatma Ghandi, 'there is room for us all'. *Victorian Bar News* unashamedly embraces the cult of personality and we look forward to continuing our observation and celebration of the careers, lives and great characters that comprise our wonderful bar, especially as we approach our historic 150th edition next quarter.

Letter to the Editors

Dear Ms Schoff and Mr Hayes,

The Women Barristers' Association Committee is disappointed at the decision to include the "Portia Woods" diary in the last two editions of *Victorian Bar News*. The pieces, written in the guise of a female member of the Victorian Bar but with no mention of the true author/s, plays to all the familiar stereotypes. The female barrister is portrayed as weight-conscious, in awe of her male counterparts, and plagued by self-doubt. In the first piece, despite the seriousness of the Royal Commission, she is focused on restocking her wardrobe.

No doubt Portia is intended to be humorous in the style of Bridget Jones. However, we question the value of humour which is sourced in reinforcing damaging stereotypes. The WBA Committee calls on the editors of *Victorian Bar News* to make better choices in allowing the publication of such material in a Victorian Bar publication.

Yours sincerely,

Joye Elleray, Convenor

CORRECTION:
The Summer 2010 edition of the Victorian Bar News published photographs of the State funeral of the former Chief Justice of the Supreme Court of Victoria, The Hon John Harber Philips AO QC. The accompanying words incorrectly stated that the funeral was held at St Paul's Cathedral. In fact the funeral was held at St Patrick's Cathedral.

The Privilege of Service

Michael Colbran QC

Pro Bono and Legal Aid

As I am writing the 2010 Law Week has just concluded. This annual event which focuses attention on the contribution of the law and lawyers to society is now nationwide.

A highlight of this year's law week was the celebration of the 10th Anniversary of the Victorian Bar's pro bono committee. We were honoured that the Chief Justice, The Honourable Marilyn Warren AC, spoke at this important event held to recognise the public service given by so many of our members. Her Honour's remarks appear later in this edition.

The Victorian Bar was the first in Australia to establish a committee of its members devoted to providing access to justice in deserving cases and raising matters of public interest. In a similar way, some years earlier, the Victorian Bar was the first to establish a legal aid committee to co-ordinate the generous work of its members on behalf of those who could not afford legal representation.

These are examples of the Bar's ethos of public service. In thinking about pro bono work we need to broaden the understanding of how the public good is served by the profession. Our contribution is not only about giving free legal advice and appearing in high profile human rights cases. It includes service to society of various kinds.

The view that lawyers are all motivated by avarice is as widespread as it is baseless. Most join the Bar inspired by ideals of service to the community and to uphold a system of laws and legal administration that protects the individual and seeks to ensure that the weak or vulnerable are dealt with justly.

At a time when constraints on legal aid restrict access to justice particularly in the field of civil work it is timely for the Bar to consider how it can do more to reach the vast number of citizens who otherwise do not receive legal assistance that they need in order to vindicate their legal rights.

The failure over many years of governments to sustain legal aid funding is well recognised. Many of our members receive an income meted out ever so slowly by Legal Aid solicitors at a rate of less than half the average weekly wage. Will a time come when our members serving the community by underwriting the poorly funded Legal Aid system will be given due recognition.

The Bar Council and staff are working to improve the position of the most hard pressed members of the Bar particularly the legal aid bar. Our relations with Legal Aid and the LIV are strong and together we are endeavouring to find a way to ensure the equitable allocation of the funds available to legal aid. But ultimately the answer must lie with the Federal and State Governments living up to this fundamental obligation to ensure justice is available for all.

Innovative diversionary schemes may be a part of the answer but the importance of the role of independent judicial decision making is no less now than it has been at any time. The prevailing tendency to spin the emollient fiction that the private resolution of conflicting interests is a substitute for the impartial determination of legal rights threatens more than funding for the Courts. It undermines that respect for judicial authority which is a pillar of our society.

Growth of the Bar

Approximately 200 lawyers await their opportunity to join our Bar. This demand has been a constant feature over many years as our Bar grows each year, making it the most dynamic and diverse in the country.

In his warm responding speech at his Melbourne welcome in early May, published later in this edition, the Chief Justice of the Federal Court the Honourable Justice Patrick Keane reminded us of some iconic figures of the Victorian Bar's past. He reminded us amongst others of Owen Dixon, Robert Menzies, Keith Ackin and Neil McPhee. The achievements of these legendary characters continue to inspire our community of 1800 practising members.

As the Bar continues to grow the Bar Council is working with BCL to ensure that there will be accommodation to meet the need. Also, with BCL the Bar is extending the scope of its intranet to ensure that all members of the Bar have the opportunity to access data networking services on equal terms irrespective of the chambers they occupy. The new website and greater use of contemporary telecommunications technology will enhance the Bar's internal communications including to those members of the Bar who do not currently hold chambers and are nevertheless part of the community.

Readers Course Review

The recent review of the Readers Course has led the Bar Council to adopt a series of recommendations put to it by the working group chaired by Peter Riordan SC. These changes, which include the introduction of exams, the development of a curriculum type of approach and change in duration will be implemented during 2011. The Bar Council is indebted to the working group chaired by Peter Riordan and to the Honourable George Hampel and Chris Roper for their detailed reports. The Bar Council recognises the importance in the public interest of ensuring that this course continues to offer first class education and a vital introduction to the responsibilities and ethics of our independent profession.

Diversity and Retention issues

It is beyond question now that there are problems that need to be solved that affect the retention rates of women, and others, at the Bar. The question is not why there are not more senior women at the Bar. There are many logical and historical reasons for that. The real issue is to identify and alleviate systemic disincentives to remaining at the Bar or returning to it after voluntary absence. It is idle to pretend that such barriers do not exist or that some are not gender related. Our responsibility is to try to remove the barriers.

The Equality and Diversity Committee and in particular the subcommittee chaired by Jeremy Twigg is to be commended for their work in this area which is ongoing and enjoys the strong support of the Bar Council.

The challenges to professionalism implicit in some of the proposed national profession reforms, the continuing decline in real terms in funding for legal aid services, the chronic problems in County Court listings, the unacceptably cramped facilities in the public areas of the Children's Court, the clear need for a new Supreme Court Building - all of these burdens our community of 1800 have weathered with fortitude and equanimity. It will always be so for our individual and collective ethos is one of service to an ideal greater than passing political point scoring.

JUDGES AT WORK

Making Decisions and Writing about them

The Hon Peter Heerey QC

Like any piece of writing, be it play, novel, plumbing specification or beer commercial, a judgment has its own target audience, terminology and conventional style. Primarily a judgment is directed at the parties, and particularly the losing party. Others who may read it for professional reasons include the appeal court, courts in other cases, the legal profession and students. Occasionally the media and the general public may find something of interest.

Writing a judgment is central to the judge's role. It is a personal and non-delegable task (Australian judges by and large have not yet adopted the US clerk-drafting Santa's Workshop approach). There is a substantial jurisprudence on the minimum requirements for satisfying the judicial obligation to give reasons. This obligation includes dealing with issues that are raised and making appropriate findings of fact: see for example *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247. Similar obligations are imposed on arbitrators: *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255; *ThoroughVision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139.

Of recent years attention has been directed to another aspect of judgment writing. For want of a better word this can be called readability. A judgment may satisfy the minimum legal requirements for giving reasons, but be almost unreadable: too long, turgid, repetitive, rambling, convoluted and replete with lengthy slabs of cut-and-paste quotations from cases, statutes or evidence. Such judgments bring to mind Pascal's apology that he had made a letter longer because he had not the time to make it shorter.

If the reasonably well educated layperson is the touchstone, a judgment, or at least the critical part of it, ought to be no more difficult to read than a serious piece directed towards the general public.

Needless to say, readability is in no way inconsistent with legal sufficiency. Indeed the one complements the other.

Judicial education bodies like the National Judicial College of Australia and the Judicial College of Victoria, and some Australian courts, have conducted judgment writing workshops under the leadership of the American legal writing consultant Professor James Raymond. Professor Raymond, who is not a lawyer, was formerly a professor of English at the University of Alabama but is now based in New York as a full time legal writing consultant.

While on the Federal Court I had the pleasure of participating as a judicial presenter in a number of the workshops attended by judges and magistrates. They involve a 3-4 day residential course of lectures and sessions in which participants' judgments (actual delivered judgments) are redrafted and critiqued. The results are remarkable. Judgments are typically shortened by a third to a half, with great improvement in clarity and readability but without sacrifice of any of the basic legal requirements.

A feature of the workshops is the participation of distinguished professional writers who are not lawyers. These have included Helen Garner, Chris Wallace-Crabbe and Eva Sallis.

Professor Raymond's approach is discussed in his article The *Architecture of Argument* (2004) 7 The Judicial Review 39. (I would be happy to provide a copy to any interested Bar News reader.)

As the title of his article would suggest, structure is a critical element. Professor Raymond adopts the metaphor of what is called in America the shotgun house – it would seem a rural version of our single-fronted Victorian terrace. Each room follows the other in a straight line from a front porch to a back porch. The front porch is the introduction, the back porch the conclusion. Each room contains the analysis of a particular issue.

The front porch introduces the reader to the main characters and the conflicts which have given rise to the litigation. It may then proceed, perhaps in a "foyer", to a general overview of the evidence and some general legal principles. Where possible, detailed discussion and findings as to evidentiary conflicts are dealt with in each of the rooms devoted to particular issues.

The suggested approach for dealing with issues is what is termed the LOPP/FLOPP analysis. LOPP is the Losing Party's Position. FLOPP is the Flaw in the Losing Party's Position. For example: "The plaintiff claims he relied on the defendant's representation as to the takings of the shop. However, the plaintiff's very detailed letter of complaint of 1 May 2008 makes no complaint about the takings. The defendant therefore succeeds on this issue". I must say that, apart from anything else, this approach makes for easier reading than a judgment which trudges through the issues: "The plaintiff says A, the defendant says B. I find A. The plaintiff says C, the defendant says D, I find D. etc etc".

The back porch is the place to summarise the reasons, in plain English without repeating the detailed argument, citations etc. I had some reservations about the recent practice in the Federal Court where in what the judge declares to be a matter of general interest there is a separate summary which is expressly stated to be not part of the reasons for judgment. Apart from anything else, it seems vaguely patronising. Implicitly the reader is being treated as a bit dim and not up to reading the judgment itself, which is only for smart people like lawyers. It is rather like an actor reviewing his own performance.

The basic reasoning of any judgment, however legally or factually complicated, ought to be understandable by a reasonably well educated layperson. The structure of the judgment ought to be such that the essence of that reasoning is accessible and understandable.

An important aspect of judgment structure is the use of headings and sub-headings. These are now used very widely in judgments of any length. The development is relatively recent. Those of us whose time at Law School was much taken up with reading the classic High Court judgments of the first half of the 20th century will recall page after page of what was doubtless great law but presented visually as a trackless savannah of print, with paragraphs sometimes of more than a page and no signposts for the weary traveller.

Justice Michael Kirby is one who used headings to great effect. Headings can be informative, be it in the form of a question, a conclusion, or simply identification of the issue. Too frequently one sees unhelpful headings such as "The facts" or "Background" (as to the latter, since it is usually followed by relevant facts it might be better to say "Foreground").

The experience of the workshops showed how there can be a great deal of clutter often inserted unthinkingly in judgments. The judge is not a clerk who must record the date of filing of every pleading, interlocutory application etc, nor a transcript recorder. As to the opening (front porch), Professor Raymond pithily observes (op cit at 50):

> When jurisdiction and standing are uncontested, starting with "Pursuant to" is like putting a hotdog stand on prime real estate. The first paragraph and the last are possibly the only places where you can count on the reader's attention. Why waste this space by filling it with uncontested assertions or with information the reader can be presumed to know?

If the reasonably well educated layperson is the touchstone, a judgment, or at least the critical part of it, ought to be no more difficult to read than a serious piece directed towards the general public and stylistically should not present all that differently. I don't mean by this that there should be an ideologically driven exclusion of all technical terms. In recent times a stern Latinophobia has emerged in some quarters. But some terms like *prima facie case* and *forum non conveniens* succinctly convey quite complex legal concepts, but then so does the English word "consideration", which has a technical legal meaning related to but extending beyond its meaning in ordinary speech. As one of the minor Roman poets wrote in a recently discovered epic: *Relaxate amici lingua Latina magnum negotium non est*, which roughly translates as: "Chill it guys; Latin's no big deal".

There have been some irritating stylistic mannerisms which have somehow crept into judgments in recent years.

Prominent amongst these is bracket creep. It now seems to be convention that a case which is going to be referred to more than once appears first as, say, *Mann v Carnell* (1999) 201 CLR 1 ("*Mann*"). Why the reader should be in any doubt that a subsequent *Mann* refers to the case which has already been fully cited escapes me. The nadir of this technique appeared in a recent judgment where after "United States of America" there appeared the bracketed acronym ("USA"). Presumably it was considered that in the absence of the bracketed acronym the reader coming across a subsequent USA might have thought something along the lines "Hmm, what can this mean? Perhaps University Sexologists Association? or Ugandan Secret Army?". (In fairness to the judge, this may have resulted from some unthinking application of the publisher's style guide.)

The use of historical and literary allusions arouses some controversy. Sometimes the reader may think the judge is just showing off. Sometimes they can illuminate or clarify. My friend and former colleague Justice Anon (a descendant of the well known poet) had something to say on the subject:

> A judgment surely need not bore;
> The judge can postulate the law,
> Adjudicate on points of fact,
> And do so with finesse and tact,
> But still engage in modest fun –
> A quip, a joke, a harmless pun.
> It's rather nice if judgment draws on
> Shakespeare, Pope, or Henry Lawson.
> And why should critics get all snooty
> At metaphor from sport, like footy?
> So I don't think that one should curb
> Adventurous use of noun and verb.
> And why not play up to the gallery?
> At least have fun, if not much salary.
>
> © Anon J. Reproduced with permission.

Before writing the judgment, there must of course be a decision as to what the result should be. The judgment follows a linear path dictated, as to form, by the traditions and obligations of the judge's craft and, as to substance, by the self-propelling correctness of the successful party's case. But the messy internal decision-making process is often a marked contrast to the seeming serenity and inevitability of the written judgment: see *Aesthetics, Culture and the Whole Damn Thing* (2003) 15 Law and Literature 295 at 307 et seq. From the time the judge opens the file and starts thinking about the case there may be insights, puzzlements, incomprehensions, false leads, revived memories of other possible relevant cases. But, as I said in the piece just cited, at 308:

> … ideas, however inchoate, are forming. Hypotheses, however, tentative, are erected. At some stage these shape into a firm provisional view. Perhaps counsel's pointing to a particular fact or argument gives the judge a new platform from which to view the case.

Sometimes that firm provisional view is formed at a quite early stage, as a result of the operation of the kind of cognitive processes mentioned below.

The judge may, and indeed should, give some indication of such hypotheses, tentative and provisional of course, for the assistance of counsel. Sometimes this can be done quite firmly, as in the famous case of *Shylock v Antonio* [1550] VR 1 (of course that's Venetian Reports, not Victorian Reports). The Duke remarks to Antonio (III.iv):

> I am sorry for thee; thou art come to answer
> A stony adversary, an inhuman wretch
> Uncapable of pity, void and empty
> From any dram of mercy.

Unfortunately Shylock was unrepresented, the Venetian Legal Aid Commission having a firm policy against granting aid for flesh security claims. Good advice and skilful negotiation by counsel would have produced a much better outcome for Shylock – not to mention releasing the Duke for the Regatta Day lunch at the Rialto Club: see *The Merchant of Venice and the Trade Practices Act* (2010) 84 ALJ 112.

As George Golvan QC points out in his article in the recent issue of Bar News (2010) 148 VBN 6, an essential element in the preparation of any case is the development of a credible, realistic, persuasive and coherent case theory.

Psychologists speak of "confirmation bias", the human tendency for a person who has formed a hypothesis or explanation to accept subsequent evidence or argument which is confirmatory and reject that which is not. Bias is of course anathema for those engaged in the judicial process, even if it is only "perceived" –which is often a tactful euphemism for what the aggrieved party actually considers real and malign bias. But judges are only human and inescapably make use of "stock stories", a kind of library of ready made opinions, values, beliefs and prejudices from which judges and lawyers borrow. An example was the common law rule that women complaining of sexual offences were usually unreliable and needed to be corroborated. This has been abolished by statute in Australian jurisdictions, only to be replaced by a new stock story, first told by the High Court in *McKenny v The Queen* (1991) 171 CLR 468, that police officers giving evidence of verbal admissions are especially untrustworthy: see *Storytelling, Postmodernism and the Law* (2000) 74 ALJ 681.

A less controversial stock story is the Story of Prompt Complaint – someone suffering a serious wrong is likely to complain at the first opportunity to the wrongdoer or a third party who might be able to provide some remedy, be it only sympathy. The lack of such complaint, or long delay in making it, may suggest that the wrong did not in fact happen.

Not infrequently plaintiff's and defendant's cases do not engage one another. Each is self-contained and valid on its own terms. The two pass each other like ships in the night.

All of this shows how important it is for counsel for the plaintiff to get a well thought out case theory across to the judge in the opening and, as is often required nowadays, in a written outline which is filed with the court shortly before the commencement of the hearing. (The great advantage this first strike gives a plaintiff is somewhat modified by the widespread and desirable modern practice of affording the defendant an opening immediately after the plaintiff's.)

The opening is, strictly speaking, not the time for comment on the evidence, which of course is yet to be heard. Like most rules of advocacy, this rule can sometimes be bent a little, if not really broken. Tell the judge *why* your case theory makes sense, is rational and logical, and fits the evidence you are going to call and why that evidence (perhaps of the proverbial busload of bishops) is inherently reliable. If at the end of the opening the judge is thinking of your case as at least a reasonable working hypothesis you are more than halfway home.

The astute reader will have observed that this piece seems to have departed from the promise of its title. It has ended up as advice on advocacy. In defence, or at any rate mitigation, I can only say that judgment making and advocacy have much in common. As far as the judgment goes, it is in many ways an exercise in advocacy. The judge has made a decision and would like the reader to accept it. To that end, the judgment explains in a rational, readable and attractive way how the conclusion has been arrived at. The judge realizes that not all readers will agree with the judgment, but hopes that most will at least accept it as the work of a competent professional. VBN

Opening Of The Legal Year – Bendigo

Monday 1 February 2010

While on circuit in Bendigo, The Hon Justice Peter Vickery of the Supreme Court of Victoria delivered the following speech to open the legal year in Bendigo.

photographs Courtesy of the Advertiser (Bendigo)

Distinguished guests, members of the legal profession, ladies and gentlemen.

I would like to begin by acknowledging the traditional owners and custodians of this land, the Kulin Nations, and pay my respects to their elders past and present.

It is a particular pleasure to be present at this special sitting to mark the opening of the legal year in Bendigo.

Sitting on circuit is particularly important work. Access to justice is a fundamental right. Citizens of regional Victoria should not be deterred by the relative remoteness of Melbourne in the exercise of that right. It is in fulfillment of this purpose that the Supreme Court of Victoria, along with the County Court, regularly conduct sittings in regional Victoria. There are 12 Regional Courts which sit on circuit with Registry services provided throughout the state, and the Supreme Court has a specialist Judge appointed to manage the circuit lists. The jurisdiction continues to flourish, as it should.

This observance provides an opportunity for the legal profession, the judiciary, all those involved in the administration of justice and the community at large to reflect upon what is important to us about our legal system – our belief in upholding the rule of law and its role in achieving equality before the law in a diverse community.

The rule of law is no mere abstract notion existing in the vacuum of theory. It is a practical working fundamental of our society.

It can only operate in countries such as ours where there exist effective states providing effective political and legal institutions. To implement and enforce the law and provide the necessary services to the public, a well resourced system of courts, police force and bureaucracy are critical. All these organs of the state are creatures created by and bound by law. However, they cannot hope to be effective without the support of an independent legal profession and a vibrant civil society to inform and develop their work.

The rule of law is a principle which finds its first expressions in antiquity. Writing in 350 BC, the Greek philosopher Aristotle declared, 'The rule of law is better than the rule of any individual.'

Why should this be so?

In the first place, a civil society is one in which relations among and between its citizens can be reasonably expected to be civil. Underpinning the necessity for the rule of law in civil society is the provision of routine, confident relations among citizens and between citizens and the state. Imagine a society in which law was the dictate of the whim of a single ruler. A commercial contract could not be enforced with confidence, property rights would remain uncertain, and the conduct of its citizens would be unpredictable and hazardous.

In short, we need protection from the anti social acts of others. This we learn from Thomas Hobbes, the 17th century British philosopher. Hobbes conceived of the idea that individual power is ceded by a social contract to a sovereign with a monopoly of legitimate force in order 'to live peaceably among themselves, and be protected against other men'. This was necessary, according to Hobbes in order to avoid the primitive and spontaneous application of lex talionis – an eye for an eye, a tooth for a tooth – and a frightful world which he described in his work Leviathan.

However, the vesting of complete authority to a sovereign raised the spectre of unbridled state power in the hands of a single individual – the unleashing of a monster in waiting.

A second and fundamental object of the rule of law is therefore to provide protection from the unrestrained exercise of arbitrary power by government. This we learn from John Locke, another highly influential British philosopher of the enlightenment, writing some 40 years later. Locke developed the idea that the rule of law should be there to protect us from unlimited power exercised by the state.

This matters because the exercise of arbitrary power can result in abhorrent consequences. In a failed state, upon the emergence of a totalitarian regime, the rule of law is quickly toppled by the manifestation of arbitrary power, coupled with the fear of its exercise, concentrated in the hands of a few.

Regrettably, there are a number of examples of this affliction which exist in the world today, including some in our own region. Governments of this persuasion apply an all too well trodden formula to maintain control – destruction of the free press, suppression of

dissident opinion, arbitrary arrest, and orchestrated manoeuvres calculated to foment chronic and widespread fear are commonplace strategies. Reports of such activities reflect habitual and chilling themes. People are taken from their homes late at night and detained in military barracks where they are subject to physical violence and intimidation and warned that if they speak out against the government they and their families will be detained and tortured, to describe but one.

If there is one glimmer of relief, self aggrandizement of the tyrant can present as a comical syndrome. The late Idi Amin, the brutal despot of Uganda of the 1970s, portrayed himself as a near deity. He bestowed upon his office the quaint title 'Lord of All the Beasts of the Earth and Fishes of the Sea, and Conqueror of the British Empire in Africa in General and Uganda in Particular', amongst a lengthy list of equally absurd appellations. During his rule, he also declared himself to be a Professor of Geography and the King of Scotland and took to wearing a kilt on ceremonial occasions.

Another, almost universal trait of such regimes is the supplanting of government by rule of law with a new and cynical apparatus – unrestrained rule dictated by decree. In the new order, the doctrine of separation of powers, buttressed by an independent legal profession and judiciary, is pre-eminent in the list casualties. Independent lawyers are not tolerated. They are singled out for persecution. The third arm of government, the courts, are emasculated, with judges being made creatures of the executive, appointed at its behest, removable at its whim.

Such experiences starkly illustrate the importance of the principles which we take for granted in Australia. They also emphasise that in truth we need both forms of protection – from the dangerous acts of others and the dangerous acts of the state.

In our legal culture, these concepts are deeply entrenched. They are enshrined in the simple notion that 'no one is above the law'. This is a powerful idea. We now accept the rule of law as a fundamental premise of our social order.

What then of the law by which we are ruled? It is not, and never can be, perfect. At least three obstacles present themselves.

The first arises from the technical limitations of legal expression. The language of a statute or principle of common law may give rise to ambiguity or difficulties of construction, or may simply not address the precise problem presented for adjudication.

The second problem arises from conflicting principles of law which may apply to a given fact situation. No single rule or principle will necessarily apply. Conflicting principles may need to be reconciled.

The third problem arises from the need to see justice done and a determination made in accordance with the interests of justice. In the case of a civil dispute, justice will have at least two sides to it. The two civil disputants will have chosen opposite sides. The judge is compelled to look at what is just that each individual should receive from the judgment according to law. However, there is always present, to a greater or lesser degree, a further element. What are the implications of the judgment for the community at large, beyond the scope of the individual dispute? The judge, in making the decision, is also inevitably answerable to society as a whole.

Thus the judge will be compelled to choose between competing expressions of law, competing principles of law and competing values. How are these choices to be made?

The judge has no free hand. The judge too, is not above the law. In making the decision, the judge is not to be guided by his or her personal predilections arbitrarily applied and dictated by caprice or idiosyncrasy. It is the rule of law which fills the vacuum and provides the extraneous standards by which the determination is to be reasoned and governed.

Our most eminent Australian jurist, Sir Owen Dixon, in his famous address delivered at Yale University on 19 September 1955 entitled 'Concerning Judicial Method', said this:

The courts do not arrogate to themselves a freedom of choice … courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external legal standard. The standard is found in a body of positive knowledge that he regards himself as having acquired… It is one thing for a court to seek to extend the application of accepted principles to new cases or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with the result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience … The objection is that the judge wrests the law to his own authority. No doubt he supposes that it is to do a great right. And he may not acknowledge that for the purpose he must do more than a little wrong.

This observance provides an opportunity for the legal profession, the judiciary, all those involved in the administration of justice and the community at large to reflect upon what is important to us about our legal system – our belief in upholding the rule of law and its role in achieving equality before the law in a diverse community.

Adherents to the principle of judicial method described by Dixon are drawn from a broad spectrum of the judiciary. Indeed, it enjoys almost universal acceptance in the common law world. In delivering his Yale speech, Dixon in part was aiming his observations at Lord Denning. He said of Denning in a letter written to Lord Simonds, 15 April 1956: "He seems to be setting principle at defiance. I do not think wild horses would get a majority of the High Court to follow some of his decisions." Dixon, however, received a letter from Lord Denning soon after, saying he completely agreed with everything Dixon had written in his address.

Since Sir Owen delivered his seminal speech at Yale in the mid fifties, the legal landscape in Australia has seen some remarkable developments.

The first major development is the ever-increasing volume of legislation and regulation, which governs the conduct and affairs of citizens in a modern democratic society. One only has to compare the Companies Act 1958 with the Corporations Act 2001. The original Act consisted of a little over 300 sections. The current Act is in the thousands. As the former Chief Justice, Murray Gleeson has described it:

"Legislation and regulation on this scale represents a major change in the role of government. To an extent this, in turn, reflects a change in community expectations. It also represents a change in the nature and understanding of law."

A second momentous development in our law has been the influence of international law. Increasingly since the fifties, following the adoption of the Universal Declaration of Human Rights 1948 by the General Assembly of the United Nations, legislation has been enacted to give effect to our international obligations under international law. Human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965; the International Covenant on Civil and Political Rights 1966; and Convention on the Rights of Persons with Disabilities 2006, the latest human rights treaty of significance to be ratified by Australia, are all examples of United Nations sponsored treaties which have had an impact on both our domestic common law and statute law. One only has to cast an eye over the High Court Mabo decision to appreciate that international law now has an entrenched influence on Australian jurisprudence, including the development of its common law.

The interpretation of Australian statute law has similarly fallen under the influence of international law.

The principle of legality has been adopted as a concept in Australia. Under the principle, fundamental rights, including those recognised in international law, are to be considered in construing legislation.

Further, the Victorian Charter of Human Rights and Responsibilities Act 2006 (the "Charter") contains powerful provisions which mandate the interpretation of all Victorian legislation in accordance with human rights and international law, consistently with its purpose. The first two sub-sections of section 32 of the Charter are worth quoting in full:

32. Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

The mandatory force of s. 32(1), which applies equally to both existing and new legislation, and the invitation extended by s. 32(2) to consider international law, including international case law relevant to a human right, underscores the availability of significant new tools of statutory interpretation in the judicial workshop. This suggests something of a change in the traditional relationship between Parliament and the courts. Parliament has specifically conferred authority on the courts to modify, by means of interpretation consistently with its purpose, the effect of legislation by construing it in a manner which the judge determines is compatible with human rights and international law.

In the light of these portentous developments, will the judicial method, so incisively expressed by Sir Owen Dixon in 1955, continue to thrive in this century to ensure that we remain ruled by force of law and not by individual judges exercising authority based on personal predilection?

Making decisions about the content and application of the law is inherent in the judicial function. It has always been thus. Decisions

Photograph courtesy of The Advertiser (Bendigo)

about the interpretation of ambiguous legislation and decisions about the confinement or development of principles of the common law and its application to new facts and circumstances are part of the stock in trade of the judiciary. In so doing, the courts are compelled, as they always have been, to consider the contemporary context in which their decisions are made. The capacity of our law to adjust to change is an essence of its genius.

Making such decisions involves the exercise of power. But it is not an exercise undertaken without responsibility or check. No branch of government operates more transparently, explains its actions more openly in written judgments delivered in open court and is subject to internal checks by means of appeals and review conducted in public, so much as the judiciary. If an individual judge gets it wrong or is out of step, the courts of appeal, and ultimately Parliament, are there to correct the error. This too is an essence of its genius.

Judges will continue to be governed by the 'external legal standards' described by Dixon, although, of necessity, the nature and content of those standards can never remain frozen in time. There may be additional tools now available to resolve issues of legal significance. However, in my view, it would be a mistake to conclude that these developments pose any challenge to the rule of law.

International human rights law now comprises a well developed body of jurisprudence. Notable is the work of the European Court of Human Rights , which has developed a significant body of readily accessible case law since its foundation more than fifty years ago in 1959. It is comprised of eminent jurists. Lord McNair was its first President. In September 2008 the Court achieved a remarkable milestone. It published its 10,000th judgment.

International human rights law provides for our jurisdiction an enriched framework of structured legal reasoning against which decisions are to be made. I venture to say that application of the judicial method in the context of this growing body of positive knowledge and accepted principles will serve us well in meeting the challenges of the century ahead.

I will say it plainly – we all have a role to play in this supremely important endeavour. VBN

Propping Up The System

The Hon Marilyn Warren AC Chief Justice of Victoria

Speech delivered by the Chief Justice of Victoria on 18 May 2010, on the occasion of The Victorian Bar's Tenth Anniversary Pro Bono Celebration and Awards Ceremony held in the Supreme Court Library.

Tonight, I would like to talk about the pro bono work performed by the Victorian Bar. I do not diminish the magnificent and generous contribution made by the remainder of the legal community but this evening I focus on the Bar. I will also discuss the symbiotic relationship between pro bono work and legal aid funding. I will, further, speak about the unique role of the legal profession in our democracy and the obligation of governments to support the justice system.

The Bar's Contribution

Pro-bono legal representation is carried out, not as a piece of legal dilettantism, but as part of the every-day grind of the courts. Pro bono commitment reflects the fact that the law cannot deliver justice to large sections of the community without supplementation.[1]

Most of the free work goes unrecognised. While law firms are encouraged to perform pro bono work as an incentive or condition to winning government legal work, for barristers it is different. Were it not for the commitment to the highest ideals of the Bar displayed by those who provide pro bono work, it would not happen at all. To demonstrate, let me take you through a brief survey of what the Bar is currently doing in the area of pro bono services.

The pro bono activities of the Victorian Bar are primarily channelled through two schemes: the Victorian Bar Legal Assistance Scheme or "VBLAS" and the Victorian Bar Duty Barristers Scheme.

The VBLAS scheme is administered by PILCH and overseen by the Victorian Bar's Pro Bono Committee. The scheme has been running since 1995. It aims to provide legal assistance to those in financial need in matters both criminal or civil. Barristers are registered as participants in the program. Currently these number around 400. The VBLAS scheme provides a range of legal services, which might include preliminary advice on prospects, preparation of court documents, or even, representation in court as counsel. In 2008 2009, the scheme received 279 referrals. The financial value of the referrals accepted by members of the Bar was estimated at $1.1 million.[2]

In contrast, the Duty Barristers Scheme is a relatively new program. The scheme was founded in June 2007 with a pilot program in the Melbourne Magistrates Court. Its great success led to the establishment of a permanent program in July 2008. Since then it has been extended to the Dandenong Magistrates Court, the commercial section of the County Court and into the Supreme Court of Victoria. Essentially, it provides duty barristers who rotate through the Magistrate's Court five days a week providing advice and representation. More than 332 barristers have volunteered to participate in the scheme ranging from the most junior to the most senior members of the Bar.

The Duty Barristers Scheme's history at the Supreme Court began on an ad hoc basis in April 2008. It was established on a more formal basis in December of that year. Since then, Shane Draper, the Victorian Supreme Court's Unrepresented Litigants Co-ordinator has worked closely with the Scheme's Committee as well as its Co-ordinator, Peta Hansen, to request the assistance of barristers in urgent cases. Mr. Draper tells me that the scheme has proven invaluable to his efforts to assist unrepresented parties.

To date barristers involved with the scheme have appeared over a period of more than 500 days in the Melbourne Magistrates Court, over 100 days in the Dandenong Magistrates Court, over 100 days in the Supreme Court, over 40 days in the County Court, and over 30 days in other courts. The financial value of this commitment is estimated at over $1.6 million.[3] Of course that figure relates to barrister time only and does not include the saving to the justice system. Judge-time and court delays are better managed because of the Bar's pro bono support.

The Barristers' Stories

You might ask yourself: 'What does this all mean in practice?' 'What is the human story behind the statistics?'

On Monday 12 November 2007 at 9.30am three Victorian barristers walked across to the Melbourne Magistrates Court to announce their appearance and commence the operations of the Duty Barristers Scheme. They were Amelia Macknay, Elizabeth Ruddle and Amanda Wynne. They literally hit the ground running and were all fully engaged for the day. They represented the Bar with distinction.

The Scheme has since that first day represented many litigants in criminal and civil matters. Duty Barristers have conducted pleas, bail applications, contests and advised witnesses. They have also appeared in civil matters ranging from simple debt disputes to more complicated matters. The Scheme has worked closely with Victorian Legal Aid and the court's coordinators.

A day in the life of a duty barrister in the Melbourne Magistrates' Court is gruelling and varied. One of its participants described an average day as commencing with advising two witnesses in a serious WorkSafe prosecution involving a fatality, assisting a complainant in a sexual assault matter with advice on legal professional privilege, before acting as counsel for a self-represented accused who wished to seek leave of the court to change an existing guilty plea to a plea of not guilty.

There have been many cases in which the Duty Barristers Scheme has been asked to act, with little notice. In a Supreme Court criminal trial, a witness, in custody, required urgent advice as to the possibility perjuring himself. Within half an hour of receiving a telephone call from the Court, the Scheme arranged for a silk, Les Glick SC, and a junior counsel to appear in the Supreme Court, to interview the witness in the cells, and appear later that afternoon before the judge on the witness' behalf.

In another criminal trial in the Supreme Court, two accused had been found guilty of assault and rape. The victim sought compensation pursuant to section 85B of the Sentencing Act 1991. As this had become effectively, a civil claim, Victorian Legal Aid was unable to further represent the accused. Senior counsel appeared on behalf of the victim. The judge identified the possible application of sections 8 and 24(1) of the Charter of Human Rights and Responsibilities Act 2006 and required a notice to be given to the Attorney-General. Appearances were made by the Solicitor-General, before other senior counsel sought to intervene on behalf of the Victorian Equal Opportunity and Human Rights Commission. The Scheme was contacted and it was able to provide counsel to represent both accused. Eventually, Legal Aid was able to instruct and the matter was able to proceed to judgment.[4]

In another example, in a Supreme Court commercial case, three unrepresented litigants sought to take action against a major bank in a four week trial. Again at very short notice the Scheme was contacted and two junior counsel and a senior counsel appeared on the morning of the trial. Later, over the next two days mediation was conducted with another member of senior counsel acting as mediator on a pro bono basis in an attempt to settle the matter.

Another example was a civil case. On the morning of the hearing, litigants had lost their barristers and were about to start a five week trial. A silk and a junior represented the other side. Two duty barristers were able to attend on the first day of the hearing, have the matter stood down, and then started the trial commencing the next day, including opening the case and calling the first witness. The trial proceeded for a period of three weeks before it settled.

In the Court of Appeal of the Supreme Court, Duty Barristers have appeared on a regular basis in both civil and criminal appeals.

In a Criminal Appeal involving an appeal against sentence and conviction the Scheme was asked to provide duty barristers. Victorian Legal Aid was prepared to fund and brief counsel only for the appeal against sentence. The appellant had significant difficulty articulating his grounds of appeal on conviction and preparing submissions. The Court of Appeal requested assistance from the Scheme. Three Duty Barristers prepared the Amended Notice of Appeal on the conviction in a very short period and also filed and served detailed submissions. Shaun Brown, Sarah Keating and Will Alstergren then prepared for the Appeal and Nick Papas SC agreed to appear as leader.

The Scheme has provided many appearances in civil appeals since its inception. One very demanding appearance was a complicated multiple appeal from a decision of a trial judge, a decision of an additional trial judge dealing with contempt proceedings, and a decision of an associate judge on quantum. The appeal required appearances on preliminary questions, including fresh evidence. The appeal itself was heard over a three day period. The appellants were successful in having judgment against one of the three appellants set aside and achieved a retrial on the question of quantum for the other two appellants.

The Scheme has also provided duty barristers for mediations conducted in the Trial Division and Court of Appeal of the Supreme Court by Associate Judges. Many of these matters have settled as a result of the unrepresented litigant receiving advice and the ability to have someone articulate their case for them.

Lessons to be learned

Two things are apparent from these anecdotes. Firstly, and obviously, it is clear that effective legal assistance is integral to the just adjudication of the rights of parties in a legal dispute, whether civil or criminal; trial or appeal. One might ask what the result in each of these cases would have been if all these parties had not had the benefit of competent and timely advice. Justice would have been denied to the citizen. What is often overlooked is that the proper resourcing of legal parties is integral to the proper resourcing of the court. As Justice Weinberg noted recently, cases conducted by litigants in person can be very protracted. Thus valuable court time is wasted, at the expense of other prospective litigants who are denied timely resolution of their disputes.[5]

Legal representation allows issues to be identified and dealt with effectively. Good advocacy reduces the amount of time required by a judge to decide an issue in dispute. It also relieves the burden on judges to assist those who are self-represented to put their case adequately, receive a fair hearing, and critically, natural justice. Whilst, not all those appearing before the courts wish to be represented, for those who do, and cannot afford it, the pro bono work undertaken by the Bar provides an important impetus to the best application of limited judicial resources and the efficient use of the courts. Therefore, in a very significant way, those members of the Bar actively assist the court every time they appear in a pro bono capacity. For that, I extend the deep thanks of the Supreme Court, indeed all courts, and my fellow judges and magistrates. Without the pro bono work of the Bar, and the profession, the wheels of justice would slow down. Governments speak about court delays, they would be exacerbated without the generosity and commitment expressed through pro bono work.

The importance of legal aid

The systemic efficiency benefits of professional legal assistance are most obvious at the trial stage. A recent newspaper headline read 'Lawyers fleeing Legal Aid in droves'.[6] The heading followed a Senate committee inquiry into access to justice. If criminal barristers with the necessary experience are fleeing 'in droves' it is self-evident that responsibility for these matters will fall to less experienced, junior counsel, or counsel who are not appropriate. When this happens the judge's task of ensuring a fair trial becomes increasingly onerous. We know from the findings of the Victorian Law Reform Commission report Jury Directions[7] that where inexperienced counsel are briefed in criminal trials problems arise, trial time blows out and the risk of error increases. This leads to the running up of extra costs for trials and appeals. A former President of the Law Council of Australia observed that every dollar of Commonwealth legal aid funding spent saved up to $2.25 within the justice system.[8]

The second thing to be noticed from the pro bono stories I have told is that effective pro bono assistance only operates within the context of, and as an adjunct to, effective legal aid funding. Providing legal aid for an appeal against sentence, whilst denying any assistance in an appeal against conviction to the same party, does not increase faith in the 'justness' of our legal system. Furthermore, as soon as legal aid is restricted, demands for pro bono assistance increase commensurately. In February 2008, limits were placed on publicly funded legal assistance in family law matters. In the 2008-2009 year, the VBLAS scheme received a 200 per cent rise in referrals in family law matters.[9]

The obligations of government

The obligation to provide a just legal system is a primary obligation of the state. It is a function of government to maintain the courts so 'citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole'.[10]

Increasingly, and disappointingly, this obligation has been shifted to the legal profession. The community cannot allow the creation of a system in which extensive, even effective, legal representation is primarily conferred as a matter of professional grace, rather than as a necessary element of civic rights.

At present, legal aid in Victoria remains under-funded. Since 1996/1997, Commonwealth funding has decreased, in real terms, by 12 per cent.[11]

Whilst the Commonwealth government announced an additional $13 million boost to legal assistance services on 7 May 2009,[12] there is a long-standing structural problem not amenable to one-off budget announcements. Although the federal legal aid budget for 2010-2011 has been announced at $190.8 million[13] Victoria's position needs resolution. As Danny Barlow, former President of the Law Institute of Victoria has pointed out, not only does Victoria receive 'over 15 percent less per head of population than any other state or territory' of Commonwealth Legal Aid funding, that funding increased by only ten percent from 1999-2007, whilst funding nationally increased by 45 per cent.[14]

Former Victorian Bar Chairman, John Digby QC observed that the number of barristers working on criminal cases funded by Legal Aid had dropped by 26 per cent since 2005 and blamed the decrease on inadequate funding. This, he said, had strained available resources and put increased pressure on the lawyers still involved in the scheme.[15]

Recently, the Victorian government announced an increase in state legal aid funding of about $24 million.[16] The increase represents a beginning. More needs to be done, otherwise the cost-switching onto the court system I have described earlier will not be reduced. Courts will carry the burden of ensuring fair trials in the face of inadequate legal representation at the ultimate expense of the community.

Announcing his government's funding increase, the Victorian Attorney-General called upon the federal government to similarly increase Commonwealth funding. There is an opportunity for much better national collaboration and co-operation. Legal aid and adequate legal representation lie at the heart of our democracy. The State should not say "we have done our part and now it is up to the Federal Government". Nor should the Federal Government say "it's a state problem". If state and federal governments can resolve, with much zeal, to establish a national profession then similarly both sectors should work towards an effective national co-operative for legal aid. This should be a primary goal. One key performance indicator would be the discontinuance of barrister and lawyer protest rallies outside the Victorian County Court.[17]

Yet, the discussion should not be geared simplistically towards criticising Attorneys-General. One might readily have some sympathy for the tough advocacy task they face. When going into Cabinet and Expenditure Review Committee meetings and arguing for funding for legal aid, Attorneys-General are doubtlessly met with the remark 'more money for lawyers! You have to be joking.'

The proper funding of legal aid is not about some undeserved pay rise for lawyers. It is about recognition of the true cost of justice. If your washing machine needs to be fixed you need a competent technician or plumber. If you face a criminal charge you need a competent lawyer. More often than not, the technician or plumber is paid more than the competent criminal lawyer so whilst your machine is fixed your liberty might be risked.

The community understands that skilled service of any kind comes at a price. The legal profession should support Attorneys-General in educating governments and the community that legal representation warrants a skilled service; that the service is essential to our democracy; and that it comes at a cost.

Any decisions taken to increase legal aid funding at the state and federal levels should be taken as part of an adequate consultative process with the legal community, especially those engaged in legal aid and pro bono work, to ensure that the finite resources which have been made available are applied to maximum effect.

For the Bar this might require some give and take, for example, specialist accreditation of criminal trial and appellate barristers. Another prospect may be abolition or review of the Appeal Costs Fund.

The role of the legal profession and the national reforms

The key to the symbiotic relationship between pro bono work and legal aid is that where legal aid falls down the legal profession steps in. This altruistic reaction is reflective of the distinctive role of the legal profession in supporting our democratic society and implementing the rule of law. It is this inherent characteristic that distinguishes the legal profession from all other professions and the trades. It is for this reason that lawyers are officers of the court owing a paramount duty to it.

The federal and state Attorneys-General have announced extensive changes to the profession. All barristers and lawyers should be aware of them. The reforms are connected to the pro bono and legal aid discussion because all these topics lead to how the rule of law is achieved.

The proposed national legal profession reforms would compromise and threaten the independence of the legal profession and its democratic role. Bringing the legal profession under the control of the Executive arm of government, through the governing vehicle of the Standing Committee of Attorneys-General, risks the independence of the legal profession and its role in implementing the rule of law. The question of national legal profession reform is much more than a method of costs saving and efficiency. It is fundamentally about the rule of law. The proposed National Legal Services Board must have majority control by the legal profession and the judiciary. Whilst Executive government representation is acceptable, even welcome, it must be confined to a minority on the Board. If the Board is constituted as presently proposed there is a prospect of the Supreme Courts not recognising national admission under the scheme. It is the courts who determine and control who are officers of the court.

It is the distinctive characteristic of duty to the court and sworn commitment to do justice on admission to practice that has driven the great pro bono traditions of the Victorian Bar. Let us recall and think of Victoria's contribution to land rights and criminal justice in the Northern Territory, to Native Title and human rights. It has been the Victorian Bar who have dominated the bar table on these occasions of challenging advocacy in Victorian and Australian legal history.

Pro bono is a commitment that is on one hand convenient to government as it fills the legal aid gap and props up the justice system. On the other hand the independence of the legal profession and its upholding of the rule of law is sometimes inconvenient to governments and dismissed with the attitude that lawyers are so well paid with all the other work they do it will not hurt them to give something back.

The commitment of the Victorian Bar to pro bono work runs deep. But, that commitment is a finite resource. I fear governments exploit it at their peril. The new national scheme proposed for 1 July 2010 is awaited. Without an effective partnership between the state and federal governments to provide legal assistance to those who, without means, must negotiate the law and the courts, and without an effective national co-operative for legal aid at the state and federal levels, the state obligation to provide society with a fair and just legal system will not be met. The burden will remain with the profession putting justice at risk. A time will come when the profession will say 'enough'. I just hope the time has not begun already.

Notes

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2. PILCH: Annual Report 2008-09 (2009) Public Interest Law Clearing House < http://www.pilch.org.au/Assets/Files/PILCHAnnualReport08-09.pdf> at 3 May 2010, 7.
3. Will Alstergren, Chair, Duty Barristers' Scheme Committee, Memorandum 'Victorian Duty Barristers Scheme', (28 April 2010), p 8.
4. Kortel v Mirik & Mirik [2008] VSC 103 (4 April 2008).
5. Worldwide Enterprises Pty Ltd v Silberman & Anor [2010] VSCA 17, [35] (Bongiorno J concurring).
6. Selma Milovanovic, 'Lawyers fleeing legal aid 'in droves', The Age (Melbourne) 16 July 2009.
7. Jury Directions: Final Report (2009) Victorian Law Reform Commission < http://www.lawreform.vic.gov.au/wps/wcm/connect/107ca000404a0c5e965efff5f2791d4a/VLRC_JuryDirections_FinalReport.pdf?MOD=AJPERES> at 7 May 2010, 143.
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10. Attorney-General v Times Newspapers Ltd [1974] AC 273, 307 (Lord Diplock).
11. Media Release: National Legal Funding Crisis (19 April 2010) Law Council of Australia < http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=47473840-1E4F-17FA-D2BA-341730D3FBE3&siteName=lca> at 5 May 2010.
12. Additional $13 Million for Legal Assistance Services (7 May 2009) Attorney General for Australia <http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_7May2010-Additional13MillionforLegalAssistanceServices> at 5 May 2010.
13. Budget Paper No.3 (2010) Australian Government < http://aph.gov.au/Budget/2010-11/content/bp3/html/bp3_spp-9.htm> at 17 May 2010.
14. Danny Barlow, President LIJ's Column: In desperate need of aid (June 2009) Law Institute of Victoria < http://www.liv.asn.au/About-LIV/Media-Centre/President-s-Page/In-desperate-need-of-aid> at 5 May 2010.
15. Quoted in Selma Milovanovic, 'Lawyers fleeing legal aid 'in droves', The Age (Melbourne) 16 July 2009.
16. Nic Parkin, Vic budget spends big on health, transport (4 May 2010) ABC News <http://www.abc.net.au/news/stories/2010/05/04/2890107.htm> at 10 May 2010.
17. On 28 April 2010 a rally was held over underfunding of legal aid. See Australian Financial Review, 30 April 2010, 'Rudd slammed on legal aid', R. Nickless, p.41.

Chief Justice Keane – Welcome Address

6 May 2010

Address by the Chief Justice of the Federal Court of Australia on the occasion of his welcome in Melbourne.

Colleagues, ladies and gentlemen, I should immediately acknowledge the presence of distinguished guests who honour the Court and me by their presence today; the Honourable Justice Hayne AC of the High Court of Australia; the Honourable Justice Susan Crennan AC of the High Court of Australia; the Honourable Diana Bryant, Chief Justice of the Family Court of Australia, and justices of the Family Court; the Honourable Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria; and the Honourable Chris Maxwell, President of the Court of Appeal of Victoria; Mr Gageler, Solicitor-General for the Commonwealth. It is a pleasure to see at the Bar table the Solicitor-General for Victoria, Ms Pamela Tate, my former comrade-in-arms; and one of my mentors, Mr Merralls QC. It is also a pleasure to welcome back to the Court the Honourable Daryl Davies QC, a former judge of this Court.

Mr Colbran and Mr Stevens, thank you very much for your warm words of official welcome to Melbourne. I speak of the official nature of this welcome because I've been made very welcome in this city by members of the Victorian Bar and Victorian solicitors for more than three decades, just as they have always done their very best to make me feel at home at Noosa in Melbourne's "northern outskirts". It is, as always, great to be in Melbourne, and I'm honoured by the kindness of this welcome from members of the Victorian legal profession, a profession which, for 150 years, has set the highest standards for lawyers in this country.

Mr Colbran, on occasions like these, behind you stand the shades of Sir Edward Mitchell, Sir Leo Cussen, Sir William Irvine (who rejoiced in the appropriately Victorian nickname of "Iceberg"), Sir Owen Dixon, Sir Robert Menzies, Sir Wilfred Fullagar, Sir Douglas Menzies, and Sir Keith Aickin, and to speak of more modern times, the much lamented Neil McPhee QC and Ron Castan QC. Each of these is a great name, not only in the legal history of Victoria, but in the history of the English-speaking Bars. They are also great names in the story of the Australian Commonwealth. The brave and lucid advocacy of Sir Robert Menzies was as much responsible for the decision in the Engineers Case, the prism through which we have viewed our Constitution for 90 years, as the cerebrations of Sir Isaac Isaacs.

One knows that one should not seek to draw comparisons between these legends and our contemporaries, but I might be permitted to say that members of the Victorian Bar with whom and against whom I have appeared have always exhibited qualities of skill, resourcefulness, rigour, fairness and courage which honour the example set by their great predecessors. That was certainly my experience on the occasion of my very first professional association with the Victorian Bar, when (a quarter of a century ago) I was led in a case in the High Court by Mr Stephen Charles QC. That experience was a liberal education in itself, as Sir Robert Menzies said of appearing as junior to Sir Owen Dixon. Nothing in the 25 years since has altered my view that Victorian advocates are of a quality second to none.

Mr Stevens, the solicitors of Victoria have always been at the forefront of the Australian legal profession in ensuring that those in need are not denied access to legal advice and representation. It is also the case that in the last two decades, the leading firms of solicitors in Melbourne have spread their reach across the continent.

If I might speak for a moment as a former employee of one of the firms of Queensland solicitors which disappeared in the Melbourne expansion, sometimes the energy with which that expansion was pursued seemed a little intimidating to the targets of their attention. One of the senior partners of the firm you mentioned, Mr Stevens, said to me that it put him in mind of a German expression, "Heute Deutschland, morgen die ganze Welt."

But the world did not come to an end with the expansion of the Victorian firms and the result has been that there is a more confident and outward-looking legal profession in Australia, and that is a great thing. I look forward to benefiting as a judge of this Court from the high professionalism of the Victorian legal profession. I thank you all for your kindness in attending this morning and the courtesy you do the Court and me. We will now adjourn to reconstitute the Court for the hearing of today's appeal. Adjourn the Court, please. VBN

Farewell

The Honourable Chief Justice Michael Black AC

Federal Court of Australia

Chief Justice Black retired from the Federal Court on 19 March this year – although his Honour considered 'the better view' was that his appointment ended at midnight on Sunday 21 March. On either view, it was the end of a career for one, and an era for the profession in Melbourne.

Chief Justice Black's legal career commenced in 1963, joining the Victorian Bar in 1964. There was no Bar Readers' course when his Honour commenced – that was an innovation which he himself championed in the late 1970s. Like so many other of his Honour's innovations, this one has left an indelible mark behind him.

While his Honour's influence and foresight was no doubt evident at the bar, it was upon his appointment direct to the position of Chief Justice of the Federal Court in 1991 that his Honour was given the opportunity to lead a Court that was coming of age.

At the time that his Honour took over as Chief Justice, the Federal Court occupied the Old High Court Building in Little Bourke Street. It was without a home of its own.

The new Federal Court building in Melbourne is infused with the pioneering vision for which his Honour is renowned. His Honour has a passion for the ways in which abstract concepts, such as principles of transparency and access to justice, can be embodied in architecture, and our Federal Court's startling abundance of light and space is a testament to this. The building has always been remarkably modern by the standard of courts, having had computer access and video-conferencing facilities well ahead of some other jurisdictions.

His Honour's devotion to technology is evident as he sports a sparkling iPhone. He has increased its functionality further by 'tweaking' the device to assist his own digital dictation – much to the confusion of the Federal Court IT department.

These qualities of innovation and progressive thinking continue on in the culture of the Federal Court and will remain part of his Honour's legacy. The highly successful fast track list and docket system were instituted during his Honour's tenure, and pave the way for other imminent developments, including the electronic lodgement of all Court documents which will take place this year.

The past 19 years have seen a steady increase in the jurisdiction of the Federal Court, and under his Honour's guidance the necessary changes to practice and procedure were managed seamlessly.

His Honour had 35 associates over his time on the Bench, many of whom have themselves gone on to make significant contributions to the legal profession, both domestic and international.

His Honour's long and brilliant judicial career followed his extraordinary twenty-seven years as a member of the Victorian Bar. During that time, his Honour served on the Bar Council, the Bar Library Committee, and of course the Bar Readers' Course Committee for which he was the foundational Chair. Before taking silk, his Honour mentored a remarkable 10 readers, among them Justices Finkelstein and Middleton of the Federal Court, Justice Vickery and the late Justice Flatman of the Supreme Court, and Judge Montgomery of the County Court.

His Honour's enthusiasm for and dedication to the legal education and professional development, were the very great fortune of every reader, junior and associate who entered into his tutelage and mentorship. But his Honour's influence in this area reached far beyond those who were privileged enough to work directly with him. Aside from his Honour's role in establishing the Bar Readers' Course, Chief Justice Black was also instrumental in the work of other key legal education bodies, as a Board member of the Leo Cussen Institute for Continuing Legal Education, and as Chair of the Advisory Committee for introduction of the Juris Doctor Degree at Melbourne Law School.

His Honour's inimitable combination of quiet dignity, gentlemanly assertiveness and razor sharp intellect consistently earned him the admiration of clients, instructors and opponents while at the Bar, and the esteem counsel and fellow judges while on the Bench. The close of his Honour's time as Chief Justice truly marks the end of an age. The Hon. Michael Black enters his richly deserved retirement with our gratitude and best wishes. The Victorian Bar is proud to count his Honour as one of its most illustrious alumni. VBN

EAB

The 2010 Commercial Bar Association's *Annual Cocktail Function*

01. Andrew Bell, Dean Wattis, Rachel Derrica and Oren Bigos.

02. John Digby QC, President of CommBar. The Honourable Justice Marilyn Warren, Chief Justice of the Supreme Court of Victoria, Elizabeth Mukherji and William Lye.

03. Shadow Attorney General Robert Clark, MP, Michael Pryse, Alexandra Goldong, Peter Fox and Mini VanderPol.

04. Lydia Kinda, The Hon. Justice Curtain and Peter Agardy.

The 2010 Commercial Bar Association's Annual Cocktail Function

On May 6 2010, the President and Executive of the Commercial Bar Association (CommBar) were pleased to welcome the Honourable Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria, Judges and Associate Justices of the Supreme Court, Judges of the Federal and County Courts as well as Registrars of the Federal Court, Barristers, Solicitors, as well as Government and Corporate Counsel to CommBar 's annual Cocktail Function which was held in the Library of the Supreme Court, where it has been said that:

> "The best laws, the noblest examples, are produced for the benefit of the good from the crimes of other men" (Leges egregias, exempla honesta, apud bonos ex delictis aliorum gigni.) TACITUS, annals, Bk. xv. Sec 20.

The evening's program included a brief welcome by John Digby QC to approximately 260 guests, and continued with an overview of CommBar activities of the previous year as well as CommBar initiatives for 2010.

John Digby then invited the Hon. Marilyn Warren AC, Chief Justice of the Supreme Court to the podium. Her Honor made a number of observations including her endorsement of the statement made earlier in the day by Chief Justice of the Federal Court, Pat Keane to the effect that Victorian Barristers enjoy an excellent reputation across all jurisdictions and were "second to none". Her Honor the Chief Justice also expressed disappointment that there was no real progress being made to provide better commercial accommodation for the Court and that the recent State Budget reflected too little priority was being given to this aspect of the administration of Justice.

During the course of the evening CommBar's guests were offered superb cocktails and drinks and judging by the buzz of conversation, all took the opportunity to catch up and discuss issues in the most pleasant of surroundings – the Supreme Court Library, doing what Shakespeare aptly summarized:

> "And do as adversaries do in law,
> Strive mightily, but eat and drink as friends".
> SHAKESPEARE, Taming of the Shrew, i, 2, 277.

The evening was to officially end at 7.00pm, however a large number of guests, obviuosy enjoying themselves, lingered until such time as the caterers had packed up and made it obvious that the occasion had ended.

CommBar thanks the Chief Justice for allowing CommBar to utilize the magnificent Supreme Court Library and also thanks the Supreme Court staff who assisted with the event.

CommBar looks forward to a similarly successful event in 2010. VBN

OPPOSITE PAGE

07. The Honourable Chief Justice Mohammad Fazlul Karim, Chief Justice of Bangladesh, Lt.General,Masud Uddin Choudhury, High Commisioner for the People's Republic of Bangladesh and The Honourable Justice Marilyn Warren, Chief Justice of the Supreme Court of Victoria.

08. The Honourable Justice Vickery and John Digby QC, President of CommBar.

05. Jane Treleaven, Pamela Tate SC, Solicitor-General of Victoria and Lt.General,Masud Uddin Choudhury, High Commisioner for the People's Republic of Bangladesh.

06. Maryanne Loughnan SC and Cornelia Fourfouris-Mack.

Annual Cocktail Function

09. Athena Sikotis, Registrar of the Family Court and George Josephides.

10. Sam Rosewarne, Sally Sheppard and Michael Earwaker.

Carbon Neutral Launch

Victorian Bar's Climate Change and Environmental Law Panel

16 March 2010

The Victorian Bar has led the way in establishing a Climate Change and Environment Law Panel that will ensure that individuals and not-for-profit organisations have access to advice and representation in public interest matters arising out of climate change and environmental law. The Honourable Justice Bell, President of the Victorian Civil and Administrative Tribunal, launched the CCELP on 16 March 2010 at the Essoign in the Victorian Bar's first carbon neutral event.

The idea for CCELP was that of three junior barristers (Catherine Symons, Ursula Stanisich and Jane Treleaven) while undertaking a discovery brief. After sketching some objectives, they sought the assistance of more senior members of the Bar and PILCH to develop guidelines for the operation of CCELP to ensure that the independence and integrity of the Bar were maintained. Bar Council approved and adopted the final objectives and guidelines of CCELP in December 2009.

Fiona McLeod SC, Chair of the Panel Steering Committee, gave the welcome and introduced the President. Ms McLeod thanked the Steering Committee for bringing the Panel from inspiration to reality in what is believed to be a national first. She invited those present to read the objectives of the Panel and the guidelines which are available on the Bar's website.

Ms McLeod noted that the primary aim of the Panel is to coordinate pro bono assistance in environmental and climate change matters that raise questions of public interest in a way that "harnesses the existing expertise of members of the Bar but also permits those other members with a desire to contribute to do so by teaming them up with experienced counsel." She expressed the view that climate change is an area of the law that will explode in scope and importance touching individuals and organisations large and small in the years to come whether or not we see Federal and State legislation regulating carbon emissions. The Panel will also serve an educative role by providing submissions to Government in relation to planning and environment regulation and ensuring that issues of due process, public participation, natural justice and the open and thorough examination of evidence are the norm rather than the exception in decision-making processes.

Ms McLeod introduced Gregor Husper of PILCH, a Co-Manager of the Public Interest Scheme, to explain PILCH's role in the Project. Mr Husper referred to the high point of Australian environmental litigation as the *Tasmanian Dams case* and noted the low point as the *Gunns 20* litigation, in respect of which PILCH was proud to have referred a number of the Defendants to the Victorian Bar. He also described three matters in which PILCH has recently received applications for referral which impact on climate change:

- not-for-profit organisations seeking advice on the legality of the proposed growth areas infrastructure contribution, a levy rejected recently by State Parliament;
- the legality and implications of a Memorandum of Understanding pursuant to which the Victorian Government and Victoria Police have agreed to share police intelligence on protesters and their activities with the private consortium building the Wonthaggi Desal Plant; and
- a referral for two protestors who "locked on" to a conveyor belt in an unsuccessful attempt to stop the Hazelwood Power Station. The defence of necessity has been successfully run in the UK in response to charges of trespass and this was a defence explored in this matter.[1]

Justice Bell expressed enormous enthusiasm for the Panel. He told the audience that during his recent review of VCAT, the disempowerment of individuals and organisations in the planning system was more than apparent. He referred to the great divide being those in the know and those who are not. He said that as barristers, the Bar had an ethical and moral obligation to assist those seeking access to justice and urged participation in the Panel. He acknowledged that pro bono representation was a great tradition of both the Victorian Bar and the Law Institute of Victoria. Justice Bell said that responding to the global challenge of climate change will necessarily involve lawyers and the Panel should not ignore the international dimensions of the challenge. He also noted the potential for the impact of climate change on large numbers of people and the human rights implications.

The launch was attended by approximately fifty people, including senior members of the Bar. There were also representatives from non-government organisations such as Protecting Public Lands and the Environment Defenders Office. Lawyers from private firms who may be able to assist in briefing members of the Panel were also present including Louise Hicks, Partner, DLA Phillips Fox and Corrs Chambers Westgarth partner, Bev Kennedy. All in all, the evening was a success with all present buoyed with incredible enthusiasm for the Panel and what it hopes to achieve.

If you are interested in finding out more about the Panel or becoming a member you will find the Panel's web page under the Bar Associations tab on the Victorian Bar website or you can contact Panel Secretary, Jane Treleaven, on 9225 8950; jtreleaven@vicbar.com.au

VBN

[1] 6 Greenpeace climate change campaigners were acquitted of charges of causing damage to Kingsnorth Power Station when the jury of six accepted that they had a 'lawful excuse' to prevent even greater damage. For articles about this case, see http://www.bindmans.com/index.php?id=421.

01. Gregor Husper, PILCH

02. Michael McKiterick (Victorian Bar Legal Assistance Scheme) and Melanie Szydzik.

04. Left to Right. Adrian Finanzio, Ursula Stanisich, Tom Pikusa, Jane Treleaven, Justice Bell and Fiona McLeod SC.Members of the Climate change and environment law panel with Justice Bell who launched the panel.

03. Simon Molesworth, AM, QC, Sarah Porritt, Bev Kennedy and Julie Davis.

05. Michael Gronow and Dr Josh Wilson SC

06. The Hon. Justice Bell.

Brian Bourke

50 Years at the Bar

It should be said at the outset that Bourkey's observations of his life experiences should be told by him. He is a raconteur par excellence. The best anyone else can do is outline his life and tell the stories of other peoples' observations of him.

He was born in 1929 in Wangaratta. His father was a restless publican who bought pubs, built them up and sold them all around country Victoria. Consequently Bourkey went to 11 schools in all, everywhere from Lal Lal to Bendigo to Glenrowan to Wodonga. But his real education was at the Wangaratta Convent which he left at the end of his schooling at 16 years of age, after the Leaving Certificate. He had succeeded in the entrance exam for the State Public Service, but decided to defer that opportunity and work on his father's farm. After six months, this equally restless and energetic son was bored. He accepted a job in the public service, in the Lands Department in Melbourne, as a clerk for five pounds eleven and sixpence a fortnight. It was 1946.

Above: Brian Bourke with former Readers

This young man did not have a family history of tertiary education. One uncle had gone on at school beyond year 10. No one else. But Bourkey had attracted the interest of the Mother Superior of the Wangaratta convent, one Mother Columbanus, a woman who died well into her nineties and with whom he maintained a friendship to the end. She said to him, when he was leaving for Melbourne, "while you are down there Brian Bourke you do your matriculation at Taylors." He protested that it would be a hopeless endeavour as he could not pass English. She said that he would be fine as Carmel O'Donoghue, the brainy girl at the convent, was doing matriculation that year and Mother Columbanus would send Carmel's work down for Brian to see and learn from. So this is what happened and Brian completed his matriculation in six months with honours in English, thanks to Carmel's indirect coaching.

Early in 1947, Bourkey visited the University of Melbourne and asked to enrol in Law. He was told that he had to have a pass in Latin and this was even beyond Carmel O'Donoghue's abilities. But it was hinted that the Latin requirement would be soon dropped and so Bourkey decided to fill in a year back home in Wangaratta while he waited for admission. Back in Wang, he worked for the State Bank in a very responsible job – in charge of petty cash. One day, the manager told him that the inspectors were coming and he had to keep the petty cash in a locked room and they would come and inspect. He was duly inspected. The next day the manager called him in and said "Brian, we've got a problem with the petty cash. It doesn't balance". Bourkey, thinking that his brother Kevin, who worked at the Post Office, had miscalculated in charging for the Bank's stamps, said "How much is it short – I'll put it in". The manager replied in a deep baritone: "It is not that simple, Brian. There is too much in it, its over."

This made the 18 year old think that a career as a clerk in the State Bank was not for him, so it was fortuitous that a friend - who was a secretary at the legal firm of Brew and McGuinness - told him that articles were available there and then organized an interview for him. Within a week, he was articled to Brendan McGuiness – he signed his articles on 9 February 1948 - and he remained so for the full five years of articles, finishing the academic requirements in four years and being admitted on 2 March 1953.

In what these days would be called an 'exit interview' at the State Savings Bank, the manager (of too much petty cash fame) one Mr. Harkness, asked Brian whether he really understood the security and future he was giving up by leaving the Bank. Brian's response was "I'll take the chance". Well, Bourkey has lasted longer than the State Bank.

When he had finished his articles and been admitted, he went to the University of Melbourne (after the age of Latin) and completed the LLB and almost a commerce degree, having done 8 of 12 necessary subjects. But Bourkey could not conquer accounts – debits and credits were a total mystery to him and worse still, bored him. But being lectured by Jim Cairns in Economic History and Zelman Cowan in Public International Law and Constitutional Law entranced him.

It was in the '50s that he first became involved in debating. He is a life member of the La Trobe Debating Club, having been fundamental in the early days of the Pentridge Debating Club where he was the official coach for many years. Later, he wrote a definitive book on debating with Senator Alan Missen and was a member of the Victorian Debating Team for four years with other luminaries like Senator Missen, His Honour Justice Beach, Ivor Greenwood and the murderer, John Brian Kerr.

In 1959, Bourkey set off overseas for eighteen months on the trip of his life. He did not work at all but lived on his savings and travelled extensively in Europe, England, the United States and Central America. With his keen intelligence, his gift for observation, his interest in people and his amazing memory (Bourkey, despite the map of Ireland face, has never had an alcoholic drink), he amassed a wealth of fascinating experiences. Perhaps none is more characteristic than the following. In 1959, he was on a plane with a school teacher friend called Bill Mayfield. They had had a boring time in Havana as it was just after the Castro takeover and the Americans had left Cuba en masse, leaving empty night clubs and hotels to the revolutionaries. Bourkey and his friend boarded a DC3 to return to the US. Only one other passenger boarded, well after them, walking up the hill of the DC3 aisle to the front of the plane. As he passed, Bourkey said to his friend Mayfield, "I think I know that bloke". Bill Mayfield treated that with disdain but Bourkey was not to be put off. Once the plane was in the air, Bourkey walked to the front of the plane, sat down beside this passenger, and said "I think I know you. I'm Brian Bourke from Australia." The response was: "I'm Ernest Hemingway from the United States of America." Like everyone else who has ever been accosted (or, if a woman, kissed) by Bourkey, Mr Hemingway was charmed.

Bourkey returned to Australia in 1960 and signed the Bar Roll on 1 April, reading with Jimmy Gorman. His number is 612 and today he is the longest continuous serving member of the Bar in active practice (and his practice is very active, two courts a day are still not unknown and he is rising 81). Bourkey has never applied for silk. He has a view about it. He says that he thinks the Queen has quite enough counsel and he is Irish.

Brian did a murder trial during his reading period and, by the time he had completed a year at the Bar, was making more money than he had ever dreamed was possible. Some years later his clerk, Jack Hyland, told him that if he left, it would take two barristers to replace him financially on the list. These days, despite his advancing years, the multiplier would probably be larger. A great sadness in his life is that by the time he succeeded in the law, both his beloved parents were long dead.

If there are born golfers and footballers, then Brian Bourke is a born barrister. There have been times when he pursued other ideas of career – the foreign service, halted in his tracks by a reference from Justice McInerney saying that he would be a lousy diplomat; a patrol officer in New Guinea, saved by a wage rise from McGuinness. There, indeed, lie more stories, more anecdotes. But he has been 50 years at the Victorian Bar and without doubt, and officially, has gained legendary status. He is a man of contradictions: a non-drinker who became king of liquor law and wrote the liquor loose leaf service (always referred to by him as "the book" – in the same vernacular as "the course" for law school and "the room" for his chambers); a meticulous preparer who has elevated feigned ignorance of the law to an art form (a perilous trap for police prosecutors); a man with the utmost respect for the law and yet always prepared to break the accepted rules, especially in relation to the number of courts in which he should enter an appearance in any one day. Asked once in the Full Court to justify this, his answer was disarmingly honest: "Greed your Honours, pure greed". Only a man of Bourkey's generosity and humanity could have such an answer accepted without demur. It was so clearly a falsehood.

Before age and food overtook him, he was an athlete of some note – tennis, cricket, golf and his beloved football. President of South Melbourne, on the Board of the VFL, life member of the AFL and Tribunal member, Appeals Board adjudicator and, most importantly, friend to and advocate for enough footballers to form many championship teams. In many ways, both subtle and unsubtle, his influence on that great game is incalculable.

Everyone who has briefed Bourkey, or appeared with him, or shared a lunch or a trip to the races or a footy match with him or against him, has a story to tell. He is endlessly amusing, good hearted, associative, bemusing, eccentric, warm, interesting, empathetic

Brian Bourke - 50 Years at the Bar

– always his own person. The best way to know him is to listen to the stories he tells about his life, and particularly about his career in the criminal law.

In conclusion, a few "in brief" tales:

Allan McMonies, now a senior solicitor, then an inexperienced articled clerk, was sent to the Magistrates' Court in Russell Street to meet and instruct Brian Bourke. Bourkey is nowhere to be seen through an entire morning, Allan is stood down on the basis of his explanation that "Mr. Bourke is briefed and he will be here at any moment". Then all the other cases are finished and the Magistrate calls Allan's case on and tells him he will have to appear. At this critical, heart stopping moment, as Alan is about to attempt to begin, Bourkey appears at the door of the court, walks to the Bar Table, announces his appearance for the defendant, and then throws car keys to Alan and says "Get rid of my car – it's parked across the footpath outside". Alan found it diagonally across the Russell/La Trobe Street corner very much on the footpath.

Bourkey picked up for speeding by a young copper and brought on before the Geelong Magistrates' Court. A few minutes into the case, the young policeman, reading from his notes, in the usual police English, recited "I said to the defendant, what is your name and occupation and the defendant replied Brian Bourke Solicitor". The Magistrate stopped him there and gently explained that he would be quite unable to believe any further evidence he might give. Unfortunately, that policeman was unaware of the invariable phrase that Bourkey's sonorous gravelly voice delivers on the 'phone or in person in identifying himself – "Brian Bourke Barrister". The Magistrate had heard it more than once.

Brian Bourke has had his set backs, (perhaps, most significantly, a bone degeneration that kept him in hospital for a full year when he was just a teenager and resulted in his wearing an entire body brace for many years), but he doesn't reflect them and indeed his equanimity belies them. He often says, in the optimistic spirit that governs his life: "My mother told me I couldn't have my cake and eat it too, but so far in life, I've been able to." And we are all pleased that he has. VBN

AMN

ABA Advanced Advocacy Course

18 - 22 January 2010

The Australian Bar Association ran its "Fourth Residential Advanced Trial Advocacy Course" over five days in January in sunny Brisbane. Next year's course will be held in Melbourne. This is not a course for the fainthearted or for those looking for a relaxed week racking up half the necessary CPD points for the year. It was intensive and confronting – it exposed each participant's advocacy skills (and lack of them) to a level of scrutiny and dissection that cannot be replicated in day to day practice. But for all that, it was enjoyable and rewarding, both professionally and personally.

The course materials arrived in late December and comprised mock court documents in a Federal Court civil proceeding claiming breach of s52 of the Trade Practices Act. This was the first year in which this particular fact scenario had been used and there were a few teething problems with the materials, some of which the organisers decided to leave for us to deal with during the trial in a way that I felt was somewhat artificial. However, this did not detract from the value of the exercise. Each participant was allocated the brief for either the respondent or applicant and we were urged, in a letter from course spearhead Phil Greenwood QC of the Sydney Bar, to allocate at least three days to preparation in advance of the course – time well spent.

The course commenced on Monday afternoon with some introductory presentations, including example opening addresses by two course coaches. The following day, the participants were divided into small groups, with each participant doing a 10 minute opening address (recorded on DVD), which was critiqued by an in-court coach. Another review was then conducted with a different coach, making use of the DVD This was essentially the format for the balance of the course, with each day focussing on a different segment of the trial (openings, examination-in-chief, cross-examination and closing), interspersed with sessions on case analysis, use of voice and performance.

Participants were required to have at least two years advocacy experience – in fact the vast majority had considerably more than this. Participants included three silks, one former judge who was returning to the Bar, and one very experienced Crown Prosecutor. There was a conspicuous lack of ego, however, and the atmosphere was encouraging. The Queensland and New South Wales Bars were well represented (making up well over half the total of around 40 participants), with a sprinkling of members from other States and two members of the New Zealand Bar. The Victorian Bar was surprisingly under-represented, with only four participants.

The coaches were, for the most part, both talented and experienced, and were drawn from a wide range of jurisdictions. There were silks from England, Scotland, South Africa, New Zealand and Australia, and a number of Australian judges. The cross-examination demonstration by Gerry Hanretty QC from the Scottish Bar was particularly memorable; especially the line: "kidnappers do not normally call ahead, do they Mr Eiffel?", in response to the emotional outburst from the witness accusing the respondent of kidnapping his business's goodwill. All of the coaches were generous not only with their time and expertise, but also their energy and enthusiasm.

They gave praise where they felt it was due, and were asked to limit their criticism to one or two key points per performance.

The input from the three performance coaches was particularly valuable. They each had an impressive background in drama, voice and communication. It was useful to think about court appearances as a form of theatre and to realise that, although it is important to be yourself, we all have many "selves" which we can tap into. Participants were encouraged to think more consciously about how they wished to be perceived (perhaps warm, persuasive, authoritative or compelling) and then to consider whether their voice, appearance, energy, stance and gestures actually conveyed that impression.

The course was uniformly praised by the participants, including the Victorians. Mary-Anne Hartley SC noted three particular features of the course of value to her, namely:

- the opportunity to reflect on how we work, in a safe environment where it is possible to experiment with alternative styles or methods;
- the chance to meet and work with barristers from other jurisdictions, and to learn from the overseas faculty members as well as judges and senior members of other bars; and
- the input from performance and voice coaches who have a body of knowledge that is very relevant to our work but which few of us have had the opportunity to explore.

And members of the Criminal Bar should not be put off by the course content. Carolene Gwynn said that, as a criminal barrister, she did at first feel like a thief at the picnic, but this eased into the position of long lost family member who no-one was sure what to do with. She also noted that everybody was very welcoming and that she found the high concentration of coach assistance at the course very helpful.

Although the course shared some of the features of the Readers' Course, it demanded greater rigour from all involved and offered a stronger focus on some of the finer points of effective advocacy, commensurate with the average level of experience of the participants. I recommend the course to any member of the Bar with the requisite minimum experience. And it is difficult to think of anyone with too much experience to take something of real value away from the course.

EWW

Wigs & Gowns Regatta

21 December 2009

The 23rd annual Wigs & Gowns cruise in company was held on the waters of Hobsons Bay on 21 December 2009. The regatta was held in near perfect conditions with a light south westerly providing the perfect breeze for the fleet.

The race committee was honoured to have Victoria's highest ranking naval officer Judge Tim Wood RFD on board the committee vessel, Peter Rattray QC's Lacco carvel hulled motor boat *Argo*.

The fleet this year included Paul Lawrie in his Sonata 6 *Easy to Beat*, Chris Hanson in his Baroness 22 *Baroness*, John Digby QC in his Swanson 42 *Aranui* and a first time participant, Bob Galbally in his Salar 40 *Beldisha*. Following on-water activities and achievements, skippers, crews, dignitaries and others retired to the Royal Yacht Club of Victoria for the WAGS annual barbecue and presentation. The Thorsen Perpetual Trophy was awarded to Chris Hansen in *Baroness*. His crew included David Pumpa and Mark Black.

The Neil McPhee Perpetual Trophy was awarded to Bob Galbally in Beldisha. We hope to see you all on the waters later this year for the 24th Annual Wigs & Gowns Cruise in Company.

James Mighell SC and Peter Rattray QC

01. The fleet approaching the bottom mark from left to right – *Beldisha, Aranui, Baroness* and *Easy to Beat.*

02. Tim Wood RFD, Peter Rattray QC and James Mighell SC with the Royal Australian Navy Commodore's Pennant

03. *Aranui* and her experienced crew prior to commencement of the race.

04. *Aranui* with spinnaker set

05. *Aranui* with the crew preparing for start

Experience Wins Out

16 November 2009

Legal Fun Run

Remember the days when sportsmen and women quit competition before they turned 30 because of the commonly-held view that you were washed up and over the hill by that age? Fortunately, times have changed and the benefits of sport and exercise later in life are now well recognised.

Three members of the Victorian Bar joined to form a barristers' team in the 2009 Legal Fun Run. The team had low expectations, because each team member had long ago passed the age of consent and would be competing against much younger legs. Two were on the wrong side of 50, while the youngster of the team was aged over 40.

Conditions for the run were very warm, but not hot enough to reduce the race from its traditional two laps of the Tan to one. The organisers provided an unexpected and, probably for many, unwelcome change to the course by adding almost a kilometre to the course, creating a new run distance of 8.5 kilometres. They also made a major organisational blunder in starting the walkers just before the runners completed their first lap, so that the lead athletes were confronted with a wall of walkers and had to duck and weave their way through the milling throng at high speed.

In the final wash up, Mark 'Monna' Purvis belied his age by finishing in fourth place overall in a field of 352 runners. Strong support from Paul 'Deek' Duggan and Andrew 'Kipketer' Kincaid saw this aged trio win the barristers' team prize. Six of the first seven barristers to finish, including Graeme 'Haile' Hellyer, were from more mature age groups, which suggests that all those concerned take good care of themselves, and that the younger members of Counsel need to lift their game next year!

8.3 km Run

352 competitors (211 male, 141 female), average time 43.23

Place	Name	Time	Top 10 Age
4	Mark Purvis	30.31	1st 50-59
8	Scott Wotherspoon	31.39	3rd 40-49
37	Daniel Porceddu	35.13	4th 40-49
57	Tom Warner	36.58	
66	Paul Duggan	37.17	10th 40-49
76	Graeme Hellyer	37.57	3rd 50-59
81	Andrew Kincaid	38.21	4th 50-59
90	Phil Corbett	38.48	
186	Mark Rinaldi	43.33	
213	Sharn Coombes	44.45	
259	Andrew Woods	47.37	
296	David O'Brien	51.41	
334	Natalie Vogel	56.30	

4.5 km walk

371 competitors (80 male, 291 female), average time 42.01

Place	Name	Time	Top 10 Age
30	Peter H. Clarke	35.24	3rd 60-69
31	Joanne Piggott	35.24	1st 50-59F

Off and racing ...

Kincaid, Purvis and Duggan share the spoils of victory

Robert Richter QC

Robert Richter QC was born in 1946 in the former Central Asian Soviet Republic of Kirghizia, now Kyrgistan. As a child, he lived for 10 years in Israel moving to Melbourne with his family at the age of 13. He completed a Bachelor of Arts at Melbourne University, and subsequently a Bachelor of Laws with honours. He read with Ron Castan QC and signed the Bar Roll on 5 August 1971. He took silk on 26 November 1985.
For him, the appeal of the law was " that you could actually fight the system and at least fight for upholding people's rights in various ways and you didn't need an army. You could do it yourself, you could actually try and make a difference here and there."
Of the cab rank principle, which he has described as "one of the sacred rules of the Bar": "You get work from all sources and you do it if you're available….You can't say "I don't like your client"…you're not allowed to believe. You are an advocate."

Silence All Stand

Federal Court of Australia

The Honourable Chief Justice Patrick Keane Chief Justice of the Federal Court of Australia

Chief Justice Patrick Keane, as the third Chief Justice of the Federal Court of Australia, takes on his new role at an exciting time in the history and development of the Court.

His vision for the Court was given at his welcome in Brisbane on the 22 March 2010. He described the Court as:
… an organ of government charged by the Australian people, through the Parliament of the Commonwealth, with the special task of ensuring that the laws of the Commonwealth are applied equally and fairly for the protection and welfare of all our citizens, to ensure not merely that the power of the State does not unlawfully interfere with the liberty of the individual, but to develop a jurisprudence in which all our citizens enjoy, in equal full measure, the beneficent effect of the laws passed by the Parliament; to ensure, for example, that the taxes with which we buy our civilisation are borne fairly and equally according to law; to ensure that the laws by which our corporations are organised and operate, and the laws which regulate the exercise of rights of intellectual property, and the laws which ensure competition and integrity in business are enforced so that the aggregation of economic power in private hands is not allowed to menace our common welfare and institutions. Similarly, this Court enforces the irreducible standards of conduct in business prescribed by the Trade Practices Act.

And more fundamentally, this Court ensures, throughout the Commonwealth, equality before the law.

In developing this vision, the new Chief Justice will bring to the Court a wealth of talent and experience, and a deep sense of social conscience.

Putting aside a brilliant university career both at the University of Queensland and at Oxford University, his Honour's experience at the Bar was wide and diverse.

His Honour was appointed as Queens Counsel in 1988 and in 1992 was appointed Solicitor General for Queensland. In that role he appeared in many leading cases in the High Court of Australia representing the State of Queensland. As Court of Appeal Judge in the Queensland Supreme Court he gained first hand experience in criminal law, which will bring expertise which will be invaluable as the Court takes on its new criminal jurisdiction.

Since the announcement of the Chief Justice's appointment there has been universal acclaim. All those who have met the Chief Justice comment on his good humour and his warm and considerate manner in dealing with people. He is seen as a person who brings not only a breadth of experience and talent but also an unpretentious and modest demeanour and an understanding of the role of the Court and the Judges within it. He will continue the work of his predecessor, The Honourable Michael Black AC QC, in contributing immeasurably to the collegiality of the Court.

Patrick Keane is a very good friend of the Victorian Bar. He will continue to enjoy his visits to Melbourne and the company of his friends who work and reside in Melbourne. He has already been introduced to the delights of Melbourne's best restaurants, which he and his wife, Dr Shelley Keane, will be able to continue to enjoy on their more frequent visits to Melbourne.

The Hon Justice Middleton

Federal Court of Australia

The Honourable Justice Mordecai (Mordy) Bromberg

Justice Bromberg's early life is a classic migrant's tale. His grandfather fled from Poland when the Nazis invaded in 1939. His family settled in Israel where Mordy was born in 1959. After the six day war, his Honour's family migrated to Australia. The eight year old Mordy spoke no English. His Honour's character was forged in this crucible and he emerged as a voraciously hard working, empathic man who cares deeply for the disadvantaged and has a notably strong bond with his family and community.

He attended Elwood High School and then Brighton Grammar School. He graduated from Monash University with a Bachelor of Economics and a Bachelor of Laws. He was articled to Jonathan Rothfield at Slater & Gordon and later joined Baker & McKenzie. He served as an associate to Justice Gray at the Federal Court.

And there was the football. Between 1978 and 1981 Mordy represented St Kilda in 34 VFL games, earning four Brownlow votes. His Honour is the first Federal Court judge with his own footy card, which can be purchased on the internet for 60 cents.

He was called to the bar in 1988, taking silk in 2003. He read with Maureen Hickey and Roy Punshon.

His Honour became one of the leaders of the labour bar, appearing in many of the leading industrial law cases over the last 15 years, including appeals to the High Court such as Gribbles Radiology, and the challenge to the constitutionality of the Work Choices amendments. He represented the Maritime Workers Union (as junior counsel) in their extraordinary victory over Patricks in 1998. The result was not only historic, it stopped the nation as judgments in the Federal Court were delivered live on television. It even spawned a television mini series.

His Honour is also an internationalist. He served six years on the Bar Human Rights Committee, helped to establish the Victorian Bar Indonesian Legal Aid Committee and served as the Australian President and International Vice President of the International Centre for Trade Union Rights. He was the founding President of the Australian Institute of Employment Rights, served as technical adviser to the International Labour Organisation's review of the labour laws of Cambodia, and from 2007 was the international consultant to the ILO reviewing and drafting the labour laws of Nepal.

As counsel, he was thorough, courteous and fair and was a pleasure to work with. Opposing his Honour, on the other hand, has been likened to trying to push back a glacier. He always seemed to have a powerful and unassailable depth to his case and was skilled at disguising which parts of the glacier were all façade and no substance. And he always loved a good graph.

MAI

Supreme Court of Victoria

The Honourable Justice Clyde Croft

The regularly voiced complaint that male judges are not 'representative' of society cannot be directed at the latest appointment to the Supreme Court of Victoria: Justice Croft has been a tram driver, public servant, consultant to government, academic, arbitrator, mediator, solicitor , barrister, VCAT member and author. The only thing not 'representative' about his Honour's career is that he has excelled in all his roles.

Most Australian lawyers would know His Honour as a leading property law 'silk' and author or joint author of The Mortgagee's Power of Sale, Commercial Tenancy Law, Commercial Tenancy Law in Australia, Fisher and Lightwood's Law of Mortgage – Australian edition, On Equity and Retail Leases Victoria. Before becoming an author, his Honour graduated as a Doctor of Philosophy in Law from the University of Cambridge and held senior positions in the Victorian Attorney General's and Law Departments including acting as Deputy Secretary. He has also been Executive Director of the Victorian Law Reform Commission, secretary of the Northern Territory Department of Justice, Crown Solicitor and Solicitor for the Northern Territory, Adjunct Professor of Law at Deakin University, a visiting scholar at the University of Cambridge, as well as attending the United Nations Commission on International Trade Law Working Group in Vienna and New York.

While a student at Monash University, His Honour drove a tram – with his most famous exploit being to derail a tram during peak hour traffic on the Princes Bridge and then avoid the pending disaster by driving the tram back onto the tracks.

As a barrister, His Honour had a vast practice and maintained the most wonderful library that was available for all to use. He was a keen and conscientious teacher and mentor to law students and junior barristers. Many law students were engaged as research assistants and obtained good jobs as a result, and Jan Johannsson and Robert Hay were invited to co-author leading textbooks and a looseleaf service.

Among his Honour's many likeable traits are modesty, courtesy, and an ability to maintain friendships and mix with people from all walks of life; a person meeting him for the first time would hear nothing about his many achievements. His Honour gives freely of his time when he perceives that a grave injustice had been committed: for two years he acted pro bono with a Victorian junior barrister for a group of women who sought a declaration from the Appellate Tribunal of the Anglican Church that the Church's Constitution did not preclude the consecration of women as bishops. The application was bitterly opposed by the Diocese of Sydney. The Tribunal made the declaration and there are now several female Anglican bishops in Australia.

RSH

Supreme Court of Victoria

The Honourable Associate Justice Rita Zammit

Her Honour's appointment was welcomed by a packed Banco Court on 23 March 2010.

To anyone who has ever dealt with her Honour, the fact that her welcome was so well attended by members of the Bench and Bar would come as no surprise.

It is well known that her Honour came to the law after earlier careers as a secondary school teacher and then as a special education officer at Kew Cottages. Her Honour graduated in Law with First Class Honours and went on to practice with great distinction as a solicitor specialising in health law, particularly in the defence of claims of medical negligence.

Befitting her Honour's passage to the law and an immersion in many European family traditions, her Honour brought wisdom, balance, humour and great compassion to her practice.

Her Honour was a dream instructor and great friend of the Bar. She was well organised and had impeccable judgment. She was a steady hand in a busy and demanding practice. Her Honour revelled in the decisive "7 minute conference" which was the hallmark of a former member of Senior Counsel, now one of her Honour's colleagues at the Supreme Court of Victoria.

Her Honour's equanimity in professional life may be contrasted with her maniacal passion for the round ball football code, which even propelled her to public prominence during the World Cup of 2006. Despite the many demands of judicial office, it is expected that her Honour will be gracing the terraces again this year at the World Cup in South Africa.

Her Honour's natural warmth was evident when, even in the ethereal setting of the Banco Court, her Honour turned to her assembled family and delivered a lengthy personal message in Italian. That touching moment will be remembered by those privileged enough to have been there.

Her Honour will be missed as an instructor but the gain is that of the wider profession and the community. Her Honour's excellent judgment and instincts for fairness, together with great intellectual capacity, will be of benefit to all those who appear before her and will leave all feeling rightly that they have had a fair hearing.

Her Honour's appointment marks the commencement of a period of service which will undoubtedly be to the benefit of the Victorian community.

SOM

County Court of Victoria

His Honour Judge James Montgomery

Now a County Court Judge, James Damien Montgomery was a Barrister of over 30 years standing before his appointment in November of 2009. Having completed articles with Jones and Purcell in 1973, he read with recently retired Chief Justice of the Federal Court, Michael Black. His Honour himself has some nine readers, to whom he always made himself available.

He stood tall, quiet, and, some said, reserved. He wasn't reserved – it was the mark of an astute mind, always thinking and taking the time to make sure that every word counted, that every word was worthwhile. Well known for his great economy in cross-examination, his Honour was one of the finest examples of the greatest skill any barrister can possess – knowing when to ask a question and knowing when NOT to ask a question. He would always sacrifice the barrister's trait of loving the sound of his or her own voice for the interest of the client.

Despite the description above of the quiet and reserved thinker, his Honour was not without his moments of flamboyance, a trait that also had great appeal to a jury. For example, the jury in the trial of Beljajev and others sat through 2 years of evidence and 2 weeks of a closing address by the Prosecution. By the time it got to his Honour's turn – he was acting for co-accused Kunz – his Honour began by literally making a cup of tea at the bar table, re-enlivening the jury's interest and making pointed reference to the sugar exhibited by the Crown as part of their seizure. Kunz was acquitted.

Specialising in murder trials and an artful master of the closing address, his Honour was true to the "cab rank" principle at the Bar, and during his time represented such diversity in clients as:

- Peter Dupas – receiving abusive calls during the Trial. People didn't seem to understand that his role was to defend Dupas to the best of his ability within the instructions given, the duty to the Court and the rules of evidence.
- Hany Taha – another lengthy Trial, which saw his Honour's client acquitted of terrorism, in which his Honour made reference to co-accused Benbrika as a man who 'couldn't lead ants to sugar'.
- Claire McDonald – also acquitted of murder, in circumstances where it was alleged she lay in wait for her husband in army camouflage before shooting at him six times.

His Honour attained Silk in 2006, an achievement which reflected both his skill and regard. His Honour's keen grasp of reality should stand him, and those who appear before him, in good stead.

CRG

County Court of Victoria

His Honour Judge J L (Jim) Parrish

After completing his articles, James Lloyd Parrish came to the Bar in 1978 and read with the late Bill Magennis. He developed a practice in the Workers Compensation jurisdiction and in personal injuries litigation. His expertise in all forms of litigation under the Accident Compensation Act, including in later years the appellate jurisdiction, was the making of his reputation.

Jim's preparation was industrious and meticulous. In court, he was unfailingly polite and focused on the issues. He cross examined effectively, and never unnecessarily. His submissions, oral and written, were well researched.

His deep understanding of medical matters coupled with his great knowledge of the law made him a formidable opponent and an impressive advocate. After conducting a busy practice as a leading junior counsel, Jim became Senior Counsel in 2003.

For most of his career at the bar, Jim was in chambers on the 12th floor, Latham Chambers. He developed strong friendships among those with and against whom he appeared, including David Brookes SC, John Bowman (now a colleague on the County Court bench0, David Martin, Robin Gorton QC and John Tebbutt.

Jim married Prue Campton, entering into a family with three generations in the law. His father-in-law, John Campton QC, now retired, was a County Court Judge, and his sister-in-law is County Court Judge Jane Campton, Jim's wife, Prue, and older son Robert are both practising solicitors, and younger son, Richard is completing a law degree.

To gain respect in the Campton family, Jim had to demonstrate an appreciation of fine wine. He applied himself with the determination shown in his profession, quickly learning to appreciate the attributes of a good wine.

Jim enjoyed a good lunch when not in Court, or when cases finished or settled. He had a great sense of timing. Rarely did his court and lunch commitments clash.

Jim was Chairman of the Compensation Bar Association from 2004 until 2009.

Jim was a good schoolboy footballer and athlete, especially in field games. Over the last thirty years, he has played tennis each Friday morning with some members of the Bar from the 12th floor of Latham Chambers and others, depending on availability.

Judge Parrish's appointment to the County Court is well deserved. His experience, diligence, expertise and courteousness suit him well to the bench.

County Court of Victoria

His Honour Judge Michael Tinney

Some of those who have known his Honour Judge Tinney in recent years as a formidable but impeccably fair prosecutor may not be aware of his roots in the criminal law. His early training and experience were very much on the defence side. He completed his articles at Galbally & O'Bryan towards the end of the era of the legendary Frank Galbally. He was articled to Frank's son Francis. He worked in the worker's compensation field where he was taught by Joe Sala. He was admitted to practice in April 1984. He went to the Legal Aid Commission where he spent several challenging years working as a duty lawyer at Melbourne, Prahran, and the old Children's Court in Batman Avenue. In turn, he worked at Grace & McGregor and then at Bruno Kiernan & Associates as a defence solicitor/advocate.

His Honour went to the Bar in 1989. He read with Philip Misso, now Judge Misso, and practised happily for many years in Four Courts Chambers doing both defence and prosecuting work. He was on Foley's List. It was the list of his father, Fred Tinney, from the time Fred came to the Bar in 1962, so there had been a very long family connection with that excellent List. As an aside, it should be reported that, contrary to the belief of some, Fred is alive and well, and was sitting proudly in the jury box next to his wife Phyllis at the welcome on 31 March 2010.

At the Bar, his Honour quickly earned and thereafter retained a reputation for great skill, hard work and integrity. His sometimes serious manner could not completely conceal a wicked sense of humour. On 14 March 2006, he was appointed as a Crown Prosecutor. The appointment followed closely upon his outstanding work as a junior in the police corruption case of Strawhorn. In early 2008, he was appointed as a Senior Crown Prosecutor, and later that year, took silk. His time as a Crown Prosecutor was spent doing many important prosecutions, including the long-running prosecution of Hugo Rich for murder.

His Honour loved his time as a prosecutor and enjoyed the friendships forged in Prosecutors' Chambers. At his welcome, he spoke with great fondness of his prosecutor colleagues and the support staff. Also, he expressed his admiration for the dedication and hard work of the solicitors within the Office of Public Prosecutions.

In her speech at the welcome, the Acting Chairman of the Bar, Fiona McLeod S.C., said of his Honour, 'Your Honour's utter dedication and commitment to thorough preparation and justice, your understanding and compassion for the victims of crime and their families, and your personal modesty and generosity all promise outstanding service as a judge.'

All those who know Judge Tinney entirely agree with those sentiments.

AJT

County Court of Victoria

Her Honour Judge Gabrielle Cannon

On 13 April 2010 her Honour Judge Gabrielle Cannon was welcomed as a Judge of the County Court. Judge Cannon was educated at St Martin of Tours, Primary School and Genazzano College and at Monash (BA) and Melbourne Universities (LLB). After graduating, her Honour completed articles with the firm of Nevett, Coutts & Wilson in Ballarat and was admitted to practice in April 1986. She read with Philip Dunn QC, signed the Bar Roll in November 1991 and practiced for 18½ years as a barrister. At first, her Honour's practice was a general one, including family law, civil matters and criminal defence work. From early in her career, however, she was briefed by the Office of Public Prosecutions and developed a particular expertise in the prosecution of sexual offences.

At her welcome, the Chairman of the Bar noted that her Honour had played a significant role in the better understanding and development of that area of the law. She was consulted by the Victorian Law Reform Commission when it undertook a comprehensive review of sexual offences and was also consulted by Professors Bernadette McSherry and Arie Freiberg on preventative detention and the operation of the Serious Sex Offenders Monitoring Act 2005.

Her Honour appeared in all jurisdictions in this state. In addition to prosecuting sex offences, her Honour prosecuted a number of murder and attempted murder trials, fraud, armed robbery, drugs and occupational health and safety matters.

In 2001 her Honour was appointed a Crown prosecutor.

The Bar welcomes Judge Cannon and wishes her every success on the bench.

Adjourned Sine Die

County Court Of Victoria

His Honour Judge Stuart Campbell

When His Honour Stuart Campbell was a judge he enjoyed attending the Opening of the Legal Year service at the Greek Orthodox Church in South Melbourne. He relished the sweetmeats and buns. That annual attendance was a reminder of his time as a barrister when he represented the warring factions within the church. That was an endearing, enduring and enhancing experience. Stuart Campbell was not a stereotype; he was very much his own man. Like all of us, he had his addictions: amontillado sherry, rum, menthol cigarettes, boats (especially dinghies), tailors, hockey, tokay and Sunday night roasts.

His official farewell did not do justice to his exquisite intelligence, his love and use of the English language, his innate fairness, his distrust of bunkum, his sense of humour and his abiding commitment to individuals. He had a beautifully balanced judicial temperament, but counsel who waffled after lunch were in danger of his well-honed recipe for clearing the decks. Boating provided him with agility and stability. He loved his connection to and participation in the Bar's annual sailing adventure – The Wags – being something of a wag himself when he wanted to be.

His Honour's interest in "mucking around in boats" and the sea was nurtured during his time as a Sea Scout at the 5th Frankston Sea Scout Group. That Group was then under the command of a Mr Peter Bowling – later to become a Commander in the Royal Australian Navy serving as Director of Naval Intelligence. Contemporaneously, His Honour rose to the rank of Cadet Under Officer in the Wesley College Cadet Corps. Later, as a member of the CMF, His Honour was commissioned in the rank of Captain. His father, Brigadier Campbell, was Director of Psychology in the Australian Army. Both of these officers had a positive and profound impact upon him and the lessons learned were well exercised later in life as a barrister and judge.

Sentence writing was an art in his hands because, of course, the English sentence – so frequently disabused these days – meant much to him. He never rushed any piece of writing – sentence or judgment or ruling.

It was pointless being impatient when walking with him: there would be a peck on the cheek or a 'hello' from passers-by. His range of friends and acquaintances was comprehensive, his loyalties diverse and expansive.

He was appointed to the Court on 7 June 1994 and, therefore, served fifteen and a half years until his retirement on 13 December 2009 at the age of seventy. This age is a youthful one in the Campbell clan. His father died at the age of eighty-eight and his mother is now almost one hundred and two years of age.

His responsibility for the Adoption List gave him great joy and adoptees always found a happy knee. The cherubic face appeared in many a family photo.

His Honour Stuart Campbell brought a human lustre to the Court; without such the Court would be a dreary place and justice day.

Peter Gebhardt
His Honour Judge Tim Wood

David John Ross QC

30 June 1943 – 24 December 2009

Victorian Bar News mourns the passing of former Editor, David Ross QC.

David John Ross QC (aka 'Rossy') was a pre-eminent criminal barrister. He practised for 42 years, more than 20 years as Queen's Counsel, proudly wearing the silk gown handed to him by Sir Darryl Dawson, who had received them from Sir Keith Aickin. He also was appointed silk in Guyana.

David was born at Murray Bridge, S.A., and educated at St Joseph's College, Geelong and then at Xavier College, Kew. After completing his law degree at Melbourne University and finishing articles with Allan Moore, he signed the Bar Roll on 13 April, 1967; number 806. He read with Barry Beach, later Justice Beach. He had five readers, Rex Wild QC, Benjamin Lindner, Neville Bird, Les Webb and Kevin Armstrong.

His practice embraced the challenges of the criminal law, both in court and as a legal educator. From April, 1980 to April, 1982, he was a Prosecutor for the Queen in Victoria. Since the mid 1980's, he spent much time in the Northern Territory appearing for aboriginals at all levels, including the High Court (Ebaterinja v Deland (1998) 194 CLR 444), where he was opposed to his former reader, Rex Wild QC.

In the 1970's, he wrote the first Leo Cussen Practical Training Course, including many experienced practitioners in its innovative teaching model. Later, he taught advocacy at the Bar through Continuing Legal Education seminars, and also abroad to young lawyers in Bangladesh and the West Indies. He was an Adjunct Professor in the Law Faculty at Deakin University. And in 2005, he published 'Advocacy', reprinted in 2009.

With David Byrne QC (now Byrne J.), he edited the Victorian Bar News for eleven years. He also wrote a guide for new lawyers at the Central Australian Aboriginal Legal Aid Service. He was a member of the Bar Council, Life Member of the Criminal Bar Association and Chairman of Holme's List Committee.

David wrote many articles on criminal law, and published Ross on Crime, now in its 4th edition (2009). Rossy always maintained a cheeky sense of humour. Under the topic 'Bigamy', the penalty is noted as "Two mothers in law"! And there is also a chapter on his passion for Jazz.

Rossy played trombone and sousaphone in a jazz band called "The Sweet Nutcrackers", and with another lineup of musical insomniacs called "Up all Nighties". In the 1970's, when he sported a 'Ned Kelly' beard, he led a close-harmony Barbershop Quartet. He was also a keen paddler, competing in the Murray Marathon on over 20 occasions. And he would be surfing the waves at Anglesea whenever he got the chance. In 2007, he also got to celebrate his beloved Geelong Football Club's Grand Final victory.

In early 2009, David was diagnosed with Motor Neurone Disease. Always intellectually acute, he continued to update Ross on Crime, notwithstanding the difficulties. Rossy loved Latin and in a moment of impish optimism, he put a sign up in John Starke Chambers (of which he was Head), which read "Robertus onculus est"- "Bob's your uncle". On behalf of all those in the law, Rossy, 'requiescat in pace'.

David is survived by his daughters, Angela and Genevieve, his former wife, Pam, his sister Virginia and brother Julian.

This is an edited version of the eulogy delivered by Benjamin Lindner on 30 December 2009. Thanks to Ross Nankivell for his valuable assistance.

The importance of being Portia

The Erratic Diaries of Portia Woods, Barrister

11 May 2010

Weight: 62kg (the new personal trainer is working a treat as is the new hunter-gatherer diet); RACV gym visits: Nil (Huh, why go public when you can go private)

7:30am
Very hungover after long lunch yesterday at the Flower Drum with my former mentor, Clive Penman QC, the usual common-law suspects and a certain Federal Court judge with an iron constitution. Wondering whether said Federal Court judge was ever a member of the Bullingdon Club… Latte and scrambled eggs at Demi-Tasse provide quick and temporary fix.

8.45am
Clerk calls enquiring whether I am able to appear on an urgent mareva application tomorrow, returnable in the Supreme Court Practice Court. Large CBD firm. ASX100 client.

Greatly relieved that a new source of work has arrived. Have been wondering how things were going to pan out now that the Bushfires Royal Commission is drawing to a close.

10:00am
Spotted faced articled clerk in cheap shoes arrives at the door of my room with a trolley upon which eleven folders are resting. Twinge of a headache shows signs of returning. Finish second bottle of Evian for the morning as I dissolve my second Berocca. Feel rather pleased with myself when I see the name of my predecessor on the backsheet, a very busy senior junior who is jammed. Resist the temptation to tweet my new found importance. Divert phone. Set skype to 'Do Not Disturb'. Start reading brief. Mmmmm, interesting case. Sacked CFO of ASX mega-corporate has helped herself to 4.1 million dollars which she has invested in shares and at Crown Casino. The affidavits my applicant client has filed indicate that said thieving ex-CFO has already started liquidating her rather large share portfolio and has directed her broker to start transferring the proceeds to a bank account in the Cayman Islands.

10.30am
Solicitor calls re brief. Partner no less. "Glad you're in the case Portia. Blah, blah, blah … firm is important … blah blah blah … case is important … blah blah blah … client is important … blah blah blah … I am important ... blah blah blah … Gotta go, Fin Review is on hold. Conference at 4:00pm?". "Sure" I replied as she hung up. Enter conference in diary.

11.10am
Reading brief is heavy going. Succomb to temptation and join colleagues for a morning latte at Demi-Tasse.

12:00pm
Back in chambers ready to get back to brief.
First, check The Age website. So-so Federal Budget. Next, check Facebook. Still only one friend. At least she's a Silk. Next, check holiday deals for Noosa or Port Douglas in September. Bargains galore. Or what about Bali? Or Fiji? Or the Maldives? And the really important bit, with whom? Yes, the perennial question. Wonder what Alan is up to these days... Things haven't ever really been the same with Alan since dining with him at Moe's in Horsham and consuming one too many margheritas.

12:50pm
Surfing e-Bay searching for heavily discounted dream Birkin bag. Nothing in black croc. Only emerald green!

1:15pm
Justinian is just so funny.

1.30pm
Still stuck on Justinian. Devour salad wrap, a handful of almonds and carrot juice from Dominoes. Still hungry.

2.00pm
Return to continue reading brief, now in a state of panic.

4:00pm
Important solicitor arrives with two underlings who think they are important but are not quite as important as their important boss, or their important client. CEO of important client implores me that this case is just so… important! I try not to feel too self-important in my imported shoes when I sagely inform said important client that I fully appreciate the import of his predicament. He persistently importunes as to my thoughts about the case. This is becoming an imposition. I inform him that I am optimistic, but that it is impossible to be certain although the evidence gives a good impression of the company's plight and the ummm, importance, of the case overall.

5.30pm
Continue reading brief. Read relevant cases (Patterson v BTR Engineering is a ripper for us). Start written outline of submissions.

2:00am
Submissions now complete, aided by the consumption of one large pizza, a fistful of Kool-Mints found in the pocket of my jacket after a mediation I appeared in last week and a bottle of chardonnay. Looking for taxi in Lonsdale Street. Observe male colleague sneaking out of the Kilkenny Inn. Said male colleague dies of fright when I kindly offer him the first cab which comes along so he is not too late in getting home to his family. We say very little, he nods a perfunctory good night and then speeds off towards Camberwell. Memo to self: Remember to say hello and smile as though I never witnessed said embarrassing incident when I next see him in the lift.

12 May 2010

Weight: 61.5kg; RACV gym visits: Not today.

10:30am
Have just arrived at Court 10 with important partner, almost as important senior associate and a junior lawyer of rising importance within the very important firm. The CEO of our important client and two important assistants also follow us into court. The importance of this brief is not lost on me for a moment.

The Practice Court is packed. I hear one silk remark that he hasn't seen it like this since the Bond Corp days in the early 1990s.

Her Honour calls through the list. We are told not before 2:15pm.

2:45pm
We are called on. We are the last matter. Feeling very relieved that at least if I get a hammering it won't be before a crowded gallery.

I put the case for the applicant. Her Honour is nodding. I go in hard on risk. It is the best point to run in this case. The judge is on top of our case. She must have read my outline of submissions over lunch which I left with her associate this morning. I sit down after 25 minutes thinking that all seems to have gone rather well. The late night last night appears to have been worth it.

My opponent is a leading commercial Silk. From the lapels of her exquisitely tailored jacket to her Ferragamo shoes she is genuinely terrifying. With fingernails that shine like justice, she is bright, she is eloquent, she is sharp as a tack, she is putting the argument and having a crack. I wannabe a Silk with a short skirt and a loooong jacket… Love that song!

I try not to visibly shrink as my opponent puts the defendant's case. Nightmares of the Ringwood Magi's Court come back to haunt me. I was pretty sure we were on a good thing here. Now I am not so sure. That's the thing about a good silk. If there's a seed of doubt in your case, they'll find it. Feeling quite ill actually. Things are looking a bit risky for said important client.

Decide to keep reply very short. Right strategy with this judge.

Judgment reserved until tomorrow. Case hangs in the balance. Court rises. It will be an anxious wait.

13 May 2010

Weight: Don't care, I know I look hot; RACV gym visits: Not sure what's really going on at the RACV these days.

6:00am
Meet Darren my personal trainer at the Catani Gardens in St Kilda for boot camp session with some of his other clients. Embarrassed to be joined by aging ex-footy playing Silk who no longer fits into his old tight footy shorts like he used to – suspect said shorts used to belong to Warwick Capper and he bought them for a king's ransom in a charity auction at a sportsman's night after consuming half a slab of VB. Channel nervous energy pent up from reserved decision into crunching out endless sit-ups at will. Think about getting navel pierced.

10:00am
I sit at the bar table anxiously. Fidgeting. My instructing solicitor stares blankly at the opened folders in front of her. This is an important case. The client is important. The firm is important. She is important.

Senior counsel for the defendant is discussing with her junior Volumes 1 to 4 of Wigmore on Evidence which she read last night in between attending a pilates class, cooking a three-course Thai dinner for her family, catching up on the phone with her mother and preparing for a forthcoming comedy debate.

"Silence, all stand".

Her Honour glides on to the bench.

"All persons having any business before this honourable court are now commanded to draw nigh and they shall be heard. Please be seated".

We all bow and sit down.

Her Honour: "In this matter I give judgment for the applicant plaintiff and make orders in the form submitted to me by Ms Woods for the plaintiff. I reserve costs. Are there any other matters?".

Woods: "No, your Honour".
Senior counsel for Defendant: "No, your Honour".
Her Honour: "Very well. Adjourn the court sine die".

I try to remain composed and respectfully thank my opponent. She is gracious in defeat and commends me on a job well done. Congratulations are also forthcoming from relieved partner, obsequious senior associate and startled clients.

Invite the instructing sollys and ASX100 mega-clients to Illia for coffee on the way back from court to debrief after a good win. Sadly though they all politely decline. All very busy. More chargeable units to render and more profits to be made it seems.

24 May 2010

Weight: 62Kg; RACV gym visits: None. Passed by in the tram on the way in to chambers.

Last week of the hearings at the Bushfires Royal Commission this week. Our submissions read well. Hopefully some good will come of all of this. Worried about where my next brief will come from…

25 May 2010

Weight: 62Kg; RACV gym visits: Nil, zero, null, void, the empty set. Start investigating the RACV's reciprocal clubs abroad.

I'm outta here! 'So long, farewell, auf wiedersehen, good-bye… I flit, I float, I fleetly flee, I fly…'. As lady luck would have it, new brief has just arrived. Retained to appear for giant Australian construction conglomerate in mega international arbitration in Hong Kong. Really important instructing solicitor informs me that it will run for at least a year and that my travel details are with the brief. Economy ticket!!! What planet is said really important instructing solicitor living on??? Better run. Need to restore the natural order and call really important instructing solicitor and arrange a proper 'J' class ticket. Because at the end of the day you know, I am after all rather important!

VBN

Gallimaufry

The Hon. John Coldrey QC

You can't imagine how delighted and flatted I was when 'Schoff of the News' rang me and said "We're having difficulty recruiting talented writers so could you fill in and write a column instead?". She certainly has a way with words!

Note: the following column is environmentally friendly – it contains a considerable amount of recycled material. However, it also contains an oblique sexual reference, the inevitable mention of Frank Vincent, and strong elements of narcissism.

It is 19 years since I was declared 'honourable', so there is a temptation to reminisce about my time at the Court. I have, of course, succumbed to it. But first I have done some dazzling research about judges which I feel I should share with you.

Some years ago that respected authority The Age Sunday Life Magazine conducted a survey of 1,502 Australians on the subject of trustworthiness. Regrettably, judges were placed 14th on the table. This was just behind bus and train drivers and chiropractors. Lawyers rated 22nd on the table, and politicians 30th. Perhaps the explanation for this judicial rating can be found in the definition of a judge in the dictionary for cynics, namely "A judge is just a lawyer who was once friendly with a politician". The only silver lining is that journalists rated 26th, sandwiched between mortgage brokers and psychics. In the survey, there was no category of statesmen, but I recall reading a comment, no doubt meant facetiously, that a statesman was just a dead politician. The writer went on to proffer the view that what this country desperately needed was more statesmen. Under the new anti-terror laws such sentiments may well be regarded as seditious.

When I was appointed to the Court, I received a congratulatory note from the distinguished Judge, Bill Ormiston. Omitting formal parts it read: "I wish you well in the arduous career you have now undertaken ... [there are] many burdens of judicial office for, as 'jacks of all trades and masters of none' none of us has much time that we can call our own... I hope that you get ... satisfaction and, occasionally, pleasures in your new role". No wonder Bill only lasted in the job for 23 years!

Shortly after this encouraging evaluation, Justice Hampel (as Professor, the Honourable George Hampel QC then was), informed me that the first five years were the worst. Somewhat depressed, I retreated to my tiny room in the southern corridor. It was rather unique in that it had a hessian carpet randomly patterned with cigarette burns. Later, I was fortunate to be moved to the east wing where I was favoured with a spectacular view of a light-well ornamented with sewage pipes.

Being a criminal barrister I couldn't fill the ample shelving with law books. On observing this space the Chief Justice, then Sir John Young, enquired: "Coldrey would you mind if I agisted some of my law reports here?". Not being an absolute idiot, and not wanting to let on that I didn't know what 'agisted' meant, I responded, that, in effect, this would be the culmination of my life's dreams. Unfortunately, they were the Weekly Law Reports and quite useless.

My first scheduled day in court had an inauspicious start. At 10:27am I found myself locked in what was then the Tipstaffs' toilet. There is a view that the correct title should be Tipstaves' toilet, but I can assure you that such etymological niceties are totally irrelevant once you are actually locked inside.

"Never eat Mexican food before charging a jury"

Although I couldn't quote the specific authority, I knew enough of the law of torts from my acquaintance with the Nutshell series not to try and get out by standing on the toilet roll holder. I wondered, as one frequently does at times of stress, what would the reasonable person do? Unfortunately, there were no toilets on the Clapham omnibus.

Why was I in this particular toilet in the first place? Well, as I was nervous and confused, and, having read the pleadings in the personal injuries case I was about to try, I had a subconscious motive to lock myself away. Eventually I escaped, pausing only to wipe my fingerprints from the smashed door lock.

And so to Court. The plaintiff had been injured when he fell into a shallow trench. This seemed simple enough. But there were five defendants and three third parties. Such terms as volenti, inevitable accident and res ipsa loquitur leapt from the printed page. In short, this was everything you wanted to know about torts but were too frightened to ask! And, to cap it all, it was alleged that the trench constituted a mine pursuant to the Mines Act.

The Court was so full of counsel; there was no room for the litigants, let alone the public. Then a marvellous thing happened! Counsel requested "a little time". "Certainly", I said, while thinking – take a day, take a week, or better still, take a month and I'll be out of this jurisdiction. Fortunately, four hours later the case settled, just as I was contemplating whether it was really possible to secure my future happiness by entering into a pact with the devil. Slowly I learned more about the Court. Justice Peter Murphy alerted me to the Shanks Patent Compactum – the magnificent florally decorated toilet at the foot of the stairs to Court 11. He referred to it as the "tattooed toilet". In later years I would frequently pause before it prior to entering the court room to confront the con-artists and standover merchants – and also, of course, their clients.

Eventually, one of my judgments came up for consideration by the Court of Appeal. They dismissed the appeal. I was chortling about this to Frank Vincent but Frank (then a trial judge) advised: "just because they say you're right doesn't mean you are right: and just because they say you're wrong doesn't mean you are wrong". Subsequently, I found the later part of these propositions a great comfort.

Ultimately, I sat on the Court of Appeal with Bill Crocket. After one appeal we retired to the anteroom to listen to his leaned analysis of counsel's arguments. The great jurist paused before opining: "You know its all bullshit, but it's hard to put your finger on it".

Many times since I've felt the same way!

Sometimes in judicial life, you can gain inspiration from the arts. I refer, of course, to the TV series Judge John Deed. I recall one episode in which his Honour was faced with an application brought by an extremely attractive female litigant in person. An attractive litigant in person is, perhaps, the ultimate oxymoron – but at least you can tell the program is fiction. Having adjourned part-heard after listening to her arguments all day, Judge Deed unexpectedly encounters her in a local restaurant. In an exhibition of judicial gallantry, he wined and dined her as a prelude to spending the night with her. Then, the next day, true to the finest traditions of judicial independence and impartiality, he dismissed her application.

As a retired judge, do I have advice for judges of the future? Of course I do!

1. Always re-read letters your secretary has typed before sending them off. There was an occasion when I wrote to congratulate a newly appointed female silk. "You have," I dictated, "joined a select group of women barristers". In the letter I was about to sign my secretary had typed "you have joined a select group of women bastards". I was very narrowly saved from forensic immortality!
2. Always check the VGRS Reports of your judgments and sentences before bestowing them upon the public. One of my sentences had reached the internet before Supreme Court Librarian, James Butler, unilaterally amended it. Summarising the victim impact statement of the wife of the deceased, I wrote of the many happy hours she had spent with her husband who she described as a gentle giant. Regrettably, what was recorded, and went into cyber space, was: "Mrs A spoke of the many happy hours she had spent with her husband who she described as a 'genital giant'".
3. Never eat Mexican food before charging a jury.

I must have written at least 1,000 words, and that is quite enough!

VBN

Odd Jobs *A Bit about Words*

Julian Burnside AO QC

The first supermarket in Melbourne, so far as I can recall, opened in Balwyn in about 1960. It was an American innovation which was hailed as a modern marvel. Television had arrived in Australia in 1956, and was reshaping the tastes and aspirations of a nation of emerging consumers. For those of us old enough now to have been receiving pocket-money in 1960, the supermarket was evidence of the endless possibilities of what would later be recognised as retail therapy.

The arrival of the supermarket in Australia also began a process which drove various occupations into oblivion. Although the supermarket was an interesting – enticing – novelty, it was a bit far away. Just down the street there was a grocer, an ironmonger, a fishmonger, a greengrocer, a haberdasher, a butcher, a delicatessen and a seedsman. Most of these are just names now.

A grocer was so called because he bought in bulk (in gross) and sold in smaller portions. According to the OED2, a grocer was "A trader who deals in spices, dried fruits, sugar, and, in general, all articles of domestic consumption except those that are considered the distinctive wares of some other class of tradesmen". Children today do not know what they are missing now that we do not have grocer's shops. They sold biscuits from the tin: they weighed them out carefully into brown paper bags. They always had some broken biscuits to give to kids who came into the shop.

A green-grocer was much the same but confined himself to fruit and vegetables. By the time the Comedy Company brought us Mark Mitchell as a green-grocer in 1984, he was 'Con the Fruiterer'. I daresay there are traders who still describe themselves as green-grocers, but they must be a small minority.

The ironmonger is no more. Even that venerable institution Chalmers, which was an ironmonger when I first went there in short pants 55 years ago, is now a Mitre-10 franchise which, if you look hard, is described as a hardware store. Bunnings is now synonymous with hardware, so those lucky enough to live within reach of a Bunnings don't even talk about the hardware store. The men (they were all men) behind the counter at Chalmers were ironmongers. The men and women who staff Mitre-10 and Bunnings are just shop assistants.

There are probably one or two fishmongers in Melbourne still, but they use the word self-consciously and for effect, like the chemist who calls himself an apothecary. More likely they will be part of a fish and chips shop, or revel in a cute name like Scales or Fishy Business. The occupation of selling fish continues, but the fishmonger has virtually disappeared.

It is a rare thing to see a haberdasher these days. A haberdasher is 'a dealer in small articles appertaining to dress, as thread, tape, ribbons, etc'. A quick look at the Yellow Pages shows 148 businesses Australia-wide which include haberdashery as part of their trade, but only one which uses 'haberdashery' in its name. Closely allied to the haberdasher are the mercer and the draper. The draper was originally a manufacturer of cloth, then a dealer in cloth. Some drapers specialized, so there were woollen drapers, linen drapers, etc. The mercer was a more specialized draper who dealt in textile fabrics, but especially in silks, velvets, and other costly fabrics.

> "..most will be startled to hear of the ale-monger, the book-monger, the cheesemonger..."

These occupations survive, but their names have changed.

Some people will still recognize what a fishmonger does, but most will be startled to hear of the ale-monger, the book-monger, the cheesemonger, the fellmonger (a dealer in skins or hides of animals, especially sheep-skins), the lightmonger ('a member of the Worshipful Company of Lightmongers, a City of London Livery Company, which represents the lighting industry'), the match-monger, the weasel-monger (who hunts rats using weasels), the vizard-monger (who makes and sells masks) and the mutton-monger (defined by OED as 'whore-monger', which is not a pimp or brothel keeper, but a person who deals regularly with whores, a fornicator. Not an occupation apparently so much as a habit).

And one name which needs to be restored, because the occupation is thriving, is maggot-monger, 'a crocheteer: one who pushes or obtrudes his crotchets in politics'

The OED recognises more than 300 mongers. Most of them are not occupations in the strict sense. Many of them are jocular and self-explanatory, as turd-monger, versemonger, snivelmonger, pishmonger, panic-monger (cf: panic-merchant), mass-monger (a Roman Catholic), and cloud-monger (a diviner who looks to the clouds).

The nightsoil man has gone. Before towns were sewered, his role was an important one, but he was not generally rewarded by corresponding social esteem. I have it on unreliable authority that many years ago there was a nightsoil man with a good business in Doncaster, which was then at the outer fringe of Melbourne. He was considering upgrading his equipment, and made enquiries of the local council to see whether they had any plans to lay sewerage pipes. They did not. He spent a lot of money on new cans and the like, then the council decided to sewer the area after all. This led to litigation in the Victorian Supreme Court. The plaintiff had come originally from Italy, and had an imperfect grasp of English. The case had some obvious humorous possibilities, and the Plaintiff's evidence provoked increasing merriment. With some justification, but a poor grasp of metaphor, he said: "This may just be shit to you, but to me it's bread and butter."

And what about the dustman? He was the bloke who would pick up the rubbish bins and empty them into his van, working street by street. He generally came twice a week. People would leave out a few bottles of beer for the dustman at Christmas time, partly in recognition that he was doing an unpleasant but necessary job; partly because it tended to reduce the amount of spillage. Being a dustman was never a glamorous job, even after it was the subject of Lonnie Donegan's popular song "My old man's a dustman". It starts like this:

> Now here's a little story
> To tell it is a must
> About an unsung hero
> That moves away your dust.
> …
> Oh, my old man's a dustman,
> He wears a dustman's hat,
> He wears cor-blimey trousers
> And he lives in a council flat.
> He looks a proper nana
> In his great big hobnail boots,
> He's got such a job to pull them up
> That he calls 'em daisy roots

And so it goes for another 6 verses and 6 choruses. It had a catchy tune, and (astonishingly) reached number 1 in the English charts in April 1960. A while later, the dustman had begun to call himself the garbologist, and then wheelie bins were introduced and the entire operation changed from something humble but human to something mechanical and noisy. I don't know what their job is called these days, and people don't bother leaving out beer for them at Christmas. Sic transit gloria mundi.

Some occupations have not merely changed names: they have more or less ceased to exist, as a result of social or technological change. For example:

Scrivener: a professional penman; a scribe or copyist

Tinker: a travelling repairer of pots and pans

Town crier: the person who made public announcements in the streets

I was tempted to add crowner to this list, but everyone knows this is the earlier name of the coroner. That venerable office continues to this day, and no lawyer needs it explained. But I recently heard a colloquialism which is so wonderful I needed an excuse to pass it on. 'Full as a fat girl's sock' is well enough known, but I had never heard 'Full as a coroner's cat'.

VBN

HABITAT

Mentor's Chambers

It has been the tradition of the Victorian Bar that readers spend some time in their mentor's chambers. There are written and unwritten rules that govern the relationship. The 'unwritten' rules include:

- Never have a conference with your instructing solicitor or clients when your mentor is in chambers;
- Never talk on the telephone when your mentor is likewise engaged;
- Always leave at the end of the designated 9 month reading period.

In return, the Mentor is expected to provide instruction in the art of advocacy, and the practice, conduct and ethics of a barrister. The Mentor should also provide a 'table', which is required to be located in the Mentor's chambers*. Habitat notes that it would be quite wrong to refer to the table as a desk. Barristers do not have desks.

Many of the "tables" that we at Habitat have found in chambers seem particularly unsuited to the function they are intended to serve. There appears to be a competition running at the Victorian Bar as to who can find the smallest table for their reader and who can place it in the darkest corner of the chamber. Here is a sample of some of the types of "tables" found in chambers –

*Sir Gregory Gowans, The Victorian Bar, Professional Conduct, Practice and Etiquette, 1979.

Despite the provision of tiny tables in dark corners, the experience of Mentors sharing their chambers with readers is generally a good one.

One of Habitat's regular writers recently spoke to four silks about their prior experience of sharing chambers with readers. Four questions were put, questions that had been on the writer's mind for some time –

Question 1: Describe the most peculiar or annoying habit displayed by a reader sharing your chambers

Fiona McLeod SC says:

"Trailing computer cables all around the room."

Jeff Gleeson SC says:

"The most annoying habit was that of Lee Pascoe, my second reader. She was everything I wasn't - and still am not. She was, and still is, tall. Did I mention tall? Anyway, she realized early in her reading period that she should not stand near me in the presence of instructing solicitors or clients. Call it the Sarkozy syndrome. Anyway, on a busy day she would be bobbing up and down in chambers like a graduate lawyer during her first appearance for consent directions."

Sam Horgan SC says:

"Talking to me (all the time) without regard for my health or wellbeing."

Adrian Ryan SC says:

"Warwick Rothnie annoyed me intensely by being really clever."

Question 2: In 5, 9 or 13 words describe the experience of sharing your chambers with readers.

Fiona: "Great fun and good company, learning experience for both"

Jeff: "Like sharing a bedroom with your younger sibling, but without the fist fights".

Sam: "An imposition that is both professionally and personally rewarding".

Adrian: "A lot of fun mostly".

Question 3: If you could transport any member of the Bar or Bench back to the readers course and have that member share your chambers who would you chose and why?

Fiona: "Judge O'Neill, shared chambers with him and miss his good humour and sage advice"

Jeff: "Lionel Murphy, because he would dissent from everything I said, but would do so in a page or less".

Sam: "Nettle JA, because he would continuously remind me that the answer is to be found in the contract or statute".

Adrian: "Whelan J, so that we could replay all the banter that went on about Blackadder and other TV gems when I was reading [with him]".

Question 4: If a young solicitor sought your advice about reading, what would you say?

Fiona: "Get your savings sorted and go for it"

Jeff: "The same advice I gave to those enquiring about reading with me – You have quit a well-paid job to sit in the corner of another person's room for 9 months. You are unlikely to be paid a cent for the next year. Well, if you think things can't get worse it's probably only because you lack sufficient imagination."

Sam: "I would encourage the young solicitor to come to the bar and read with any one of the many high quality juniors at the bar. I would insist that the young solicitor has all the right qualities to make a real go of it. The junior bar is littered with fine minds who would have the solicitor earning like an oil sheik in no time."

Adrian: "Don't feel that you can only read with someone who does exactly the work you want to do. Broadening your base of experience is usually very useful and interesting".

MBT COMPETITION WINNER

MBT COMPETITION WINNER

Our MBT competition winner for this edition is Rex Wild QC and his amusing short essay appears below. Congratulations Rex! You are now the proud owner of a second pair of MBT shoes (as worn by Justice Virginia Bell) which we look forward to seeing you wearing in court.

Why is it good for barristers and/or judges to walk in MBT shoes?

When judges walk into court, it is essential they be seen over the bench. For the vertically-challenged, the extra centimetres provided by MBT shoes aid enormously. Barristers are, of course, far more eloquent when taller!

The shoes also provide a pleasant, rolling gait which I understand is quite attractive from the rear.

I travelled to South America late last year. I had foot surgery in April. I could walk only with difficulty. Using MBT shoes, bought just before departure, I walked hundreds of kilometres in the next weeks. I even scaled Machu Pichu (before the avalanche!)

MBT shoes are the best!

- REX WILD QC

MBT Shoes are available throughout Victoria. For more information about MBT Technology and where MBT Shoes are sold, visit:
www.au.mbt.com

*The Editors of Victorian Bar News and the Victorian Bar Inc, make no warranty as to fitness for purpose of MBT Shoes.

RESTAURANT REVIEW by Schweinhaxe

The Venue: *intimo*

Address: 439 Lt Collins Street, Melbourne

Telephone: 03 9606 0130

Trading Hours: Monday – Friday, 7am – 5pm

Offerings: Restaurant, Café and Wine Bar:
Breakfast and Lunch
Evening functions by arrangement

The case concluded at 12.45pm on a Friday. There is nothing more satisfying than finishing a case, stripping off the garb and then heading out to lunch. I weighed up my options with my instructor. Chinatown and the usual chilli prawns with badly matched Shiraz, or something different. I went for something different. A good friend had told me about a great restaurant/café cum wine bar in Little Collins Street just behind the RACV called *intimo*.

The owner Frank De Petro greeted us when we arrived. The table was well set with good glassware. Tables that line the window have seats adorned with large cushions. This makes relaxing easy. The wooden interior exudes warmth, not surprising given the name of the place. Two large blackboards set out the menu and also all the wines available by the glass or bottle. I knocked off a Stella with my instructor while we waited for our entrées.

I had half a dozen St Helen's Tasmanian oysters ($18.50). My instructor had antipasto of prosciutto, olives, Grana Padano, mushroom frittata and marinated artichokes ($18.50). Magnifico!

Now this is no ordinary place offering the standard fare. It is Italian-influenced but with an Australian bent. The chef, Jason Owide, is from WA and he loves fresh produce, most particularly seafood. The seafood here is spectacular. The photograph shows Jason with a marron. A marron is a freshwater crayfish found in the south-west corner of Australia. Jason gets his alive and thrashing from Pemberton in WA. He boils them, cuts them in half, grills them and they come served with a delicate garlic, parsley and butter sauce (market price).

The next thing that happened made my day. Frank asked me whether we would like a glass of good white wine to have with our entrée. Yes please! He poured us a glass of the 2008 Astrolabe Pinot Gris from Marlborough, New Zealand. The only mistake we made was not ordering a whole bottle as we had two glasses each. It is a delicate, crisp wine with a fine minerality, fruit driven but not sweet.

I did not feel like a large main. There were items on offer like a risotto of roast duck ($26.50), linguine with Western Australia blue swimmer crab meat, tiger prawns, garlic, chilli, rocket, white wine and extra virgin olive oil ($28.50) and a pan-fried Ruby snapper ($36). I went with the snapper. The flesh was perfectly cooked, still tender and juicy. It came with a salad of baby cos, vine ripened tomatoes, olives and a red wine vinaigrette. This went very nicely with the last drops of the Astrolabe.

My instructor had something I hadn't seen on the menu. It was char grilled continental sausages with potato mash, green beans, red onion jam and a Shiraz reduction ($34). My instructor is a large man. He fitted onto the chair but only just. I thought that his choice of main suited him. He knocked it off with relish. In fact, a bit of jam remained on his chin thereafter.

Half way through my main, Frank asked me whether I would like another glass of wine. I had a glass of Neudorf Sauvignon Blanc from Nelson, New Zealand. Now this is a lovely dry and elegant Sauvignon Blanc, different from the more fruit-driven classic Marlborough style. A perfect match with my snapper.

My instructor had to find a big red to go with his big sausages. Frank poured a glass of Shiraz from Lloyd Brothers in McLaren Vale. My instructor was well pleased with this wine. He told me it was fine and peppery with rich, ripe dark berry fruits. He truly did! After knocking all of that off we were well satisfied. We didn't have desserts but there was a good passionfruit tart on offer.

We enjoyed *intimo* as a post-case lunch spot. It is also a café in the morning with breakfast fare such as scrambled eggs with leek and chives on toast ($8.50) and other delicious offerings such as Roma tomatoes tossed with basil and extra virgin olive oil on toast ($7.50).

Guten Appetite!

DEAR THEMIS

Dear Themis
I note your recent response on how to address former judges at mediation. Many former judges, particularly when marketing themselves as mediators, refer to themselves as the "Hon Mr/Ms X QC/SC". Is it appropriate that former judges refer to themselves as Queens Counsel or Senior Counsel?

Stickler

Dear Stickler
The answer was provided, at least in relation to Queens Counsel appointed by letters patent, by Merralls QC in his article "Reversion is Impossible" 89 Victorian Bar News 53. In summary, Merralls QC stated that: (a) the rank of Queens Counsel merges in an appointment by commission or letters patent to a higher inconsistent office, such as being commissioned a judge of a superior court; and (b) a former judge of such a court would need to receive new letters patent giving him or her the precedence lost on judicial appointment. Sir Own Dixon was cited as authority for this view.

Themis is unsure whether the same applies in relation to the appointment of Senior Counsel because (a) such appointments are not made pursuant to letters patent; and (b) Sir Owen Dixon was not available for comment. But, in Themis's view, it is not becoming for former judges to refer to such post-nominals unless they consider it necessary, in light of their judicial career, to establish that they are really are "learned in the law".

Dear Themis
I have been at the Bar for 10 years and am about to be a mentor for my first reader. From your experience, are there any things I should know?

Apprehensive Mentor-to-Be

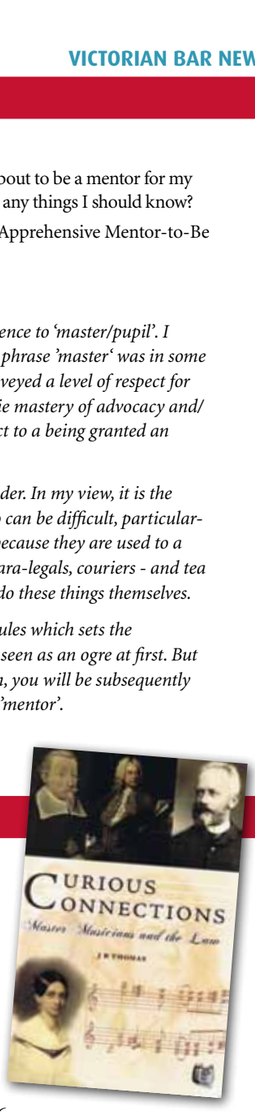
Dear Apprehensive Mentor-to-Be
'Mentor'! I deplore the abolition of the reference to 'master/pupil'. I believe it was because someone thought the phrase 'master' was in some way sexist. To the contrary, I consider it conveyed a level of respect for the experience of the more senior barrister ie mastery of advocacy and/or the law. I note that no-one seems to object to a being granted an LLM … but I digress!

It can difficult to share chambers with a reader. In my view, it is the more 'experienced' (aka older) readers who can be difficult, particularly if they have been at a large firm. This is because they are used to a support team of secretaries, photocopiers, para-legals, couriers - and tea ladies. They think it quite a come-down to do these things themselves.

My advice is to develop a very strict set of rules which sets the boundaries from the beginning. You will be seen as an ogre at first. But if you then relent a little in their application, you will be subsequently viewed as a kind and generous, if not wise, 'mentor'.

LAWYER'S BOOKSHELF

CURIOUS CONNECTIONS



Master Musicians and the Law

J. B. Thomas

Supreme Court of Queensland Library 2006

On first reaction, a connection between the profession of the law with its focus on precision and predictability and the profession of music with its focus on aesthetic creativity is not readily apparent. Retired Queensland Supreme Court Justice J. B. Thomas, who frankly admits that although his vocation was law, his true love is music, has written a most interesting book which reveals, somewhat surprisingly, that many master musicians either studied or practised law.

The book commences with short biographies of thirty great composers or musicians who have links with the law. Some, like Johann Kuhnau (1660-1722), managed to succeed in both law and music at the same time, although this appears a rare accomplishment. Others, like Georg Telemann (1681-1767), George Frederic Handel (1685-1759), Robert Schumann (1810-1856), and Peter Tchaikovsky (1840-1893) who figures prominently in the book, commenced legal studies or careers, usually encouraged by parents or grandparents, before moving on to more successful musical careers. His examples

include the American songwriter Cole Porter (1891-1964), who briefly attended Harvard Law School before taking the advice of a Law School Professor who, remarking on his lack of preparation for a class, suggested: 'Mr Porter, why don't you learn to play the fiddle.' There is also an Australian example: Justice George Palmer of the Equity Division of the NSW Supreme Court is an active composer Judge who has had an album of his music released on CD.

Some great composers were unenthusiastic about the law, such as Robert Schumann, who, whilst a law student at Leipzig University, wrote a letter to his mother complaining: 'Frigid Jurisprudence smashes you down with its ice cold definition.'

On the other hand, Tchaikovsky had quite a successful career in the law and spent two and a half years of his life as a public service lawyer, following nine years at the School of Jurisprudence at St Petersburg, before commencing to study music seriously at the St Petersburg Conservatorium. The author relates that in 1885 Tchaikovsky composed a "*Juris March*" and a "*Song of the students of the School of Jurisprudence*" to mark the 50th anniversary of the school.

The research undertaken by the author is admirable and one of the most fascinating chapters involves the author using his considerable forensic skills to examine the competing theories concerning the death of Tchaikovsky. Like a well reasoned judgment, the author closely examines the evidence of the last twelve days preceding Tchaikovsky's death, and the arguments for and against the alternative theories - namely, whether Tchaikovsky died of cholera after knowingly drinking unboiled water; or whether he committed suicide, in obedience to the decree of a "court of honour" consisting of members of his former School of Jurisprudence, after the existence of a homosexual affair was revealed. The conclusion arrived at after closely reviewing the evidence is logical and compelling, and should conclude the debate.

Thomas also displays considerable musical knowledge, befitting a trained pianist who gave broadcast recitals for the ABC, before choosing a legal career. His discussion of some compositions includes musical examples of parts of scores for the benefit of those who read music.

After reviewing the lives of the great "legal" composers and musicians, he arrives at the conclusion that there is a common denominator in almost all of the stories. Great musicians were invariably 'articulate, intelligent men with a developed capacity for self expression'. He forms the view that they must also have been naturally imaginative and articulate children, with an aptitude for reading and talking, which must have been one of the considerations which induced their parents to propose a career in the law.

I found the final chapters the most interesting of all, involving a discussion of some intersections between law and music, particularly in the way in which the two disciplines approach fundamental problems. For example, there is a fundamental issue relating to how legislation and music scores, respectively, should be interpreted. In music, there is a debate concerning to what extent old music, such as J. S. Bach, should be played on new instruments which have different tonal qualities. In legal interpretation, the debate concerns whether the test should be the intention of the legislature by reference only to the words used when they were written, particularly in relation to the Australian Constitution, or whether an attempt should be made to enquire as to the purpose of the provision in question in the context of current circumstances. Thomas points out that both the problems and solutions of the interpretation of law and music have many points of similarity.

There is also similarity between musical form and legal form. For example, Thomas proposes that music has to be in a structured form:

> A beginning, and ending, something worth saying in the middle and an overall sense of relevancy.

The same goes for the presentation of a case. Both law and music require a presentation in a form to which the listener can relate.

Finally, Thomas seeks to answer the question, raised by his own research, as to why so many talented musicians either studied or practised law. Is there some connection between legal and musical talent? He points out that the great musicians were invariably articulate and intelligent with a developed ability to present material in logical form and with interpretive skills. Thomas proposes that although there is no necessary direct connection between legal talent and creative musical skills, the study of law, which encourages the expression of ideas in logical form, must be of some assistance to a budding musician. Although, I should add that there seems to be very little evidence these days that young musical prodigies are encouraged by their parents to commence studies in law before embarking on a musical career.

The book is a highly original and well researched contribution to both law and music, which seeks to examine the nature of the creative instinct. Thomas makes the point that, contrary to popular assumption, the practice of law also frequently provides the opportunity for aesthetic creativity:

> The law is a cultural medium of expressive form, through which senses and symbols are combined, communicated and interpreted. Aesthetic dimensions exist in its expression.

There is also a very useful select discography of recommended CDs of most of the major musical pieces composed by the author's select group of "legal" musicians.

I obtained my copy from the library of the Supreme Court of Queensland.

George H Golvan QC

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