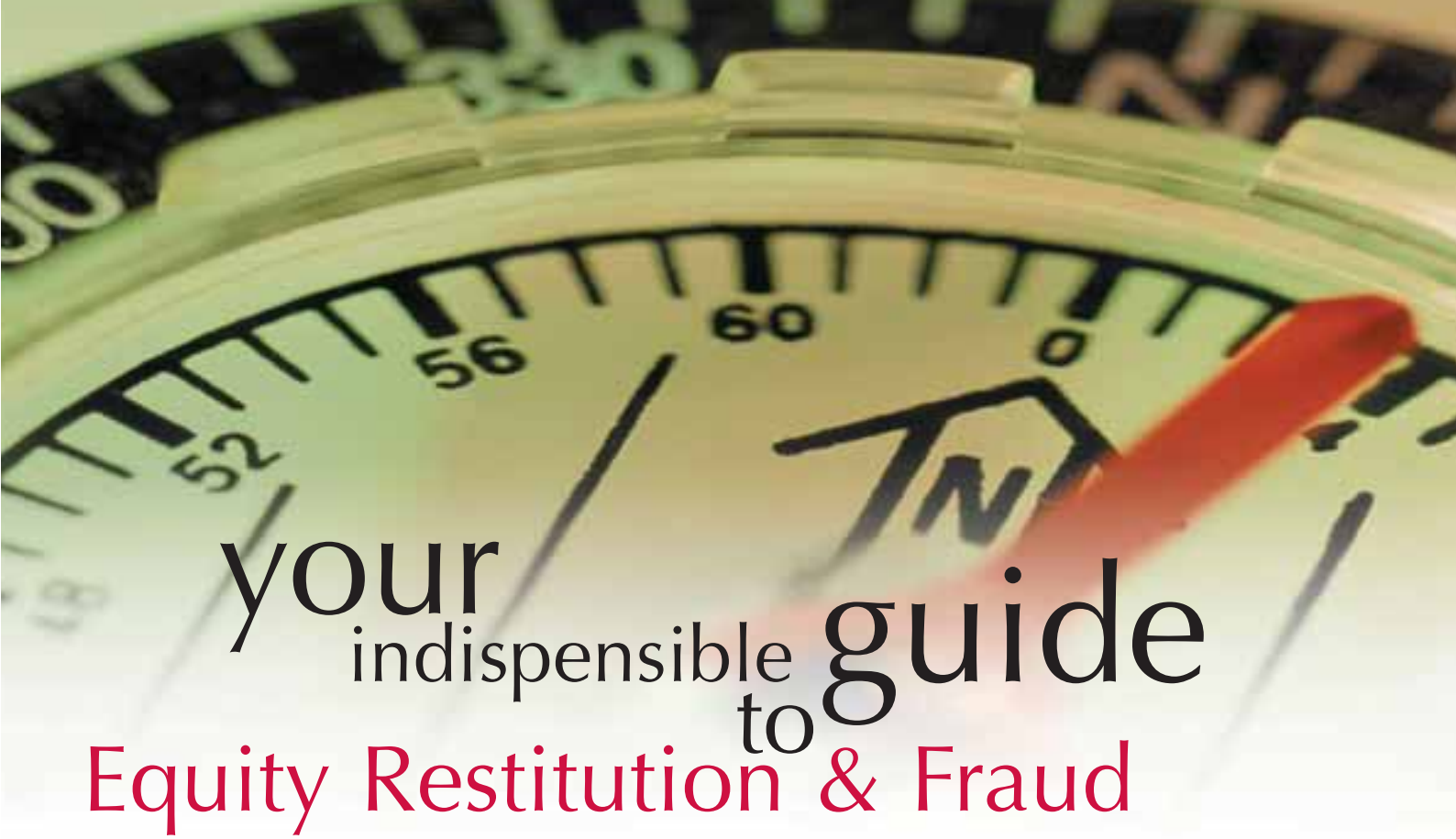
VICTORIAN BAR NEWS

No. 127 ISSN 0159-3285 SUMMER 2003

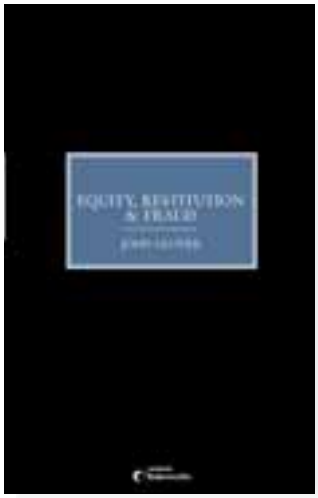
Farewell Chief Justice Phillips

Welcome: Marilyn Warren, Chief Justice of Victoria ☐ Farewell: Chief Justice Phillips ☐ Obituary: Robert Chisholm Webster ☐ 100th Anniversary of the High Court of Australia ☐ The High Court and the Death Penalty: Looking Back, Looking Forward ☐ Deciding to Kill: Jurors in Capital Trials ☐ Australian Detainees at Guantanamo Bay: Legal Twilight Zone or Black Hole? ☐ Appointment of Senior Counsel ☐ Brian Bourke Talks About 50 Years in the Law ☐ First Tenants Move Into Refurbished ODC East ☐ The Victorian Bar and its Control of the Defence Force Legal System ☐ Criminal Bar Association Dinner ☐ Irish Australian Legal Links ☐ *The Society Murders* Book Launch ☐ Give the Barrister a Chance ☐ "Bar None" Wins 4-3 Over LIV at State Hockey Centre



your indispensible guide to Equity Restitution & Fraud

DR JOHN GLOVER
BA, LLB (MELB), BCL (OXON), PHD (MON)



New Book!

Equity, Restitution & Fraud provides a comprehensive coverage of restitutionary and proprietary remedies.

This well written book traverses the boundaries between equity and remedies focusing on their strong interrelationship, and provides a scholarly analysis of the rationales and policy behind the restitutionary aspects pertaining to fraud.

Issues that are discussed include the pre-eminent actions for breach of a fiduciary relationship, unconscionability and breaches of confidence, which allow the remedial benefits of equity to intervene and mediate the rigours of the common law.

Equity, Restitution & Fraud provides in depth analysis, allowing more precise and structured arguments in court. This book will also no doubt become an essential text for students studying in the area of equity.
Price: (LIMP COVER) $130.00 inc GST (HARD COVER) $180.00 inc GST

Contents include:

To order, simply call our
Customer Relations Department on 1800 100 161

LexisNexis™

VICTORIAN BAR NEWS

No. 127 SUMMER 2003

Contents

Cover: Farewell Chief Justice Phillips (See report on pages 17–18).

Welcome: Chief Justice Warren

Farewell: Chief Justice Phillips

Obituary: Robert Chisholm Webster

Appointment of Senior Counsel

Refurbishment of ODC East

Brian Bourke Talks About 50 Years in the Law

Criminal Bar Association Dinner

Irish Australian Legal Links

The Society Murders Book Launch

'Bar None' Wins 4–3 Over LIV

VICTORIAN BAR COUNCIL
for the year 2003/2004
*Executive Committee

Clerks:

W *Brett QC, R.A. *(Chairman)*
B *Ray QC, W.R. *(Senior Vice-Chairman)*
B *McMillan S.C., Ms C.F. *(Junior Vice-Chairman)*
D Fajgenbaum QC, J.I.
G *Howard QC, A.J.
F *Dunn QC, P.A.
A *Shand QC, M.W. *(Honorary Treasurer)*
F Dreyfus QC, M.A.
G Crennan S.C., M.J.
D Beach S.C., D.F.R.
F Quigley S.C., Ms M.L. *(Assistant Honorary Treasurer)*
D Jones. I.R.
D McLeod, Ms F.M.
D Riordan P.J.
W Neal D.J.
R Doyle, Ms R.M.
D Duggan, Ms A.E.
D *Gronow M.G.R.
B Coombs, Ms D.J.
L Hannebery, P.J.
D Connor, P.X.
D Attiwill R.H.M. *(Honorary Secretary)*
D Moore Ms S.E. *(Assistant Honorary Secretary)*
G Anderson, Ms K.J.D. *(Assistant Honorary Secretary)*

Ethics Committee

B McMillan S.C., Ms C.F. *(Chair)*
H Merralls AM, QC, J.D.
S Willee QC, P.A.
S Lally QC, W.F.
P Bartfeld QC, M.
F Dreyfus QC, M.A.
G Lacava S.C., P.G.
H Lewis S.C., G.A.
F Quigley S.C., Ms M.L.
A Macaulay C.C.
M Clelland, N.J.
F Shiff, Ms P.L.
G Judd, Ms K.E.
D Riordan P.J.

Chairs of Standing Committees of the Bar Council

Aboriginal Law Students Mentoring Committee
B Kaye QC, S.W.

Applications Review Committee
W Brett QC, R.A.

Charitable and Sporting Donations Committee
D Riordan P.J.

Conciliators for Sexual Harassment and Vilification
B Curtain QC, D.E.

Counsel Committee
G Crennan S.C., M.J.

Equality Before the Law Committee
B Millane Ms F.

Ethics Committee
B McMillan S.C., Ms C.F.

Human Rights Committee
D Fajgenbaum QC, J.I.

Legal Assistance Committee
G Howard QC, Anthony J.

Legal Education and Training Committee
B Ray QC, W.R.

Past Practising Chairmen's Committee
G Berkeley QC, H.C.

Professional Indemnity Insurance Committee
A Shand QC, M.W.

Professional Standards Education Committee
S Willee QC, P.A.

Victorian Bar Dispute Resolution Committee
S Martin QC, W.J.

Victorian Bar Theatre Company Steering Committee
A Derham QC, D.M.B.

VICTORIAN BAR NEWS

Editors
Gerard Nash QC, Paul Elliott QC and Judy Benson

Editorial Board
Julian Burnside QC
Jack Rush QC
Graeme Thompson

Editorial Consultant
David Wilken

Editorial Committee
John Kaufman QC, Olyvia Nikou S.C., William F. Gillies, Carolyn Sparke, Georgina Schoff, Paul Duggan, Peter A. Clarke, Nicola Gobbo, Victoria Lambropoulos, Richard Brear and Peter Lithgow (Book Reviews)

David Johns (Photography)

Published by The Victorian Bar Inc.
Owen Dixon Chambers,
205 William Street, Melbourne 3000.

Registration No. A 0034304 S

Printed by: Impact Printing
69–79 Fallon Street,
Brunswick Vic. 3056
This publication may be cited as
(2003) 127 Vic B.N.

Advertising
Publications Management Pty Ltd
38 Essex Road, Surrey Hills,
Victoria 3127
Telephone: (03) 9888 5977
Facsimile: (03) 9888 5919
E-mail: wilken@bigpond.com

Exclusionary Behaviour at the Bar

A mauve bulletin was recently distributed to members of the Bar. It was entitled "Bulletin No. 6 of 2003 of the Ethics Committee" and it concerned exclusionary behaviour at the Bar. [Many members are madly going through their Invicta expanding files in order to find Bulletins No's 1 to 5].

It appears from the bulletin that exclusionary behaviour is defined as behaviour that demonstrates an excessive level of familiarity with the presiding judicial officer. The concern of the bulletin was the effect of such familiarity on minority groups within the legal profession and on litigants. Counsel are warned to be careful to avoid and should discourage one-sided banter or over-friendly interchanges with a presiding judicial officer when counsel is appearing in a court or tribunal. It appears the dangers are greater where counsel often appear before the same person sitting in the court or tribunal and those people somehow or other get to know each other.

The message seems to be "think before you joke" and having thought of the repercussions, especially from minority groups and the other side in the case, desist, desist. Banter and humour are not correct.

Debate has raged as to the extent to which this principle can be applied to the behaviour of barristers generally. Some have advocated that this is an overarching sociological principle that well exceeds the narrow confines of Bar Rule 83. That Rule provides as follows:

> A barrister must not in the presence of any of the parties or solicitors deal with a court, or deal with any legal practitioner appearing before the barrister when the barrister is a referee, arbitrator or mediator, on terms of informal personal familiarity which may reasonably give the appearance that the barrister has special favour with the court or towards the legal practitioner.

Those disposed to a teleological jurisprudential analysis advocate that this is the mere tip of the iceberg of the exclusionary behaviour principle. Many see this principle as a new and underlying thread of post World War II Australian society and politics. Therefore the principle can be applied in far wider areas than courts or tribunals.

Indeed concerns have been raised that the Bar Children's Christmas Party is a prime example of exclusionary behaviour albeit in the wider sociological sense. The presence of a largish Father Christmas or, as he is otherwise known, Santa Claus, engaging in banter and familiarity in the Botanical Gardens, in which acts of familiarity include the handing out of lollies and presents, may well be said to be in breach of the principle.

Concern has been expressed of the effect of such conduct both on litigants and minority groups within the legal profession. There have been grave difficulties in identifying just what are the minority groups within the legal profession. A large grant has been given to the Essoign Institute for Sociological Studies in order for researchers to identify the multiplicity of minority groups within the ongoing superstructure that is the Victorian Bar.

Counsel are warned to be careful to avoid and should discourage one-sided banter or over friendly interchanges with a presiding judicial officer when counsel is appearing in a court or tribunal.

A sociologically relevant model is being constructed as to the position and necessity of the concept of Christmas as a celebration that somehow concerns Christians. For instance, in many state schools the concept of Christmas and its ramifications can only now be considered as a festive celebration, for retailers and purveyors of hospitality.

Those visiting New York City at Christmas time would note, also, the deletion of the concept of Christmas per se as opposed to the happiness of a festive-type season.

Litigants who become aware of the behaviour of barristers and their offspring at the children's Christmas party, and the way that barristers conduct themselves thereat, may understandably make adverse inferences against counsel and conclude that counsel were indeed tak-

ing time off from pursuing the interests of litigants and that counsel were somewhat indolent and susceptible to the evils of alcoholic beverages.

Should the principle be limited to the exclusion of banter and over familiarity in court? It may well be that both litigants and minority groups, especially those on the other side, will take offence at counsel's oral and written submissions, particularly when they seem to have an effect upon a judge and to the extent that the judge is accepting these submissions, rather than those of the other litigant and the litigant's counsel. Should there be some evening up of the process whereby the less talented and clever do not feel prejudiced and left out? The mechanics for such an evening-up process are said now to be the subject of a further sub-committee of the Bar Council.

Many writers have identified a variant of the principle which has been termed: "reverse exclusionary behaviour".

This principle occurs where the behaviour of a minority can be seen to be exclusionary in that it excludes the majority. The ramifications of the Republican referendum can be seen as such an example. Some have said [although perhaps a minority] that the majority of Australians, and indeed every State in Australia, voted to retain a Constitutional Monarchy. It could therefore perhaps be said that the majority of Australian voters prevailed. This of course has led to reverse exclusionary behaviour in the form of the abolition of the title of Queen's Counsel and the multiple deletion of the words "Crown, Queen, and Monarch" throughout the State of Victoria.

So there is a salutary Christmas warning to those out there who engage in banter, familiarity and humour. It may well also be a warning to those who consider themselves to be in the majority. Beware — do not appear to be too funny or clever. You may be counselled for exclusionary behaviour.

WE WERE WRONG

As many avid readers noted, the photograph appearing at page 35 of the Spring edition did not depict David Shavin QC, Pamela Tate S.C. and Colin Golvan S.C. as indicated by its underlying caption. Indeed the photograph was of Viviene Fajgenbaum and Diana and Jeffrey Sher QC whose photograph did in fact appear underneath and whose photograph therefore appeared twice on the page. We apologise for any hurt and upset occasioned to those concerned. The error occurred because of a technical fault at the printers, not that of the Editors. The publishers and printers of the *Bar News* therefore apologise and not the Editors. Any other errors discovered in the last edition are hereby disclaimed by the Editors as they were the product of spel-cheque and others.

The Editors

The Real …

David Shavin QC, Pamela Tate S.C. and Colin Golvan S.C.

A Year of Change — and More to Come

CHIEF JUSTICE PHILLIPS

ON 18 October, John Harber Phillips retired as Chief Justice of Victoria. For over 10 years His Honour served as a member of the Bar Council and as a member of numerous Bar Committees. He was Chairman of the Criminal Bar Association. In a remarkable career of public service, His Honour was the first Director of Public Prosecutions in Australia. He was a Justice of the Victorian Supreme Court for six years, and then served as Chairman of the National Crime Authority also holding a commission as a Justice of the Federal Court. His Honour returned to Victoria as Chief Justice and served with distinction, grace and dignity for 12 years. The Bar wishes His Honour well in his retirement from the Court and his appointment as a Professor and the Provost of the Sir Zelman Cowan Centre of the Victoria University.

CHIEF JUSTICE WARREN

The appointment of Justice Marilyn Warren as the eleventh Chief Justice of Victoria has been greeted with universal acclaim. It is certainly of historical significance that Her Honour is the first woman to be Chief Justice of any Australian jurisdiction. However, as I observed at the ceremonial welcome, what is important about Her Honour's appointment is that she is an excellent lawyer and an excellent judge. She has extensive and detailed knowledge of the practice of law in Victoria, and of the structure and operation of the Victorian courts, particularly the Supreme Court. Her Honour has qualities of leadership and purpose, and a belief in the need to do justice that will serve Victoria and the Court admirably in the years to come.

SENIOR COUNSEL

Appointment as Senior Counsel is an important public recognition of high professional ability and achievement. I extend warmest congratulations to the 21 people appointed Senior Counsel on 11 November and wish them every success in this new stage in their professional careers.

The Attorney-General has announced that the State Government will not in future be involved in the appointment of Senior Counsel. This raises important issues for the Bar. The first question is whether the institution of Senior Counsel should be retained at all. Then, if the office is to be retained, there are a number of complex questions that arise about the manner in which Senior Counsel should be appointed.

I observe that the New South Wales Bar Association has been appointing Senior Counsel in that State for a number of years.

The Bar Council has appointed a subcommittee to explore the various questions. It will of course be necessary for decisions to be made early next year, in time to put new arrangements in place if it is decided that the office should be retained.

LEGAL PRACTICE ACT REVIEW

An Implementation Group established by the Attorney-General to work with the Department of Justice on developing legislation to implement the new framework for regulation of the legal profession in Victoria has begun work. The Group includes representatives of the Bar, the Law Institute, VCAT, the Legal Profession Tribunal, the Legal Practice Board, the Legal Ombudsman's Office, the Community & Public Sector Union, and the Federation of Community Legal Centres.

The Implementation Group first met on 12 November. The Group's deliberations are confidential. Since then, Justice Department members of the Implementation Group have met with Kate McMillan S.C., the Chair of the Bar Ethics Committee, and Debbie Jones, the Ethics Committee Investigations Officer, to discuss procedures for handling complaints and disputes.

The Department of Justice has advised the Implementation Group that it will be very busy in January and February 2004 considering the proposed changes and reviewing drafts of the new Act. The Department's plan is for the revised Act to be tabled in Parliament in May 2004, although it is likely that many of its provisions will not take effect until 2005.

ACCOMMODATION

A matter that has been much discussed by the Bar Council is the current shortage of Barristers' Chambers Ltd accommodation. The Bar Council and BCL have established a joint Accommodation Committee with representatives from both bodies. That Committee has evaluated the results of the Bar Council September accommodation survey of all counsel of less than

"What is important about Her Honour's appointment is that she is an excellent lawyer and an excellent judge."

three years call, the results of which were reported in the 7 October 2003 issue of In Brief.

A meeting was held of all counsel under three years call to discuss the issues. The meeting was chaired by Jack Fajgenbaum QC, and I attended along with numerous members of the Bar Council and the BCL Board.

The immediate difficulty is that, until the renovations of Owen Dixon Chambers East are complete, there will be at all times approximately 75 sets of chambers unavailable for occupation. The work is proceeding three floors at a time, so the chambers on those floors are unavailable. As soon as one group of three floors is completed, another three floors are made unavailable, and work commences on them. The final three floors will not be complete until the end of 2004.

There will be some limited relief in about April 2004, when the 6th floor of Joan Rosanove Chambers becomes available. This will provide about 15 rooms. These 15 rooms, plus the approximately 75 that will become available in Owen Dixon Chambers East in late 2004, will mean that in about a year there will be a total of about 90 more BCL rooms than there are now. This should make a considerable difference; but in the meantime, there is a shortage.

BCL is continuing to look for temporary accommodation. BCL is, however, under very great financial constraints due to the cost of the renovation, and these constraints have so far ruled out all of the locations considered. Counsel seeking chambers are also looking privately and keeping BCL apprised of their efforts. The Accommodation Committee and the Bar Council continue to monitor the situation. All applicants to sign the Bar Roll are now being advised that there may not be BCL accommodation available to them at the conclusion of their reading period.

As previously advised, the Chambers Sharing Rules have been relaxed to alleviate the situation, and a number of barristers are now sharing chambers. Processes are being developed to enable the Readers' Centre video review rooms and moot court rooms to be used as temporary chambers when they are not needed for the Readers' Course (eg., to enable barristers sharing chambers to conduct interviews and conferences).

The immediate difficulty is that, until the renovations of Owen Dixon Chambers East are complete, there will be at all times approximately 75 sets of chambers unavailable for occupation. The work is proceeding three floors at a time, so the chambers on those floors are unavailable.

READERS' COURSE

I congratulate and welcome the 41 people who successfully completed the Readers' Course recently. They signed the Bar Roll or, in the case of our overseas reader from Papua New Guinea, the Roll of Overseas Practitioners, at the Bar Council meeting on 20 November.

The Readers' Course has, for some time now, had more applicants than places. However, until the recent September 2003 intake, we have, in the end, been able to offer places to everyone on the waiting list — there have been withdrawals, and we have occasionally added one or two extra places over the standard class of 40. For the September intake, however, there were for the first time 12 people on the waiting list to whom the Bar Council could not offer a place. It is not yet clear whether this is a "one off", or whether there will be more applicants than places in the longer term. There are very long waiting lists for the March and September 2004 courses. The Bar Council is monitoring the situation and considering various remedies.

CONTINUING LEGAL EDUCATION

Last June, following careful consideration of all the issues raised in the submissions received from Bar Associations and individuals, the Bar Council resolved unanimously in favour of the extension of mandatory CLE to all practising members of Counsel. This will be introduced next year.

The Bar is indebted to the Honourable Justice Geoffrey Nettle who chaired the committee for the establishment and conduct of the Victorian Bar Continuing Legal Education Program. That committee has now reported to the Bar Council with a detailed and comprehensive proposal for a CLE program for 2004. A small committee of the Bar Council is working on the details of implementing compulsory CLE.

EQUAL OPPORTUNITY

The Bar Council continues to work on this important issue. Much has been achieved. Women barristers have volunteered for service, and there are good levels of participation by women barristers on all Bar Council committees and in Bar appoint-

ees to external bodies and committees. Women barristers are also well represented on the various List committees. More women barristers are coming to the Essoign Club. There seems to be a higher level of integration of women in the life of the Bar generally.

However, as already noted, the August 2003 Equality Before the Law Committee Survey Report shows that women barristers are disproportionately under-represented in court, particularly in more senior work. Moreover, the Victorian Department of Justice has reported that, in 2002–2003, 16 government panel law firms briefed 58 barristers for 106 matters. Although 17 per cent of the work went to women barristers, they earned only 6 per cent of the fees.

The Standing Committee of Attorneys General, at its November meeting, asked the Law Council of Australia to formulate a model national Equal Opportunity briefing policy. It also endorsed the principle of government entities engaging in legal services having regard to equal opportunity, and agreed that each jurisdiction is to report at the next SCAG meeting in March 2004 on any impediments in their existing briefing practices or otherwise to the achievement of equitable briefing outcomes.

ADVOCACY WORKSHOPS IN PAPUA NEW GUINEA

Since 1990, the Bar has been conducting intense advocacy workshops in Papua New Guinea. These workshops constitute a very significant contribution by the Bar, and the members of the Bar who participate in them, to the law and administration of justice in Papua New Guinea. Barbara Walsh is the driving force in organising these workshops and attends them all. I wish to recognise members of the Bar who have participated in the four workshops that have taken place over the last 12 months:

October/November 2002: Workshop for Government Lawyers — Ross Ray QC, Paul Coghlan QC, Michael Tovey QC, and Martin Grinberg.

May 2003: Advanced Workshop for Government Lawyers — The Honourable Justice Eames, The Honourable Justice Coldrey, Ross Ray QC, Robert Taylor and Paul Lawrie.

October 2003: Pre-Admission Course at the Legal Training Institute — The Honourable Justice Eames, Paul Coghlan QC, Geoffrey Steward and Julie Condon.

November 2003: Specialist Course for the Ombudsman's Commission of Papua New Guinea in relation to the Leadership Code for Lawyers from the Ombudsman's Commission and Specialist Public Prosecutors, including participants from Fiji and Vanuatu — The Honourable Justice Harper, Michael Tovey QC, Martin Grinberg and Ronald Gipp.

The PNG Ombudsman's Commission presented the Bar with a portrait of a tribal warrior, which is now framed and hanging in the Neil McPhee Room. These workshops are deeply appreciated. The Bar has been asked to conduct another three such workshops next year.

SUBMISSIONS

Recent submissions made by the Bar Council include submissions on and to: The Senate Inquiry into Legal Aid; VicRoads Proposals for a Road Management Bill; the Commonwealth Attorney-General's Office Federal Civil Justice Strategy Paper; the Victorian Law Reform Commission Interim Report on Sexual Offences; the Victorian Parliament Law Reform Committee Discussion Paper on Administration of Justice Offences; a joint submission with PILCH to the Migration Litigation Review; and numerous pieces of State legislation including, significantly, the Wrongs and Other Acts (Law of Negligence) Bill. The Criminal Bar Association, Common Law Bar Association, Family Law Bar Association and Commercial Bar Association, and many individual members of the Bar contribute substantial time, effort, experience and expertise in the preparation of these submissions.

COMPLIMENTS OF THE SEASON

I wish fellow members of the Bar the compliments of the season, and all the best for the coming legal vacation.

Robin Brett QC
Chairman

Substantial Investments in Victoria's Court Infrastructure Reviewed

THE subject of court infrastructure would rarely be described as scintillating. The presence of facilities in which the law is administered is, to many minds, a bread and butter topic, the territory of engineers and architects, rather than those who conduct their business within its walls.

I believe, however, that this view underestimates the value of a properly functioning court house. It fails to understand the message that the presence of a court sends its surrounding community about the importance of access to justice.

I believe, instead, that a court presence is vital if a community is to feel it can access the law and that its right to the protection that the law offers is cherished. I believe that ordinary Victorians forced to travel long distances to a remote location for their matter to be heard will feel alienated from the system and its capacity to deliver meaningful justice. In particular, I'm convinced that, too often, it is the people most in need of a court's assistance, such as victims of family violence, who are the least able to access its services unless it is located at a site they can easily access.

This is why the Bracks Government has a policy of no court closures. This is why, for example, the Moonee Ponds Court remains open for court business one day a week for family violence matters rather than these matters being heard at a busier court that is difficult for women with children using public transport to access. This is also why we are being creative, facilitating opportunities for local community groups within the surrounding area to use these facilities on the days that the court is vacant.

However, the mere presence of a courthouse in a central location is no longer sufficient. A court in 21st century Victoria must be capable of truly administering justice, and of "representing" justice, signalling that justice is a priority and that

the rights and responsibilities of the surrounding population are taken seriously.

What does this mean, then, in practical terms? As someone who practised for five years in the rough justice of Northern Queensland I saw first hand what it does not mean. It does not mean having court hearings conducted in police stations, nor does it mean client interviews being conducted under the shadiest tree within earshot of the coppers. It means space, consideration and forethought. It means a holistic approach that incorporates the breadth of services that we now understand as essential to a just and equitable legal system. It means recognition of the diverse needs and vulnerabilities of court users and acknowledgment of the security considerations required in this era of heightened anxiety.

A court in 21st century Victoria must be capable of truly administering justice, and of "representing" justice, signalling that justice is a priority and that the rights and responsibilities of the surrounding population are taken seriously.

Long gone are the days of a single courtroom and a couple of interview cupboards. Gone, too, are the days of the brown brick box, its occupants slowly roasting while they do their best not to step on each other's toes.

Instead, the Bracks Government is building new courts that barely resemble the old, courts that are required to have appropriate disability access to every part of the building and courts that use natural light, space and air conditioning to ease the suffocation of a tense court experience.

The courts we are building have facilities for all associated support networks and restorative justice programs that this Government is developing to return meaning and effectiveness to the coal face of the law, such as the CREDIT bail program, diversion programs, disability liaison officers, Koori liaison officers, and Koori Court, Drug Court and, eventually, Family Violence Court.

The courts this Government is building are also designed to maximise efficient administration, secure transfer of prisoners, access to Sheriffs and Community Correctional Services and of course to ensure secure facilities for witnesses to give evidence via video link and secure and separate entrances for victims of violence and for Children's Court users. In short, the Bracks Government is in the process of building state-of-the-art facilities.

Just as importantly, however, we are building courts where they are most

needed. On coming to office four years ago the Bracks Government immediately recognised that rural and regional Victoria were crying out for justice facilities. Long neglected court houses at Mildura and Warrnambool, for example, could only be described as third world, and the La Trobe Valley was in desperate need of a superior facility in a central location that could accommodate the heavy circuit traffic that the region attracts.

Accordingly, this Government is making a $15 million investment in the Warrnambool community, with a state-of-the-art facility being built next to the recently constructed police station, and a $16 million investment in the Mildura community, with construction there well under way. In addition, the $25 million La Trobe Valley Police and Courts complex project includes a multi-jurisdictional six-courtroom complex, a 24-hour Police Station and Divisional Headquarters, and offices for Community Correctional Services and the Sheriff's Office.

These exceptional court facilities will make an enormous difference to access to justice in their surrounding areas, as will the upgrades of the Bendigo, Wangaratta and Horsham court houses to improve jury and staff facilities, disability access and increase the comfort of staff and court users alike via the installation of air conditioning and additional amenities.

Finally, of course, readers will be aware of the gaping hole left in the south-east region of Melbourne's suburbs by the closure of the beloved Prahran Court. On coming to office the Bracks Government conducted a comprehensive study which indicated that population growth and the urban sprawl had changed the dynamics of Melbourne's south-east and that this catchment area would benefit most from a new court facility in the Moorabbin area. Consequently the Government is in the process of identifying the most appropriate site and expects to commence construction of a 21st century courthouse for Melbourne's south-east as soon as possible.

It is up to all of us, in the profession and in Government, to advocate not only for the immediate interests of our clients but for the interests of the legal system as a whole, and court infrastructure plays a significant part in this campaign. I wish all of you a safe and happy Christmas, and wish you well for an accessible and just 2004.

Rob Hulls
Attorney-General

Discrimination in the Law

Inquiry under section 207 of the *Equal Opportunity Act 1995*

Call for Submissions

The Scrutiny of Acts and Regulations Committee is an all-party Committee of the Victorian Parliament. The Committee is currently inquiring into provisions within Victorian Acts and enactments (other than Council by-laws or local laws) that have the effect of discriminating or leading to discrimination against any person.

The Committee invites comments or submissions from all interested persons identifying possible discriminatory provisions. The comments or submissions may also address whether these laws should be retained, amended or repealed.

Background

The objectives of the *Equal Opportunity Act 1995* (the 'Act') include to -

- promote recognition and acceptance of everyone's right to equality; and
- eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes. The attributes are listed in section 6 of the Act.

Section 207 of the Act provides that 'The Minister must cause a review of all Acts and enactments (other than municipal council by-laws or local laws) to be undertaken for the purpose of identifying provisions which discriminate, or may lead to discrimination, against any person'.

Discussion Paper

The Committee has prepared a Discussion Paper to assist persons or organisations wishing to make comments or submissions. Copies are available from the Committee Office, on the internet **www.parliament.vic.gov.au/sarc** or by phoning Sonya Caruana on (03) 9651 3614. An e-mail copy may be obtained by request made to - sonya.caruana@parliament.vic.gov.au

A person with an impairment or disability may make a comment or submission by audio tape or another agreed method, or through a friend or advocate.

Further information about the inquiry process and timetable may be obtained by contacting the Senior Legal Adviser, Andrew Homer on (03) 9651 3612.

Comments or submissions should be received by 1 June 2004 addressed to -

Lily D'Ambrosio MP
Chairperson,
Scrutiny of Acts and Regulations Committee,
Level 8, 35 Spring Street, Melbourne 3000

hmaBlaze 063303

Chief Justice of Victoria, Maril Ceremonal Sitting held in the

Chief Justice Warren presiding.

Rob Hulls
Attorney-General

MAY it please the Court.

It is my very great privilege to welcome Your Honour to the most senior judicial post in the State.

Of course, it is an enormous honour, as Attorney-General, to be involved in the appointment of Victoria's judges. However, with this privilege, comes a duty to appoint the best and brightest to our benches, one which is particularly acute in the context of the appointment of a Chief Justice. The Supreme Court of Victoria is one of Australia's greatest common law courts and of course this State's superior jurisdiction.

This proud history must be preserved and enhanced through the appointment of judges of the highest calibre, and I take this opportunity to observe that Your Honour is the first to be appointed from an unprecedentedly wide pool of candidates. No doubt those in attendance here today will have their opinions about the Government advertising for expressions of interest and recent legislative amendments to expand the pool of candidates for appointment even further. Nevertheless, Your Honour's appointment from this extended assembly is, in my view, a particular vindication of your suitability for this office.

SIGNIFICANCE OF APPOINTMENT

Others here this morning will speak of Your Honour's career — the administrative, policy and interpretative skills honed in the Public Service, your wide and expert practice at the Bar, your distinguished years on the Bench.

Others may also speak of Your Honour's interests outside the law, including your energetic pursuit of bushwalking, bike riding and squash, as well as the ghetto-blasting 1812 overture played by you on route to circuit courts. I could, but will not, touch on those days in the 1970s

yn Warren welcomed at a Banco Court, 1 December 2003

when our paths almost crossed, when you were a chef at the Elsternwick Hotel, churning out some 300 meals a night and around the same time I was a plate cleaner and glass washer at the same pub.

Instead, what I would like to speak about this morning is the importance to Victoria of Your Honour's acceptance of this position. It is, of course, undisputed that Your Honour was a standout candidate for this position. It is equally certain that Your Honour will be an exemplary leader of Victoria's courts. It therefore should be of no consequence that Your Honour is a woman.

However, as Your Honour has so humbly acknowledged, it is of significance that you are the first woman to be appointed to this office and, as many women practitioners have already indicated, it will transform the landscape of Victorian justice, women practitioners now realising that it is possible for them to aspire to the most significant legal office in this State.

Like Your Honour, I too wish that there had been others. Like Your Honour, I wish that this occasion were remarkable only for Your Honour's unquestionable talents, and that a woman's gender went completely unnoticed upon her appointment to any senior post. However, as Your Honour has pointed out on a number of occasions, it is an undeniable reality that women continue to confront barriers to their professional progression and that women and minorities continue to be underrepresented within the leadership of the law. Given, then, that Your Honour has spoken so candidly in the past about the importance of 'keeping gender on the agenda', I feel it incumbent upon me, on behalf of a community that deserves the participation and energy of all its legal profession, to make a few remarks in this regard.

LEVELLING THE PLAYING FIELD

I have said this many times before, Your Honour, and I will continue repeating it. I believe in appointing the best and the brightest to office on the basis of merit, rather than homogeneity. This means, that rather than falling into the trap of assuming that the new must resemble the old, this Government casts its net wide and searches for individuals who possess the breadth of skills, experience and perspective that will benefit the Court and the community as a whole. We would therefore be failing in our duty to the administration of Victorian justice if we did not ensure that every possible candidate is brought to our notice, rather than just the usual assortment which convention automatically reveals.

I would like this Court, and the profession, to understand that I do not encourage women to accept senior positions as some sort of token gesture. I do not do it to be paternalistic. Nor do I do it solely in the pursuit of equality, although this is a good in and of itself. My reasons are at once more extensive and more selfish than that.

Your Honour, I want to be Chief Law Officer in a legal system that benefits from the expertise and talents of all its members. It seems obvious to me that the diversity of a population should be reflected in those who adjudicate over it. It also seems obvious to me that the qualities and expertise that the community requires in its adjudicators will not be exclusively housed in one particular group of individuals.

Yet, those who, like me, take this view continue to be charged with conspiracy theories, and those women who accept appointment continue to be measured against some sort of paternalistic yardstick, required to jump higher and faster than any male candidate lest they be labelled an undeserving token.

It is at this point, Your Honour, that I cannot hide my disappointment in some quarters of the profession who persist in undermining women in senior office, referring to them in patronising terms or ranking them in some sort of unspoken contest in which, I suspect, they themselves would not fare well.

Attorney-General, Rob Hulls.

It seems that the complexities, and the subtleties, of issues of gender are lost on some otherwise capable intellects. As a consequence, they are unable to appreciate that, in pursuing the interests of the legal system, ensuring that women are considered for appointment and encouraging the profession to provide opportunities for women to shine and gain experience, we must acknowledge the barriers that women have traditionally faced.

In doing so we are not, as some would have it, doing women any favours. Nor are we appointing women beyond their capabilities. We are simply trying to lift the curtain of invisibility, of direct and indirect discrimination, of baseless assumptions, paternalism and the invidious and territorial fear of difference that greets women at the door of the profession. We are, in short, simply ensuring that, where women were overlooked in the past because of this invisibility, they are considered — on their merits as competent and capable professionals, and on an equal footing with their male colleagues.

I was therefore heartened to read Your Honour's comments urging senior women to encourage and assist those women who come behind them, and urging them to accept appointment to senior posts as a duty to their gender, asking, if these women do not accept appointment, who will? Your Honour's comments also confirmed my suspicions that women continue to need to hear these specific calls of encouragement, as the tides of discouragement are strong.

Your Honour, I do not apologise for my commitment to ensuring that women are considered for appointment, and I grow increasingly impatient with the small-minded, unimaginative and presumably idle, who think that, in doing so, I am undermining them and their kind.

CONCLUSION

Despite the new horizons that Your Honour's appointment represents, Your Honour is Victoria's 11th Chief Justice because you have a unique blend of experience, expertise, vision and human qualities. These qualities and expertise are present because of Your Honour's abilities as an individual, and because of the particular professional path you have walked. Your Honour is, in short, an eminent jurist, and will be an unparalleled and inspirational leader of this Court.

Everyone present will have been struck by the humility with which Your Honour has responded to this appointment, and no doubt you would be reluctant to reflect on the legacy that Your Honour will carve over the coming years. However, I think it pertinent to note that, on being appointed to the Court five years ago, Your Honour was welcomed by the Bar with the words "We at the Bar look forward to the days of the Warren Supreme Court in this State", alluding, of course, to the Warren Court of the US, which was known for its landmark decisions and focus on the rights of the individual and minorities.

This remark, it seems, was prophetic, and I too look forward to the days of the Warren Supreme Court that lie ahead for Victoria. May it please the Court.

Robin Brett QC Chairman

MAY it please the Court.

On behalf of the Victorian Bar I extend warmest congratulations to Your Honour upon Your Honour's appointment as Chief Justice of Victoria.

Five years ago, at Your Honour's welcome to this Court, Your Honour said of the Court as it was about to enter the new millennium: "The time will bring change and innovation. I embrace the opportunity and the challenge." The Bar looks forward with confidence to Your Honour leading the Court, as Chief Justice, as it takes that opportunity and meets that challenge.

This year, Your Honour's address to Victorian Women Lawyers was an important contribution to the continuing discussion of Equality of Opportunity for women in the law. It reflected Your Honour's personal experience, determination and positive attitude, as well as Your Honour's grace and good humour.

In that address, Your Honour identified and described the five ages of women.

The first age was "the young wild years until reaching 20", In Your Honour's "young wild years", Your Honour was educated at Kilbreda College and began the combined Jurisprudence and Law course at Monash University. That certainly covers the "young" part of the description; but I have not heard particulars of the experiences that led Your Honour to decide that the word "wild" ought to be applied as well.

In the early part of the "outrageous and exciting years until 30", Your Honour completed the law course and served articles with Mr John Cooke, the solicitor to the Public Trustee. Your Honour became a legal officer, and then a senior legal officer, in that office. At the end of that decade of Your Honour's life, Your Honour was a legal officer in the Policy and Research division of the Law Department.

The thirties were called by Your Honour the "energetic and ambitious years until 40", For Your Honour, the first half of these years saw Your Honour become Senior Legal Policy Advisor to the Attorney-General, the Victorian Officer on the Standing Committee of Attorneys-General, and an Assistant Chief Parliamentary Counsel. Your Honour also earned the Master of Laws degree at Monash.

Your Honour then came to the Bar, and read with Chris Canavan. Your Honour

Bar Council Chairman, Robin Brett QC.

rapidly developed a strong and successful practice, particularly in commercial and town planning law — for Your Honour, an energetic and ambitious ten years indeed.

The "cool, calculating and driven years until 50" saw Your Honour' practice continue to develop, to the point where Your Honour took silk in 1997.

Not long before Your Honour took silk, Your Honour appeared as junior to Bernard Bongiorno QC, as His Honour then was, before the High Court in *Pyrenees Shire Council* v *Day*. On that occasion there were two cases heard together, involving non-feasance liability of a public authority in negligence. The five members of the High Court all reached the same result in *Day* (the council lost), and decided 3–2 against the council in the companion case, and delivered five different sets of reasons.

One member of the Court in that case, asked privately if he understood the decision, said that of course he understood his own judgment, but he was not sure about the decision as a whole. Justice Bongiorno credits Your Honour as the only person he knew who was able to explain and reconcile all five judgments in *Pyrenees Shire Council.*

In addition to a substantial and successful practice, Your Honour served as a member of the Bar Council's Law Reform Committee for eight years from 1986 to 1994, and continued to provide assistance to the Bar Readers' Course, conducting town planning moots. Your Honour had two readers, Grevis Beard and David Loadman, who became a magistrate and, more recently, Chairperson of the Lands & Mining Tribunal in Darwin.

In 1998 Your Honour was appointed as a justice of this Honourable Court.

Your Honour very quickly became known as an excellent trial judge, who runs a very pleasant and efficient court. Your Honour's judgments are clear, logical and elegant. A significant number of them have been reported.

Your Honour' first reported case was *Equuscorp Pty Ltd* v *Lloyd.* Your Honour heard that case on 27 October, 1998, only two weeks after Your Honour's appointment to the Court, and gave judgment six weeks later, thus establishing that Your Honour possessed another attribute of a good judge: the ability to make a decision.

Your Honour's other reported cases are in a variety of areas of law, including wills and trusts; restitution; unjust enrichment; breach of confidence; limitation of actions; and, in the *Computershare* cases, discovery, confidential information, and legal professional privilege, as well as jurisdictional cross-vesting.

A number of Your Honour's cases have had considerable commercial significance, including the complex *Ansett Superannuation* and *Disctronics* cases.

Your Honour's good humour on the Bench was demonstrated in a recent building case, heard in Court 13. The acoustics are not what they might be in that court, and the female shorthand writer, seated beside Your Honour, was having difficulty hearing a witness. Counsel said to the witness, "Just concentrate on the lady up there." Your Honour responded, "Which lady?"

In Your Honour's five years on this

Court, Your Honour has sat in every aspect of the jurisdiction of the Court, including the criminal. Your Honour has won high praise as a judge and judicial administrator. For three-and-a-half years, Your Honour headed the Commercial List with great distinction, helping to re-establish this Court as a court of choice in commercial matters.

Your Honour has also recently completed a term on the Court of Appeal, hearing cases involving criminal law, planning law and defamation, including the *Popovic* appeal.

It might seem from this recitation of achievement that Your Honour's life has consisted of nothing but work. That is far from the case. Your Honour has been married for many years to Mick Healy, and you have two grown children, Jack and Rose.

Your Honour has as neighbours a large number of lawyers and other professionals. They include silks and other judges. The fact that the neighbourhood contains so many eminent professionals prompted another neighbour, a journalist, to exposed in a daily newspaper what other residents put out for rubbish or recycling. He contrasted the mineral water bottles of the physician with the grape juice bottles of a psychiatrist, and the whisky bottle outside a barrister's house with "the big shock" of numerous red wine bottles and flattened beer cans outside a certain judicial residence – not Your Honour's residence.

Your Honour is fond of music, especially opera. Your Honour has always been an active sportswoman. You were a champion squash player. For years, Your Honour has ridden a bicycle to work. Indeed, barristers in adjacent chambers marvelled at Your Honour's daily swift transformation from somewhat outlandishly-attired cyclist to immaculate barrister. As a judge, Your Honour has continued to cycle to Judges' Chambers.

Your Honour had an outstanding career at the Bar, and has been an outstanding judge of this Court. Your Honour's appointment as Chief Justice was announced on 25 November, 2003, six years to the day from Your Honour's appointment as one of Her Majesty's Counsel.

After the age of 50, Your Honour said in the speech to which I have referred, "women assume experience and wisdom that is an untapped resource", Fortunately for justice in Victoria, Your Honour's experience and wisdom is employed to the full.

Several facts concerning Your Honour's appointment have received considerable attention. One is that the position was advertised — in a very sober and dignified manner, it must be said.

No-one can quarrel with the proposition that in appointing the Chief Justice of the State, it is essential for the best person for the job to be found. If calling for expressions of interest is thought to assist the search, there can be no objection to it. The fact that unsuitable persons might apply can do no harm. And the fact that some very suitable persons might not answer the advertisement is also not a good reason for not advertising, so long as the fact that a person does not answer does not rule him or her out of consideration, and is not taken to count against him or her.

The Supreme Court is the superior Court of Victoria with unlimited jurisdiction. The Chief Justice of Victoria is the leader of that Court. The Court is the keystone in the system of judicial administration in the State of Victoria.

Of course, there is no doubt that unsuitable persons may well be tempted to apply. I have heard on reasonably reliable authority that a particularly enthusiastic response was received from an employee of the Kentucky Fried Chicken organisation. I don't believe that he or she made the shortlist.

Whether the position is advertised or not, what is of fundamental importance is that its essential requirements are kept foremost in the mind. The Supreme Court is the superior Court of Victoria with unlimited jurisdiction. The Chief Justice of Victoria is the leader of that Court. The Court is the keystone in the system of judicial administration in the State of Victoria. To lead the Court the Chief Justice must have extensive, detailed knowledge of the practice of the law in Victoria and the structure and operation of the Victorian courts, particularly the Supreme Court.

While it is theoretically possible that a person may exist in the world of business, or in the academic world, or in another State, who possesses such extraordinary qualities that he or she stands out as the best person for the office, it is, in the nature of things, very highly likely that the best person will be found among the practising Victorian legal profession or the current judges of a Victorian court. The Victorian Bar is not at all surprised that the best person was found in the most likely place.

The fact that has been most remarked about Your Honour's appointment, at least in the press, is that Your Honour is a woman. Justice Rosemary Balmford, who recently retired as a judge of this Court, reflected at her farewell on her long career in the law, and on the fact that she was, at the outset, one of very few female practitioners. Her Honour said that one thing that she was particularly pleased about was that women in the law are no longer unusual. One would not have thought so in the days since Your Honour's appointment.

It is somewhat surprising that so much has been said about a characteristic of Your Honour's that is, after all, shared with 50 per cent of the population. And it is not Your Honour's gender that the Victorian Bar wishes to remark. That is not what is important about Your Honour's appointment. What is important is that Your Honour is an excellent lawyer and an excellent Judge, and more than that, that Your Honour has qualities of leadership and purpose, and a belief in the need to do justice, that will serve the Court admirably in the years to come.

Your Honour's namesake, Earl Warren, was Chief Justice of the United States from 1953 to 1969. High on the façade of the Supreme Court building in Washington are the words "Equal Justice Under Law". Every one of those words is important. The success of Your Honour's Chief Justiceship will be measured by the extent to which the Court is able, under Your Honour, to do equal justice under law.

The Victorian Bar wishes Your Honour long and satisfying service in the high office of Chief Justice of Victoria. We thank Your Honour for accepting it, knowing the dedication it requires.

May it please the Court.

Supreme Court

Chief Justice Phillips

JOHN Harber Phillips has stepped down after 12 years as Chief Justice of the Supreme Court of Victoria.

His tenure as Chief Justice saw the introduction of the Long Cases List and of the Major Torts List. He introduced the Pegasus Task Force and Pegasus II, designed to reduce delays in criminal proceedings. The Portals mediation initiative, which committed the court to court-appointed mediation, was his initiative. He oversaw the creation of the Court of Appeal and the creation of Divisions of the Court.

Under his aegis the Supreme Court acquired the old High Court building and also the premises at 436 Lonsdale Street, and much of the Supreme Court was refurbished, in particular the dome of the Supreme Court library and courts 10 and 13. Court 13 was not only refurbished to become one of the most beautiful — if not the most beautiful — courtroom in Australia but it was also designed to use computer technology to facilitate the presentation of complex documentary trials.

These achievements have to be seen in their historical context. As the President of the Law Institute of Victoria, Mr O'Shea pointed out at His Honour's farewell:

> Upon welcoming Your Honour's appointment as Chief Justice in January 1992, my predecessor, Gail Owen, did not mince her words. She described the legal system of the day as being under attack. She berated the courts for lengthy delays and cumbersome practices. She laid down the gauntlet by declaring, "it will be during Your Honour's stewardship that changes will need to be made". She went on to say that these changes may be unpalatable but urged Your Honour to implement them in a way that does not bring the law into disrepute. At that time: "Public trust in the judiciary was at a low ebb … It was a time of economic and social uncertainty. The court system was regarded as out of touch with the community. Judges themselves were regarded in some cases as aloof and even elitist."

John Phillips did not see his official duties as ceasing when the court rose at 4.15, or when he put his pen or dictaphone down at 9 or 10 at night, or when he had finally digested the papers for the next day's case. He saw the role of the Chief Justice as an outgoing one. The Court had to be seen as part of the legal profession and as part of the wider community.

He was of the view that the public should know and understand the courts, and with this in mind he introduced Open Days during which he personally conducted public tours of the court explaining to members of the public the functions of the court and its history.

He was and is a true member of the community and of the profession. He consistently (and apparently enjoyably) attended annual meetings and conventions organised by regional law societies. He participated in general community activities. He was both a willing performer and a willing audience at legal conventions, plays, skits and the like. He presented well researched lectures and talks on topics of general interest, including in particular his beloved Ned Kelly.

On one occasion he attended a Law Institute conference at Portsea at which black tie was the uniform for the formal dinner. Unfortunately His Honour had failed to pack any footwear more elegant than desert boots. Unperturbed he attended the dinner wearing a dinner suit with desert boots.

His Honour's career has been varied and highly successful throughout. He

came to the Bar in February 1959 and read with Victor Belson. He was a member of the Bar Council for a period of ten years from 1974 to 1984 and Chairman of the Criminal Bar Association from 1980 to 1984. In 1989 he was appointed Director of Public Prosecutions; in 1984 a Justice of the Supreme Court; in 1990 became Chairman of the National Crime Authority; in 1991 he was appointed Chief Justice.

His experience in the Lindy Chamberlain trial in the Northern Territory, and the concern which that experience generated in relation to the need for precise and independent forensic evidence, caused His Honour to be instrumental in the establishment in 1985 of the Victorian Institute of Forensic Medicine. He has been Chairman of the Victorian Institute of Forensic Medicine since its inception in 1985 and of the National Institute of Forensic Science since its inception in 1992.

Many years ago in discussing judicial appointments with a County Court Judge one member of the Supreme Court (who had attended Xavier College) said to his County Court friend (who had been taught by the Christian Brothers): "You boys who were taught by the Brothers can never aspire to the Supreme Court. Positions on that Bench are reserved for those of us who were taught by the Jesuits".

When one looks at what John Phillips has achieved as Chief Justice one can only be grateful that the policy, if there were one, behind that statement is no longer operative. John Phillips was a De La Salle boy taught by the Marist Brothers.

He has appeared for the defence in many of the leading criminal cases in Australia, including, of course, the *Chamberlain* case. He also regularly performed work pro bono before that term became popular and worked on Aboriginal legal aid matters in the Northern Territory. The Attorney-General said at his farewell that His Honour "was known as a quiet, economical and devastating cross-examiner, smiling engagingly while extracting what you sought from every witness".

It is hard to know where to stop talking about John Phillips. He is perhaps what many of us would like to think of as a typical educated Australian — widely read, sensitive, but not unprepared to cut through the "bullshit". He is, however, much more than that. He is a "complete" person who has been properly described as a "renaissance man". He has written plays, poetry, a biography, a text, *Advocacy with Honour*, and, of course, *The Trial of Ned Kelly*.

He is as much at home standing around at a barbecue discussing the football, or at a cocktail party discussing architecture, art, history or literature, as he is sitting in the Court of Criminal Appeal.

The essence of the man is illustrated by the fact that at the conclusion of his farewell and on the adjournment of the court he did not leave the courtroom but mingled with those who had come to farewell him.

His retirement as Chief Justice does not herald the end of his public involvement in the law.

While he was Chief Justice His Honour was heavily involved and played a key role in the establishment of the Sir Zelman Cowan Centre of the Victoria University, which is a joint operation of the University of Cambridge and Victoria University. He is and will continue to be a Professor and Provost of that centre.

On Thursday 4 December 2003 John Phillips, the actor and lecturer, is billed to appear as Ned Kelly in the dramatic presentation "An Irish Tragedy" at Victoria Law School.

We wish John Harber Phillips the Chief Justice a long and active retirement in which he can enjoy his many other jobs, including that of husband, father and grandfather.

At the Bar's farewell dinner for Chief Justice Phillips held in the Supreme Court Library

Entertainment at the dinner.

Lady Anna and Sir Zelman Cowen, and Justice John Batt.

Xavier Connor AO, QC and Dennis Hutton LLB.

Robin Brett, David Faram (former LIV president) and Chief Justice Phillips.

Bill O'Shea (outgoing LIV president), Chief Justice Phillips, Attorney-General Rob Hulls, and Robin and Jane Brett.

Robert Chisholm Webster

"Webster" 1946–2003

ROBERT Chisholm Webster was born at Kyabram on 9 September 1946. He died suddenly at Anglesea on Sunday 23 November 2003; devoted husband of Frances and father of Kim, Catherine and Jane. At his funeral service at Wesley College the girls made a poetic tribute to their much loved father.

At his funeral service he was described as, "noble"; "unassuming"; "a man of great integrity", with a social conscience which was exceptional — typical of some people who had been through that great school, very much in the tradition of John Wesley.

Webster was Captain of Wesley as was his brother 10 years before him, Professor Ian Webster.

Webster came to the Bar with an Honours Degree in Law and a first in English Literature. He did his articles with his father's brother's firm, Pearce & Webster.

"Webster" as he was called by the Bar (Robbie, Webbie, Wobbie and very recently Robster) read with the late Ronald Castan QC. He established a practice in common law and general work including crime. He had a circuit practice in Bendigo and Geelong and when young did appellate work in the Victorian Full Court; his outstanding case was that of a successful Full Court Appeal from *Tadgell J. Grubb* v *Trevey.*

He was elected to the Bar Council in the years 1977, 1978 and 1979. He in those years served on the Ethics Committee, work he did not much like. He was four years at the Bar when he was first appointed to the Ethics Committee and somewhat restless at the older barristers' response to misbehaviour by other barristers.

He had a brilliant practice as a young barrister. It was all about to change. He accepted a two-year appointment as Deputy D.P.P. Commonwealth in the 1980s. He was Deputy to Temby QC. It involved moving to Canberra with his wife and three young children. He made the commitment. He never said it was a mistake; it was. The D.P.P. role as we know, is semi-judicial, independent of Government. As a man of conscience he took a stand whilst Deputy D.P.P. in relation to a particular prosecution, and suffered. As it turned out Webster was right and those he opposed wrong.

The President of our Court of Appeal, Justice Winneke AO said at Webster's funeral service on 27 November 2003:

> This short tribute which I am about to make to commemorate a portion of the life of Rob Webster is my own — but I make it in the belief that his friends and colleagues at the Bench and Bar of Victoria would share the sentiments which I express.
>
> Rob Webster was a dear friend to many people. The presence of so many at this ceremony is testimony to that. But to many of us he was a respected and able colleague in the law. He was a good effective advocate in the area of the common law with a sound grasp of relevant principles and a good eye for the facts. He could be witty and charming and, when required, caustic but never discourteous.
>
> Most significantly Rob was a man who respected the law; in the sense that he practised it for the benefit of his clients and the community; but never for himself. He accumulated knowledge and wisdom, but did so without fuss. He was eminently suited for appointment to one of the Benches in this State, and — if asked — I suspect he would have been pleased to accept. The trouble is that those things depend upon the patronage of others which — all too frequently — is not forthcoming to those who, like Rob, practise their profession with quiet dignity and humility.
>
> Rob Webster died far too young; but he has left behind him his own legacies which we shall not forget. I extend my deepest sympathies to Frances and the children. Vale Rob Webster — sportsman, colleague and friend. We will sorely miss you, but we shan't forget you.

When Webster came back from Canberra he was briefed in many lengthy inquests and inquiries which further removed him from general practice. He came back to doing common law work but had to depend upon criminal prosecution work. No one else at the Bar of his age did both. No one complained less or was better mannered in his change of fortune.

All barristers need a confidant and someone to have a laugh with, someone sensible but a bit silly. Prepared to laugh at himself, Webster played a great role in that department with many, many barristers.

He was an exceptional athlete, getting colours in three sports at Wesley — he for years came second in the 100 and 200 yards sprint races at the APS sports as his brother-in-law said at the Funeral, his *bête noire* was expelled from Xavier in his last year. He was let back in by Xavier in the third term so Webster was again second in the 100 and 200 but he won the 400 yards.

He played in the 1st XI and was a champion in the 1st XVIII. He played for his old school "Collegians" for about 15 years, best and fairest, captain etc. etc. He was President of Collegians when in their centenary year they won the A Grade Amateur Premiership. He was 10 years on the Wesley College Council.

Webster happily moved to Lennon & Hyland's list in his last few years at the Bar. Peter Lennon showed real concern and interest in Webster's practice. The people he was with at Monash University remained great friends. He was a tenth floorian from his early days at the Bar. He was enticed by Jim Howden, now deceased, to Aitken Chambers where he enjoyed the company of Howden and Shannon, now deceased, and then went to Henry Winneke Chambers. Then back to the tenth floor, back home.

When Webster moved to Lennon &

Hyland he went to the list dinner. At that dinner they welcome the new members to the list; their potential competitors. There were about 100 people at the dinner, it was early in the night. The other new members of the list were welcomed with polite muted claps. When Webster's name was mentioned there was an eruption of "WEBSTER". Rolls were thrown in the air everyone stood and he was given a standing ovation. Why? Because that is how much we loved him. He was described in that memorial service as "a typical public school boy — well educated but one who did not think that he was better than any one else. Talented but humble".

Humble he may have been but what a magnificent mate.

Oh for the Hurly Burly of the Magistrates' Court

THERE is a story that Sir Gerard Brennan, when asked what the purpose of an outline of argument in a special leave application said: "We need the outline so that we can know what you would have said if we had given you an opportunity."

The following extract from the argument presented by the Solicitor-General in *Blunden* v *Commonwealth of Australia* on 6 August 2003 appears to bear out this explanation.

Mr Bennett: If the Court pleases, this is a case about private international law.
Hayne J: Why? Not so fast, Mr Solicitor, not so fast.
Kirby J: One could characterise it in a different way.
Mr Bennett: One could. In *Pfeiffer* this Court disposed of the rule in *Phillips* v *Eyre* and held that one looks as a matter of private international law in torts to the lex loci delicti as between States. In *Zhang* this Court extended that to torts committed in foreign countries. The issue that arises today of course is what one does in relation to torts committed at sea, specifically a tort committed in relation to a collision between two ships of the Royal Navy which do not have home ports.
Kirby J: Of the Royal Navy?
Mr Bennett: Royal Australian Navy, I should have said, Your Honour. The problem is how one applies the rule in *Pfeiffer* and *Zhang*.
Hayne J: Why?
Gummow J: No, the question is whether there is any occasion to apply any law other than the lex fori.
Mr Bennett: The way we put it, Your Honour, lex fori is one of choices.
Gummow J: Wait a minute, where there is no other law area with an interest, if you like, which the forum recognises through its common law rule of private international law.
Hayne J: There is no choice between the laws of two law areas, is there Mr Solicitor?
Mr Bennett: That is my submission, Your Honour, and what we will be saying is that in those circumstances the private international law — and I advisedly use that term instead of conflicts of law — of the forum has to decide between three possible solutions — four possible solutions, I suppose. The first solution is the lex fori on its own, and that involves all the disadvantages identified by this Court in *Pfeiffer* and *Zhang*, and, not withstanding what Mr Bell may have said in his book, all the disadvantages of forum shopping.

One may secondly try to identify lex loci, and we submit that neither the law maritime nor the common law, for different reasons, can be …
Gummow J: There is no lex loci.
Mr Bennett: Precisely, Your Honour. That is what my submission will be. I thought it might take me some time to reach that point but if that be …
Gummow J: The question comes down to, I think, we are in the forum, the forum has federal jurisdiction, section 80 of the Judiciary Act indicates the common law, the common law includes rules of private international law, the question is, is there any such rule here which has a claim if you like to be included as part of the lex cousae other than the lex fori. The hazard is that unless you fix upon some particular law, you will have differential outcomes between different forums in Australia.
Mr Bennett: Yes.
Gummow J: You say it has to avoid that.
Mr Bennett: Yes.
Gummow J: The question is, why, when it was always open to you to enact a federal limitation law and you failed to do it for 100 years.
Hayne J: And where the differential outcomes applies only in this very unusual set of circumstances of collision at sea between two naval vessels, and not operate in relation to other collision cases.
Mr Bennett: One hopes it is unusual, Your Honour, but it applies to a large number of claims.
Gummow J: Reading *Verwayen*, one would have thought limitation problems had gone away.
Mr Bennett: There is a difference between *Voyager* claims and *Melbourne* claims.
Gummow J: I will not ask any more.

Legal Practice Act 1996

Practitioner Remuneration Order (includes GST)

WE the Honourable Geoffrey Michael Eames a Judge of the Appeal Court of Victoria nominated by the Chief Justice of the Supreme Court of Victoria, Peter Arnold Shattock and Philip Laurence Williams being two persons nominated by the Attorney-General, Ariel Weingart and Peter Bardsley Murdoch QC being two members nominated by the Legal Practice Board, Marija Terese Johnson being a person nominated by Victorian Lawyers RPA Ltd., and Nicholas Joseph Damian Green QC being a person nominated by Victorian Bar Inc. and being the seven persons authorized in that behalf by the *Legal Practice Act 1996* do hereby in pursuance and exercise of the powers thereby conferred upon us order and direct in manner following:

1. This Order may be cited as the Practitioner Remuneration Order and shall come into operation on the 1st day of January 2004.
2. This Order applies:
   (a) in the case of business to which the Second, Third and Fourth Schedule applies — to all business for which instructions are received on or after the day on which this Order comes into operation; and
   (b) in the case of any other business to which this Order applies — to all business transacted on or after the day on which this Order comes into operation.
3. (1) The Practitioner Remuneration Order commenced 1 January 2003 is hereby revoked.
   (2) Notwithstanding the revocation of the Practitioner Remuneration Order commenced 1 January 2003, the provisions of that Order shall continue to apply to and in relation to business, other than business referred to in Clause 2, in all respects as if that Order had not been revoked.
4. (1) In this Order and in the Schedules, unless inconsistent with the context or subject-matter:
   "Folio" means 100 words or figures or words and figures.
   "In print" means in print on a form readily available for sale to the public.
   "Document" has the same meaning as under Section 3(1) of the *Evidence Act 1958*.
   "Typewriting" means the production and presentation of words figures and symbols on pages or otherwise by means of hand writing typewriting or the use of word processing equipment or any other form of mechanical or electronic production other than photocopying.
   (2) A reference in this Order and the Schedules to the consideration is a reference:
      (a) where the consideration relates to a matter or transaction and is not wholly monetary, to the sum of the monetary consideration and the value of the real or personal property included in the consideration that is not monetary;
      (b) where the consideration relates to a matter or transaction comprising land and personal property, to the sum of the consideration for the land and the personal property;
      (c) where the consideration or part of the consideration for a matter or transaction is marriage or any other consideration which is not monetary, or where there is no consideration for a matter or transaction, to the value of the subject matter of the transaction;
      (d) where the consideration relates to a mortgage, bill of sale or stock mortgage by which a specified or ascertainable sum is secured, to the sum of the amount secured and the amount of any other specified or ascertainable sum agreed to be advanced and secured; and
      (e) where the consideration relates to the sale of an equity of redemption:
         (i) where the purchaser is the mortgagee and the purchaser employs the legal practitioner who prepared the mortgage — to the sale price; and
         (ii) in any other case, to the sum of the consideration and the amount of any principal sum owing under the mortgage at the time of sale.
   (3) Where the consideration relates to a matter or transaction comprising land under the provisions of the Transfer of Land Act 1958 and other land, the remuneration of the legal practitioner shall be apportioned according to the respective values of the properties in question and remuneration may be charged in respect of each document necessarily prepared.
5. (1) The remuneration of legal practitioners in respect of business connected with sales, purchases, leases, mortgages, wills, settlements, formation and registration of companies, deeds of arrangement and other matters of conveyancing, including negotiating for or procuring an agreement for a loan, and in respect of other business not being business in any action or transacted in any court or in the chambers of any Judge or in the offices of the Master of the Supreme Court Prothonotary or other officer of any court and not being otherwise litigious business, shall, subject to this Order:
   (a) where the Second, Third or Fourth Schedule applies, be in accordance with that Schedule; and
   (b) in any other case, be in accordance with the First Schedule.
   (2) Where the business undertaken is the whole of the work for which some charge or charges is or are prescribed by the Second or Third Schedules but is not

substantially completed but this occurs at the request of or with the concurrence of the client or the client chooses to make use of any of the work done, the charges which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work done or the work so made use of, as the case may be.

(3) Where the business undertaken is a portion of the work for which some charge or charges is or are prescribed by the Second or Third Schedules:

(a) if it is completed or substantially completed, the charge which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work so undertaken; and

(b) if it is not completed or substantially completed, and this occurs at the request of or with the concurrence of the client, or if the client chooses to make use of any of the work done, the charges which may be made shall be a rateable part of the relevant charges prescribed by those Schedules proportionate to the extent of the work done or the work so made use of.

(4) In all cases where matters or transactions for which charges are prescribed by the Second or Third Schedules:

(a) involve work which in normal circumstances is not usual and necessary to complete such matter or transaction on behalf of a client, or require the consent of any Government, public authority or third party in respect of business transacted and performed, a further charge in respect thereof may be made in accordance with the First Schedule; or

(b) are of unusual difficulty or complexity, or involve skill or responsibility which in normal circumstances is not usual and necessary to complete the matter or transaction on behalf of a client, a further charge in respect thereof may be made which is fair and reasonable having regard to all the circumstances of the case.

6. The charges in the First Schedule relate to ordinary cases, but in extraordinary cases the Taxing Master may increase or diminish such charges if, for any special reason, he thinks fit.

7. In addition to the remuneration prescribed by clause 5, there may be charged:

(a) disbursements for duties or fees payable at public offices or fees payable to municipalities or public authorities, surveyors, valuers, auctioneers or counsel, or for travelling and accommodation expenses, duty stamps, postage stamps, courier or delivery charges, electronic systems of communication and other disbursements reasonably and properly incurred and paid;

(b) in accordance with the First Schedule:

(i) payments necessarily made for correspondence between legal practitioners where one legal practitioner is employed as agent; and

(ii) charges by an agent against his or her principal or such lesser amount as is reasonable having regard to the charge that the principal legal practitioner may be entitled to make to his or her client; and

(c) charges at the rate of $10.40 to $15.10 per quarter hour in respect of business necessarily transacted at the request of the client outside the normal business hours of the legal practitioner;

(d) expenses reasonably incurred in microfilming of files and the storage and retrieval of files so microfilmed.

8. (1) In all cases to which the remuneration prescribed by the Second or Third Schedules applies a legal practitioner may, within fourteen days from the time of undertaking any business, by notice in writing to his or her client and when any third party is obliged by contract or otherwise to pay that client's costs, by notice in writing to such third party elect to charge under the First Schedule.

(2) Upon such election, the client may terminate the retainer and the First Schedule shall apply in respect of services rendered prior to the termination of the retainer.

(3) (a) A third party obliged to pay a legal practitioner's client's costs may pay either the amount charged under the First Schedule or the amount which, but for the legal practitioner's election, would have been payable under the Second or Third Schedule, whichever is less, in full satisfaction of his obligation.

(b) The client shall pay the difference between the amount charged by the legal practitioner and the amount payable by the third party.

9. Where a matter or transaction to which the Second Schedule applies comprises land the title to which is a right to occupy the land as a residence area pursuant to Division 11 of Part I of the *Land Act 1958* or a licence pursuant to Section 138(1)(g) of the *Land Act 1958*, the appropriate charge shall be the charge specified in that Schedule for a similar transaction comprising land under the provisions of the *Transfer of Land Act 1958*.

10. (1) Where a legal practitioner:

(a) is authorised by the First Schedule to make any charge in connection with the sale, purchase, transfer or conveyance of land and is also authorised by the Second Schedule to make any charge in respect of the same land and the transaction is completed at the same time for the same client; or

(b) is authorised by the Second Schedule to make charges in respect of two or more matters or transactions relating to the same land completed at the same time for the same client:

then each charge under Part A or Part C of the Second Schedule shall be reduced by one-third or to a sum equal to the highest of those charges (before a reduction) together with the sum of $102.00 for each additional charge, whichever is the greater.

(2) Where, in connection with any transaction to which the Second Schedule or Part A, C or D of the Third Schedule applies, a legal practitioner acts:

(a) for both mortgagee and mortgagor; or

(b) for both lessor and lessee; or

(c) for both creditor and debtor:

the legal practitioner may not, in respect of the transaction, charge more than he or she would have been entitled to charge if he or she were

acting only for the mortgagee, lessor or creditor as the case may be.

11. In respect of loans not exceeding $110,000 where a legal practitioner acts for a society registered under the provisions of the *Co-operative Housing Societies Act 1958* his or her charge under Part A or Part C of the Second Schedule shall be reduced to 75 per cent of the charge otherwise appropriate.
12. The Second and Third Schedules shall not apply to matters or transactions concerning any premises subject to a licence as defined in the *Liquor Control Act 1987* and, accordingly, the First Schedule shall apply to those matters or transactions.

FIRST SCHEDULE

Instructions

1. A charge may be made by way of instructions in addition to the items hereinafter contained in this Schedule having regard to all the circumstances of the case including the following:
   (a) The complexity of the matter and the difficulty and novelty of the questions raised or any of them;
   (b) The importance of the matter to the client;
   (c) The skill, specialised knowledge and responsibility involved;
   (d) The number and importance of the documents prepared or perused, without regard to length;
   (e) The place where and the circumstances in which the business or any part thereof is transacted;
   (f) The labour involved and the time spent on the business;
   (g) The amount or value of any money or property involved; and
   (h) The nature of the title to any land involved.

   Notes:
   (1) A charge shall not be made pursuant to this item in respect of the sale, purchase or transfer of land where the consideration does not exceed $60,000.
   (2) The charge pursuant to this item in respect of the sale, purchase or transfer of land where the consideration exceeds $60,000 shall not exceed 0.3 per centum of the consideration.

Drawing

2. Any document including memoranda of instructions to counsel not in an action or a proceeding in court:
   (a) not in print, per folio — $13.60 to $22.20
   (b) partly in print, for so much as remains in print, per folio — $6.80
   (c) partly in print, for so much as is not in print, per folio — $13.60 to $22.20

   Note: There are approximately three folios in each A4 page.

Typewriting

3. (1) Per folio — $8.40
   (2) For each carbon copy, photocopy or other machine made copy, per page — $1.50.

Facsimiles

4. Transmitting or receiving written material by means of the legal practitioner's own facsimile machine as follows:

   Transmitting:
   First page $8.80
   Each subsequent page $3.00
   Receiving:
   First page $8.80
   Each subsequent page $1.50

Perusing

5. When it is necessary to peruse any document or part of a document (including correspondence), whether in print or not, per folio — $8.40.
6. When it is not necessary to peruse a document or correspondence but scanning of the document or correspondence is warranted, e.g. to determine the relevance or otherwise of the document or correspondence, per folio — $4.30.

Letters

7. Formal acknowledgment or the like, e.g. letter enclosing documents, requesting a reply, etc. — $22.20.
8. Circular letters — i.e. letters which except for the particulars of address are identical, for each letter after the first — $10.90.
9. Other letters — $32.50 or such charge as is fair and reasonable having regard to items 1, 2 and 3 of this Schedule.

Attendances

10. To file, lodge or deliver any documents or other papers, to obtain an appointment or to obtain stamping of a document, to insert an advertisement, or other attendance of a similar nature capable of performance by a junior clerk — $40.40.
11. Making an appointment by telephone or similar telephone attendance capable of performance by a junior clerk — $17.60.
12. On counsel with case for opinion or other papers or to appoint consultation or conference — $61.40.
13. On consultation or conference with counsel — $152.00.
    After the first hour, per half-hour or part thereof -— $75.60 to $118.00.
14. Searching title and other searches, per half-hour or part thereof — $50.30.
15. On settlement of a conveyancing or commercial matter —$48.50 to $75.90.
    After the first half-hour, per half-hour or part thereof — $75.90 to $118.00.
16. Attendance by telephone or otherwise requiring the personal attendance of a legal practitioner or his or her managing or senior clerk and involving the exercise of skill or legal knowledge; per quarter-hour or part thereof — $34.00 to $63.00.
17. All other attendances; per quarter-hour or part thereof — $34.00.

Journeys

18. For time spent occupied in necessary travel to and from or necessarily spent in any place whether in or outside Australia more than sixteen kilometres removed from any place of business or residence of the legal practitioner the charge to be made, in addition and having regard to any appropriate charges made under Part A hereof, shall be:
    per hour or part thereof — $75.90
    but not exceeding for any one day — $1,064.90

SECOND SCHEDULE

PART A — MORTGAGE OF FREEHOLD OR LEASEHOLD LAND

1. Charges of *legal practitioner for mortgagee* in connection with mortgage of freehold or leasehold land comprising instructions, investigation of title, necessary searches, obtaining necessary certificates, preparation and perusal of documents, enquiries as to outgoings, preparation of requisitions on title, preparation of accounts, all necessary attendances and correspondence, arranging and effecting final settlement of transaction, stamping and registration of mortgage shall be:
   (a) in the case of land under the provisions of the Transfer of *Land Act 1958*, the charges prescribed by Column 1 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 1 of Table B.
2. Charges of *legal practitioner for mortgagor* in connection with mortgage of freehold or leasehold land comprising instructions, preparation and perusal of documents, answers to requisitions on title, checking accounts, all necessary attendances and correspondence and arranging and effecting settlement of transaction, shall be:
   (a) in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 2 of Table B.
3. The First Schedule shall apply to a *transfer of mortgage* but so that the charges shall not exceed:
   (a) in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1 of Table A; and
   (b) in the case of any other land, the charges prescribed by Column 1 of Table B.

TABLE A — *TRANSFER OF LAND ACT 1958*

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	**Consideration**	**Col. 1**	**Col. 2**
	$ Not exceeding	$	$
19	20 000	237	164
20	22 000	255	174
21	24 000	269	185
22	26 000	288	197
23	28 000	305	208
24	30 000	319	218
25	32 000	337	230
26	34 000	351	241
27	36 000	370	252
28	38 000	384	264
29	40 000	400	275
30	42 000	416	288
31	44 000	433	299
32	46 000	449	311
33	48 000	467	322
34	50 000	482	334
35	52 000	492	339
36	54 000	501	346
37	56 000	510	354
38	58 000	520	360
39	60 000	532	367
40	62 000	542	373
41	64 000	552	378
42	66 000	561	387
43	68 000	570	392
44	70 000	580	398
45	72 000	590	405
46	74 000	600	411
47	76 000	608	420
48	78 000	619	426
49	80 000	629	433
50	82 000	639	440
51	84 000	649	447
52	86 000	657	452
53	88 000	667	459
54	90 000	677	464
55	92 000	688	471
56	94 000	695	479
57	96 000	705	486
58	98 000	716	493
59	100 000	727	499
60	110 000	760	520
61	120 000	792	543
62	130 000	825	567
63	140 000	858	590
64	150 000	889	610
65	160 000	922	633
66	170 000	955	656
67	180 000	988	677
68	190 000	1020	700
69	200 000	1053	722
70	250 000	1133	778
71	300 000	1214	836
72	350 000	1297	892
73	400 000	1378	946
74	450 000	1460	1002
75	500 000	1540	1058
76	Over 500 000 add per 100 000	82	58

TABLE B — GENERAL LAW

Column 1 legal practitioner for mortgagee Column 2 legal practitioner for mortgagor

Ref. No.	**Consideration**	**Col.1**	**Col. 2**
	$ Not exceeding	$	$
77	20 000	344	208
78	22 000	362	222
79	24 000	378	235
80	26 000	396	251
81	28 000	414	266
82	30 000	431	279
83	32 000	449	293
84	34 000	467	306
85	36 000	485	322
86	38 000	501	337
87	40 000	519	350
88	42 000	535	364
89	44 000	553	378
90	46 000	570	392
91	48 000	586	408
92	50 000	605	422

93	52 000	614	431
94	54 000	625	440
95	56 000	638	448
96	58 000	646	458
97	60 000	657	464
98	62 000	667	475
99	64 000	677	482
100	66 000	689	491
101	68 000	699	499
102	70 000	709	507
103	72 000	717	518
104	74 000	728	524
105	76 000	738	534
106	78 000	750	542
107	80 000	761	552
108	82 000	771	558
109	84 000	783	568
110	86 000	792	576
111	88 000	802	585
112	90 000	811	594
113	92 000	823	603
114	94 000	835	610
115	96 000	844	619
116	98 000	855	628
117	100 000	864	638
118	110 000	900	663
119	120 000	934	693
120	130 000	968	722
121	140 000	1002	750
122	150 000	1038	778
123	160 000	1073	808
124	170 000	1109	836
125	180 000	1142	863
126	190 000	1176	892
127	200 000	1212	918
128	250 000	1297	991
129	300 000	1383	1064
130	350 000	1469	1135
131	400 000	1558	1206
132	450 000	1644	1275
133	500 000	1729	1346
134	Over 500 000 add per 100 000	88	71

PART B — DEED OF VARIATION OR EXTENSION OF MORTGAGE

1. Charges of *legal practitioner for mortgagee* only in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents, investigation of title, obtaining necessary certificates, necessary inquiries as to other interests in the land, preparation of any necessary accounts, stamping and registration and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.
2. Charges of *legal practitioner for mortgagor* in connection with deed of agreement for variation of terms of mortgage of freehold or leasehold land including extension of date of payment, alteration of rate of interest or reduction or increase of loan comprising instructions, necessary searches, preparation and perusal of documents and all necessary attendances and correspondence in connection therewith shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.
3. Where the *consent of a prior or subsequent mortgagee* is required in order to vary or extend the mortgage, the legal practitioner may in addition charge the following sum for each such consent — $131.10.

Transfer of Land Act 1958

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor

Ref. No.	Amount of loan (if unvaried) or (if varied) the amount of the loan as varied	Col. 1	Col. 2
	$ Not exceeding —	$	$
135	20 000	120	60
136	35 000	164	82
137	50 000	196	98
138	Over 50 000 add per 25 000	22	11
139	—		

General Law Land

Where the land secured by a mortgage is land which is not under the provisions of the *Transfer of Land Act 1958*, the following additional charge may be made — $45.40.

PART C — DISCHARGE OF MORTGAGE OR DISCHARGE OF PART OF THE MORTGAGED LAND OR DISCHARGE OF MORTGAGE AS TO PART OF THE DEBT SECURED

1. Charges of *legal practitioner for mortgagee* (where no part of the debt secured is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and perusal of documents (including memorandum of discharge of mortgage) and all necessary attendances and correspondence, delivery of discharge of mortgage to the mortgagor, his or her legal practitioner or agent shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the sum of $162.00.
2. Charges of *legal practitioner for mortgagee* (where the debt secured or part thereof is received by the legal practitioner) in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, preparation and delivery of the discharge of mortgage, receipt of amount to be discharged, perusal of documents and all necessary attendances and correspondence and effecting final settlement with mortgagor, his or her legal practitioner or agent shall be in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 1.
3. Charges of *legal practitioner for mortgagor* in connection with discharge of mortgage or discharge of part of the mortgaged freehold or leasehold land or discharge of mortgage as to part of the debt secured comprising instructions, perusal of memorandum of discharge of mortgage, registration at Land Registry, attention to insurance policies and all necessary attendances and correspondence, and effecting final settlement with mortgagee, his or her legal practitioner or

agent, shall be, in the case of land under the provisions of the *Transfer of Land Act 1958*, the charges prescribed by Column 2.

Transfer of Land Act 1958

Column 1 legal practitioner for mortgagee. Column 2 legal practitioner for mortgagor.

Ref. No.	Amount of Principal Debt Discharged	Col.1	Col. 2
	$ Not exceeding —	$	$
140	100 000	164	142
141	200 000	245	218
142	300 000	327	273
143	Over 300 000 add per 100 000	27	22

General Law Land

Where the land secured by a mortgage is land which is not under the provisions of the *Transfer of Land Act 1958*, the following additional charge may be made — $45.40.

THIRD SCHEDULE

PART A — LEASE OF LAND WHETHER OR NOT UNDER THE *TRANSFER OF LAND ACT 1958* BUT NOT INCLUDING LEASES EXCEEDING 21 YEARS, LEASES NOT CAPABLE OF BEING REDUCED TO AN ANNUAL RENTAL OR PERIODIC LEASES DETERMINABLE BY NOTICE

1. Charges of *legal practitioner for lessor* in connection with lease of land comprising instructions for and drawing lease, settling draft with lessee, his or her legal practitioner or agent, perusal of documents and all necessary attendances and correspondence to effect completion of transaction:
   (a) with material alteration (in duplicate) after amendment — shall be the charges prescribed by Column 1A; and
   (b) without material alteration — shall be the charges prescribed by Column 1B.
2. Charges of *legal practitioner for lessee* in connection with lease of land comprising instructions, settling draft lease with lessor, his or her legal practitioner or agent, preparation and perusal of documents and all necessary attendances and correspondence to effect completion of transaction on behalf of lessee:
   (a) where lease is executed after material alteration (by lessor) after amendment — shall be the charges prescribed by Column 2C; and
   (b) where lease is executed without material alteration (by the lessor) after amendment — shall be the charges prescribed by Column 2D.
3. If the document used (irrespective of the number of folios) is *in print*, the charge of a legal practitioner shall be two-thirds of the charges prescribed by Columns 1B or 2D.
4. If the document used (irrespective of the number of folios) is in a form prepared by a legal practitioner for a lessor for use in connection with *five or more leases* of premises forming part of the same building or development — the charge of a legal practitioner for the lessor for each such lease shall be two-thirds of the charges prescribed by Column 1B.
5. The charges of a legal practitioner upon the *renewal of a lease* pursuant to an option for renewal contained in an existing lease shall be two-thirds of the charge prescribed by Columns 1B or 2D.
6. Charges of legal practitioner in connection with a *disclosure statement* made pursuant to section 17 of the *Retail Leases Act 2003* including instructions, preparation of the disclosure statement, preparation of the notice of objection, perusal of all documents and all attendances and correspondence are not included in Columns 1A and 1B and the legal practitioner may charge additional remuneration in respect thereof in accordance with the First Schedule.

Ref. No.	Total Rental for Period of Lease including Premium (if any)	Legal Practitioner for Lessor		Legal Practitioner for Lessee	
		Col. 1A	*Co. 1B*	*Col. 2C*	*Col. 2D*
	$ Not exceeding —	$	$	$	$
144	15 000	191	164	164	109
145	20 000	255	192	192	126
146	22 000	275	207	207	137
147	24 000	299	223	223	149
148	26 000	319	240	240	160
149	28 000	343	256	256	170
150	30 000	364	273	273	181
151	32 000	384	289	289	193
152	34 000	408	306	306	203
153	36 000	428	322	322	214
154	38 000	452	339	339	226
155	40 000	472	354	354	235
156	42 000	493	372	372	246
157	44 000	518	387	387	258
158	46 000	537	404	404	268
159	48 000	561	420	420	279
160	50 000	581	436	436	291
161	52 000	595	447	447	299
162	54 000	608	455	455	305
163	56 000	622	464	464	311
164	58 000	634	476	476	316
165	60 000	649	486	486	323
166	62 000	662	496	496	331
167	64 000	674	505	505	337
168	66 000	688	514	514	344
169	68 000	700	524	524	350
170	70 000	714	534	534	355
171	72 000	727	543	543	364
172	74 000	740	553	553	370
173	76 000	752	562	562	377
174	78 000	765	574	574	383
175	80 000	778	584	584	388
176	82 000	792	594	594	396
177	84 000	804	603	603	402
178	86 000	816	613	613	410
179	88 000	831	623	623	415
180	90 000	844	633	633	421
181	92 000	858	643	643	428
182	94 000	870	652	652	434
183	96 000	884	662	662	443
184	98 000	896	671	671	448
185	100 000	908	681	681	453
186	110 000	953	714	714	476
187	120 000	996	747	747	497
188	130 000	1039	780	780	520
189	140 000	1082	813	813	542

190	150 000	1127	846	846	564
191	160 000	1171	879	879	585
192	170 000	1214	911	911	606
193	180 000	1257	944	944	629
194	190 000	1300	977	977	651
195	200 000	1345	1007	1007	671
196	250 000	1454	1091	1091	727
197	Over 250 000				
	add per 200 000	109	82	82	56
198	*	*	*	*	*
199	*	*	*	*	*
200	*	*	*	*	*

PART B — STOCK MORTGAGE AND LIEN ON WOOL OR LIEN ON CROP

1. Charges of *legal practitioner for both creditor and debtor* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, searches, attention to adjustment account (if any) and all necessary attendances and correspondence to complete transaction on behalf of creditor and debtor shall be the charges prescribed by Column 1.
2. Charges of *legal practitioner for creditor only* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, searches, attention to adjustment account (if any) and all necessary attendances and correspondence to complete transaction on behalf of creditor shall be the charges prescribed by Column 2.
3. Charges of *legal practitioner for debtor only* in connection with stock mortgage, lien on wool or lien on crop comprising instructions, preparation and perusal of documents, attention to adjustment account (if any), searches and all necessary attendances, and correspondence to complete transaction on behalf of debtor shall be the charges prescribed by Column 3.
4. The charges prescribed in Column 1 shall only apply where Rule 10 of the *Professional Conduct and Practice Rules 2000* made pursuant to the *Legal Practice Act 1996* does not prohibit the legal practitioner from *acting for both creditor and debtor.*

Ref. No.	**Consideration**	**Col. 1**	**Col. 2**	**Col. 3**
	$ Not exceeding —	$	$	$
201	10 000	136	108	88
202	12 000	149	119	96
203	14 000	165	131	105
204	16 000	180	142	114
205	18 000	193	153	124
206	20 000	208	164	135
207	22 000	222	174	143
208	24 000	235	185	153
209	26 000	251	197	160
210	28 000	266	208	170
211	30 000	279	218	180
212	32 000	293	230	190
213	34 000	306	241	197
214	36 000	322	252	207
215	38 000	337	264	217
216	40 000	350	275	226
217	42 000	364	288	234
218	44 000	378	299	242
219	46 000	392	311	252
220	48 000	408	322	263
221	50 000	422	334	269
222	52 000	431	339	275
223	54 000	440	346	280
224	56 000	448	354	288
225	58 000	458	360	293
226	60 000	464	367	299
227	62 000	475	373	305
228	64 000	482	378	311
229	66 000	491	387	316
230	68 000	499	392	322
231	70 000	507	398	327
232	72 000	518	405	334
233	74 000	524	411	339
234	76 000	534	420	343
235	78 000	542	426	349
236	80 000	552	433	354
237	82 000	558	440	360
238	84 000	568	447	365
239	86 000	576	452	372
240	88 000	585	459	377
241	90 000	594	464	382
242	92 000	603	471	387
243	94 000	610	479	392
244	96 000	619	486	398
245	98 000	628	493	404
246	100 000	638	499	410
247	Over 100 000 — such additional charge as is reasonable having regard to the responsibility involved in and the complexity of the transaction.			

PART C — RENEWAL OF BILL OF SALE

1. Charges of *legal practitioner for creditor* in connection with the renewal of a bill of sale comprising instructions, preparation and perusal of documents and all necessary attendances and correspondence shall be the charges prescribed by Column 1.
2. Charges of *legal practitioner for debtor* in connection with renewal of bill of sale comprising instructions, perusals and all necessary attendances and correspondence shall be the charges prescribed by Column 2.

Ref. No.	Consideration	Col 1	Col. 2
	$ Not exceeding —	$	$
248	10 000	56	33
249	14 000	61	34
250	18 000	66	38
251	22 000	71	43
252	26 000	76	46
253	30 000	82	48
254	34 000	88	51
255	38 000	94	53
256	42 000	99	58
257	46 000	104	61
258	50 000	109	65
259	Exceeding 50 000	109	65

PART D — SATISFACTION OR DISCHARGE OF BILL OF SALE OR STOCK MORTGAGE

1. Charges of *legal practitioner for creditor* in connection with satisfaction or discharge of a bill of sale or stock mortgage comprising preparation and perusal of documents (including memorandum of satisfaction or discharge) and all necessary attendances and correspondence and effecting final settlement with debtor, his or her legal practitioner or agent shall be the charges prescribed by Column 1.
2. Charges of *legal practitioner for debtor* in connection with satisfaction or discharge of a bill of sale or stock mortgage comprising instructions, perusal of memorandum of satisfaction or discharge, registration and all necessary attendances and correspondence and effecting final settlement with creditor, his or her legal practitioner or agent shall be the charges prescribed by Column 2.

Ref. No.	Consideration	Col. 1	Col. 2
	$ Not exceeding —	$	$
260	10 000	56	33
261	14 000	61	34
262	18 000	66	38
263	22 000	71	43
264	26 000	76	46
265	30 000	82	48
266	Exceeding 30 000	82	48

PART E — APPLICATION BY LEGAL PERSONAL REPRESENTATIVE UNDER THE *TRANSFER OF LAND ACT 1958*

267. Charges of legal practitioner in connection with an application by a trustee, executor or administrator to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application, necessary attendances and correspondence and registration — $205.40.
268. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $19.40.

PART F — APPLICATION BY SURVIVING PROPRIETOR

269. Charges of legal practitioner in connection with an application by a survivor of joint proprietors to be registered as proprietor of real estate or mortgage, including instructions, checking title identity, preparation of application and declaration, necessary attendances and correspondence and registration — $228.10.
270. For each additional certificate of title or mortgage produced beyond the first title or mortgage referred to in the application — $19.40.

PART G — PRODUCTION FEE

271. For production of Crown grants, certificates of title, title deeds, or other documents in the possession of the legal practitioner of the person entitled to the custody thereof at such legal practitioner's office or at the Land Registry, Office of the Registrar-General or elsewhere, including, where necessary, endorsement of an order to register:

    for not more than two Crown grants, certificates of title, chains of title deeds, or other documents — $129.60.

    for each additional Crown grant, certificate of title, chain of title deeds, or other document beyond the second — $19.40.

FOURTH SCHEDULE

PART A — NEGOTIATING FOR OR PROCURING AN AGREEMENT FOR A LOAN WHEN THE MONEY IS IN FACT LENT AND THE LEGAL PRACTITIONER IS NEITHER THE LENDER NOR ONE OF THE LENDERS

272. In respect of money lent upon the security of real or leasehold estate or personal property – 1.09 per centum upon the amount lent.

    Note:

    If a legal practitioner negotiates for or procures an agreement for the renewal of a loan he or she shall not in respect thereof be entitled to charge remuneration in accordance with this item and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.
273. (1) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of any person (other than a legal practitioner) to whom a procuration fee is payable then he or she shall only be entitled to remuneration in accordance with the First Schedule in respect of negotiating for or procuring such agreement.

    (2) If a legal practitioner negotiates for or procures an agreement for a loan for his or her client being the borrower or mortgagor through the agency of another legal practitioner then the remuneration provided by item 272 shall be divided between the legal practitioners, two-thirds being payable to the legal practitioner for the mortgagee and one-third to the legal practitioner for the mortgagor.
274. The remuneration prescribed under item 272 or 273 shall not include disbursements reasonably incurred in travelling from any place of business and home respectively of such legal practitioner and disbursements otherwise reasonably incurred in the inspection of the property mortgaged or charged and in procuring the agreement for the loan which disbursements may be charged in addition to the remuneration so prescribed.

PART B — FOR NEGOTIATING FOR OR PROCURING AN AGREEMENT FOR A LOAN WHEN THE MONEY IS IN FACT LENT AND THE LEGAL PRACTITIONER OR THE LEGAL PRACTITIONER'S NOMINEE COMPANY IS EITHER THE LENDER OR ONE OF THE LENDERS

275. When the legal practitioner, or a nominee company of which the legal practitioner or a partner of the legal practitioner is a director, is either the lender or one of the lenders no remuneration shall be charged for negotiating or procuring the loan, except in the following cases:

    (a) when the legal practitioner arranges and obtains the loan from a person for whom he or she acts and subsequently by arrangement with his or her client lends the money and executes or signs the security in his or her own name or the name of a nominee company of which he or she or his or her

partner is a director, he or she or such nominee company being in fact trustee or agent for the person aforesaid; or

(b) when the legal practitioner contributes portion of the money in fact lent, and arranges and obtains the remaining portion from another person not being his or her partner as a legal practitioner, not being a co-trustee with him or her in relation to the money lent.

276. In either of the foregoing cases a charge for negotiating or procuring an agreement for a loan may be made at the rate prescribed in Part A in respect of the amount so obtained from such other person.

Note:

If a legal practitioner negotiates for or procures an agreement for the renewal of a loan from such other person he or she shall not in respect thereof be entitled to charge remuneration in accordance with item 272 and his or her charge shall be 0.55 per centum upon the amount of the renewed loan.

CHIEF JUSTICE'S CHAMBERS
SUPREME COURT
MELBOURNE 3000

Opening of the Legal Year

Monday 2 February 2004

The services for the Opening of the Legal Year are as follows:

St Paul's Cathedral
Cnr Swanston and Flinders Streets, Melbourne
at 9.30 am

St Patrick's Cathedral
Albert Street, East Melbourne
at 9.00 am (Red Mass)

Melbourne Hebrew Congregation
Cnr Toorak Road and Arnold Street, South Yarra
at 9.30 am

There will be no Greek Service because of the clash in the Greek Orthodox Calendar.

Ethics Committee Bulletins

Independence of Counsel

A matter which was recently before the Ethics Committee raised an issue concerning the independence of counsel.

The factual situation concerned a barrister who was regularly briefed to advise and to appear by a client ("the first client") through its solicitors. The barrister did not hold a general retainer for the first client. The first client was a body established by statute and a regular user of legal services and a frequent litigant. Whilst holding briefs for the first client, the barrister was briefed to advise and appear by another client ("the other client") through its solicitors in a proceeding where the first client was the opposing party in the proceeding. Upon becoming informed that the barrister held a brief against it, the first client maintained that it had a policy that a barrister briefed by it cannot hold a brief opposed to it whilst the barrister retained its brief(s). The first client requested the barrister to return the brief of the other client in the proceeding, advising the barrister that if the barrister failed to do so, the barrister would be obliged to return all briefs where the barrister had been instructed by the first client. The barrister offered to obtain and be bound by a ruling from the Ethics Committee to resolve the matter. The first client declined to accept the offer. The barrister then returned all of the briefs where the barrister had been retained by the first client.

The barrister's refusal to hand back the brief for the second client was correct conduct. It is an instructive example of the application — and sometimes the cost — of the "independence" principle.

The obligations of counsel in these circumstances is set out in Rule 113 of the Rules of Practice as follows:

> A barrister must not make or have any arrangements with any person in connection with any aspect of the barrister's practice which imposes any obligation on the barrister of such a kind as may prevent the barrister from:
>
> (a) accepting any brief to appear for reasons other than those provided by the exceptions to the cab-rank principle in Rules 92 and 96 and by the retainer rules in Rules 111 and 112; or
>
> (b) competing with any other legal practitioner for the work offered by any brief for reasons other than those expressly referred to in the Rules of Practice.

In addition to Rule 113, members should also have regard to the cab rank principle set out in Rule 86 of the Rules of Practice which provide, in essence, that a barrister in independent practice is bound to accept any brief to appear in the field in which the barrister professes to practise having regard to the barrister's experience and seniority at a proper fee having regard to the length and difficulty of the case and to the barrister's availability. A barrister is not obliged to accept a brief, however, and in many cases is obliged not to do so, if there are special circumstances justifying such refusal: for instance, where to accept a brief would place the barrister in a position of conflict of interest or where the barrister is in possession of relevant and confidential information or where Rules 92, 94, 95, 96, 98, 100 or 101 apply.

Bulletin 3 of 2003

Counsel's Obligations to Courts and Tribunals

IT has come to the attention of the Ethics Committee that Members and Registrars at VCAT are very concerned about members of counsel who accept briefs to appear for more than one applicant at compulsory conferences listed on the same day and at the same time. This has resulted in the staff at VCAT being subjected to considerable delays as those conducting the conferences are experiencing difficulty negotiating because counsel are tied up elsewhere.

Members of counsel are reminded of their obligations to Courts and Tribunals to not prejudice the administration of justice and diminish public confidence in the legal profession. Further members are reminded of their obligations under Rules 14 and 15 that they must take all reasonable and practicable steps to ensure that professional commitments are fulfilled and having accepted a brief to appear alone at a hearing they shall be present in court ready to represent their client on each occasion on which the hearing proceeds.

Bulletin 4 of 2003

Counsel Acting in Migration and Refugee Matters Without Instructions from a Solicitor

THE Ethics Committee ("the Committee") receives requests from counsel seeking dispensation from the direct access rules in regard to acting, without a solicitor, for migration and refugee matters. The direct access rules are set out in Part VI of the Rules of Conduct — rules 165 to 177.

VICTORIAN BAR LEGAL ASSISTANCE SCHEME ("PILCH")

Generally PILCH contact the Committee seeking the necessary dispensation before

engaging counsel to act.

ORDER 80 — FEDERAL COURT OF AUSTRALIA

The necessary dispensation from the Committee is not required if the matter falls within Order 80 of the Federal Court of Australia. Counsel must contact the Registrar of the Federal Court to obtain a referral if appearing without a solicitor on the record.

Otherwise

If a barrister wishes to accept instructions or a brief under the direct access rules (without the intervention of a solicitor) the barrister must obtain the written permission of the Committee pursuant to Rule 171 of the Rules of Conduct. Counsel must also have regard to all of the direct access rules, in particular rules 168, 172, 173 and 174. If there is any query in relation to the direct access rules, barristers should contact a member of the Committee.

Bulletin 5 of 2003

Court Behaviour

FROM time to time the Ethics Committee receives enquiries and complaints concerning alleged behaviour which could be described generally as exclusionary in that the behaviour demonstrated an excessive level of familiarity with the presiding judicial officer.

The Committee is particularly concerned to ensure that members of the Bar are aware of the dangers in acting in an overly familiar and exclusionary manner with a presiding judicial officer and the effect that such conduct has on both litigants and minority groups within the legal profession.

Counsel should maintain a proper and truly professional public relationship in court at all times. In particular, counsel should be careful to avoid and should discourage one-sided banter or over friendly interchanges with a presiding judicial officer when counsel is appearing in court or a tribunal. The dangers are greater where counsel often appear before the same people sitting in the court or tribunal and get to know each other.

Litigants observing such behaviour during the course of a case, and who are otherwise ignorant of counsel's duties and the way barristers conduct themselves, may understandably make adverse inferences against counsel and conclude that justice was not done in the circumstances. It is important that justice is not only done but must manifestly be seen to be done.

The attention of members is drawn to Rule 83 which provides as follows:

> A barrister must not in the presence of any of the parties or solicitors deal with a court, or deal with any legal practitioner appearing before the barrister when the barrister is a referee, arbitrator or mediator, on terms of informal personal familiarity which may reasonably give the appearance that the barrister has special favour with the court or towards the legal practitioner.

Bulletin 6 of 2003

Full and Frank Disclosure

FROM time to time the Ethics Committee receives enquiries relating to the propriety of:

(a) Barristers being briefed by solicitors with whom the barrister has a personal or familial relationship.
(b) Two barristers being briefed where the two barristers are in a personal or familial relationship.

Examples which have arisen for consideration were where a solicitor had briefed a partner/husband/wife, where a solicitor had briefed a sibling, parent or child and where two counsel who were in a personal relationship were briefed.

It is a fundamental principle that the integrity of the adversary system is dependent on lawyers acting in good faith untainted by divided loyalties of any kind. This is central to the preservation of public confidence in the administration of justice and the independence of barristers. In the circumstances as outlined, the barrister's independence may be compromised and the barrister's duty to his or her client may be adversely affected by a lack of objectivity caused by conflicting loyalties.

In the circumstances as outlined, the view of the Ethics Committee is that the barrister should make full and frank disclosure to those persons with whom there may be an actual or potential conflict and continue to act only if the other person agrees to such a course being undertaken.

The attention of members is drawn to the following Rules of Conduct.

> *Rule 2*
> The object of these rules is to ensure that all regulated practitioners of the Bar ("barristers") act in accordance with the general principles of professional conduct, act independently, recognise and discharge their obligations in relation to the administration of justice, and give to clients who choose them services of the highest standard unaffected by personal interest.
>
> *Rule 4*
> A barrister must not engage in conduct which is:
> (a) dishonest or otherwise discreditable to a barrister;
> (b) prejudicial to the administration of justice; or
> (c) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.
>
> *Rule 92(q)*
> A barrister must refuse to accept or retain a brief or instructions to appear before a court where to do so would compromise the barrister's independence, involve the barrister in a conflict of interest, or otherwise be detrimental to the administration of justice.

Bulletin 7 of 2003

100th Anniversary of the High Court of Australia

Chief Justice Murray Gleeson's speech, was given in the Banco Court of the Supreme Court of Victoria, for the 6 October 2003 ceremonial sitting of the High Court.

Chief Justice Murray Gleeson

YOUR Excellencies, Prime Minister, Mr Attorney, President of the Law Council of Australia, President of the Australian Bar Association, and all who have joined us to mark this anniversary of the first sitting of the High Court of Australia.

My colleagues and I are honoured by your presence. We value the expressions of confidence and goodwill that we have heard. The role of the Court is sustained, not by force, but by public confidence. The statements of the Prime Minister on behalf of the Commonwealth of Australia, the Attorney-General on behalf of the States and Territories, and leaders of the legal profession, reflect the confidence which this Court has earned by its work over the past 100 years.

One of the most important speeches in Australian parliamentary history was made in March 1902 by the Attorney-General, Alfred Deakin, in support of a Bill for the establishment of this Court. He pointed out that the Constitution required Parliament to create "a Federal Supreme Court, to be called the High Court of Australia", and explained why that was so. The Court, he said, was "the necessary and essential complement of a federal Constitution". It's highest function would be "exercised in unfolding the Constitution itself". He said that its task would be to lay down, for all to see, the boundary lines of governmental power so that "citizens may transact their business in security, without the hazard of finding themselves within the domain of some power upon whose ... authority they did not calculate". The founders understood that a federal constitution would necessarily give rise to disputes between citizens and governments, and between governments, as to the boundaries of authority. Following the model of the United States, they drafted a Constitution upon the premise that the ultimate resolution of those disputes would be committed to a Federal Supreme Court. They departed from the United States model by also giving the Federal Supreme Court a general jurisdiction to hear appeals from State Supreme Courts and such other federal courts as Parliament may create. These were the two primary functions of the new Court: to act as a constitutional court, and as a court of appeal. At the time, Australia was a part of the British Empire, and those functions were subject to the role of the Privy Council. A century later, that qualification is no longer relevant. The High Court is now the nation's court of final appeal. It maintains the Constitution, declares the common law of Australia, and interprets and applies the statutes of the Federal, State and Territory Parliaments.

At the time of Federation, much emphasis was placed upon the need for a constitutional court to be independent of the legislative and executive branches of government, and to conduct itself in a manner detached from political partisanship. At the Adelaide Convention in 1897, Edmund Barton described the proposed court as:

> [A] body which shall decide in the peaceful and calm atmosphere of a court, not under surrounding of perturbed imagination or of infuriated party politics, those questions of dispute which arise, and which must arise, under a Federal Constitution.

The High Court is now the nation's court of final appeal. It maintains the Constitution, declares the common law of Australia, and interprets and applies the statutes of the Federal, State and Territory Parliaments.

Lawyers will have their own ideas about the peaceful and calm atmosphere that prevails in the Court; and judges may think they see at the Bar table some occasional examples of perturbed imagination. Even so, the Court has generally succeeded in leaving party politics to others. As a member of this Court, Justice Barton returned to his theme of judicial detachment. In paying tribute to Justice O'Connor on his death in 1912, he referred to "his ripe judgment, his keen discrimination, his deep learning, his resolute adherence to the principles of law and the ethics of judicial decision, and his calm disregard of the political point of view".

That is not to say that the Court, or its members, have ever been free from controversy or political criticism. In this courtroom 100 years ago, when he was sworn in as the first Chief Justice, Sir Samuel Griffith felt obliged to

mention, and deflect, attacks that had been made upon him in Parliament when his appointment was announced. His fitness for office was challenged by Mr Kingston, a former Premier of South Australia, and by Senator Keating, a protege of Andrew Inglis Clark of Tasmania, who was one of the original architects of Federation, and who himself had been regarded as a leading candidate for appointment to the Court. The animosity probably resulted from Sir Samuel's involvement, when Chief Justice of Queensland, in the difficulties with the Imperial Parliament over s.74 of the proposed Constitution, and the continuing role of the Privy Council. In the early years of Federation some observers noted that the first three members of the Court, and, when its size was increased to five, the next two, had all been prominent politicians. Chief Justice Griffith had been Premier of Queensland; Justice Barton had been Australia's first Prime Minister; and Justice O'Connor had been a Senator. People wondered whether this would set the pattern for the future. As things turned out, it did not; although a career in politics has never been regarded as a disqualifying factor.

The constitutional work of the Court continues as it has from the beginning, although the nature of the disputes varies from time to time. In the early years, the work of industrial tribunals occupied much of the Court's attention. In the middle years of the 20th century, s.92 was a fruitful source of litigation. Now, relatively few industrial cases reach the Court, and the only s.92 case to come before the Court in the last five years had nothing to do with trade or commerce. Refugee cases are now a major area of constitutional litigation, especially in the application of s.75(v). Judicial review of the lawfulness of action by officers of the Commonwealth was regarded, at Federation, as an essential protection of the rights of citizens and of the States. In the Convention debates, Mr Barton referred to the necessity of providing for the issue of constitutional writs to public officers "so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution".

The capacity of citizens to challenge, and of courts to judge, the validity of legislation, and the lawfulness of administrative action, means that the judiciary must remain at arm's length from the legislative and executive branches of government. In Alfred Deakin's speech to Parliament in support of the Judiciary Bill, he quoted Edmund Burke, who said:

> Whatever is supreme in the State ... ought to give a security to its justice against its power, it ought to make its judicature, as it were, something exterior to the State.

Burke made that statement in criticising the lack of independence of tribunals set up by the revolutionaries in France. The idea that power and justice are distinct, and separate, aspects of sovereignty still struggles for acceptance in many places. It came early to Australia. It is embedded in our Constitution. It goes to the essence of the role of this Court.

Independence of government, and of all forms of external power and influence, is as important to the appellate, as to the constitutional, work of the Court. Modern governments and their agencies are regular litigants in civil cases. Most criminal cases are conducted as contests between a government and a citizen. Both the appearance and the reality of impartiality in the administration of civil and criminal justice depend upon manifest judicial independence. This Court ought to be a model of independence for the whole of the Australian judiciary.

The Court depends greatly upon the assistance of the legal profession. In all Australian jurisdictions there is a vigorous, skilful and independent profession. In our common law tradition, the relationship between Bench and Bar is vital. The conduct of litigation is the defining service provided by the legal profession. That service is provided to courts as well as clients, and is subject to the authority and discipline of the courts. The role of the courts both as consumers and as regulators of legal professional services is sometimes overlooked. We welcome the presence today of so many members of the profession.

I should make particular acknowledgment of the presence today of all the living Chief Justices of the Court, and of a number of former Justices of the Court, and of my colleagues of the Council of Chief Justices of Australia and New Zealand. The Court is honoured and delighted by their attendance.

In conclusion, I should express the Court's thanks to the Chief Justice and judges of the Supreme Court of Victoria for making this courtroom available to us, as they made it available to our predecessors a century ago. There were only three of them then, and now we are seven. That brings us together in circumstances of unaccustomed intimacy; but for a brief time only. The hospitality extended to us has made it possible to mark, in a suitable fashion, this important occasion in the life of the Court.

The Court will adjourn until 10.15 tomorrow in Canberra.

The High Court and the Death Penalty: Looking Back, Looking Forward

The Honourable Justice Michael Kirby AC CMG, Justice of the High Court*, gave the following address in the *Essoign* on 6 October 2003, at a large gathering organised by *Reprieve Australia*.

Justice Kirby.

ONE HUNDRED AND FOURTEEN SOULS

TODAY is the Centenary of the High Court of Australia. Exactly a hundred years after the first Justices took their seats in the Banco Court in the Supreme Court of Victoria in Melbourne, the present Justices filed onto the same Bench. We looked back. But we also looked forward.

Of many things in the Court and the law we can be proud. Such was the history of violence, war, genocide and revolution in the twentieth century that there are few countries that can celebrate a hundred years under the same Constitution, upheld by the same final court. For the most part, judges are required to apply the law made by others. They are not, as such, morally responsible for the content of the law. If they cannot uphold the law, their duty is to resign and seek greener pastures. However, this does not tell the whole story. Judges, especially in a final court, play a large part in developing the principles of the common law. With a new Constitution, the judges of the High Court had large choices to make concerning the meaning of the document of government. Judges have discretions. They must make choices about the meaning of ambiguous words. They often influence the course of events in trials.

For most of the century of the High Court, it presided over the criminal law of Australia under which, for certain capital crimes (mostly murder), the punishment involved the infliction of State-sanctioned termination of the prisoner's life. Between the foundation of the Commonwealth in 1901 and the hanging of Ronald Ryan, the last person executed in Australia on 3 February 1967, 114 prisoners were executed. During this time, the last hope of these prisoners was the intervention of the High Court.

It is difficult to find definitive statistics about the role of the High Court in capital cases. Many of the early decisions involving special leave applications in criminal matters were not reported. The unreported decisions are not searchable or readily accessible. The names of the 114 prisoners executed in Australia are unavailable. The cases where the sentence of execution was confirmed, as in the case of Rupert Max Stuart, do not tell the whole story. In some cases, like Stuart's, the death penalty was later commuted. Thirdly, in many instances, no reference was made to the fact of the sentence of death. Its availability, and the practice of commuting it, varied between the Australian States and depended on the government in power. The sentence of death was abolished in Queensland in 1918. Where it survived in other States, it was normally commuted when the government was formed by the Australian Labor Party which had a policy of abolition.

Nonetheless, it is instructive to look at nine reported proceedings involving capital cases. They illustrate the way in which the Court performed its role as effectively the penultimate arbiter of life and death. After the High Court, the only chance of reprieve lay in the Royal prerogative of mercy.

Jeannette Morish QC welcomes Justice Kirby.

The author thanks Alex de Costa, Legal Research Officer of the High Court of Australia, for the collection of materials and comments used in this paper.

CAPITAL CASES IN THE COURT

The first reported case involving a prisoner under sentence of death is *Ross* v *The King*. Colin Ross was convicted of murder and sexual assault of a young girl. The Full Court of the Supreme Court of Victoria refused special leave. In the High Court, Mr Ross complained of deficiencies in the trial judge's summing up because he had failed to inform the jury that they could enter a conviction of manslaughter. This remained a source of complaint about judicial charges in homicide cases. By majority, the High Court rejected the contentions. Justice Isaacs dissented. The decision was given on 5 April 1922. The prisoner was hanged at Melbourne's Pentridge Prison on 24 April 1922.

The second case has recently returned to the news. In *Tuckiar* v *The King*, Mr Tuckiar, described as a "completely uncivilised Aboriginal native" was charged with killing a police constable at Woodah Island near Groote Eylandt in the Northern Territory. The trial judge directed the jury to draw an inference of his guilt from his failure to give evidence. This was a serious departure from the principle of accusatorial trial and the general right to silence. In the days before organised legal aid, the lawyer appointed to represent Mr Tuckiar was very inexperienced. He did not object to the prosecution leading evidence of the good character of the deceased constable. Following the jury's conviction of Mr Tuckiar for murder, and in the midst of high feeling in the Territory about the crime, the appointed counsel announced in open court that he had been told by Mr Tuckiar that he had lied to one of the two witnesses who gave evidence against him. The prisoner was sentenced to death. The High Court overturned the conviction and sentence. It directed that an acquittal be entered. It expressed the view that the public remarks of Mr Tuckiar's lawyer would so have prejudiced the chance of a fair trial that a fresh proceeding should not be ordered. In July of this year the *Tuckiar* case was remembered in Darwin at a ceremony in the Supreme Court. The occasion was an opportunity for symbolic acts of reconciliation between the families and the indigenous community and other citizens.

In *Sodeman* v *The King*, the prisoner had confessed to murder but entered a plea of insanity. The trial judge instructed the jury that the prosecution had to prove the constituent elements of the crime beyond reasonable doubt and that Mr Sodeman bore the burden of proving that he was insane at the time of the offence. The High Court agreed that Mr Sodeman carried the burden of proving insanity, although not on the criminal onus. The question arose as to the interpretation of the trial judge's charge. The Court was evenly divided. Latham CJ and Starke J concluded that the trial judge's instructions to the jury were adequate. Dixon and Evatt JJ disagreed. Because the High Court was evenly divided, the decision of the Court of Criminal Appeal of Victoria was not disturbed. A petition for special leave to appeal was dismissed by the Privy Council on 28 May 1936. Four days later at Pentridge Prison, Mr Sodeman was hanged.

In *Cornelius* v *The King* also in 1936, the prisoner had allegedly killed a minister of religion after entering his church for the purpose of stealing. An issue arose as to whether a written confession signed by Mr Cornelius should have been excluded on the basis that it had been procured by an "inducement" which was "calculated to cause an untrue admission of guilt to be made". The High Court unanimously found that the confession was rightly admitted. Special leave to appeal was therefore refused. Mr Cornelius was hanged at Pentridge Prison within the month of Mr Sodeman's execution.

In the following year in *Davies and Cody* v *The King*, the accused were tried for the murder of an employee of the Stamp Duties Office killed in the course of an attempted robbery. They were convicted and sentenced to death. Evidence was given against them by a former criminal associate who said that they had made admissions to him. After the Court of Criminal Appeal of Victoria had dismissed their appeal, the associate confessed that his evidence had been totally fabricated. This evidence was received by the High Court in circumstances that might not now be possible. The Court unanimously decided that the convictions were unsafe and they were quashed.

In the same year in *Packett* v *The King*, the prisoner was convicted of a double murder and sentenced to death. The trial had been fought on the defences of provocation and self-defence. In the Tasmanian Court of Criminal Appeal, he unsuccessfully raised grounds of complaint against the summing up by the trial judge and about the form of the indictment. These failed in the intermediate court and in the High Court. It is not clear whether Mr Packett was later executed but in all probability he was for that was the standard of those days.

In 1938 in *Green* v *The King*, the prisoner was convicted of the murder of two women and sentenced to death. In the Victorian Court of Criminal Appeal he sought to adduce fresh evidence. His application was dismissed and so it was in the High Court. The leading judgment of the High Court was given by Latham CJ. He rejected the new evidence on the ground that it had been available to Mr Green at his trial. In those days, such issues were dealt with by rules of procedure that tend to be stricter than those that we observe in times more attentive to the substance of the case. Mr Green was hanged at Pentridge Prison on 17 April 1939, which was a month after I was born.

The next capital case is *O'Leary* v *The King*. This was another appeal against conviction of murder. It was claimed that the homicide had occurred in the course of a drunken orgy during which the prisoner had assaulted a number of people. Evidence of the other assaults was admitted at trial on the basis of the similar facts rule. The trial judge directed the jury to have regard to it as demonstrating that the prisoner was "a man who had no care for the ordinary feelings of pity or humanity which restrain ordinary people". The prisoner's lawyer complained that this effectively put him on trial for multiple offences and diverted attention from the issue to be decided. However, his appeal to the Supreme Court of South Australia was rejected, as was his application to the High Court, with McTiernan J dissenting.

In 1950 the celebrated case of *The King* v *Lee & Ors* was heard in the High Court. Jean Lee was the last woman to be executed in Australia. She was convicted of murder with two confederates who had strangled the victim in a hotel room. Miss Lee had not participated in any act of violence against the deceased. However, she was convicted of murder on the basis of the doctrine of common purpose. An appeal by the three prisoners was allowed by the Victorian Court of Criminal Appeal in June 1950. It was held that statements to police had been obtained improperly. However, in a single joint judgment, the High Court overturned that decision and reinstated the convictions and death sentences. An application to the Privy Council failed in February 1951. Eight days later the three prisoners were hanged at Pentridge Prison.

Eight years after the reimposition of the death penalty in that case, in *The Queen* v *Howe*, Dixon CJ said:

> It would not be in accordance with the prac-

> tice of this Court to entertain an application for special leave from an order setting aside a capital conviction and granting a new trial if there were no other grounds for the application except that the State Court of Criminal Appeal ought to have taken a different view of the evidence or ought not in the particular case to have regarded some specific direction to the jury as necessary or ought not withstanding that some error of law appeared to have held that no substantial miscarriage of justice had occurred.

These remarks suggest that there was a practice of the High Court derived from more cases than those that are reported. It may also suggest a growing disenchantment with capital punishment in the Court, as in the Australian community at that time.

In *Stapleton* v *The Queen*, the prisoner was convicted of murdering a police constable at Katherine in the Northern Territory. He was sentenced to death. However, the High Court unanimously set aside the conviction and sentence, holding that the trial judge had failed to explain the legal test of insanity correctly to the jury. A new trial was ordered. The outcome can be contrasted with that in *Sodeman*.

In 1958 in *The Queen* v *Howe*, the prisoner was convicted of murder and sentenced to death. His defence had been based on claims that he had been victimised by "sodomitical attacks". The issue was whether the prisoner had used more force than was reasonably necessary and whether the judge's directions were appropriate in this respect. The Court of Criminal Appeal of South Australia overturned the conviction. Unanimously, the High Court refused to intervene.

Then came the decision in *Stuart* v *The Queen*. Rupert Max Stuart was convicted of the murder and rape of a nine-year-old girl in South Australia. There were three objections to the safety of his conviction. The most important related to the admissibility of a typed confession. The High Court received an affidavit suggesting that Mr Stuart was only proficient in the Arunta language of his native people and that the contents of the confession were not his own expression. In an unanimous decision, the High Court stated twice that the case had caused it "a great deal of anxiety". Nonetheless, although Mr Stuart was under sentence of death, the Court declined to intervene. Later the death penalty was commuted following the establishment of a Royal Commission in response to media and public concern. A film has recently been distributed telling the story of the trial of Max Stuart. It portrays the culture of the law of those days. By so doing it illustrates the improvements that have happened in the meantime.

In *Thomas* v *The Queen*, the prisoner was convicted of wilful murder and sentenced to death. In the course of his summing up, the trial judge had directed the jury that they could convict if they arrived at "a feeling of comfortable satisfaction that the accused is guilty". The accused complained that these words misdirected the jury concerning the obligation of the Crown to prove the case beyond reasonable doubt. The High Court set the conviction aside and ordered a new trial. However, Mr Thomas must have been convicted at the new trial because he was hanged at Fremantle Prison in Western Australia less than six months after the High Court's decision. There is no record that he attempted a second appeal.

In *Mizzi* v *The Queen*, in 1960, the prisoner was likewise convicted and sentenced to death for murder. At the trial, the judge misdirected the jury concerning the defence of insanity and did not explain how medical evidence, received during the trial, was relevant to the factual question which the jury had to answer. The High Court set the conviction aside. It entered a verdict of "not guilty on the ground of insanity", an apparently bold step taken on the judges' review of the facts for themselves.

In *Tait* v *The Queen*, the prisoner was convicted of murder. His sole defence was insanity. The case involved a dramatic tussle between the High Court and the Bolte Government in Victoria. Chief Justice Dixon insisted upon obedience to the delay in the hanging of the prisoner so that his application to the High Court would not be rendered futile. In the end, the High Court and the Privy Council refused leave to appeal. However, the death penalty imposed upon the prisoner was subsequently commuted, in part as a result of the controversy that had surrounded the challenges in the courts.

There followed in 1966, the last capital case to come before the High Court. On 29 June of that year, Ronald Ryan sought special leave to appeal from a decision of the Court of Criminal Appeal of Victoria dismissing his appeal against his conviction for murder. The Court of Criminal Appeal had made a number of critical observations concerning the punishment. In a unanimous decision, the High Court rejected the request that it should intervene. Because it viewed the conviction as inevitable, it refused to intervene, as did the Privy Council in January 1967. Ronald Ryan was hanged at Pentridge Prison on 3 February 1967, becoming the last person to suffer the punishment of death in Australia.

A TEST OF VIGILANCE?

Can it be said that in the foregoing cases, the High Court of Australia exhibited a standard of vigilance in relation to trials resulting in conviction of prisoners of capital crimes? Is a test of "vigilance" relevant to the contemporary law?

There is no doubt that, in capital cases that now come before the Judicial Committee of the Privy Council, some members of the Board have acknowledged the special vigilance with which convictions followed by the death sentence must be viewed. Thus in *Higgs and Mitchell* v *The Minister of Social Security and Others* (Bahamas), Lord Cooke of Thorndon put it this way.

> Self-evidently every human being has a natural right not to be subjected to inhuman treatment. A right inherent in the concept of civilisation, it is recognised rather than created by international human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms … A duty of governments and courts in every civilised state must be to exercise vigilance to guard against violation of this fundamental right. Whenever violation is in issue a court will not fulfil its function without a careful examination of the facts of each individual case and a global assessment of the treatment in question.

In that case Lord Cooke was writing in dissent. Subsequently, one of the appellants, David Mitchell, was hanged in the Bahamas three weeks after the Privy Council's decision. The other appellant, John Junior Higgs, escaped the gallows by committing suicide on the day before his appointed execution. The notion of vigilance of which Lord Cooke spoke appears to have been adopted by the Privy Council in later capital cases. The board has recently been inclined to subordinate application of pre-existing authority to the need for specific examination of the validity of the capital prisoner's conviction and sentence. Such an approach may be seen in five cases that followed *Higgs and Mitchell*.

First, in *Lewis & Ors* v *Attorney-*

Judge Campbell, Judge Wood, Judge Davey, Judge Howie and Justice Rowlands.

Justice Kirby and Nick Harrington, President of Reprieve Australia.

Judge Dyett, Annie Nash and Denis Bourke.

Jennifer Batrouney S.C., Claire Harris and Hamish Redd.

Chris Maxwell QC, Julian Burnside QC and Bronwyn Polson.

Ash Rogers, Natasha Stojanovich, Barnaby Johnston and Tamara Hamilton.

Paul Holdenson QC and Virginia, Damian Murphy, and Bryan Keon-Cohen QC.

Anne-Louise Juneja and Natalie Scattini.

General of Jamaica, the six applicants for leave to appeal were sentenced to death in Jamaica for murders committed there. Three issues arose before the Privy Council: whether it was incumbent upon the Jamaican Privy Council before considering whether a person's death sentence was to be commuted to disclose information that it had received; whether it was unlawful to execute a person where that person's petition still remained for consideration by the Inter-American Commission on Human Rights; and whether a person's conditions of imprisonment could render unlawful the death penalty imposed on him or her. As Lord Hoffman observed in dissent, there was very recent authority (that was unfavourable to the applicants) on all of these points. In particular, in *Higgs and Mitchell* (where Lord Cooke had dissented on the prison conditions issue), Lord Hoffman had led majorities specifically against the second and third contentions. However, the majority in *Lewis* chose not to follow these authorities in the circumstances of the case. As one commentator has observed:

> *Lewis* is revealed as an exceptionally important case which immensely enhances both the procedural and substantive rights of death row inmates and demonstrates an unusual willingness to depart from existing authority.

Lord Cooke's conception of vigilance is also visible in the Privy Council's recent treatment of the mandatory imposition of

the death penalty for murder. As one commentator notes, the mandatory nature of the death penalty in this context had gone unquestioned in many cases before the Privy Council. However, in three cases that were heard together, the Board held that differential culpability inherent in the offence of murder rendered the mandatory death penalty offensive to international human rights norms. Such norms then informed the Board's approach to the construction of constitutional provisions that forbade infliction upon a person of "inhuman or degrading punishment or other treatment".

The corollary of this vigilant approach has been an apparent increase in the number of death sentences set aside by the Privy Council. In fact, it does not appear that the Privy Council has upheld a death sentence in the past eighteen months. The recent decision of *Roberts & Anor* v *The State* (Trinidad and Tobago) would seem to be another example of this vigilant approach. There, the two appellants had been convicted of murder and sentenced to death by a Court in Port of Spain. On appeal, a point arose concerning the sufficiency of the trial judge's summing up in relation to certain identification evidence. For reasons that were not made clear, the shorthand notes of the trial judge's summing up had been lost. However, a line of authority existed which held that, where a trial judge's short-hand notes of a summing up could not be located, it was to be assumed that the trial judge had not substantively erred. Nonetheless, based on other decisions that suggested that judges in Trinidad and Tobago were frequently failing to give sufficient identification directions, the Privy Council held that such an assumption was "much too fragile". Accordingly, the appellants' convictions were set aside.

DID THE HIGH COURT ACCEPT A VIGILANCE APPROACH

Of course, in the way of those times, there was no reference to international human rights law in the decisions of the High Court disposing of the appeals in the capital cases that I have listed. The case of *Stuart* v *The Queen*, in particular, would seem to indicate that the Court did not, as a general rule, adopt a specially vigilant approach. Nonetheless, two decisions indicate that at least two of the Justices were specially concerned because of the drastic outcome that rested on their judicial decision. In *Packett* v *The Queen*, Evatt J adverted to "the fact that the charge is for a capital offence [which] cannot be excluded from consideration".

Earlier, in *Ross* v *The King* Isaacs J, in dissent, at the outset of his reasons asked: (the facts of which are, again, described above). At the outset of his judgment, Isaacs J asked "[h]as the prisoner had substantially the fullest chance for his life before the jury which the law says he shall have?" There followed a detailed examination of whether the trial judge's summing up had been deficient because of his failure to inform the jury that they could have entered a conviction of manslaughter. In answering that question in favour of Mr Ross, it is difficult to escape the conclusion that the impending prospect of the death penalty was foremost in Isaacs J's mind. At the end of his decision he states:

> [i]n my opinion, and without hesitation, I hold that there should be a new trial, because the proper finding of the guilt of the accused, involving capital punishment, should be ascertained, not by Judges, but, on a sufficient direction, by a jury in the way the law requires.

In other fields of law, the notion of special vigilance is sometimes mentioned in the High Court. Thus, I have referred to it in the criminal context and in refugee cases. There are doubtless other instances where the circumstances and consequence of a judicial decision demand heightened attention and closer scrutiny.

CONTEMPORARY RELEVANCE

The death penalty no longer operates in any jurisdiction of Australia. Australia is a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights. This effectively endorses opposition to capital punishment as contrary to human rights and human dignity. It represents an obstacle to any attempt on the part of a State or Territory of Australia to restore capital punishment. The federal government and opposition have each expressed opposition to the return of capital punishment in Australia. What relevance, if any, does capital punishment have to lawyers in this country?

If they continue to follow legal developments in the United States, Australian lawyers will be familiar with the continuing debates about the requirements of the Constitution in that country, as interpreted by the courts. Two recent decisions may be noticed. On 2 September 2003, the Ninth Circuit of the Court of Appeals held in *Summerlin* v *Stewart* that State laws permitting judges, and not juries, to decide whether the sentence of capital punishment should be imposed on a convicted prisoner, were unconstitutional. The decision, which rests on the jurisprudence of the Constitution of the United States, seems unfamiliar to us. In our legal tradition, it is ordinarily for judges to impose the sentence, although in the case of capital crimes, the imposition of the death penalty was fixed by law, giving the judge little or no discretion. The decision in *Summerlin* considered a question which the Supreme Court had left open in 2002 in *Ring* v *Arizona*. There, that Court had held that the United States Constitution required that only a jury could sentence a convicted murderer to death. The Supreme Court had left open the question of whether the right was so fundamental as to apply retrospectively or whether it should only have application to present and future cases in which the point was specifically raised.

Secondly, in *Atkins* v *Virginia* the Supreme Court held that the imposition of the death penalty upon mentally retarded persons was contrary to the requirements of the Constitution. The importance of that decision was the invocation, by the majority, of a principle of international human rights law and the reference to decisions by the European Court of Human Rights and other international bodies. In the past, the Supreme Court of the United States, reflecting the somewhat isolationist culture of that country, has not found international human rights law helpful in elaborating the requirements of the United States Constitutions. The decision in *Atkins*, followed soon after by the decision in *Lawrence* v *Texas*, which held unconstitutional the Texas criminal law against consensual adult homosexual conduct, represents something of a breakthrough for the utilisation of universal human rights in constitutional elaboration. In Australia, I have invoked the same principle as an interpretative tool in construing the Constitution. However, so far, it has not attracted general support. If one looks at the broad directions in which the final courts of the world are moving, there can be little doubt that municipal law and national constitutions will, in the future, be influenced by international legal developments. This is a natural and inevitable process of symbiosis. It is one in harmony with the globalisation of the economy and ideas.

Closer to home, it is a development in Indonesia that has given debates concerning the death penalty a heightened relevance for Australia. The imposition of the

death penalty on Amrozi bin Nurhaysim and on Samudra (Abdul Aziz) for their parts in the Bali bombings on 12 October 2002 has reinvigorated the debate about capital punishment in Australia. The debate cannot be ignored. Abolition cannot be taken for granted. Last month, in Boston in the United States, the Governor of Massachusetts, Mr Mitt Romney, launched a move to bring the death penalty back to that State. The penalty was abolished in 1984. However, Governor Mitt has appointed an 11-member committee to write a law that would rely on scientific evidence to justify execution. As in current moves to reverse the century-old principle of relief from double jeopardy (also upheld by international human rights law) there are many who put unqualified faith in science as a stimulus to basic change in criminal procedure and punishment.

In a poll conducted in August 2003, 56 per cent of respondents answered affirmatively the question "would you personally be in favour or against the introduction of the death penalty in Australia for those found guilty of committing major acts of terrorism?" As reported, the Prime Minister has expressed a somewhat ambivalent view about the death penalty. He suggested that its introduction could only be "pursued at a State political level". As all States presently have governments formed by the Australian Labor Party, which is institutionally opposed to the death penalty, there would seem to be no immediate possibility of legislation. In any case, by virtue of Australia's signature to the Second Optional Protocol to the ICCPR, if a State or Territory Parliament chose to reintroduce capital punishment in Australia, it would arguably be open to the Federal Parliament to override the change by federal law based on compliance with that international treaty.

Some commentators have suggested that the ambivalence of the Australian government in relation to the imposition of the death penalty upon the convicted Bali bombers is imprudent. The prisoners, if executed, may be rendered martyrs for a cause that could proliferate. By failing to lift our voices in their case, we may disable ourselves from making representations in other cases where our national interests are not involved. This is yet another instance of the important lesson which the High Court taught in 1951, in one of the most important decisions of its first century. In the *Communist Party* case, the Court insisted that it was essential to adhere to basic principles in respect of people who are unloved and seen as a threat. That is when our adherence to fundamental human rights is tested. It is not tested in dealing with people like ourselves with whom we can identify. It is tested when we deal with strangers who are hated and feared. It will be tested, in the years ahead, as we enact and apply laws to deal with the problem of terrorism.

If we ask why most lawyers in Australia, including most judges, are opposed to the death penalty, the answers, in the end, come down to three. First, they know, better than anyone else, the fallibility and imperfections of any system of justice — even the highly refined Australian system over which the High Court of Australia presides. It is not much comfort having inquiries years after an execution which finds a miscarriage of justice and apologises to the family. Some of the cases in capital crimes that came before the High Court demonstrate that it can be a close run thing as to whether the Court intervenes.

Secondly, lawyers are also familiar with the statistical evidence which demonstrated that the presence or absence of the death penalty has insignificant consequences on the rate of homicide. Looking at the intervals when, in several States, the death penalty was carried out and then when it was commuted, it is clear that execution had no effective deterrent effect in the long term. Unreasoned violent conduct does not typically act in such rational ways. That leaves only vengeance to support the punishment of death. It denies the postulate of redemption and reform that lie at the heart of the world's great religions and philosophies.

Thirdly, the death penalty brutalises the State that carries it out. Public servants must prepare the messy business of termination of a human life. They must act with the greatest premeditation. They must clean up the mess when it is accomplished. Many lawyers object to being part of this process — the sole profession that would be involved in deliberate, planned homicide. Like much else, it is a left-over from an earlier and more barbaric time.

We have set ourselves upon a path to a higher form of civilisation. It is one committed to fundamental human rights. Such rights inhere in the dignity of each human being. When we deny them we diminish ourselves. We become part of the violence world. Lawyers and judges stand for the rational alternative to a world of terror and violence. They will not always succeed in their efforts. The law will often fail. But inflicting the death penalty is the ultimate acknowledgment of the failure of civilisation. That is why most lawyers oppose it.

Deciding to Kill: Jurors in Capital Trials

On any given day in the United States an ordinary citizen could be called upon for jury duty and have to decide whether a human being should be executed. There is perhaps no task more daunting. The American criminal justice system plays a crucial role to allow jurors to overcome the enormity of this unenviable civic duty.

INTRODUCTION

IT is one thing to support the death penalty, but it is completely another to be actively involved in the killing of another human being. As one juror states:

> I remember going into the penalty phase of the trial, praying an awful lot, that, uh, for guidance, and tell me what to do, because, uh, I remember not feelin' sure if I could do it. I mean, I remember the jury selection. They asked my opinions on the death penalty, and I said, 'Well, y'know, if you asked me that any other time, I would have told you how strongly I believe in it, but I mean, sittin' across the room from, y'know, lookin' somebody straight in the face, knowin' that, it was gonna be my decision, uh, it's not quite so easy.

This article discusses the legal and psychological mechanisms that bridge the gap between ordinary citizen and "executioner".

To be viable and effective, the system of death sentencing in the United States depends on an extraordinary set of psychological conditions. These conditions must prevail to encourage ordinary people to participate in state sanctioned murder. Since under typical circumstances, a group of 12 law-abiding citizens would not calmly discuss killing another person and then take actions to bring about their death, these unique factors are crucial in precipitating the death sentence process.

Each year since 1980, two to three hundred juries in the United States are able to traverse the moral and psychological barriers against taking a life. This suggests the system is effective in overcoming the natural inhibitions of human beings to kill.

Ashley Halphen is a member of the Victorian Bar who practises in the area of criminal law. He is the Vice President of Reprieve Australia, an organization that provides legal and humanitarian assistance to those facing execution by the state around the world. He is currently working at the Office of Capital Post-Conviction Counsel in Jackson, Mississippi.

LEGAL LANDSCAPE

The modern era of American death penalty law began in 1972 with the decision of *Furman* v. *Georgia* 408 U.S. 238. In this case the United States Supreme Court held that juries were imposing the death penalty in an arbitrary and capricious manner in violation of the Eighth Amendment's prohibition against "cruel and unusual" punishment. No longer could a jury wantonly impose the death sentence.

States responded with new laws designed to remedy the arbitrariness in juries' life or death decisions. Some enacted mandatory capital statutes intending to eliminate arbitrariness by removing jury discretion altogether; these statutes made death the only punishment for specified forms of murder. Other states adopted guided discretion capital statutes that provided procedures for jurors to follow during the sentencing phase of the trial. These procedures involved the weighing of aggravating factors against mitigating factors as part of the sentencing calculus.

The Supreme Court reviewed these statutory schemes in 1976. In a trilogy of cases the Court endorsed the guided discretion statutes. It was thought that these statutes provided protection and would therefore prevent the death penalty from becoming as arbitrary as "being struck by lightning".

Interestingly, following the approval of a guided discretion in sentencing, the Court eroded the formulation in a series of decisions.

The first step was the Court's ruling that jurors could take into account any mitigating factor and not only those prescribed by statute. The Court later relaxed the guidance of statutory aggravating factors and in so doing, held that only a single statutory aggravator needed to be found; thereafter jurors were at large to consider any non-statutory aggravator. The Court also extended the scope of non-statutory aggravators to include the personal characteristics of the victim and the emotional impact on the victim's family and friends; and finally decided not to require that a

verdict be monitored to ensure statutory compliance. Thus the jury could reach either a verdict of life or death for no stated reason whatsoever.

After 30 years the final product is a sentencing instruction that generally provides that:

- aggravating factors must be weighed against mitigating factors;
- aggravating factors include murders committed in the course of a felony, for pecuniary gain, in heinous/atrocious/cruel circumstances or whilst the defendant was in custody at the time or has a prior felony for the use of violence;
- mitigating factors include but *are not limited* to the fact that that the defendant was under the influence of extreme mental disturbance, or was acting under duress or whose role was relatively minor, whose capacity to appreciate the criminality of the conduct was substantially impaired, or the age of the defendant or the lack of prior history or *any other matter considered mitigating;*
- an aggravating factor must be unanimously found to exist beyond reasonable doubt;
- the balancing exercise must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling;
- if the mitigating circumstances do not outweigh the aggravating circumstance a death sentence *may* be imposed; and
- if the mitigating circumstances do outweigh the aggravating circumstances a sentence of death *shall not* be imposed

MECHANISMS OF MORAL DISENGAGEMENT

Ready … aim … fire!

A life is taken. Each marksman seemingly bears responsibility. In Utah, where the firing squad is still in use, one squad member is given a blank rather than a bullet to load in the rifle. None of the squad members know which of them is firing the blank and so each is comforted by the possibility of not being the cause of the condemned's death.

The modern legal system in the United States employs a more sophisticated and complex set of techniques that allow jurors to participate in an emotionally trying process. These techniques contribute to the moral disengagement of jurors from the consequences of their decree and therefore play an integral role in the transformation of average citizen to a state-sanctioned assassin.

Each technique shall be discussed in turn.

A. Dehumanisation

Dehumanisation focuses on stripping any human qualities from the defendant. The legal formalities of trials create psychological barriers between the defendant and the jurors. A defendant is rarely, if ever, addressed by anything other than, "defendant" or "accused"; while the victim is referred to more personally.

Dehumanisation gains persuasive effect when combined with the strategy of the prosecution and the structure of the proceedings.

i) Prosecution Strategy

Prosecutors are well aware that human beings are more likely to react punitively towards others regarded as deviant or in some way fundamentally different. This was the very focus of the highly sophisticated propaganda campaign employed by the Nazis in the period leading up to World War II. The campaign focused on distinguishing and exaggerating Jewish characteristics and physical features to engender loathing and fear amongst ordinary Germans.

In the context of a capital trial, prosecution strategy will involve the use of various phrases tending to demonise the defendant. Not surprisingly then research has revealed the overuse by prosecutors of descriptions for defendants such as "filth", "dirt", "slime", "monster", "animal", and "scum". This kind of imagery is effective in creating, highlighting and exaggerating differences. Jurors are then able to dwell on the nature of the defendant's crime to further develop distance, alienation or a sense of "otherness". It is much easier to sentence a "monster" to death than to sentence a fellow member of the community.

The legal formalities of trials create psychological barriers between the defendant and the jurors. A defendant is rarely, if ever, addressed by anything other than, "defendant" or "accused"; while the victim is referred to more personally.

ii) Structure of the Proceedings

Capital proceedings are divided into two stages. Jurors determine guilt or innocence at the guilt phase. Then following a finding of guilt, the sentence is decided by the same jury at the penalty phase.

Defendants regularly remain mute throughout proceedings. As a result, jurors hear nothing beyond the vile allegations surrounding the crime. Prosecutors also encourage jurors to make their sentencing decision on the basis of an isolated moment, albeit tragic and horrible, without regard to any other information. The essence of a person is reduced to a snapshot of violence. As a consequence, the full measure of a person's entire life's worth is lost in the portrait painted by the prosecution.

Not until the penalty phase is the defence afforded an opportunity to humanise the defendant. Then counsel tries to place the defendant's life in context, to give it substance, texture, history and a set of connections to other lives to overcome the dehumanising aspects of the trial. However, by then it is often too late as jurors' impressions have already crystallized.

Research has found that at the conclusion of the guilt phase and before any penalty phase evidence has been presented, twice as many capital jurors believed that the defendant should be sentenced to death as believed that life was the more appropriate verdict. And further, these jurors remained absolutely convinced that a death determination was the right punishment for the duration of proceedings.

Psychological research into how jurors go about making their decisions is both consistent with these findings and enlightening. During the guilt phase, jurors evaluate guilt by arranging evidence into a sequence, replicating a story about the alleged criminal activities. The story is then compared to the available guilt verdict categories; jurors then choosing the category which best fits the story. As the story of the crime develops in the juror's mind, the juror becomes more resistant to evidence that would require a reconstruction of the story. During the penalty phase jurors will thus begin with a story already constructed during the guilt phase of the trial. Since stories are resistant to reconstruction, a juror may then be wholly unreceptive to new penalty phase evidence.

B. The Role of Fear

Human beings react aggressively against people who are frightening them or who they believe pose a physical threat. Under these circumstances, people tend to morally disengage from the consequences of any violent response and regress to the level of self-preservation or the protection of others.

The visually graphic details of gruesome facts in a typical capital murder trial are terrifying. Thus the jury's reaction is natural and inevitable. The sense of fear that is evoked from hearing such evidence encourages jurors to embrace their role as protectors of the community. Studies confirm that a majority of jurors believed such evidence, by itself, established that the defendant would be dangerous in the future. An overwhelming concern with future dangerousness compelled these jurors to impose a sentence of death.

Evidence of the defendant's violent acts precedes any acknowledgement of the humanity of the individual responsible. Jurors are consequently provoked towards revenge and the need to protect. The overall structure of the trial is then replicated in the penalty phase as the prosecution is first to present evidence of aggravation. This evidence revisits the circumstances of the murder and any prior acts of violence. In the absence of a context in which to understand the defendant, the jury is left with little more than an affirmation of the stereotypes they held before they even entered the courtroom. A general lack of understanding the origins of the defendant's violence confirms for jurors the defendant's inherent evil, making jurors more resilient to the irreversible nature of their sentencing decision.

C. Responsibility

Many jurors deny their personal moral responsibility for their sentencing decision. There are a number of ways responsibility is abdicated.

i) Shifting Blame

People are more likely to act out of character and inflict injury where personal responsibility is abdicated, diffused, distanced or directed elsewhere. Because being asked to decide if someone lives or dies is so alien and overwhelming, individual jurors readily share the enormity of their responsibilities with other jurors or else maintain the belief that someone else is responsible, typically the defendant, the system, the judge or even appellate courts. Ironically, the greater the protections afforded to a defendant, the greater the diffusion of responsibility will be. Some jurors will deny responsibility by either claiming that their role is purely linguistic and that they do not personally carry out the deed. Other jurors point out that these "mere words" are only a recommendation.

Standard capital penalty instructions do little to ensure that responsibility remains entirely within the domain of the juror.

Jurors are distanced from the moral consequences of their penalty decision because of the limited information provided to them ... The asymmetrical focus, in which the law allows one set of consequences admissible but prohibits another, operates to disengage jurors from the moral implications of their actions.

ii) Imperfect Knowledge

Misunderstandings about various aspects of capital murder and the death penalty make it easier to render a death verdict. This is because jurors become morally disengaged from the implications of their decision-making.

Capital jurors are beset with a variety of information about law and order derived from distorted representations of crime and punishment by the media. As a consequence, individuals mistakenly believe that the death penalty deters crime, that it is administered in a racially fair manner and that it is less expensive than life imprisonment. Some jurors believe that the execution will never occur and so do not believe there is a fatal consequence associated with their verdict.

Jurors are distanced from the moral consequences of their penalty decision because of the limited information provided to them. Capital jurors learn little about the ritualistic machinations of the execution. The jury is confronted with the graphic details of the murder, and hear testimony of the unquantifiable loss and grief that the defendant's actions have cast on the victim's family and friends. At the same time jurors learn nothing and see no images of the consequence of the sentence that they are asked to impose. The asymmetrical focus, in which the law allows one set of consequences admissible but prohibits another, operates to disengage jurors from the moral implications of their actions.

Another example of misunderstanding is the fact that jurors grossly underestimate how long a convicted capital murderer, not sentenced to death, must stay in jail. In a number of jurisdictions it is not effectively explained to jurors whether life without parole means life or merely a set number of years. Jurors continue to grasp firmly onto preconceived notions that if given life without parole, the defendant will inevitably be released.

Underestimating of the sentencing alternative to death encourages a pro death stand because many conclude that life is not enough suffering, leaving death as the only way to reflect their condemnation. Jurors become disengaged from the moral complexities of their choice because the law does not allow them a way to discount their preconceptions. Thus, jurors vote to execute not because they have made a reasoned decision that death is the appropriate punishment, but because they are misled in believing its alternative is not punishment enough.

Tragically, the law has done little to rectify the situation. This is evident at *voir dire* and in the detail of the sentencing instruction.

Voir dire is an integral stage immediately preceding the trial. The process involves the selection of citizens from a *jury venire*. The questions posed to prospective jurors by either prosecutors or defence attorneys are designed to identify individuals who would not administer their civic duties in accordance with law.

Capital jury selection procedures require persons opposed to the death penalty be systematically excluded from participation. To repeatedly ask jurors whether they can follow the law and impose the death penalty acts to convey the message that the favoured position, as far as the legal system is concerned, is one that supports the imposition of the death penalty. The jurors then feel compelled to adopt a pro death stand where a defendant has been found guilty.

At the other end of the procedure, convoluted verbiage and the overuse of legal phrases causes jurors to believe that

death is the only option. Jurors interpret the judge's instructions as eliminating most of their personal and moral responsibility. Take for example a study that found close to half or more of those jurors interviewed mistakenly believed that judicial instructions authorized them to rely on any aggravating factor, regardless of whether it was prescribed by statute, but to rely on mitigating factors only where there was unanimous agreement that they had been proved beyond reasonable doubt. Badly framed and poorly understood instructions seem to provide jurors with a protective shield that enables them to avoid a sense of personal responsibility. Many acknowledge the sense in which condemning someone to death is "not really my decision, it's the law's decision" and they come to believe they are just following orders.

CONCLUSION

Language and timing are effective mechanisms to bridge the gap between ordinary citizen and executioner. Dehumanisation and demonisation of the defendant induce a level of fear and with it the urge to protect and defend. In addition, there are ample players within the overall system that a juror can turn to in order to shift responsibility away from themselves. And when ill-informed about a factor relevant to their decision, the law is silent when it should be shouting, lax when it should be taut, weak when it should be strong.

The end product is that jurors are morally distant from their unenviable civic duties. The penalty phase, even though well intended, loses much force by virtue of the structure of the proceedings.

It would come as no surprise that studies show that jurors, notwithstanding the degree of their disengagement, suffer lingering traumatic effects from the experience.

These findings heralded an evocative response claiming that:

> If the realities of this system were laid bare for capital jurors, not just the cold intricacies of the legal machinery of death and the human face that endures the consequences, but also the larger socio political system that produces capital crime in the first place and then mystifies its origins, then the death sentencing process might just break from the weight of all the honesty.

Australian Detainees at Guantanamo Bay: Legal Twilight Zone or Black Hole?

Professor Gillian Triggs, Co-Director, Institute for Comparative and International Law, University of Melbourne

ON 4 July 2003, the Attorney-General and the Minister for Foreign Affairs announced that Australia's David Hicks had been included in the first list of six detainees "eligible" for trial by a US Military Commission for "war crimes and other criminal activities". Some weeks later, further talks were held between Australian and American officials during which commitments regarding trial procedures were made in the event that Australian detainees were to be prosecuted before a commission established by the President's Military Order of the 13 November 2001 and Order No.1. The Australian Government then announced that David Hicks and other Australians such as Mamdouh Habib, will be given "no less favourable treatment than any other non-United States citizen tried by military commissions".

Professor Gillian Triggs

For the present, and after nearly two years in detention, Hicks is merely "eligible" for trial. There is no requirement that he will in fact be charged or tried. Hicks' detention in Guantanamo Bay continues with little or no contact with his family or lawyers, knowing that the State of which he is a national will not insist that he be returned to Australia for a fair trial. It seems the Australian Government has been unable to convince its close ally to recognize that a fundamental principle of human rights law, the right to a speedy and fair trial, applies to all persons regardless of their legal status. Against this background, allegations are now being made that the detainees are being subject to forms of torture used to gain evidence for "show trials" in the future. (ABC, "AM" 8 October 2003)

The 700 or so people from 38 nations who are currently detained at Camp Delta, Guantanamo Bay, are at best in a legal twilight zone; at worst confined indefinitely to a legal black hole. International law requires that all persons detained are entitled to a trial within a reasonable time before an open and impartial tribunal. The United States claims, to the contrary, that the detainees are "non-privileged combatants" who US Vice President Dick Chaney believes "don't deserve the same guarantees and safeguards that we use for United States citizens". In addition to concerns for the rights of detainees, there are wider concerns that their treatment is symptomatic of disproportionate responses to terrorism that threaten the international rule of law. The application of one law for US citizens and another for all others threatens the credibility of the rule of law in international diplomacy and promotes a tendency toward unilateral action by the US and other nations.

This article briefly examines some of the international legal implications of indefinite confinement without trial of the Australian detainees at Guantanamo Bay. Before doing so, it might be observed that in many respects international law, like most law, is created by reference to the past. National laws and many international treaties and norms, do not quite "fit" contemporary acts of terrorism, whether ad hoc individual acts or State sponsored acts. Efforts to squeeze terrorist activities into laws drafted from the 1940s –70s seem artificial and an inappropriate response to the heinous nature of the acts. International law is thus in need of significant reform, both as to substantive principles and institutional procedures. To recognize the scope for reform does not, however, detract from the clear principles of international and national laws requiring a fair trial to all detainees regardless of their legal status.

COULD HICKS BE PROSECUTED UNDER AUSTRALIAN LAW?

It would be usual in international criminal law, for those accused of crimes to

be returned for trial to the State of which the accused is a national. Indeed the governing principle of the International Criminal Court, recently established at the Hague, is that of "complementarity" under which the State has the primary right to prosecute nationals accused of war crimes, crimes against humanity and genocide. It is passing strange that the Australian Government has not more robustly sought to have Hicks returned to Australia for trial. Australia's negotiating hand in arguing for the return of the Australian detainees at the United States military base in Cuba may have been weakened because there appears to be no legislative basis on which Hicks could be tried in Australia were he to be released to Australian authorities.

The *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) has been considered the most likely basis for founding a charge against Hicks in Australian law. As the Second Reading Speech demonstrates, this legislation was intended to prevent Australians from acting as mercenaries in conflicts in Africa, such as Angola and Mozambique. The central offence is defined by Section 6:

> "a person shall not:
> (a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or
> (b) engage in a hostile activity in a foreign State.

To engage in a "hostile act" means to do an act with the intention of "overthrowing the government", "engaging in armed hostilities in the foreign State" and "causing by force or violence the public to be in fear of suffering death or personal injury". Each objective is defined by reference to the foreign State into which the person has entered. Those captured in Afghanistan do not appear to have had the intention of achieving any of the listed objectives against Afghanistan itself. Whatever the purposes of detainees such as Hicks are shown to have been on entering Afghanistan, their activities were not directed against this State or its people. To the contrary, the essence of the US charges against Hicks is that he supported terrorist objectives (directly or indirectly supported by the Taliban) against the US itself. Were Australia to bring charges against Hicks under section 6, it would be difficult to gain a conviction against him in the absence of some evidence that he intended to harm Afghanistan or its people. Moreover, the legislation does not apply where, as appears to be the case where the detainees where fighting for the Taliban, the act was done as part of the "person's service in any capacity" in the armed forces of the government of the foreign State.

Some have argued that the Australian government should more emphatically demand that Hicks be tried in Australia, thereby ensuring him a fair trial. They interpret the objective of "engaging in armed hostilities in the foreign State" to apply to acts that have their effect in a third State such as the US. The US Ambassador to Australia, Tom Schieffer, is reported to have told the National Press Club in Canberra that Hicks "was engaged in killing or attempting to kill American soldiers". In fact, Hicks was arrested by the Northern Alliance in November 2001, several weeks before the first US death in combat in Afghanistan. Aside from the facts, to adopt a wide interpretation of the Section 6 would be a distortion of the apparent intention of the legislation in preventing Australian mercenaries entering foreign States with the intent of acting against the government or peoples of that State. The more likely interpretation of the meaning of the section is that it does not apply to an Australian who has been active within a foreign State who intends to act against a third state.

The Foreign Incursions Act does not seem to be an appropriate legislative ground for prosecution of the activities of detainees such as those of Hicks. Any successful prosecution under Australian law would need to be founded on other legislation. There is, however, no other relevant basis on which a prosecution could be brought against Hicks.

The Foreign Incursions Act does not seem to be an appropriate legislative ground for prosecution of the activities of detainees such as those of Hicks. Any successful prosecution under Australian law would need to be founded on other legislation. There is, however, no other relevant basis on which a prosecution could be brought against Hicks. The crime of "treason" under the Crimes Act does not apply because the necessary proclamations of "enemy" status have not been made. The recently enacted *Terrorism Act 2003* (Cth) does not apply retrospectively. Similarly, the International Criminal Court, inaugurated in March 2003, does not apply to war crimes, crimes against humanity and genocide committed before 1 July 2002. No other legislation appears to be applicable to the alleged activities. This conclusion is supported by the principle of interpretation that Australian criminal laws do not apply extraterritorially in the absence of a clear legislative intent that they should do so.

ARE DETAINEES ENTITLED TO PRISONER OF WAR STATUS?

Australia's Attorney-General (at the time of writing, Daryl Williams) believes that the detention of David Hicks must be considered in a military context; that he is in military custody and subject to military law. (Letter to Law Council of Australia, 16 July 2003) On this basis, Hicks is not considered by Australia to be in the same position as a person held in custody under the ordinary criminal laws of another country. For Australia to make this concession has played conveniently into the hands of the United States which characterizes the detainees as "non-privileged combatants" or "unlawful enemy combatants" who are liable to trial and sentence to death by United States military commissions. United States citizens are by stark contrast entitled to the full benefits and protections of the US Bill of Rights and to the usual rules of criminal procedure. In light of the extensive application by the US of its laws extraterritorially, the decision by a US District Court that the Bill of Rights does not apply to Guantanamo Bay is surprising. Several US nationals detained at Guantanamo Bay, such as John Walker Linh, Yasser Esam Hamdi and Jose Padilla, are to be tried before civilian courts and subject only to life imprisonment. Such unequal treatment demonstrates the refusal by the United States to apply the Third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention) to which it is a party. The Third Geneva Convention provides that prisoners of war (POWs) are to be treated humanely without discrimination on the grounds of race, nationality or religious belief. If a POW is to be prosecuted for an offence he must be tried by a court that is independent and impartial,

according to procedures that entitle him to qualified legal assistance of his own choice and a right of appeal against any sentence.

The United States argues that non-US citizen detainees fighting for the Taliban or Al Qaeda are not entitled to the status and rights of a POW. Article 4 of the Third Geneva Conevntion defines a POW as including a member of the armed forces, militia, and volunteer corps belonging to a party to the conflict if they meet certain conditions such has having a distinct sign or carrying arms openly. While the Taliban was recognised as the legitimate government of Afghanistan only by Saudi Arabia, the United Arab Emirates and Pakistan, it was at least the effective de facto government of the State. Its forces, however, may have had no distinctive insignia within the meaning typically accorded to Article 4. While it is arguable, nonetheless, that the fighting forces of the Taliban meet the criteria for POW status, it may be doubted that members of Al Qaeda do so. They do not represent or act as agents for any recognized nation and neither carry arms openly nor have any distinctive sign. Nonetheless, Mary Robinson, former UN Human Rights Commissioner, and Kofi Annan, Secretary General of the United Nations, have insisted that all detainees held at Guantanamo Bay are entitled to POW status and should be treated accordingly.

The critical point, however, is that it is not for the United States to decide for itself the question of POW status. The Third Geneva Convention provides in Article 5 that, where there is any doubt about the legal status of persons in the power of the enemy, they are to be treated as POWs until their status is finally determined by a "competent tribunal". International law thus requires that detainees are accorded all the rights of the Geneva Convention until a properly constituted tribunal decides otherwise. No such tribunal has in fact been established or even mooted. The practical consequence is that, in the absence of diplomatic persuasion, the US remains the arbiter of the legal status and rights of all detainees. The public outcry over the photographs of detainees may, for example, have been influential in ensuring the right under Article 13 of the Geneva Convention requiring that POWs are protected against "public curiosity".

More profoundly disturbing for detainees and their families is the slippage in language from characterizing the detainees as "unlawful combatants" of the war in Afghanistan to describing them as terrorists in a "war on terrorism"; a war considered by senior US Defense officials as "open ended". If the detainees are combatants in relation to the war in Afghanistan, it might reasonably be demanded that they are duly tried and sentenced or released. If they are combatants in an ongoing war on terrorism, the view of the US government leaves them without rights of any kind until such time as the administration deems that war to be over. The central problem for detainees on this analysis is thus one of the duration of their detention without trial.

More profoundly disturbing for detainees and their families is the slippage in language from characterizing the detainees as "unlawful combatants" of the war in Afghanistan to describing them as terrorists in a "war on terrorism"; a war considered by senior US Defense officials as "open ended".

PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW

In many respects it is misleading to concentrate analysis of the legal rights of detainees upon their rights under the Third Geneva Convention. Some 15 years after the Geneva "Red Cross" Conventions were negotiated, members of the United Nations signed the *International Covenant on Civil and Political Rights 1966* (ICCPR). This cornerstone human rights treaty currently attracts the adherence of over 140 States within the international community, including the United States and Australia. It is a comprehensive statement of fundamental rights that bind Parties to minimum legal obligations. In short, human rights law has evolved and built upon the Geneva Conventions and their dated and complex provisions.

The ICCPR provides that, regardless of legal or political status, all persons are:

- entitled to take proceedings before a court to decide on the lawfulness of detention and to a trial within a reasonable time (Art. 9);
- equal before the courts, entitled to a "fair and public hearing by a competent, independent and impartial tribunal established by law" and to be presumed innocent until proved guilty, to be informed of all charges against them and to communicate with counsel of their own choosing (Art. 14);
- entitled to the benefit of the principle that no one may be held guilty of any criminal offence in relation to an act that did not constitute a criminal offence at the time it was committed (Art. 15); and
- entitled to be treated with humanity and with respect for the "inherent dignity of the human person" (Art 10).

These and other human rights instruments have consolidated the right to a fair trial as a norm founded in both treaty-based and customary international law, binding the United States in its treatment of all detainees at Guantanamo Bay.

WHAT ARE THE POWERS OF A MILITARY COMMISSION?

Military commissions have been used rarely in State practice, and those that have been employed by the US provide little guidance as to their procedures and jurisprudence for present purposes. Military commissions are different from other war crimes tribunals including courts martial, the Nuremberg and Tokyo tribunals, the ad hoc tribunals set up by the United Nations Security Council in relation to the civil wars in Rwanda and Bosnia Herzegovina or the International Criminal Court. Used extensively in the American Civil War, the US set up military commissions during WWII to try spies and saboteurs. A military commission is typically created to avoid exposure to public and legal scrutiny in times of threat to national security. They are, nonetheless, arguably an appropriate mechanism through which to prosecute detainees allegedly responsible for activities during the war in Afghanistan. This is especially so where no international tribunal has jurisdiction and the Security Council is unlikely to agree to creating another ad hoc tribunal. Any such military commission must, however, adopt internationally recognised procedures and apply existing criminal laws.

The proposed military commissions have been authorized by a Presidential Order creating a legal regime that lies entirely within the US executive branch from which there is no judicial review

or appeal, even in relation to imposition of the death penalty. The Order provides that detainees are "to be tried for violations of the laws of war and other applicable laws by military tribunals". It is thought not "to be practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the US district courts". Detainees have no right to seek a remedy in any US court. Of international concern is the peremptory statement, straying well beyond jurisdiction recognized by international law, denying detainees the right to seek a remedy in the courts of any other national or international judicial body.

As a consequence of the Australia/US discussions in July 2003, the US has made certain commitments as follows:

- A presumption of innocence will be made.
- The standard of proof will be "beyond a reasonable doubt".
- The accused will have a right to remain silent and no adverse inferences may be made if this right is exercised.
- The accused has a right to obtain evidence and documents to be used in his defence and to cross-examine prosecution witnesses.
- The United States will not seek the death penalty in the case of David Hicks.
- Arrangements are to be negotiated to transfer Hicks to Australia if he is convicted so he will serve any penal sentence both in accordance with Australian and US law.
- An Australian lawyer with appropriate security clearances may be retained as a consultant to Hicks' legal team at his request, following approval of military commission charges.
- Conversations between David Hicks and his lawyers will not be monitored by the United States.
- Prosecution in the Hicks case does not intend to rely on evidence requiring closed proceedings from which the accused would be excluded.
- Subject to necessary security restrictions, a Hicks trial will be open, the media may be present and Australian officials may observe the proceedings.
- The United States has agreed to consider ways in which Hicks may be allowed additional contact with his family via telephone following the approval of the military commission charges.

WHAT ARE THE LEGAL RISKS IN MILITARY COMMISSIONS?

Despite these concessions, military commissions as currently conceived do not meet international legal standards and will not ensure a fair trial in the following respects:

- The presiding officer can admit evidence on the basis that it would have probity of value to a reasonable person, thereby avoiding the usual rules of evidence in criminal trials including the hearsay rule.
- Conviction and sentencing is possible with two-thirds concurrent commissioners rather than a unanimous verdict of a jury; a unanimous verdict is, however, required for imposition of the death penalty.
- Proceedings can generally be held in secret and evidence not normally allowed in proceedings could be admitted.
- There is no provision for the burden of proof to lie with the prosecutor nor for reasons to be given for judgments.
- A Military Commission is an executive body and is thus not independent from the executive. The commissioners do not appear to be impartial as the prosecution, trial procedures, rules of evidence, conviction, sentencing and review will be determined by military officers on behalf of the United States government, rather than judicial experts.
- Hearings are possibly to be in secret and transcripts may not be available.
- Members of the Commission may not be lawyers and are unlikely to be experienced in criminal trials.
- There is no provision for judicial review or appeal from the commission's decision.

Each of these defects in the proposed military commissions poses serious concerns for the legal validity of any trials of the detainees held at Guantanamo Bay. Certainly, the State of nationality of each detainee to be tried by such a commission can seek special commitments from the US to ensure acceptable conditions of trial. To do so is hardly consonant with rights to equal treatment and may create precedents for trial procedures that do not meet recognized international legal standards.

Fundamental to the detainees is that they have a speedy trial, even on common criminal charges. Detention without due process violates the most fundamental principles of international and national laws and the US should be brought to account for their breach.

CONCLUSIONS

It is acceptable at international law that a nation can derogate from its legal obligations where there is a public emergency threatening the life of the nation. President Bush is determined that an "extraordinary emergency exists" and that "the nature of international terrorism renders it impracticable to apply the principles of law and the rules of evidence generally recognised in criminal trials". Such an appeal to national security sits ill with Bush's oft repeated assertion that terrorists must be brought to justice. Military commissions may not be capable of delivering justice and it will be for the United States to demonstrate that they are justified by national security. If it fails to do so, the United States risks losing support for its war on terrorism, rendering hollow its claim to respect the rule of law and diminishing the capacity of POWs from all nations to enforce their rights under international law.

While the Military Commissions create justifiable concerns for the rules of criminal procedure and evidence, trials of those detained at Guantanamo Bay remain hypothetical. None has yet been proposed and no charges have been laid. Fundamental to the detainees is that they have a speedy trial, even on common criminal charges. Detention without due process violates the most fundamental principles of international and national laws and the US should be brought to account for their breach.

Left to right from back: *G.Thomas S.C., J. Champion S.C., J. Peters S.C., T. Neal S.C., J. Delany S.C., M. Gordon S.C., F. McLeod S.C., T.J. Ginnane S.C., C. Macaulay S.C., N. Clelland S.C., M. Bromberg S.C., G.J. Clarke S.C., D.J. O'Callaghan S.C., J.J. Noonan S.C., S.G. O'Bryan S.C., P. Riordan S.C., D.S. Mortimer S.C., E.A. Strong S.C., K.P. Hanscombe S.C. and J.L. Parrish S.C.*

Appointment of Senior Counsel

On 11 November 2003, the Governor in Council appointed as Senior Counsel the persons listed above as assembled, and below, in order of precedence.

Mr Graham John Thomas S.C.
C/- List W. Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Peter Julian Riordan S.C.
C/- List D. Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr John Ross Champion S.C.
C/- Office of the Commonwealth Director of Public Prosecutions, Level 22, 200 Queen Street, Melbourne 3000

Mr Timothy James Ginnane S.C.
C/- List F. Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Anthony Crofton Neal S.C.
C/- List G. Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr James Lloyd Parrish S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Jonathan James Noonan S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Christopher James Delany S.C
C/- List A, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Graeme Stewart Clarke S.C.
C/- List A, Owen Dixon Chambers, 205 William Street. Melbourne 3000

Mr David John O'Callaghan S.C.
C/- List A, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Cameron Clyde Macaulay S.C.
C/- List A, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Stephen Guy O'Bryan S.C.
C/- List F, Owen Dixon Chambers, 205 William Street. Melbourne 3000

Mr Neil John Clelland S.C.
C/- List M, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr Mordecai Bromberg S.C.
C/- List A, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Mr James William Sturrock Peters S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Ms Carmen Maria-Francesca Randazzo S.C.
C/- Victoria Legal Aid, Level 18, 350 Queen Street, Melbourne 3000

Ms Elspeth Anne Strong S.C.
C/- List F, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Ms Debra Sue Mortimer S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Ms Michelle Marjorie Gordon S.C.
C/- List G, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Ms Fiona Margaret McLeod S.C.
C/- List D, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Dr Kristine Patricia Hanscombe S.C.
C/- List G, Owen Dixon Chambers, 205 William Street, Melbourne 3000

Verbatim

Briefer Brief Fee

County Court Civil Jurisdiction

24 April 2003
Coram: Coish J
Rose v *Frankston City Council*

His Honour: I will fix senior counsel's brief fee at 4,950. Although the defendant has asked me to fix junior council's fee on scale I have had regard to the complexity of the issue and the work that went into the various submissions made by both parties and in the circumstances in the exercise of my discretion I feel it is appropriate to certify senior counsel's fee at 50 per cent of junior counsel's fee. So I'll certify …
Mr Rosenberg: I think that's the other way around, so I think Mr O'Loghlen would be up here in about two seconds.
His Honour: Did I give you …
Mr Rosenberg: You gave me twice Mr O'Loghlen's, which was very kind of Your Honour …
His Honour: I was actually …
Mr Rosenberg: It's been a very good Passover.
His Honour: I made a fatal error then, Mr Rosenberg. I was trying to think and speak at the same time. I was trying to work out what 50 per cent of 4,950 was as I concluded the ruling. So I've learnt my lesson, I'll never do that again. You get 50 per cent of 4,950 …
Mr Rosenberg: I am content.

A Matter of Interpretation

16 October 2003
Coram: G.D. Lewis J
Lioupras v *Wooltara (Aust) Pty Ltd*

His Honour (to interpreter, who had just been sworn in)**:** Madam interpreter, I don't like what I term "half and half interpreting". When the plaintiff is asked a question in English, whether she is able to answer it or not, please translate it into Italian. When she replies, translate her answer back from Italian into English. Is that clear?
Interpreter (in amazement)**:** But, Your Honour, the plaintiff is Greek!

A Sentence Too Soon

17 October 2003
Coram: G.D. Lewis J
WorkCover Mentions and Directions List

Solicitor: Your Honour, we seek to adjourn this matter to a further callover in six months time.
His Honour: Six months! Why six months?! … The world may end in six months.
Solicitor: Our client has recently been sentenced to 15 months imprisonment.
His Honour: Application granted, and that will teach me to keep my big mouth shut.

Avuncularity

Firearms Appeals Committee

24 September 2003
Unrepresented applicant, Mr Payne, for Firearms Licence calls his uncle as a character witness. Mr Payne calls the witness and the following exchange takes place:

Payne (After witness is sworn in)**:** Uncle, I want to ask you some questions … (to Tribunal) Can I call him Uncle?
Tribunal: Yes you can. I'll even call him Uncle if you like.
Payne: Thanks. Uncle … (proceeds to ask question).
Senior-Constable Charlesworth (cross-examining)**:** Mr Sutherland, I won't call you Uncle it that's all right …

Time Out

United States District Court for the Western District of Wisconsin

1 July 2003
Stephen L. Crocker, Magistrate Judge
Hyperphrase Technologies, LLC and *Hyperphrase Inc* v *Microsoft Corporation*

Pursuant to the modified scheduling order, the parties in this case had until 25 June 2003 to file summary judgement motions. Any electronic document may be re-filed until midnight on the due date. In a scandalous affront to this court's deadlines, Microsoft did not file its summary judgement motion until 12:04:27 am on 26 June 2003, with some supporting documents trickling in as late as 1:11:15 am. I don't know this personally because I was home sleeping, but that's what the court's computer docketing program says, so I'll accept it as true.

Microsoft's insouciance so flustered Hyperphrase that nine of its attorneys, namely Mark A. Cameli, Lynn M. Stathas, Andrew W. Erlandson, Raymond P. Nero, Paul K. Vickrey, Raymond P Niro Jr, Robert Greenspoon, Matthew G. McAndrews and William W. Flachsbart, promptly filed a motion to strike the summary judgment motion as untimely. Counsel used bolded italics to make their point, a clear sign of grievous iniquity by one's foe. True, this court did enter an order on 20 June 2003, ordering the parties not to flyspeck each other, but how could such an order apply to a motion filed almost five minutes later? Microsoft's temerity was nothing short of a frontal assault on the precept of punctuality so cherished by and vital to this court. Wounded though this court may be by Microsoft's four minute and twenty-seven second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion four minutes and thirty seconds later with supporting documents to follow up to seventy-two minutes later.

Having spent more than the amount of time on Hyperphrase's motion, it is now time to move on to the Gordian problems confronting this court. Plaintiff's motion to strike is denied.

Brian Bourke Talks About 50 Years in the Law

Interviewed by Patrick Tehan QC

Patrick Tehan QC: *Brian, you have been a lawyer for 50 years. You've still got a very active practice, in court almost every day. Why do you still do it?*

Brian Bourke: I still get a kick out of being able to appear and have the odd success either in the County Court or the Magistrates' Court, or the odd Supreme Court murder that I still do. It just keeps me active and I still associate with others at the Bar. The latter is one of life's great joys.

PT: *You came to the Bar in 1960 but before then you were a solicitor for some years. What sort of work did you do as a solicitor?*

BB: It was primarily liquor work. I did a five-year articled clerks course. I actually started articles in 1948. I was admitted in 1953 and I worked as a solicitor until 1958. I went overseas for about 18 months and came to the Bar early in 1960. The liquor industry was strictly controlled and there was a great deal of work.

PT: *Well, there used to be a lot of licensing liquor cases before the Magistrates' Courts, Courts of Petty Sessions in those days, sly grog cases, those sorts of cases. Why were there so many?*

BB: Well, if we can deal with the second matter first. So far as sly grog was concerned, there was a limitation on the types and numbers of licenses that could be issued by the Licensing Court. Until 1954 no more licenses of each type could be issued in a particular area than that issued in 1917. That coupled with the fact of 6.00 pm closing and no Sunday trading until 1966 led to a large number of illegal outlets. Courts at South and Port Melbourne, Richmond, Hawthorn dealt with a large number of sly grog cases. I was regularly briefed to appear in prosecutions both for licensed and non-licensed persons until the late sixties.

PT: *You would have had the opportunity as a young solicitor in those days to brief some good counsel and see some good judges. Who were they?*

BB: Well, the best judge I ever saw in my life was, (and the best judge I ever appeared before) was Tom Smith, but there were some wonderful judges: Sir Henry Winneke who became Chief Justice in 1964; Lush, Gowans, Newton, McInerney, Bill Harris, Starke and Crockett; some on the County Court — Leo Dethridge, one of the most kind, pleasant and affable men I have known; and fellows like Bernie Shillito and Jim Forrest.

So far as advocates, I had a great opportunity to see them when I was doing long articles and after admission — no-one came near Jack Cullity. But the other leading advocates of the day were fellows such as Vic Belsen, Rob Monahan before he went to the Supreme Court Bench, Frank Galbally, and Ray Dunn — the king of the Magistrates' Courts. We used to brief Lou Voumard. He was one of the great lawyers and a charming man — Dick Eggelston, Jack Nimmo, Dr Coppel — could make a case out of nothing — and Ashkanasy. Neil McPhee — I never met a sharper fellow than this wonderful bloke. Jack Winneke, top lawyer, top advocate. Bill Crockett, Jack Starke and of course some of the present day fellows — Bob Richter, could stand tall with any of them. The Bar has always had many great minds and I am sure they are still here today.

PT: *In 1958 you travelled overseas. In the 5th edition of Bourke's Liquor Laws of which you were an author, Mr Justice McInerney said "Brian Bourke at one stage was interested in joining the diplomatic service". What turned you away from the foreign service and towards the Bar?*

BB: I think what turned me away was that I didn't get the job. There were 700 applicants. I was in the final 14 and they wanted 11. I still missed out. At the final meeting in Canberra I was asked "How

well do you know Murray McInerney?" I said extremely well, he's a very close friend of mine. In a reference I got from McInerney he said he couldn't understand why I was applying to join the Foreign Affairs Department because he thought I would be far better suited in the law. That reference fixed me. All I want to say is McInerney was 100 per cent right.

PT: *You signed the Roll of Counsel on …?*

BB: 1 April 1960. I had actually come to the Bar about the end of January when I came back from overseas. In those days things were a bit more relaxed. There was no such thing as readers courses and you signed the Roll by agreement — I got the date adjourned twice — too busy!

PT: *Who did you read with?*

BB: Jim Gorman.

PT: *What sort of practice did he have?*

BB: Running down, almost exclusively. Good advocate and a good judge when he was appointed to the County Court.

PT: *What was reading like in those days compared to today?*

BB: Well, you took a brief on your first day. Some mates because of my involvement in debating briefed me as soon as I arrived. I'll never forget my first brief. I appeared before Ben Dunn, in the County Court, who subsequently became a Judge of the Supreme Court, and he locked my

Patrick Tehan QC and Brian Burke in chambers.

BB: *"I think the great advantage I had was I got to know police, judges and magistrates and other barristers and solicitors quickly."*

fellows up. It wasn't a very good start. It was completely different then. You didn't spend all that much time with your Master. You were in Court, you were around the Courts seeing other barristers in action, taking responsibility for making decisions in relation to matters. I don't know which is the better option. It does mean that I never really learnt how to draw pleadings but I don't think I would have been able to do that if I came to the Bar today. I think the great advantage I had was I got to know police, judges and magistrates and other barristers and solicitors quickly.

PT: *You were briefed in more than a couple of murder trials as Junior to Mr Justice Starke, who was appointed to the Supreme Court in 1964. What sort of barrister was Starke?*

BB: He was tops. He was a wonderful man. Fierce advocate. At times he might have been a bit too vigorous but he feared nobody, particularly the Bench. I heard him say once, there's a bit too much of "If Your Honour pleases" about this trade and I think he is right about that. He led me in the Magistrates' Court and Court of General Sessions as well. He did all sorts of work.

PT: *Starke presided over the trial of Ronald Ryan, the last men to hang in the State. You were Junior Counsel to Phil Opas. What sort of fellow was Ryan?*

BB: Well, I think he is the toughest and most courageous bloke I ever met. I appeared for both him and Walker on my own in committal proceedings that went for about two or three days, in February 1966. I knew Ryan prior and I was in communication with him while he was on the run and I went out to see him as soon as he was returned to Victoria. I can remember the first day after his return saying to him, "You know Ronnie, if you go down for this you're in for the big jump." He said, "You don't have to tell me anything about that, I know." I never saw the bloke concerned about his own fate. He wasn't a big-time crim. He was a thief and a burglar, but I got pretty close to him over his last 12 or 13 months and we became friends.

PT: *The trial got an enormous amount of publicity. No doubt Starke conducted it well?*

BB: He certainly did. Jack Lazarus — a very good barrister — appeared for Walker, who was convicted of manslaughter. It was sort of a sympathy verdict I think, but in all events it was good in the circumstances. Ryan never had any concern about that and so far as the trial was concerned it occupied I think 11 sittings days. It was just a well conducted trial; there was no delay. Starke kept us on the straight and narrow. Included in that time was a view that took place at Pentridge and it was great to observe the jury; they were just excited at the idea of walking around Pentridge. The publicity was absolutely enormous. It had a great influence on my career.

PT: *In what way?*

BB: Well, the publicity. I had known a lot of crims because I coached the Pentridge debating team from about 1954 until I went overseas. We established a debating club there. The principal organiser in the jail was a fellow by the name of John Bryan Kerr, a much publicised murderer. I had done murder trials before Ryan but the publicity of Ryan's trial meant more briefs.

PT: *John Bryan Kerr stood trial for murder I think three times and was prosecuted by Sir Henry Winneke. You got to know Kerr pretty well; what sort of fellow was he?*

BB: Well I got to know him extremely well because I was visiting Pentridge on a regular basis — about every second or third Friday night for a couple of hours. We ultimately got Kerr selected as a member of the Victorian debating team with such fellows as the late Ivor Greenwood, Allan Missen and Barry Beach. I can't think of the names of the others; there were six of us I think in the team. Kerr had three trials during 1950. Henry Winneke prosecuted him twice and Frank Nelson on the third occasion. There were two disagreements. In those days they didn't go much beyond the six hours, and the hope was if there was a disagreement the third time they would nolle the matter and the jury went for right on six hours but then came back with a guilty verdict. Kerr was a radio announcer, an odd fellow. I might say that I was at his funeral at Springvale in the last 12 months. I kept in touch with him and got to know his parents well. After he was released I saw him quite a deal. He got himself a decent job. He was intelligent, arrogant. His conceit was never matched in my view, but all in all he did a great job in Pentridge in relation to debating.

PT: *If I could return to the Ryan case. Were you involved in Ryan's appeals and the process to stay his execution?*

BB: Yes I was. We had appeals to the Full Court as it was in those days, presided over by Sir Henry Winneke. I just forget the other judges on that Court. We were unsuccessful. It was significant in that appeal that John Young was brought in to lead Jack Lazarus for Walker, I was with Opas. Tony Murray had prosecuted the trial with his usual skill and complete fairness. Geoff Byrne was his Junior. It was just a revelation and delight to see Young in the Full Court arguing this criminal matter. I must say I found John Young one

of the very great judges that I appeared before and one of the most humane. Ryan's appeal went to the High Court and Privy Council. We had applications for stay of execution. It was a very interesting year for me.

PT: *And what about Ryan, the case attracted enormous publicity. Who were the key figures involved in the moves to save Ryan from hanging?*

BB: Well we all know Father Brosnan did much. Barry Jones was absolutely tireless in his efforts. Lots of people, but I think the two people that one would have thought would have been most persuasive was the prosecutor Tony Murray and Judge Starke. Neither of them wanted Ryan to hang. They were both heard by cabinet on the matter. The Premier of the day was intent on hanging him and that was all about it. There was a huge organization that developed quickly to try and prevent the execution. The night Ryan was executed there was a meeting held in the Chambers of Dick McGarvie who was also prominent in trying to prevent the execution. I was present. At the meeting we had a couple of professors. We had a crim and two or three other people present. There was a transcript of the meeting. When I get things organised I'll certainly give that transcript to the Bar for it to keep for whatever use they want to make of it.

PT: *The story is famously told of Mr Justice Starke advising Cabinet that he did not doubt Ryan's guilt. Why was Starke called before Cabinet and why did he have that view, do you think?*

BB: Prior to 1975 when the only sentence for murder was death, judges spoke to Cabinet in relation to whether the sentence was to be commuted — almost always it was. I don't think there was anything particularly unusual in Starke being asked to appear before the Cabinet and saying to them what his views were about the case. I think on the evidence Starke didn't have any doubt about his guilt and I think he would have conveyed that to Cabinet, but I suppose Cabinet were just checking to see that the trial judge didn't think there could possibly be some miscarriage. I became very close to Ryan. I knew what Ryan's view and attitude was and I don't think there was a miscarriage relation to the conduct.

PT: *Where were you on the morning of his hanging?*

BB: I can remember coming in. I was living at Hawthorn at the time and I can remember walking down Bourke Street He was executed at 8.00 am. I was just passing the post office at 8.00 am. I had an arrangement with a great friend of mine who was a Senior Officer at Pentridge to ring me as soon as he could. By the time I got to Chambers there was a message to ring him. He told me that it had gone very quickly. It was a very tense time because there hadn't been an execution since, I think, 1953. Jack Galbally was the leader of the Labor Party in the Legislative Council for a very long time and every year he used to bring a Bill to change the Crimes Act to abolish capital punishment and fix a term of life for murder. He could not get Parliament to support the Bill. The Liberals abolished capital punishment in 1975.

PT: *How did you cope with the tension and the anxiety of those sorts of trials over such a long period of time?*

BB: It was difficult. But you knew in most cases that the sentence wouldn't be carried out. You couldn't get a worse result for a client could you, than get him convicted of murder and to trot up those stairs beside the 4th Court and try to talk to a client who had just been convicted of murder was one of the most arduous tasks you could ever engage in. I was helped in any decision to not do many murder trials by the late Woods Lloyd, one of the best barristers that was ever at this Bar who himself had done several murder trials. He told me of the dangers of getting too involved. I accepted his warning but I did about 50 murder trials.

PT: *And who were the barristers doing murder trials in the 1960s with you? People like Bob Vernon, Michael Kelly? Tell us a bit about them.*

BB: Vernon was one of the best barristers I was ever with. When he was hot there was no-one to match him. His addresses, his cross-examination — everything was short, direct and telling. A wonderful barrister. Michael Kelly, well just look at him now. He could make a silk purse out of a sow's ear. He was and is a wonderful compassionate man. Lacked the vigour of Vernon, but that was Kelly's style. He was very good. George Hampel was doing a lot of murders. Crockett, Starke, Belson, Lazarus and those fellas were all doing them. Strangely enough Jack Cullity didn't do all that many murder trials.

PT: *Jack Cullity is almost regarded as the doyen of the Criminal Bar. Why?*

BB: He was the most wonderful advocate you could imagine. His presence in court was like no other advocate I have seen here or in England or the US. He was a quiet man. In fact Cullity away from the Court room was a very shy individual. All his presentation was done to plan. His cross-examination was brief but piercing. The police were justifiably scared of Cullity. His addresses to the jury were short, clear and persuasive. He had the respect of every judge and magistrate he appeared before. The crims idolised him.

PT: *There is no secret that you've long been regarded as a Labor man. In the*

PT: *"Jack Cullity is almost regarded as the doyen of the Criminal Bar. Why?"*

1960s was there a Labor Bar?

BB: There were always prominent members at the Bar who were Labor oriented. Greg Gowans was a very prominent Labor fellow and a really gifted, intelligent individual, and many members of the Bar have stood for Parliament. I stood myself once, but I wouldn't have thought there was ever a "Labor Bar". I think one of the great things at this Bar, it is not very political. I never concerned myself to know the politics of anyone else and I don't think many other people at the Bar would be concerned about another's politics. Xavier Connor and Dick McGarvie were prominent in the ALP and of course John Thwaites is a member of the Bar.

PT: *In 1967 you became President of the South Melbourne Football Club and you've been involved with footy for most of your life. You were a VFL Director and a member of the Tribunal and now on the Appeal Board. Tell us of your involvement with football.*

BB: Well I played junior football but I was nothing much at it. I joined the committee of the South Melbourne Football Club in 1960. They said they wanted a lawyer on it. I was the Club's delegate to the VFL within a couple of months. 1 served for 10 years which gave me a life membership of the league which has been the most rewarding and satisfactory connection I have had with footy. I became President of South by default. During my 10 years as a league delegate and now over 30 years a life member I've kept myself in touch with football, and some of the greatest friends I have know are footballers and people who administered football. Sir Kenneth Luke became a great friend of mine and was a really wonderful bloke. He led the league.

PT: *You sat on the Tribunal for many years. Tell us of some of the more interesting cases you sat on.*

BB: Well after I finished at South in 1971, sat on the Tribunal and I now sit on the Appeals Board. I sat on the Tribunal with Jack Winneke as Chairman at one stage and Jack Gaffney at another and the late Alf Foley — a magistrate for a short time. All those charged are innocent or so some sections of the public says. I think Brian Collis gets far more publicity for his work than Murray Gleeson does. The Tribunal preserves the mystique of the game. It is good for football. I sat on Carmen's case. Carl Dietrich of St Kilda was the most interesting bloke.

PT: *Who are some of the best footballers you have seen?*

BB: Really this is answered by a litany of names. Without saying much: Whitten, Coleman, Farmer, Ablett, Rose, Skilton and Bedford and Clegg. Graeme Arthur from Hawthorn and Leigh Matthews, perhaps the best player I ever saw. Carey. Bill Hutchison from Essendon. Anybody who plays league football is a good player. Anybody who is a top player in his own club is excellent and every club has a few of those.

PT: *Now it is not a secret that you entertained judges down at South Melbourne when you were President, and Sir Henry Winneke was one. Who were some of the others?*

BB: Well, Sir Henry Winneke, he was one of the great blokes. We used to have Ester Barber, Murray McInerney who had the great wisdom to be a South supporter. Trevor Rapke and Joe O'Shea. To have those people there was great for South, for football and to see Henry Winneke having a drink — or two or more with Bob Pratt and Laurie Nash was terrific.

The attitude to accused must change. I believe if pleas were made less formal and the judge had some direct verbal contact the judge would get a more complete assessment of the accused. The accused would have a better regard for the process. An understanding attitude by a judge directly to the accused is the spark for rehabilitation.

PT: *I heard you kept him waiting one afternoon, that is Sir Henry Winneke on the Full Court, is that true?*

BB: Yes it is actually. I made an enquiry over there about 4.10 pm one afternoon as I had a rape committal at Coburg the next morning. JPs conducted committals in those days. I don't know what happened in the Full Court. I got a message about 10.30 am to say that I was wanted in the Full Court. Reg Smithers, a great character at this Bar, told me once, if you are going to do anything at the Bar as long as you are completely honest about it you will get away with murder. Winneke said to me "What's your explanation?" I said "sheer greed", and he said "Oh get on with it". Of course it was another example of the CJ's generosity.

PT: *What sort of judge was Sir Henry Winneke?*

BB: I think he was just matchless. His ability to deliver judgments off the cuff. I don't just mean in appeals against sentence but he would just give deliver the judgment in an appeal against conviction without leaving the Bench. The judgments then are great. At all times Henry Winneke treated the accused as though he was a person entitled to fairness, consideration and courtesy. He was regarded with real affection in Pentridge, which is saying something for a Chief Justice. But it was his ability just to run the Court with no fuss, little pomp and where everyone present felt relaxed. I mean this is what ought to happen now. I think one of the problems with the present system is that judges are not strong enough in the way they determine things. The easiest order to make is to adjourn a matter. It is also easy to reserve all sort of matters for a later ruling or sentence. That wasn't Winneke's way. Yet he did it with such finesse the system was better. I have a letter written to me by Tom Smith which praises Sir Henry Winneke — for changing the attitude in criminal appeals.

PT: *Can I return to your practice in the law. Criminal trials and pleas now seem to take longer than they did years ago. Why do you think that is the case and are the accused ultimately better off?*

BB: Both take longer now. I don't think the accused are advantaged. I don't think all the pre-trial appearances achieve much and the cost is prohibitive. Judges should be more assertive in the trial process and less concerned with worrying about the Court of Appeal. Rulings should be given on the spot. When sentencing an accused now there are two appearances — nearly all sentences are "thought about". I believe 90 per cent of the sentences should be delivered at the end of the plea. Barristers in my view address juries for too long, and charges become too complicated because of the length of them and the repetition of facts. Judges do one or two pleas a day — Leo Dethridge would do eight of a morning and the accused was sentenced immediately. The attitude to accused must change. I believe if pleas were made less formal and the judge had some direct verbal contact the judge would get a more complete assessment of the accused. The accused would have a better regard for the process. An understanding attitude by a judge directly to the accused is the spark for rehabilitation. We proceed with an

insular narrow approach to reformation. The fact is that we have a highly efficient system of crime management directed at protecting victims instead of coping with its causes.

PT: *Brian, you never took silk, why?*

BB: I don't really believe in silk. I don't regret I didn't take it for one minute. I've had a number of readers and several of them have taken silk but I didn't ever want to.

PT: *When will you retire?*

BB: I don't know, I'll keep going for a little while yet. I still feel that I can keep up with the young bloods at the Bar for a year or two. I've got plenty of good mates around this Bar who will tell me when I ought to give up.

PT: *Tell us about the old style crim.*

BB: Crims that I used to deal with when I first came to the Bar in 1960 were mainly charged with dishonesty offences. It was rare they carried a gun, they weren't involved in drugs.

Whilst they didn't like police they had some innate respect for the law. They would never inform on anyone. You never did a trial where one crim gave evidence against another and when you think about the old prosecutors such as Jack Maloney, Stan Mornane and Bob Bitstrup it was a different scene. I don't think those fellas were interested in calling people to inform on other crims and what's more other crims didn't. Nowadays you can hardly do a trial where there is not some informer. The Court sanctioned reductions for assisting the police has led to a change in the attitude of some crims, particularly drug operators. I still see crims that I acted for 40 years ago. They are little different to other people.

PT: *Who was your most dangerous client?*

BB: The only time I was ever threatened was by letter from a fellow convicted of a murder. It is a reported case: *R* v *Baron* and I led Frank Vincent. Baron was convicted of two counts of murder of two Salvation Army people who befriended him. He got them to take him to St Kilda and wait while he went inside and got a gun, shot the two of them and left their bodies out past Narre Warren. I subsequently got a letter from Baron after all the appeals had been exhausted. He told me that he didn't know how I slept at night. He didn't know how the judge could keep on going and furthermore that Harry Morrison from the homicide squad was on his list. He was going to fix us. Nothing ever really happened about it. I spoke to the prosecutor and I spoke to the judge. The letter was sent down to the homicide squad. Frank Vincent told me later on that Baron was certified. I've never heard any more about it. I was not unduly upset about it but it was a bit of a jolt to get the letter.

PT: *Still I suppose most threats by criminals come to nothing.*

We were speaking earlier about some barristers that you had appeared with in the sixties and seventies. What about some of the solicitors who were around in the fifties, sixties, and early seventies?

BB: Well, the solicitors in those days were very different. I mean you used to get briefed a lot by Frank Galbally. Frank Galbally was a complete advocate. Quick, short and to the point. Avoided the facts. Knew how to play on emotion and had very great success. Ray Dunn, who was the best Magistrates' Court solicitor you could hear. Ron Window, who had a practice Lynch and Window in Richmond. He was a fine solicitor.

PT: *Who was the solicitor who appeared in the Kerr cases?*

BB: Jack Jones. He's got a daughter now at the Bar and he ran a practice in partnership for many years with Noel Purcell, who is a magistrate. Jack Jones was a wonderful solicitor. Didn't do all that much appearing, he used to brief extensively but he was devoted to the cause, very hard working and certainly did a great job on the Kerr case because Kerr went within a brink of being acquitted. Every client got good service from Jack Jones.

PT: *What about recidivist sexual offenders, how would you deal with them in terms of sentencing?*

BB: The Parliamentarians know. Ask the Court of Appeal.

I believe most of the people charged with those offences are sick. One can only hope in the fullness of time there will be proper places for these people to be looked after, treated and helped. Of course there will be failures, there are failures in everything in life.

PT: *Well in your 50 years in the law you have certainly seem some dramatic changes in the courts. In the lower courts, the Magistrates' Courts, what have been the changes and have they been for the better?*

BB: Generally I don't think the changes have been for the better. Most changes have been politically inspired. There is too much bureaucracy, too many mentions, pre-trial conferences and I do not like the distraction created by computers in court.

PT: *You spoke about the need for more judges. Would the appointment or the proposed appointment of temporary judges solve the problem?*

BB: No, I don't think the appointment of temporary judges would solve anything.

First Tenants Move Into Refurbished ODC East

AS at December 2003 the Owen Dixon Chambers East renovation and refurbishment works are under way on Levels 8 to 10 following the re-occupancy of Levels 11 to 13 in October. Unfortunately the tenants who moved into the refurbished chambers on levels 11 to 13 experienced a number of "teething" issues with the operation of services including power and data connection points, the door lock mechanism, toilet access, air-conditioning, and the design and location of BCL supplied joinery.

All issues have been addressed, although some issues have taken time to be resolved. Generally, BCL has received favourable reports from tenants regarding the "new" accommodation. The quality of the rooms with their modern facilities including openable windows together with the vista on each floor over the Supreme Court have significantly enhanced the amenity of Owen Dixon Chambers East.

For its part BCL and the builder have been through a significant learning phase in relation to levels 11 to 13. The sheer logistical challenge in moving tenants into the refurbished chambers whilst at the same time relocating dislocated tenants

to temporary rooms to enable the next three floors to be progressed — a total of some 140 moves — has been a complex procedure.

Additional effort before handover by BCL, the project manager and the builder on future levels should minimise building defects. Furthermore tenants will be consulted regarding the positioning of joinery and the location of power/data points in their chambers. BCL is confident that the re-occupancy of levels 8 to 10 in late March/early April 2004 and subsequent levels will be less disruptive for tenants.

The BCL Board has listened to tenants and agreed to modify the floor plans for the remaining floors by enlarging some rooms — this will produce an enhanced mix in the size of chambers.

BCL has continued its policy of providing a rental rebate for barristers who occupy a room on a floor which is significantly impacted by renovation noise. Noisy works during business hours are being minimised by the builder, but unfortunately noise does occur and it becomes an issue, particularly as the building remains the home of many barristers during the refurbishment works.

The scaffolding on the William Street facade is being removed as each floor is completed, and it is expected that each level will be scaffold-free shortly after reoccupation of each level.

In terms of progress, the refurbishment works are two to three months behind schedule, but BCL is still confident that the project will be completed in late 2004 and within budget.

The goodwill of the Bar and Owen Dixon Chambers East tenants is particularly gratifying considering the difficult circumstances of this refurbishment project.

The refurbishment of Owen Dixon Chambers East is a significant undertaking by the Bar and BCL that not only creates a valuable asset, but will provide a "quality home" for members of the Victorian Bar for the next 30 years.

A Motherhood Statement

Coram: Judge Morrow
Heatherton v *S.M. Collins*
M. Scarfo for the Plaintiff
J. Ruskin QC with M. Fleming for the Defendant which was in effect the VWA.

Argument re costs:
Mr Ruskin: Yes. But can I say this to Your Honour, King Solomon would have decided the case this way. His Majesty would have said as follows: The defendant pay the plaintiff's costs of amending the defence and the plaintiff pay the defendant's costs of the application to strike out … His Majesty would have noted that since both applications were heard together you cut the baby in half and therefore there should be no order as to costs.
That's really why there should be no order as to costs because each out weighs the other.
His Honour: But King Solomon never did cut the baby in half.
Mr Ruskin: I know, that is because the true mother came along.
His Honour: Exactly.
Mr Ruskin: Here, the mother of all compensation commissions came along and saved the day …
His Honour: The true mother in this case might say well, alright, we'll pay the plaintiff's costs.
Mr Ruskin: No, no, not this mother!

The Victorian Bar and its Control of the Defence Force Legal System

Two members of the Victorian Bar (both on List S) have recently been appointed to significant posts in the Defence Force Legal Service.

HEAD OF THE MILITARY BAR

THE heading in the *Reserve News* reads: "Captain Paul Willee, RFD, QC, RANR, Head of the Military Bar — the Defence Legal Service". Paul Willee was appointed "Tri-Service Head of the Military Bar" last year. This appointment means that no longer can Captain Willee appear for the defence, or to prosecute or to assist an inquiry. Paul Willee played a major role in the 1978 Court Martial of the ship's company from *HMAS Adroit* and in the proceedings resulting from the grounding of *HMAS Darwin* in Hawaii in 1990. More recently he conducted a review of the Army Board of Inquiry findings in relation to the Black Hawk helicopter incident with the Australian Defence Force. He was also retained as counsel in the recent inquiry into sexual harassment in the Australian Defence Force.

Perhaps the most important event of his naval career is that he disembarked from *HMS Voyager* at Jarvis Bay only four hours or so before the ship went back to sea for its fateful exercises with *HMAS Melbourne* in 1964. Apparently timing such as this runs in the family. His father was an RN Telegraphist in *HMS Hood* who left that ship to undertake a PTI course a week or so before it was sunk by the *Bismarck*.

Now he is responsible for establishing a collegiate organisation similar to that of the State Bars for all navy, army and air force members of the Defence Force Legal Service. This includes responsibility for putting in place a code of ethics binding on service lawyers, many of whom do not have, and are not required to have, practising certificates. Until that code is in place Paul Willee acts as their Ethics Committee both for the purpose of advising and supervising and provides a filter in respect of allegations of misconduct.

Paul Willee.

Director of Military Prosecutions

IN 1997 The Honourable Brigadier Mr Justice Abadee, a Justice of the Supreme Court of New South Wales and a Deputy Judge Advocate of the Australian Defence Force highlighted the need for the appointment of a Director of Military Prosecutions for the Australian Defence Force.

Brigadier Abadee's report was in part instigated by the need to ensure that the system of military disciplinary tribunals operating in Australia complied with the need to ensure that only an independent and impartial tribunal sat in judgment on any person charged with an offence. The United Kingdom's system of Courts Martial was successfully challenged before the European Court of Human Rights in the case of *Findlay* v *The United Kingdom*

(case number 110/1995/616/706 — judgment delivered 21 January 1997). The main concern expressed in *Findlay* was that in an armed hierarchical force the vesting of the power of appointment of a court (including a particular Judge Advocate), the selection of a prosecutor and the eventual review of proceedings (even if carried out on legal advice) in one commander was such as to raise a perception that a hearing or trial so conducted was not independent and impartial. The overriding concern was that the person convening a Court Martial was potentially a person apparently able to exercise some command influence over those involved in any particular trial. While no such influence was ever shown the perception was sufficient.

Colonel Gary Hevey.

While the Australian system of Courts Martial and hearings before Defence Force Magistrates differed considerably from the United Kingdom model there was still a concern that a total review of the procedures needed to be carried out to ensure that all involved in the process could be assured that "justice was not only being done it was manifestly being seen to be done".

A number of Brigadier Abadee's recommendations were accepted and implemented by the then Chief of Defence Force and the Chiefs of Services. However, the recommendation that an independent statutory Director of Military Prosecutions be appointed was not accepted at that time. In his annual report to Parliament in 2000 the then Judge Advocate General of the Australian Defence Force, The Honourable Major General Mr Justice Duggan of the Supreme Court of South Australia, expressed his view that the time had come for the appointment of a DMP. At around this time there was concern over what became known as "rough justice" within the 3rd Battalion of the Royal Australian Regiment, and Mr Burchett (previously a Justice of the Federal Court) was appointed to enquire into those allegations. The Senate Standing Committee on Foreign Affairs and Trade was also enquiring into the entire system of Military Justice within Australia. Both Mr Burchett and the Senate Committee recommended that a Director of Military Prosecutions needed to be established.

In 2002 General Peter Cosgrove and the Chiefs of Service Committee accepted the recommendations and the position was advertised nationally. In April 2003 Minister Dana Vale announced that Colonel Gary Hevey, a member of this Bar, would assume the position as Director of Military Prosecutions with effect from 1 July 2003. The position is currently an interim position pending the passing of legislation which is expected to occur during 2004.

Gary's role as DMP is analogous to that of the DPPs within the Commonwealth, States and Territories although his jurisdiction is confined to members of the Australian Defence Force and Defence Civilians. This jurisdiction relates to offences prescribed by the *Defence Force Discipline Act 1982* and includes offences committed while on service overseas.

The Directorate of Military Prosecutions office is to consist of eight full-time prosecutors with an ability to augment that staff from almost one hundred full-time ADF lawyers or three hundred reserve officers. The office is currently located at Garden Island Dockyard in Sydney, and Gary aims to spend about one week per month at that location with the rest of his time in Melbourne in his civilian practice. The case load is anticipated as being about 50 to 100 trials per annum across the Navy, Army and Air Force. This case load compares with the Canadian Defence Force which is also similar in size to the ADF.

Gary brings a wealth of military and legal experience to his new position. He was admitted in 1977 and served as a regular officer in the Australian Army Legal Corps between 1977 and 1982. He moved from Melbourne to Adelaide with the Army in 1981 and became a Crown Prosecutor in South Australia between 1982 and 1985. In 1985 he signed the Bar Roll in South Australia. He returned to Melbourne at the end of 2001. After leaving the Regular Army he continued in the Army Reserve and was appointed a Judge Advocate and Defence Force Magistrate in 1999. He resigned those appointments to assume his new role.

The new position of DMP will mean that Gary will be responsible for deciding which serious allegations within the ADF will proceed to trial and at what level. His position as a statutory appointment will remove him from the chain of command within the ADF and will require him to report to Parliament annually in a manner similar to the Commonwealth DPP. His statutory appointment will mean that the current system of thirty-three commanders who currently have the power to convene a Court Martial or Defence Force Magistrate Hearing will be replaced by this office. The aim is to ensure that there is a uniformity of decision making across the three arms of the service, across the geographical spread of the forces and across all ranks within the service.

Criminal Bar Association Dinner

Colin Lovitt

Treasury Restaurant, Thursday 27 November 2003

"LOVITT! We must have a dinner!" Thus spake the Criminal Bar Association's inaugural Chairman, Michael Kelly, early in 1980, when the CBA was little more than a year old.

"But, Michael, who will organize the dinner?"

"You're the Secretary — you do it."

I was always fearful that no one would come. Initially, my concerns were confirmed. First numbers were not what we hoped. We had to appoint someone from each of the Clerk's lists to attempt to "encourage" fellow members' attendance. In the end, some 65 criminal barristers attended Allison's, the current site of "Jacques Reymond".

Woods Lloyd was guest speaker, somewhat mischievously chosen because, inter alia, he had recently successfully defended the *Melbourne Herald* newspaper in a libel action launched by the then owner of Allison's after a particularly vitriolic article by the paper's restaurant reviewer, Eric Page (he of the mythical spouse "Hortense"). "Fat Ronnie" was appointed Woods' "taster" — just in case the owner was tempted to exact retribution. The choice of taster was ideal, as "Fat Ronnie" always "browsed" on his neighbours' plates anyway.

Kelly had been appointed a judge by then, and John Phillips was the new Chairman. The names of the attendees were neatly entered into a book I duly inherited — by the then Treasurer, one Frank Vincent.

Wines were from the Victorian Wine Centre (which happened to be situated within a drop kick of my home), and that started a tradition of the CBA supplying the wines, which, for many dinners, were purely Victorian in origin; thus, we limited the costs but maximized the parochiality.

It was a rowdy affair. There had never been a social gathering in Victoria of so many criminal practitioners. The exuberance of some commenced another tradition, which continues to this day. (I have always thought that the heckling and general rudeness of the audience was part of the charm of speaking at a CBA dinner, but the current executive seems to have moved towards a more formal, less humorous gathering. It'll never last!)

The night having been voted a great success, we did not have to rope in attendees thereafter. Our dinners, generally held twice a year (pre-Easter and Oct/Nov) became part of the folklore of the CBA, and indeed of the Bar itself. Indeed, some common law barristers joined the club simply to be eligible to attend the dinners! Even "Sam" Spry signed up and came to many evenings, traditionally at popular restaurant venues, with food and wines of a high standard, cheap prices, CBA subsidy, a raucous atmosphere, and the prospect of discussing the 3-2-1 votes from the last dinner. I cherish the memory of "dad" solemnly standing and acknowledging the enthusiastic ovation which greeted the announcement that "History has been made, folks, in that we have a father and son quinella for best-on-the-ground at the last dinner. Congratulations, Ramon and Simon Lopez".

I've lost count of the number of feasts since that first in 1980. I know that Chairman Bob Kent (much missed by the CBA) presented me with a large key which I still treasure, signed by everyone in the room (about 140 at Fortuna Village) upon our 21st dinner. That would have been in circa 1991. We must have passed the 40 mark by now.

Helen Delany and Ian Hill QC.

Caroline Jenkins, Jarrod Williams and Anita Spitzer.

Chief Judge Rozenes, John Hasse, Dyson Hore-Lacey S.C., and Ed Lorkin.

Judge Nicholson, Remy van der Weil, Judge Walsh, Shivani Pillai, Tony Howard QC and Brendon Murphy QC.

Nha Nguyen, Bruce Nibbs, Garry Hinson and Amber Harris.

Carolyn Burnside, Rob Hulls A.G., Colin Lovitt QC and Steven Shirrefs S.C.

So it was that about 100 members and guests attended the Treasury restaurant on 27th November to celebrate the 25th anniversary of the formation of the Association, whilst simultaneously honouring John Phillips upon his retirement as Victorian Chief Justice.

A cavernous ground floor, with a view of the terraced mezzanine service areas, meant that the acoustics were a little strained. Food was excellent, although I have always disliked the plonking down of alternate dishes (this time, for entree, main, even dessert) without recourse to the preferences of the individual diner; at least there did not seem to be the quaint tendency of the past to assume that the ladies wanted white meat and the gents red.

Wines, from Rathdowne Cellars, were first-class. It was a hot night and the restaurant really should not have had to be asked to activate the air-conditioning (which only partially relieved the difficulty — due, no doubt, to the size of the problem).

Chairman Lasry's absence, observing a death penalty case overseas, led to Vice-Chairman Ian Hill acting as master of ceremonies. He welcomed the Guests-of-Honour, John and Helen Phillips, together with some of the founding executive of the CBA, the Attorney-General, honorary members, the new criminal silks, and current readers.

Phil Cummins once again spoke eloquently of the importance of the role of defence counsel, and treated those who could hear to a selection of John Donne's poetry. In this regard, I was a little confused regarding his allusion to Phil Dunn's ancestral connection. Doubtless Dunny's ancestry has been questioned by others in the past, but his relationship to the said laureate?! Recourse to a spellchecker might have helped! Or maybe, just maybe, Phil was jokin'.

John Phillips entertained with some reminiscences of the Association's history. He was clearly moved by the CBA's gesture and was in fine form. I have always found him to be a thoroughly well-prepared and engaging after-dinner speaker.

All round, a fine evening, if a tad warm. Guests were surprised to see Robert Redlich whipping them home (er, metaphorically, folks) and the judges will take that into account when awarding votes for the night.

A grateful word to the tireless Treasurer, Nicola Gobbo, who stepped into the breach when Secretary Reg Marron became caught in the bush, together with Reg and his secretary, Rebecca, for their assistance in the thankless job (just ask me) of organizing all and sundry. Over 30 attendees booked or cancelled on the day of the dinner! Good to know that nothing has changed.

Irish Australian Legal Links

Speech by John (Jack) Rush QC, Chairman of the Victorian Bar, to the Irish Bar Conference, Sydney, 28 August 2003.

The life, the times, the legend of Ned Kelly — bushranger, outlaw, to some folk hero — is perhaps demonstrative of the conundrum presented when one comes to examine the Irish influence in Australian legal history.

NED Kelly, of humble Irish parentage, sought to revenge wrongs committed on his mother, sisters and brothers by a corrupt constabulary of Irish origins. Kelly, in the company of his outlaw gang all of Irish extraction, shot Police Constables Lonigan, Scanlon and Kennedy, all of Irish extraction. When eventually caught, he was tried before and when found guilty sentenced to be hanged by Sir Redmond Barry, Justice of the Supreme Court of Victoria. Barry was a graduate of Trinity College, Dublin, formerly of the Irish Bar. Offender, victim, judge and no doubt more than half the jury were all of Irish background.

Let me set the 1870s social scene with a quote from Ned Kelly's Jerilderie letter. This is a rambling letter Ned Kelly wrote in an attempt to explain his actions. After robbing the bank at Jerilderie and before taking off with the booty Ned left the letter with a Bank clerk for the purpose of publication. It was published widely and added to his contemporary legendary status. It was also used against him in his murder trial:

> I am reconed a horrid brute because I had not been cowardly enough to lie down for them under such trying circumstances and insults to my people ... I have been wronged and my mother and four or five men lagged innocent and is my brothers and sisters and my mother not to be pitied also who has no alternative only to put up with the brutal and cowardly conduct of a parcel of big, ugly, fat-necked wombat headed big bellied magpie legged narrow hipped splay-footed sons of Irish bailiffs or English landlords which is better known as officers of justice or Victorian Police ... a policeman is a disgrace to his country ... next he is a traitor to his country and ancestors and religion as they were all Catholics before Saxons and Cranmore yoke held sway ... what would people say if they saw a strapping big lump of an Irishman shepherding sheep for 15 bob a week or tailing turkeys in Tallarook ranges for a smile from Julia ... they would say he ought to be ashamed of himself and tar-and-feather him. But he would be a king to a policeman who for a lazing loafing cowardly bait left the ash corner deserted the shamrock – the emblem of true wit and beauty to serve under a flag and a nation that has destroyed massacred and murdered their fore-fathers …

Sir Redmond Barry.

At the time of writing the letter Kelly was approximately 23 years of age. It can be seen that in the Irish tradition, with little or no education, Ned Kelly was an advocate and his speech from the dock in his murder trial bears testament to this.

Kelly's trial judge represented a different Irish contribution to Australian law. Redmond Barry came to Australia from the Four Courts, Dublin, in 1839.

A recent biography of his life records that even on his sea journey to Australia he was controversial. He commenced a liaison with the wife of a senior government official of the then colony of New South Wales. The biographer noted that in his diary of the sea journey Barry placed an asterisk at each date he managed intercourse on the voyage. There was an impressive tally. As the voyage wore on he entered the details like a cricket score. 31/7 Mrs S twice — 6/8 Mrs S four times. The affair raged on despite the passengers being scandalised by the behaviour. The scandal meant he was packed off to the then separate colony of Victoria.

Sir Redmond Barry was part of the class referred to as the Anglo-Irish. They were the establishment Irish, integral to the colonial process. In pre gold rush Australia:

> ... the Irish were local representatives of the Anglo-Irish ascendency, an Irish cousinage of gentlemen whose lineage, connections, wealth and social position ... were granted superiority in "colonial society". They were, the best of them, in the words of Mahaffy, the provost of Trinity College in which so many of them were educated, heroic, splendid mongrels, a mixed breed in decline and increasingly alien in their own Ireland ... yet feeling themselves Irish and indeed formed by distinctive and unique Irish attitudes and experience ... Australia was their chance to realise frustrated Irish ambitions. The Anglo-Irish were central to every proposal of liberal reform during this era.

At his trial Kelly was represented by an inexperienced barrister, less than a year's call at the Bar. Bindon had never appeared in the Supreme Court. He failed to adequately to put a case of self-defence or manslaughter. Kelly according to the laws of the time was unable to give evidence. After the verdict was announced the Judge's Associate asked Kelly if he had anything to say as to why sentence should not be passed. A remarkable exchange

between Bench and dock then ensued.

Kelly, long silent, commented on the proceedings "... Bindon knew nothing about my case" — that on the evidence presented "... no juryman could have given any other verdict". Kelly stated that if he had examined the witnesses "... I am confident, I would have thrown a different light on the case". Kelly said he did not cross examine because he did not want to appear as flash or with bravado. Barry, black cap upon his head, told Kelly "... the verdict pronounced by the jury is one which you must have fully expected .... no rational person would hesitate to arrive at any other conclusion but that the verdict is irresistible and that it is right." Kelly, gazing at Barry said, "My mind is as easy as the mind of any man in this world." Barry called him blasphemous: "... you appear to revel in the idea of having put men to death." Kelly retorted "more men than me have put men to death" directed at Barry, notorious since the l850s for invoking the death penalty. This exchange continued on at length until Barry sentenced Kelly to death concluding with the words "... and may God have mercy upon your soul". Kelly replied, "I will go a little further than that, I will meet you where I go."

The curse had force. Barry died suddenly but 12 days after Kelly was hanged.

Barry was an extraordinary man. As a barrister Barry was the first to appear for Aborigines without fee. Barry was instrumental in the establishment of the magnificent State Library of Victoria; he worked assiduously to establish Melbourne University and was its first Chancellor; he was responsible for the establishment of the Philosophical Institute and the Melbourne Hospital. He was a great man of public affairs.

Barry was also a Judge involved in the Eureka trials. The Eureka uprising looms large in Australian history, an uprising of miners on the Ballarat goldfields led by Irishman Peter Lalor. Lalor, also a Trinity graduate, trained as an engineer, his father a Member of Parliament, his family of the 7 septs of leix. That Lalor, vestige of old Irish aristocracy should have been a digger at Ballarat says much for the solvent effect of immigration and the gold rushes.

To explain the Eureka uprising briefly is difficult. Rigid police enforcement of a licence fee, accompanied by manhunts, overnight chaining of delinquents to trees, police corruption, hard times on the goldfields and a mass of humanity meant discontent was high. In 1855 hundreds of diggers marched to Bakery Hill, Ballarat, and unfurled their flag, the flag of the Southern Cross. They burned gold licences. Two days later their stockade was overrun by troopers with over 20 killed.

Mark Twain described this action as a strike for liberty, a struggle for principle, a revolution small in size but great politically. Thirteen diggers were charged with high treason. Barry was one of three judges who heard a number of trials. Stawell (later Chief Justice) prosecuted.

Barry was an extraordinary man. As a barrister he was the first to appear for Aborigines without fee. he was instrumental in the establishment of the magnificent State Library of Victoria; he worked assiduously to establish Melbourne University and was its first Chancellor; he was responsible for the establishment of the Philosophical Institute and the Melbourne Hospital. He was a great man of public affairs.
Barry was also a Judge involved in the Eureka trials.

The prosecution chose the first to be tried carefully. An American black, Joseph, was the accused in the first trial. The Crown felt his race would be unpopular with the jury.

At this trial the first test of the legal process occurred when the Crown challenged jurors with Irish names together with publicans. The defence threw the courtroom into mirth when it objected to jurors who gave their occupations as gentlemen or merchants. Eventually two gentlemen and a publican got through. Joseph was acquitted. His acquittal was met with loud cheers from thousands who gathered outside the Court. There was even talk of storming the Court if a guilty verdict was delivered.

Even with long delays between trials and new jury lists, acquittal followed acquittal. The trials took on an air of farce. In the last trial Barry solemnly warned the jury: "The eye of heaven was upon you and your verdict." This jury deliberated for 20 minutes — the shortest deliberation of all the trials. Not one digger was found guilty. When Manning, Irishman and Eureka rebel, was freed outside the Court to a large throng he declared:

> I owe my life to the unbending honesty and integrity of a Melbourne jury. Future history will remember these people with honour.

Ireland QC appeared for the defence in the Eureka trials. Ireland was also a graduate of Trinity College, Dublin (in 1837, the same year as Barry). It was said of Ireland that he was the greatest advocate the Victorian Bar had seen. He died a bankrupt and in poor circumstances, admitting he had squandered four fortunes in his lifetime.

Lalor, the leader of the Eureka uprising, was wounded when the stockade was overrun. He managed to escape and eventually received a pardon. He was elected to the Victorian parliament in 1855.

I think in Victoria of all the Australian states the Irish links have been the closest. The Supreme Court of Victoria has a dome modelled on Dublin's Four Courts. Until the developers' cranes rendered it rubble, on the adjacent corner to the Supreme Court was the second home for generations of Melbourne barristers, the Four Courts Hotel, later to become Four Courts Chambers. In Victoria, and no other Australian state, as in the Irish courtroom, solicitors sit facing counsel with their back to the Judge.

In Victoria, Queen's Counsel, and now Senior Counsel, wear with their gowns a rosette at the back. Popular belief held that the silks' rosette was of Irish origin. Great was the disappointment of the correspondent of the *Victorian Bar News* who reported on the Australian Bar Association conference held in Dublin in 1988. The idea that the rosette was another tradition inherited from Ireland was a "furphy".

Douglas Graham QC (a Scot) in the following edition of the *Victorian Bar News* seemingly obtained great satisfaction in revealing the rosette belonged with Windsor court dress and was otherwise known as a "wig bag" or "powder rosette", that those who wore the rosette looked "rather as though they had just attended a levee and had forgotten to take it off".

I digress. Victoria in 1851 became a Crown colony separate from New South Wales. From 1857 to 1935 every Victorian

Chief Justice was Irish born; all bar one were graduates of Trinity College, Dublin.

The great Gavan-Duffy family has been the subject of a separate paper at this conference. Charles Gavan-Duffy declared himself the first emancipated Catholic in Ireland. Nevertheless, he left Ireland for the Victorian Bar. He was greeted on his arrival in Melbourne by a welcoming committee. He combined law and politics. He became Premier of the State of Victoria. After the death of his second wife, he returned to Europe. In France he married Louise and had a further four children. Of those four children Frank became Chief Justice of the High Court of Australia and George, President of the High Court of Ireland. His grandson Charles Gavan-Duffy became a Justice of the Supreme Court of Victoria and a great grandson Sir John Starke was a legendary Victorian barrister and a fine Justice of the Supreme Court.

Irish nationalism was a strong undercurrent of Australian politics, particularly in the latter part of the 19th and early 20th centuries. Barrister Gerard Supple came to Australia in 1857. He had been associated with the 1848 uprising in Ireland. He became a member of the Victorian Assembly. He was so angered by the anti Irish sentiment of *The Age* newspaper that in May 1870 he attempted to shoot the editor in broad daylight in La Trobe Street, Melbourne. Whether by accident or because he was almost blind he wounded the editor but killed a bystander.

When in the 1880s brothers John and William Redmond arrived in Australia to represent the Irish Parliamentary Party and the National Land League, tensions went up a notch. Hotels refused accommodation to the Redmonds, public halls were closed to them. So complete was the shut down of public halls in Melbourne that the Irish community set about building the Hibernian Hall. In most areas the Redmonds' visit produced enormous enthusiasm, particularly in country districts. In New South Wales at Temora John Redmond was met with a cavalcade of a thousand men on horseback.

Young Frank Gavan-Duffy, educated by the Jesuits at Stoneyhurst and at the University of Melbourne, was presented with a dilemma. In Melbourne the respectable Irish ran for cover. Young Duffy turned up at the Redmonds' meeting. Afraid of the damage associating with the Redmonds might do to his law practice, he spoke of the necessity of avoiding the introduction of Ireland's problems to Australia. He pleased nobody.

Another great figure of Australian legal and political history took the stage that day. Henry Bourne Higgins felt he must bear the cost of witness to his beliefs. He vigorously supported home rule for Ireland.

Higgins was born in Ireland on 30 June 1851 in County Down, the second of nine children. His father was a Wesleyan preacher who decided to emigrate, sending his family ahead of him to Melbourne in 1870. After secondary education Higgins went to work but then won a university exhibition. He completed degrees in Arts and Law at Melbourne University. In 1876 he was called to the Bar in Victoria. His identification with the Redmonds did not do his political career any harm. In 1900 when he opposed the Boer War he lost his seat in Geelong but at the next election he won the seat of North Melbourne, obtaining the vote of a large Irish Catholic electorate.

In 1901 with the Federation of Australian states, the Commonwealth of Australia was born. Higgins in 1906 was appointed to the High Court. In 1907 Higgins was appointed to the Presidency of the Arbitration Court. He presided over the famous Harvester Judgment which declared a basic or minimum wage for working class Australians, a wage sufficient to provide food, water and shelter, a wage designed to allow employees to live in a condition of "reasonable and frugal comfort".

Higgins was typically Irish — a contradiction — radical lawyer, a father of federation who opposed the constitution, upper middle class hero of the labour movement and protestant supporter of the Irish cause.

In 1901 with the Federation of Australian states, the Commonwealth of Australia was born. Higgins in 1906 was appointed to the High Court. In 1907 Higgins was appointed to the Presidency of the Arbitration Court. He presided over the famous Harvester Judgment which declared a basic or minimum wage for working class Australians, a wage sufficient to provide food, water and shelter.

By the turn of the 20th century the nation was changing but lawyers a hundred years ago were no different to lawyers of today in that they liked the reminiscence.

In the *Bulletin* in 1913 a reminiscence of bush justice was published under the heading, "They never did it better in Ireland":

> In the 1850s things were done, in Victoria, in a free-and-easy, unconventional way. The writer remembers staying at Murphy's Castlemaine Hotel when the sessions were on, and at the dinner-table, along with the judge on circuit, his associate, the Crown prosecutor, and a number of barristers, were several persons charged with criminal offenses, but out on bail. Among these were two young men from Smythesdale, who were to take their trial for tarring and feathering a man. After dinner, at the suggestion of bibulous little barrister McDonough (known as John Phillpott Curran), the table was removed. Quinn, a surveyor, produced his fiddle, and soon was presented an astonishing spectacle, judge, men on the jury list, solicitors, barristers and offenders, whooping around the jib, and reel, and polka, and waltz, until the morning hours, when broiled bones and whisky-punch finished up the saturnalia.
>
> Next day every jig fitted into its proper place. The people on bail gave themselves up. The judge sat. The Crown prosecutor thundered his charges against men with whom he had hobnobbed the night before. And the two young fellows, tried for tarring-and-feathering got three years' "hard".
>
> As G.V. Brooke (one of the company) observed, "They never did it better in Ireland.

Because I reside south of the Murray River I will only refer briefly to the Irish of New South Wales. In so doing I borrow very heavily from the words of Sir Gerard Brennan and a paper he delivered to a conference of the Australian Bar Association in Ireland in 1988.

Roger Therry was a Dublin man, whose father was one of the early Catholic barristers admitted to that profession when the penal laws were relaxed at the end of the 18th century. Therry went to Trinity College, Dublin. He was called to the English and Irish Bars. He was private secretary to Canning, and was subsequently appointed Commissioner of the Court of Requests in New South Wales. His was the tenth name on the roll of NSW barristers and he conducted a successful practice

whilst discharging his duties in the Court of Requests.

Therry was joined in Sydney by a fellow student he had met at Trinity College, John Herbert Plunkett. Plunkett had been a successful barrister on the Connaught Circuit. Plunkett was appointed Solicitor-General for New South Wales. He arrived in Sydney in 1832. In 1836 he became Attorney-General.

Plunkett and Therry were men of integrity. In 1838 they prosecuted to conviction the perpetrators of the infamous Myall Creek massacre in which a large number of Aboriginals — men, women and children — were slaughtered. The rigorous enforcement of the law in protection of Aboriginal people excited a great deal of comment, but the Attorney-General and his junior counsel earned public respect for their impartial enforcement of the law.

Plunkett secured the passage of the Church Act in 1926 which established legal equality between Anglicans, Catholics and Presbyterians — later extended to Methodists. He became President to the Legislative Council and was elected to the Legislative Assembly for a term. He was a noted leader of Catholic opinion, a supporter of Caroline Chisholm, a force in the establishment of St Vincent's Hospital. He sat on the Wentworth Committee responsible for establishing of the University of Sydney and became its Vice-Chancellor. He died in Melbourne on his 67th birthday.

Therry's career followed a different course. He was appointed resident judge at Port Phillip. He was not received well by the Port Phillip community. From 1846 to 1859 he was a Judge of the Supreme Court of New South Wales. In May 1850 he held the first circuit court for the district of Moreton Bay. After Therry retired he lived in Paris and London before returning to his native Dublin.

Sir James Martin and Sir Frederick Darley were Chief Justices of New South Wales. Both were born in Ireland. Martin arrived in Sydney in 1821 as a child aged 18 months. His parents were poor but made sacrifices to secure an education for a brilliant son. He became a barrister and Attorney-General. On two occasions he was Premier of the State. He became Chief Justice in 1873. He died in 1886 and was succeeded by Darley.

Darley was a graduate of Trinity College, Dublin, a member of the Munster Circuit. He arrived in Sydney in 1862 and became Queen's Counsel in l878. He never saw public recognition though he was laden with Honours. He desired to be remembered only as "an old Irish gentleman". He died in London in 1910 and was buried in the family vault at Dublin.

The Irish influence on the Australian profession has been enormous. That influence has changed. The Anglo-Irish as a group or class have fallen away. Irish Australian lawyers of the latter half of the 20th century were the grandchildren or great grandchildren of the Irish who left their homes in despair but with hope and above all a deep longing for freedom. When consideration is given to the names of some of the Judges of our High Court responsible for the *Mabo* judgments — a key judgment in relation to the rights to land of Aboriginal people, Brennan, Gaudron, McHugh, Toohey — I think one can say that that in Australia the Irish have passed on, through the generations, those hopes and that passion for freedom possessed by their forebears.

Death Sentence

IN 1755 Samuel Johnson published his dictionary. In the preface, he laments the chaotic state of the language:

> When I took the first survey of my undertaking, I found our speech copious without order, and energetick without rules; wherever I turned my view, there was perplexity to be disentangled and confusion to be regulated ….

He despaired at the scope and futility of his task:

> It is the fate of those, who toil at the lower employments of life, to be rather driven by the fear of evil, than attracted by the prospect of good; to be exposed to censure, without hope of praise; to be disgraced by miscarriage, or punished for neglect, where success would have been without applause, and diligence without reward.
>
> Among these happy mortals is the writer of dictionaries; whom mankind have considered, not as the pupil but the slave of science, the pioneer of literature, doomed only to remove rubbish and clear obstructions from the paths, through which Learning and Genius press forward to conquest and glory, without bestowing a smile on the humble drudge that facilitates their progress. Every other author may aspire to praise; the lexicographer can only hope to escape reproach, and even this negative recompense has been yet granted to very few.

For the next 170 years, things went on much as before, although we dropped long *S*s and terminal *k*s and the Americans spiralled off into their own idiosyncrasies.

What Johnson had tried to do for orthography and etymology, Fowler attempted for grammar. In 1926, Henry Watson Fowler brought forth on the world one of the quirkiest books on grammar and style ever published in the English language. Modern English Usage combines erudition and grumpiness in a way unrivalled since Johnson. He set out to expose error and ridicule folly. His manifest irritation is only partly explained by the narrow diet of news available on Guernsey. He understood the difficulty of his task. Under the heading "Sturdy Indefensibles" he wrote:

> Many idioms are seen, if they are tested by grammar or logic, to express badly, and sometimes to express the reverse of, what they are nevertheless well understood to mean. Good people point out the sin, and bad people, who are more numerous, take little notice and go on committing it; then the good people if they are foolish, get excited and talk of ignorance and solecisms, and are laughed at as purists; or, if they are wise, say no more about it and wait ….

These grumpy old men of the English language, Johnson and Fowler, concentrated on rules — grammar, orthography and usage — without too much concern about the purposes for which language was deployed. Love poems or business letters; history or journalism: for them it was all grist for the mill or (as we might say nowadays) input.

Twenty years after the first edition of *Modern English Usage*, George Orwell took the subject a step further. His message was delivered both as an essay (Politics and the English Language (1946)) and as a novel (*1984* (1948)). Despite his brevity — "Politics and the English Language" is an essay of only 5,000 words — and his tart astringency, we quickly forgot his message.

It is an astonishing thing that, so soon after Orwell showed the stage tricks used by the main offenders, those tricks continue to work. We sit, most of us, like captivated schoolchildren in sideshow alley, spellbound as the hucksters of language deceive and dissemble. And while we know from Orwell how the tricks are done, we are nonetheless beguiled.

Orwell wrote of the misuse of language by politicians:

> A mass of Latin words falls upon the facts like soft snow, blurring the outline and covering up all the details. The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish spurting out ink.

Don Watson has published a new book: *Death Sentence — the Decay of Public Language*, which describes the progress of that disease into all areas of public language: education, commerce, the bureaucracy and politics. He holds up for hatred ridicule and contempt some examples from each domain.

Education:

> (The curriculum) … speaks of English as: experimenting with ways of transforming experience into imaginative texts in different contexts for specified audiences. Or monitoring and assessing the most appropriate technologies and processes for particular purposes of investigating, clarifying, organising and presenting ideas in personal, social, historical, cultural and workplace contexts …

Commerce:

> Our procedures in respect of the audit of the concise financial report included testing that the information in the concise financial report is consistent with the full financial report, and examination on a test basis, of evidence supporting the amounts, discussion and analysis, and other disclosures which were not directly derived from the full financial report.

and

> This program is another example of how this organisation, comprised of 40 leading companies from 15 business sectors is continuing to move forward to address its important mission.

Of these violations Watson says:

> The language of corporations is like a vampire without fangs. It has no venom or bite, but you don't want it hanging off your neck just the same.

Bureaucrats:

> Funding for legal aid is increasingly meeting less of the demand, but allocating additional funds on a one-off basis without a specific reason may be seen as an admission by the Government that funding is insufficient.

Politics:

> I imagine the sorts of children who would be thrown would be those who could be readily lifted and tossed without any objection from them. (P. Ruddock)

and

> Um, look, in relation to the sort of ques-

> tioning that we might undertake for intelligence purposes, I mean, that — that really depends upon the availability of people here. But in relation to any criminal offences, I'm not aware of any — any matters that might involve charges in relation to him, and so that's — that's not an issue that's arisen. …
>
> Well, you don't need powers to ask people questions. You need powers if you need to detain people for that purpose. In this case he was detained by Immigration authorities because of a breach of a — of a visa condition. And he had been — if you go back and look at it, I mean, he was identified by French authorities initially to us on 22 September.
>
> … the reason for Immigration powers being used is that they were clearly available. He breached visa conditions. It's not clear, in relation to the powers that have been quite severely circumscribed by the Senate, in terms of the way in which they're able to operate, that we would have had available evidence for us to use those powers here in Australia at this time.

Those last quotes from Philip Ruddock are drawn from an interview with Laurie Oakes on 2 November 2003. Laurie Oakes is one of Australia's most senior and respected journalists. Mr Ruddock substantially filled the interview with the verbal sludge for which he is justly famous. Nowhere during the interview did Laurie Oakes complain that Mr Ruddock made no sense, conveyed no meaning, expressed no ideas.

Clearly, the public language is in trouble.

Death Sentence is a delicious mix of analysis and mockery, gently basted with Watson's mordant wit. Let a few examples stand for the whole:

> Grammar is not the problem. To work on the grammar is like treating a man's dandruff when he has gangrene. The thing is systemically ill. It does not respond to any form of massage or manipulation. You try surgery and when you finish there's more on the floor than on the table. Look again and you realise that it has been a corpse all along. It is composed entirely of dead matter …
>
> Here (in Australia) we make do with language, as we make do with low rainfall and thin soil and bits of wire. Our politicians have long been in the habit of making phrases as if they were door sausages to keep out draughts, and tossing us clichés like bones to dogs ...

Of Bob Hawke:

> When speaking off the cuff he embarked on his sentences like a madman with a club in a dark room: he bumped and crashed around for so long his listeners became less interested in what he was saying than the prospect of his escape. When at last he emerged triumphantly into the light we cheered, not for the gift of enlightenment, but as we cheer a man who walks away from an avalanche or a mining accident.

And of our current Prime Minister:

> The Prime Minister's language is platitudinous, unctuous and deceitful. It is in bad taste. If it is not actual propaganda, it has much in common with it … abuse the language and you abuse the polity. If you construct a collective character and a mythic history and paint over them with invented virtues you also abuse the people: you demean them and deny them their own history. …
>
> Myths are tempting to those who are in a position to manipulate their fellow human-beings, because a myth is sacred, and what is sacred cannot be questioned. That's where their power comes from. They simplify and provide meaning without the need of reason … they stifle doubt and provide relaxation and comfort. It is about here that they meet clichés which are the myths of language …

Death Sentence is more than a book about grammar or usage or style. It advances a deeply important point. Public language has been hijacked to serve a fraudulent purpose: not to communicate ideas but to conceal meaning; not to speak truth but to insinuate falsehood.

> There can be no respect for the truth without respect for the language. Only when language is alive does truth have a chance.

Whereas language was once used as a rapier, it is now used as mustard gas. Corporate mission statements, whilst a harmless idea in themselves, nowadays communicate no intelligible idea more sophisticated than motherhood and apple pie.

When senior politicians speak, it is now essential to listen acutely to appreciate that they are simply staying "on message" whilst avoiding truth, accuracy or anything remotely approaching an answer to the question they have been asked. Even when they appear to be answering the question, you have to look very closely to see which part of the question they are answering. Remember the skilful evasions of Mr Howard when he was asked a question in Parliament by the Member for Chisholm:

> ANNA BURKE, MEMBER FOR CHISHOLM: Prime Minister, was the Government contacted by the major Australian producer of ethanol or by any representative of him or his company or the industry association before its decision to impose fuel excise on ethanol?
>
> JOHN HOWARD, PRIME MINISTER: Speaking for myself, I didn't personally have any discussions, from recollection, with any of them.

A document obtained by the Opposition under freedom of information laws records a meeting between John Howard and Dick Honan about ethanol, just six weeks before the decision.

But Mr Howard says he spoke the truth; that his answer related to a different part of the question and that he has been taken out of context.

This same inclination to use language in order to deceive has infected the public service.

* * * * *

Some surprising things happened in the world after September 11, 2001. First, we discovered that terrorism exists. Second, Australia discovered that it could emerge from obscurity to become a terrorist target, by helping the United States invade Afghanistan and later Iraq. Having lifted Australia's profile from irrelevance to deputy sheriff, Mr Howard was moved to write a letter to all Australian households assuring us that we are safe whilst warning us to be careful. In a devastating, sustained deconstruction of that letter, Don Watson nails once and for all the decay of public language:

> Dear Fellow Australian,
> I'm writing to you because I believe you and your family should know more about some key issues affecting the security of our country and how we can all play a part in protecting our way of life …
>
> As a people we have traditionally engaged the world optimistically … our open, friendly nature makes us welcome guests and warm hosts …

Here is part of what Watson says of this greasy prose:

> This rose-coloured boasting smells of some nightmare ministry of information … the

phrase "as a people" might not be a lie, but it smells like one. And it sits askew to the element of conservative political philosophy that opposes all attempts to categorise people by class or historic tendency, or any other conceit that will serve as an excuse for eliminating them.

"The people of Australia" is not so rank because it does not carry the suggestion that some mythic or historic force unites us in our destiny. But if we must have as a people, then "traditionally" has to go, and not only because "optimistically" is sitting on top of it. It has to go because it is so at odds with Australian history it could be reasonably called a lie.

"Traditionally" we built barriers against the world we are alleged to have engaged so "optimistically"; "traditionally" we clung to the mother country for protection against that same world; "traditionally" … we took less of an optimistic view of the world than an ironic, fatalistic view of the world.

The smugness of the sentence about our being lovely guests and warm hosts is so larded by fantasy and self-delusion, it transcends Neighbours and becomes Edna Everage.

It will occur to some readers, surely, that it has been "our nature" recently to play very cold hosts to uninvited guests, the sort of people we don't want here, who throw their children into the sea, who are not fun-loving, welcoming, warm, sunny, etc. …

Given (our) recent history, we might wonder if the words are as ingenuous as they sound. The thought, even the subconscious thought, might have been of a piece with Medea's "soft talk". Thus — "as a people" Australians are very nice; people who don't agree with this proposition are not nice people; people who are not nice are not Australians in the sense of Australians "as a people". People who are not prepared to be Australian "as a people" should shut up or piss off back where they came from.

Reflect on the state of public discourse in Australia these days, and you will see he is right.

Julian Burnside

The Society Book Laun

ABOUT 100 invited guests gathered in the Essoign Club on Wednesday 12 November 2003 for the launch of Hilary Bonney's book, subtitled *The true diary of the Wales-King murders*. As the cocktail hour wore on and the hospitality flowed it became increasingly apparent that there was not the usual mix of 95 per cent lawyers to 5 per cent others in "this" group, although some eminent silks and other members of counsel were certainly part of the happy throng (and of these, some had even been key protagonists in the Wales-King saga in the Supreme Court). There were publishing and production people, sales marketing and publicity persons, and a host of personal acquaintances, friends and genuine well-wishers to the author and the product of

Ray Gibson reads from the pages of the book during the launch.

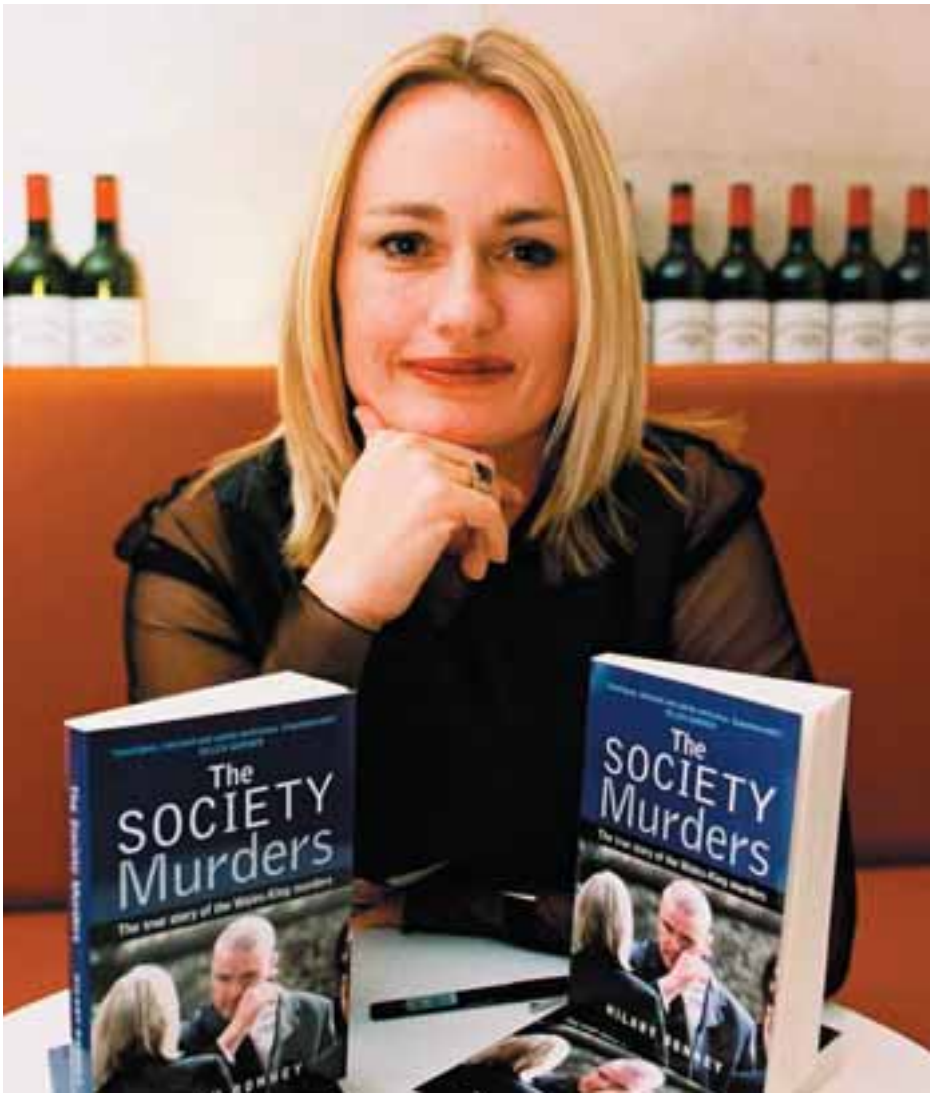
Sarah Wilson, Stuart Gibson, Pamela Irving and Benjamin Lindner.

y Murders
ch

her labours to make the launch a more than usually "feel good" experience.

The book was actually launched by its publisher, Sue Hines of Allen & Unwin. This is, in protocol terms, highly unusual in that it is generally left to someone more objective to sing the praises of the tome about to be disseminated to the public. In this case, the publisher's speech waxed lyrical not just about the book itself and its content which, (judging by the number of noses already buried deep into advance copies on public transport) should be a best-selling winner. She reserved her highest accolades for the author herself, whose application and dedication in getting the whole thing written in less than six months was a precedent which I suspect prospective authors will not be too happy to have quoted at them. Such efforts can only be described as Herculean. The publication cycle of idea/creation, writing, editing, and production to final product appears to have been a most felicitous and rewarding experience for all concerned. That is not, you will be surprised to learn, invariably the case.

Hilary's reply to the launch was also atypical in its modesty, humility and gratitude to the team who had done her work proud. While it was clearly a relief to be at the book launch end of the exercise rather than at the writer's block end of chapter whatever, for her too the whole process had been, due in no small measure to the support of family and friends, a pleasurable one. Not without its sacrifices, but of course all worth it by the book launch date.



The author, Hilary Bonney.

The launch also contained a reading (by Crown prosecutor Ray Gibson, who also happens to be the author's spouse) of excerpts from the text, which illustrated eloquently why this book is sure to please. Perhaps only barristers, trained in seeing all sides of a case can do it quite so well; but this is not to take away anything from Hilary Bonney's own unique genius in capturing emotion, extremes and highly charged tension in spare, economical and elegant prose.

It was an indeed a great party, an acclaimed achievement and a grand occasion.


Jennifer Castles, Sue Hines, David Baxter, Rosemary Mellor and Louisa Gibson.


Melanie Archer, Malcolm Dodd and Hilary Bonney.


Judy Benson and Heather Gordon.

Give the Barrister a Chance

Our correspondent offers solicitors a handy guide to preparing the perfect brief

Deliver the brief as late as possible.
The later, the better. That way we can be certain we are reading the papers when really up to date with the law. Reading papers in the dead of night helps us to concentrate better, and the bags under our eyes make us look devilish and intimidates the other side.

Do not explain the case in the Instructions to counsel.
Barristers are very clever. We do not need our minds cluttered with your thoughts about the case. We regard it as a challenge to work out the issues halfway through the papers, rather than be told what they are at the start.

Do not arrange the papers into a ring-binder file.
A set of dog-eared documents requires a tidy mind to compensate. A ring-binder means that, if the papers accidentally get knocked, they do not fall on to the floor in a mess, letting us indulge in the fun game of re-arranging them.

And if you insist on using a lever-arch file, make sure that it is sufficiently flimsy for the spines to break in the DX on the way to Chambers. Which is nice.

Staple every document. Twice.
This is particularly important if you have arranged the documents in a ring-binder file because the staples prevent us turning the pages and lets us relive childhood by ripping bits of paper. It is often thoughtful to staple each individual two-page letter in the correspondence file: we always find it difficult to make our way between pages of a letter without a staple to help us. If possible, use the big, thick staples that inflict injury: barristers get aroused by the sight of blood and we become more aggressive in court.

Do not arrange documents chronologically.
It helps to see the response to a document before reading the document itself. If you enclose a copy of the correspondence file, make sure it is in reverse chronological order.

Remember to copy every irrelevant document to us.
Barristers enjoy receiving wads of correspondence each morning and spending an hour digging out the relevant briefs and inserting the documents. And because brief fees are not strictly based on time spent, we get the added satisfaction of knowing that time spent on this is pro bono. So please send us at least one document a day in each case.

Send us original documents.
We probably won't realise and will highlight the papers in five different colours before scribbling cross-examination notes all over them. Since our thoughts are so incisive, it will increase the value of the papers. Also, it encourages settlement because, when documents are disclosed, the other side will get to see where we have noted inconsistencies in the client's account.

Photocopy alternate pages of documents only.
It is a good test to see if we are awake. Barristers are natural show-offs: we like to phone you up to point out we have noticed your little tricks. And we particularly enjoy doing that in front of clients, so that they understand why we have not read the crucial documents properly.

Do not obtain the client's comments on the other side's documents.
We like to guess. It's more of challenge.

Do not tell us what advice you have given the client.
That way, if we think differently, we do not warn you or explain things to the client diplomatically. Instead, we make you look stupid in front of the client, who will develop otherwise avoidable concerns about the conduct of the litigation.

Do not tell us if the case settles.
All barristers get very excited when we see how full our diaries are. It makes us feel wanted. And there is a feeling of relief when, the day before a hearing, our clerk informs us: "The solicitor forgot to tell us it had settled." We will not have accepted any other bookings and can go on holiday. Hooray!

Do not tell us the result of the case.
If judgment is reserved don't send us a copy of the decision. We don't care about the client and have no interest in the result. In any event, we're far too busy taking staples out of documents to be concerned with trivialities like results.

Daniel Barnett
The author is a barrister at
2 Gray's Inn Square Chambers

‘Bar None’ Wins 4–3 Over LIV at State Hockey Centre, 23 October 2003

FORGET the mystery shrouding the appointment and selection of the new Chief Justice, the really big news around the Victorian Bar is, or ought to be, the stunning 4–3 victory by the “Bar None” hockey stalwarts over the Law Institute of Victoria team at the State Hockey Centre on 23 October 2003.

It has become commonplace in articles about our hockey team to comment on the age disparity that necessarily arises between the Bar and Solicitors’ hockey teams, but it is nonetheless fair to say that this year these issues presented themselves at the outset with vigour.

On my walk past the Solicitors’ team towards our own Bench, I passed a number of members of what appeared to be a State junior training team, and was appalled to realise, when I saw some well remembered faces amongst them, that these must all be members of their side.

To coin a phrase often used in other circumstances, “articled clerks are getting younger every day”. The Solicitors, as it turned out, had at least three State League players, together with three or four Pennant players. None of the Bar team presently plays at such heights.

The Bar team was presented with an initial dilemma. Sharpley, our regular and talented goalkeeper, failed to turn up. Lynch, a seasoned veteran between the posts, was there to play but had not brought his gear, whereas Brear, whom we have never seen in goals before, had brought his. Both declined to say who should be chosen in goal, so I tossed a stick and flats came up for Brear.

The game started at a cracking pace, and luckily for us all our runners, i.e. Wood, Clancy, Parmenter and Tweedie, were present. From my vantage point on the back line I saw an awful lot of energetic scurrying around. In fact, we had to start the game with Lynch at kicking back as Brear was putting his goalkeeping equipment on. We held out through this difficult period and in due course scored a superb goal when Tweedie smashed the ball across for a brilliant Parmenter deflection into the net. The game proceeded on a very even basis, but the revelation was the form of Brear in goal.

Captain Philip Burchardt accepting the Scales of Justice cup from Tony Dayton, the senior umpire.

Putting on the goalkeeping gear is to Richard Brear what going into the telephone booth is for Clark Kent. Mild mannered, exquisitely polite, one might even say at times slightly diffident, Richard transforms himself into a brilliant, belligerent, commanding goalkeeper. He kept us in the game with a number of

outstanding saves, doing particularly well when faced with waves of solicitors coming through in the clear. Although the other side scored a very good penalty corner goal, a 1-1 result at half time reflected Brear's defensive qualities on the one part together with an outstanding effort by all the other players on the side

We got particular drive out of Clancy at centre half, Tweedie at left inner, Parmenter at right inner and with Wood (aided by a superannuated veteran who shall remain nameless) strong and decisive in deep defense.

One all at half time seemed not bad, but we went out all guns blazing in the second half.

In due course, Tweedie scored a good goal from a Parmenter pass, and then repeated the dose with about a quarter of an hour to go.

At this stage, things were looking excellent, but at this point the really superior players in the Law Institute team decided to get cracking.

Their centre half (Ben Schokman) plays State League 1 for Doncaster, one of the premier clubs in Victoria. A State League 1 player is to the Bar team what a tank is to a set of horse cavalry. Once he extracted the proverbial digit our fortunes seemed to ebb, an ebbing by no means unassociated with our vividly obvious running out of legs. He was ably assisted by the other higher grade players in the side

An interesting side feature of the game was the raucous encouragement given, predominantly to the Solicitors for some unknown reason (other perhaps than their relative youth and beauty), by a large group of young school girls who came into the stand during the second half. Their shrill shrieks of "come on white team" (the Solicitors) interspersed with less voluminous "come on black team" suggested that they had no direct interest in the game. In any event, their enthusiasm appeared to spark the Solicitors to even greater effort.

Ben Schokman scored two further goals from short corners, the second with about four minutes to go. I doubted whether, despite all our gallant efforts, we would hang on.

At this stage, with the Solicitors pressing for victory, fortune came our way. A good clear pass to Tweedie saw him in space and, more importantly, he picked out an unmarked Michael Tinney on the 25. A clean crisp pass straight into his path and Tinney was down on goal where he smashed the ball past the keeper. 4-3 with about a minute to go. Ecstasy all round.

I have played in all but one of the last 15 games played in this match, which is played, all joking aside, to an increasingly high standard. This was the best game in which I have participated, and clearly our best win back at least to 1989.

We held out until the final whistle and indulged in the inevitable extensive and unrestrained self-congratulation thereafter.

The umpires chose Ben Schokman as the best player in the match, and he was therefore awarded, very properly, the Rupert Balfe trophy, which the members of the Bar team have monopolised in recent Years.

More to the point, however, I had the pleasure of accepting the Scales of Justice cup from Tony Dayton, the senior umpire, for the first time in my capacity as captain.

I have played in all but one of the last 15 games played in this match, which is played, all joking aside, to an increasingly high standard. This was the best game in which I have participated, and clearly our best win back at least to 1989.

It is fair to say that everybody who played, played well. The list of players at the end do not need to be enumerated here because each and every one of them played both as well as they possibly could and in any event to a very high standard.

To beat such a good Solicitors' side is a really excellent achievement and one of which all those who participated could be justly proud.

The usual drinks followed in Nortons, and plans are under way to play the New South Wales Bar team in February 2004 (the Rugby World Cup prevented our playing our usual fixture in October).

I have promised Warwick Newell, the Solicitors' captain, that an article will be written in which restraint and modesty will be wholly absent. Nonetheless, this article is a fair overall appreciation of what was a very good game, and a particularly satisfying result. As the Executive Director of the VHA has informed me, You've got bragging rights for a yearly

If the Solicitors get their act together next year and have their best side, we will definitely struggle, but since the Law Institute Journal never seems to publish reports of the hockey game, we can afford to do our gloating now.

I think Rupert Balfe must have been looking down upon us; he would be absolutely delighted. Those who played in this memorable game were Brear, Burchardt, Wood, Gordon, Dreyfus, Clancy, Appudurai, Andrew Tinney, Robinson, Parmenter, Michael Tinney, Tweedie, Lynch and Collinson. It is spectacularly bad luck on Meryl Sexton that she yet again missed a winning game, but I am sure she will be with us next year.

Philip Burchardt

Chester Porter — Walking on Water: A Life in the Law

Autobiography
Random House.
Pp. 319, Hardback $49.95.

Chester Porter.

ALL young persons contemplating "a life in the law" as a career should read this book, ideally when they are about 16, to allow adequate time to switch to dentistry, say, or engineering. But whatever your age, Chester Porter's huge experience, wisdom and humanity will enlighten you about the true inwardness of those sometimes compatible concepts, justice and law.

The phrase "walking on water" undoubtedly describes the opinion many barristers hold about their own hours in chambers and in the courts, but no such delusion of divinity afflicts Chester Porter QC. He joined the New South Wales Bar in 1947 when he was 21, the youngest barrister ever admitted. He practised there for half a century without interruption, except during a serious injury from a motor accident.

He appeared in, or was involved with, a great proportion of the most famous cases of his time, including many Royal Commissions. Some, like the notorious bent Sydney detective Roger Rogerson, were local celebrities. Others commanded the legal headlines of the nation, such as the Lindy Chamberlain case; the second Royal Commission into the *Voyager* naval disaster; High Court Justice Lionel Murphy, and Judge John Foord, charged with attempting to pervert the course of justice.

Porter commanded high respect and high fees. How does he then feel today about the prime accolade bestowed by a satisfied client, the unattractive Sydney underworld monster Neddy Smith: "You fucking beauty! Chester Porter is the man. Get him regardless of the expense!"?

A reviewer can best convey the book's flavour by picking out some plums — there are many:

> In the practice of the law, you find human nature at its worst, angry and in dispute. Divorce (now coyly called "family law") is the jurisdiction where "bastards and bitches prosper". Lionel Murphy's matrimonial legislation, on the whole, made matters worse, and increased the instability of social life.

Porter says that the rich generally avoid their share of taxation, and probably always will. He believes that the real leaders of the drug trade are never caught, and never will be; that they regularly and deliberately betray a proportion of their dealers lower down the line to help the police bump up their apparent "success" rates and to deceive the public into thinking that "something is being done". The true basis of the wholesale price of petrol will never be disclosed. The criminal justice system makes it easy for an innocent person to be convicted. In many sex cases, an innocent man is gaoled, and has his life blasted.

Porter laughs at the idea of the "inestimable benefit" supposed to be enjoyed by the original trial judge, who can watch the demeanour of the witness. Eyewash! Cunning witnesses put it all over judges every day. He says that lie detectors, fingerprints and DNA may all be unreliable, as well as much of the psychological evidence solemnly swallowed by the Bench. He is cynical about today's mass of paper wheeled by the trolley-load into court, of which but a tiny proportion may add enlightenment or truth. Much of it is simply flimflam from the rich and well-resourced litigant, put in merely to crush the small suitor under the expense.

These distillations of Porter wisdom make a life in the law sound like a daily trudge ankle-deep through human ordure, but there is nonetheless a brighter side. Women judges have improved the temper and quality of the Bench, and female jurors have lifted the standard of verdicts. Australian courts of appeal are among the best in the world. A better magistracy rates as a great success story of Australian legal reform. Porter's plain prose might score high on the George Orwell literary scale, but it lacks sparkle and zest. He comes across, on his own telling, as a decent, steady, kind and patient man, more dreadful than he shows it to be. He seems relieved not to have been appointed a judge. Maybe that is society's loss.

By authentic "book people", both Porter and his publisher will be convicted and severely sentenced: there is no index, in a book replete with names, cases and leading facts; no sign that a skilled book editor ever got within a bull's roar of his manuscript. Not only are there innumerable repetitions, but repetitions of repetitions. For all that, the book is splendidly printed, without a single typo to be found.

We should all read *Walking on Water* and be better educated, and no one should embark on litigation before they have done so. By the time they lay the volume down, they will have cooled off, left their solicitor untelephoned, saved themselves a bucket of money and averted a heart attack.

Peter Ryan,
Secretary of the Board of Examiners for Barristers and Solicitors in Victoria.
Reprinted from the October issue of the *Australian Book Review*, with permission

Alternative Dispute Resolution

By Tania Sourdin
Law Book Company
Pp. v–xxii, 1–295 (including index)

Alternative Dispute Resolution, under whatever guise, has become an important part of the litigation and pre-litigation process.

In her book she discusses what generally is understood by alternative dispute resolution and court based programs. Much is misunderstood about the mediation process, which forms only part of the alternative methods available in resolving disputes, and the author discusses at length the concepts of negotiation, partnering, mediation, conciliation and dispute counselling under the heading of Advisory Process. She refers also to the determinative process of arbitration and expert determination.

The systems objectives are defined as well as the skills that are necessary. She emphasises the listening skills and the creation of an atmosphere which is conducive to the resolution of disputes.

For those who are familiar with process, there is perhaps nothing new in her discussion of foundation skills. However, she reminds us, which is often forgotten, of the essential element of communication. Encouragement of reality testing is an important part of a mediator's tools.

In chapter 5 the court based process are discussed, both in the state courts in New South Wales, Queensland and Victoria and other states as well as the Federal System,

Such a process can also be used to great advantage outside the litigation system to settle such things as neighbourhood disputes, public policy and health care, which the author examines at length.

The book includes within the appendices a number of useful guides, such as a sample open statement. The guidelines for those involved in mediations and the Law Society's Mediation's model are set out. Similarly the book contains a number of precedents which include an Agreement to Mediate and an Appointment of a Mediator.

All in all, for those involved in the mediation process this is a very useful book to have on one's shelf.

John V. Kaufman

Trusts Law In Australia (2nd edn.)

By Denis S.K. Ong
The Federation Press 2003
Pp. i–ix, Table of Cases x–xliv, 1–708, Index 709–722

TRUSTS Law in Australia is in its 2nd edition. It continues to provide a concise and scholarly exposition of the law of trusts from an Australian perspective.

The familiar themes of trust law such as the creation of the trust relationship, trustee's duties, powers and rights, resulting trusts, constructive trusts, the rights of life tenants and remaindermen and the rule against perpetuities are given substantial coverage. Charitable trusts still warrant a separate chapter, although it is remiss in this reviewer's opinion that neither the taxation aspect of trust law nor the topic of unit trusts warrants separate and discrete examination in the text. These aspects of the law of trusts have substantial practical application and their own discrete legal issues, yet writers in this area of the law often overlook any real examination of the particular legal issues peculiar to these topics. Particular "subtopics" that are given useful coverage in the text include the rule in *Barnes* v *Addy* (1874) LR 9 Ch. App. 244, *Romalpa* clauses, tracing and trustees' powers under discretionary trusts.

Trust Law in Australia is an excellent and scholarly resource providing an exposition of the law of trusts along traditional grounds. Full and appropriate weight is given to the traditional themes as applied in contemporary circumstances. It is hoped the third edition may extend its coverage to practical issues of taxation and units trusts as alluded to above. However, overall *Trusts Law in Australia* is an excellent work which can be recommended to students, scholars and lawyers who require a thoroughly updated and Australian focused guide to the law of trusts.

P.W. Lithgow

Conference Update

25–27 February 2004: Sydney. Fourth World Tax Conference. Contact Vanessa Cripps. Tel. (02) 8223 0000. Fax (02) 8223 0077. E-mail worldtax@taxinstitute.com.au.

26–28 February 2004: Superannuation 2004: A National Conference for Lawyers. Contact Dianne Rooney. Tel. 9602 3111. Fax 9670 3242. E-mail: dirooney@leocussen.vic.edu.au.

26–29 February: Adelaide 2004. International Law Conference. Contact All Occasions Management. Tel. (08) 8354 2285. Fax (08) 8354 1456. E-mail: ilaw@aomevents.com.

26 April 2004: Melbourne. Eleventh Annual Wills and Probate Conference. Contact Kathleen Gaynor. Tel. 9602 3111. Fax 9670 3242. E-mail: lpd@leocussen.vic.edu.au.

24–28 August 2004: Naples. Association Internationale des Jeunes Avocats 42nd Congress. Contact Association International des Jeunes Avocats. Tel. 322 347 3334. Fax 322 347 5522. E-mail: office@aija.org.

29 August–2 September 2004 Geneva. YIA Congress. Contact. Union Internationale des Avocats. Tel. 331 4488 5566. Fax 331 4488 5577. E-mail: uiacentre@wanadoo.fr.

Benjamins Jewellers

COURT DRESS

Cultured pearl
8.5mm – 9mm
necklace and gold clasp.
RRP $3,950.

Longines ladies and gents watches
RRP $1,295 each.

Pink sapphire
and diamond
set ladies
dress ring.
RRP $3,500.

1.24ct diamond
pavé set bangle
RRP $3,400.

Blister pearl stud earrings. RRP $800.

Merchants in fine jewellery,
watches and distinctive gifts since 1880.

360 LITTLE COLLINS STREET MELBOURNE 3000 TELEPHONE +613 9670 9414 FACSIMILE +613 9670 3936

THE LEGAL WEAR SPECIALISTS

146 King Street, Melbourne
Telephone: (03) 9621 1521
Facsimile: (03) 9621 1529
E-Mail: info@ludlow-legal.com
Contact: Andrew Tolley or Richard Phan
URL: www.ludlow-legal.com

LUDLOWS