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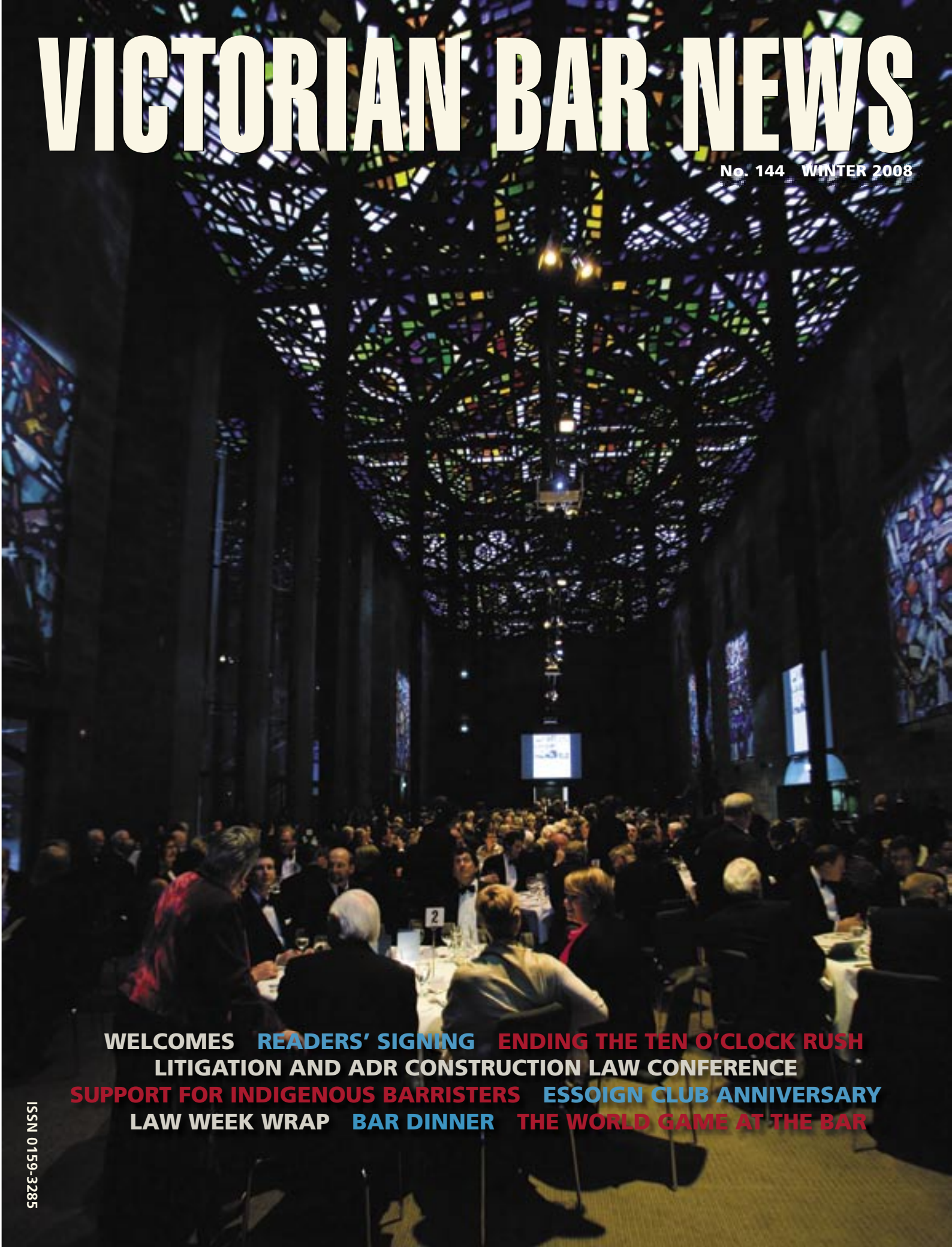

WELCOMES READERS' SIGNING ENDING THE TEN O'CLOCK RUSH
LITIGATION AND ADR CONSTRUCTION LAW CONFERENCE
SUPPORT FOR INDIGENOUS BARRISTERS ESSOIGN CLUB ANNIVERSARY
LAW WEEK WRAP BAR DINNER THE WORLD GAME AT THE BAR

ISSN 0159-3285

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VICTORIAN BAR NEWS

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Cover: The Great Hall, NGV, venue of the 2008 Bar Dinner

Welcome: Justice Peter Vickery

Welcome: Justice Emilios Kyrou

Welcome: Judge Paul Lacava

Welcome: Judge Jane Patrick

Welcome: Judge Peter Wischusen

Bar Dinner

Law Week wrap

Readers' signing

The World Game at the Bar

Barristers in Perspective

Barrister bashing has always been the sport of politicians and the media – certainly not of Kings. It is a bit like bear baiting, or bull fighting. Those who engage in it know that the animal is easy prey and enjoy the pleasure of blood sport, the blood sport of stirring up the tall poppy syndrome, and appealing to the 'chip on the shoulder'. There is no rational exchange of ideas but simply resort to a stream of slogans.

The latest round is nothing new. A read of the *Herald Sun* and *The Age* newspapers during June paints barristers in a very poor light. If one is to believe the quotes in the papers, barristers are deliberately railroading the whole judicial system, which includes the administration of civil justice and legal aid.

'Troglodyte' is the new buzz word thrown about by politicians and the press. Barristers are troglodytes – a caveman or cave dweller or a person who is deliberately ignorant or old-fashioned. Not only are barristers ignorant and old-fashioned but deliberately so. The main aim is to maintain their usual fees of $14,000 a day and to ignore the justice system as a whole.

According to editions of *The Age* and the *Herald Sun* in June of 2008 the Attorney-General has suggested that barristers' fees are putting justice out of the reach of many Victorians, particularly when you have some barristers charging $14,000 a day. Barristers are described as grandstanders using the courts as a vehicle to display their acting talents and increase their bank balances. Therefore it is argued that the whole adversarial system might be past its use-by date. As barristers are the major cause of the civil backlog in the Victorian Courts, the whole adversarial system that

has been in place in the common law for hundreds of years should be radically changed.

There is no doubt that there should be a discussion of reform of the judicial system, both criminal and civil. But does it serve any purpose for this debate to make statements of this nature?

At least the newspapers published a response from the Bar. As the Chairman of the Victorian Bar Council, Peter Riordan SC stated the attack was a misrepresentation. Mediation is universal in disputes in Victorian civil cases. It is not a new thing. There was no doubt that getting Judges more involved in the resolution process was critical but it was not of any use to refer to some barristers who might charge $14,000 a day when the vast majority work for a fraction of that rate.

Robert Richter QC and Julian Burnside QC were also quoted as saying that referring to the fees of one or a few barristers was not helpful in the overall debate on the judicial system. The inherent problem was that of inadequate Legal Aid funding. If the State Government provided adequate Legal Aid then there would be 'access to justice within the community'. To engage in barrister bashing simply obfuscates the whole issue and detracts from the real debate.

These attacks must cause bemusement amongst the vast majority of the Victorian Bar. The vast majority of the Criminal Bar performs Legal Aid work. To tar them in this manner is extremely unfair. Those barristers who quietly perform many hours of pro bono work must also find the remarks wide of the mark, indeed those who are signing up for the Bar's new duty roster scheme to assist in the Magistrates' Court would be wondering whether it is worthwhile 'grandstanding' as part of a duty roster scheme.

But is it all just a question of social engineering? Barrister bashing is just part of attacks made on the professions over many years. The medical profession is continually under such attack. There is the push to promote the para-medical as well as the para-legal. In the dental profession there is the rise of the dental hygienist and technician and now we see a push for nurses to be operating, under certain restrictions, medical practices.

This edition contains a report of the Bar Dinner. Ross Gillies QC's speech at the dinner was noteworthy not only for its wit but particularly concerning his comments on the Bar as a whole and how the Bar operates as a profession. It was good to see the Attorney-General present at the dinner and it is to be hoped that future discussion of the whole judicial system can be made in a more rational atmosphere.

The question of acting judges has caused further dispute between the Attorney-General and the Bar. The Victorian Bar's policy has always been to oppose the appointment of acting judges as, it would

seem, is the policy of the Law Institute and many other bodies. Barbara Cotterell, a Magistrate for many years, was appointed an acting Judge for five years. The Bar Council resolved that it would not attend Her Honour's welcome as it would seem to be support for the principle of acting judges. Many people at the Bar disagreed with this decision, particularly since Barbara Cotterell was an extremely well liked and intelligent member of the Bar and the Magistracy before her promotion. Her welcome was well attended by many in the profession who hold her in utmost respect. However, this cannot detract from the over-riding principle of the Bar's opposition to acting judges.

THE EDITORS

Mediation killed the radio star

For the late Douglas Graham QC and David McLean SC

So many faces round this place
I don't know now

So many people signing the Roll
I don't know how

So little work to be divvied up
Among so many

How's a man or woman to keep body & soul together?

Lean pickings at the Bar
Reduce us to scavengers

The goose that laid the golden egg
Looks more like a spatchcock these days.

NIGEL LEICHARDT

Strategic plan will reinforce the value of being a member

THE STRATEGIC PLAN

Next July, the Bar will celebrate 125 years of service founded on traditions of independence, superior service delivery and exemplary conduct; of advocacy in support of law reform and access to justice; and commitment to pro bono contributions to the community.

Successive generations of barristers have absorbed these living traditions in pupillage and in the collegiality of practice at the Bar.

These traditions are embedded in the values that are fundamental to a barrister's professional life and are core to the health of the Bar.

The last 20 years have brought rapid and far-reaching change to the business and professional environment in which barristers now operate – a very different, and ever-changing, intensely commercial and competitive environment – one to which we, and the institution of the Bar must adapt and respond.

The Bar, like other successful membership organisations, is responding by implementing a clearer style of governance and decision-making, underpinned by a commonly understood and accepted statement of mission and values. This includes a clear statement of time-defined organizational objectives – and is embodied in the Bar Strategic Plan.

We began this process over 12 months ago with the formation of the Strategic Planning Committee. The Committee's first focus was to examine the challenges and opportunities for the Victorian Bar (in commercial organizations this would be referred to as the SWOT analysis Strengths, Weaknesses, Opportunities and Threats).

The Committee worked to develop objectives based in the core traditions and values of the Bar – and I take this opportunity to thank Mark Moshinsky SC and his Committee for their outstanding work on this vital project.

The Bar's five-year Strategic Plan brings new emphasis to planning for and managing the often competing demands of commercial decision-making and efficiency with the missionary zeal needed to respond to the needs of members. The Strategic Plan can be found on the website at <www.vicbar.com.au/members/strategicplan>.

My introduction of the Strategic Plan in this column is necessarily in general terms. I hope you will take the time to read and reflect on the detail of it, and share your thoughts with a member of the Bar Council.

As with all strategic plans, it is dynamic and is only the first step towards regular renewal.

We will review our performance against the Strategic Plan at regular intervals and report to members on that performance.

THE YEAR IS CLOSING

This year, the Bar committed to considerable external examination of our operating environment as we sought to focus attention on areas of stress within the justice system.

The Bar Council has not spared itself from similar internal and external scrutiny, beginning with the May 2007 independent consultant's report into governance and management at the Bar. The Council has considered, and implemented as appropriate, the recommendations of that report within the year just passed.

Another major step was the Bar Council weekend planning conference to examine the Strategic Plan and settle its objectives and priorities.

This was followed last month by the engagement of consultants to undertake a high-level review of governance and the administrative structures and practices of the Bar in relation to barristers' chambers and the relationship between the Bar and Barristers Chambers Limited.

Due to report by the end of August, the review will focus on the effectiveness of governance structures and administrative practices relative to what members judge they require in respect of accommodation, communications and other services.

Last month's media commentary on the work of Barristers Chambers Limited was regrettable and did not accord members of the Board and staff the recognition they deserve for the very valuable work they do, and have done for many years.

CHANGES IN ANNUAL REPORT, AGM AND ELECTION TIMES

As the Annual General Meeting draws near, the Council, committees and Bar administration begin their 'reckoning' of achievements for the year.

Reflecting the greater emphasis on communication with members, this year's Annual Report has been redesigned and expanded to give barristers more information about the work of the Bar, its governance and its performance.

To accommodate the later delivery of the Annual Report (which for the first time will include consolidated accounts of the Bar including Barristers Chambers Limited), the date for the Annual General Meeting has been pushed back to October. The Bar Council election will also be in October.

REFORM OF CIVIL JUSTICE SYSTEM REPORT

In the last Chairman's Cupboard, I referred to the Bar's report *Reform of the Civil Justice System: A Major Opportunity to Improve Justice and Boost the Victorian Economy*. The Bar's report emphasizes that the pillars for reform are: effective case management; appropriate rules; and judicial excellence – but that all this needs to be underpinned by a collaborative and supportive profession.

The impact of this report is already evident. It was cited several times in the Victorian Law Reform Commission's *Civil Justice Report* and by the Chief Justice in her speech at the official launch of that report.

Notably, the Chief Justice's own work in reforming the Supreme Court is supported by the recommendations of the Bar's report.

Also, the President of the Law Institute of Victoria, Tony Burke, based his column on law reform in the June Law Institute Journal largely on the Bar's report.

This wide acceptance and use of the material, information and insights of the Bar's report – commissioned by the Bar with funding support from the Legal Services Board – and its translation into direction and support for Civil Justice reform is all very positive, particularly now, as the Government assesses and weighs the recommendations of the VLRC *Civil Justice Report*.

CHIEF JUSTICE AND ATTORNEY-GENERAL MEET WITH BAR COUNCIL

The Chief Justice met with the Bar Council at its 22 May meeting and spoke on the reform process occurring at the Supreme Court.

The Attorney-General met with the Council at its 29 April meeting and outlined preliminary areas for emphasis in the Government's policy statement *Justice Statement 2*.

BAR PAPERS

Following up on our submissions to the VLRC Civil Justice Review and the report we commissioned, the Bar issued papers on *Smarter Dispute Resolution* and on the use of *The Docket System*.

MEDIA COMMENTARY ON COURTS STATISTICS

Fuelled by the release of figures from the Centre for Corporate Law and Securities Regulation, the media has highlighted the lopsided proportion in the number of judgments in the Victorian Supreme Court compared with the number of judgments in the Supreme Court of New South Wales.

The lack of standardized metrics between the courts complicates meaningful comparison, and barristers practising in these courts will know that comparison is not simple.

It should also be remembered that the reform process in the Victorian Supreme Court started later than that in the Supreme Court of New South Wales, and that Victoria has made significant progress in the last five years.

UPDATE REPORT ON CRIMINAL LAW LEGAL AID FEES

As it did in 1997, the Bar engaged PricewaterhouseCoopers to examine the impact of the real decline in fees paid to barristers by Victoria Legal Aid.

The key finding of the 2008 report is that, over the last 15 years, barristers practising in legal aid criminal law work experienced a real reduction in fees income of between 25% and 40% compared to a real rise of 15% in other professions.

Barristers' willingness to devote themselves to legal aid criminal work has been an access-to-justice pillar in the framework of the criminal law justice system in Victoria for many years. Another key finding of the 2008 report that is scarcely surprising, but a cause for significant concern, is the connection of this drastic reduction in real fees income with the 26% fall, over the last three years, in the number of barristers practising in legal aid criminal law work.

The analytical research in the 2008 PricewaterhouseCoopers report stands in

stark contrast to the extravagant figure which, at least as it was reported in the media, was presented as indicative of what barristers earn – a figure which must relate to so few barristers that it is irrelevant to the real issue of the cost of justice.

In the last survey of pro bono work performed by barristers for the 2004–05 year, it was estimated the Victorian Bar Legal Assistance Scheme dispensed in excess of 10,700 hours of pro bono work by barristers valued at over $3.4 million. Extrapolated for 2006–07 this estimate rises to 11,500 hours at $4.25 million.

I am glad to report that the Government has brought forward its review of the operation and funding of Victoria Legal Aid.

DUTY BARRISTERS SCHEME

On Monday 12 November 2007, the first three Duty Barristers announced their appearances in the Melbourne Magistrates' Court. They were Amelia Macknay, Elizabeth Ruddle and Amanda Wynne, accompanied by Will Alstergren, Chair of the Bar Committee that established the Scheme.

The three barristers hit the ground running and were very soon assigned by the Court to advise and appear. The Scheme has continued to operate well ever since.

What was initially a pilot scheme worked well and has now commenced in earnest.

I congratulate Will Alstergren for his inspiration and hard work with his committee and thank, in particular, Magistrate Leslie Fleming, who is also a member of that Committee; and, of course, Chief Magistrate Ian Gray for his support of the venture.

The Duty Barristers Scheme is a significant addition to the Bar's work and commitment to more effective access to justice for more Victorians.

BAR HEALTH AND WELL-BEING COMMITTEE

The name of the Bar Care Committee was changed, after discussion at the Strategic Plan weekend conference, to the Health and Well-being Committee. This is to reflect the greater emphasis to be placed on the health and well-being of barristers.

The immediate focus of the Committee is to provide members with the tools and educational resources to allow them to recognize causes and early signs of stress or other health concerns.

Already the Committee, now chaired by Philip Priest QC, has organized several CPD sessions for barristers. It has also discussed what we may be able to do to strengthen support structures for barristers with a number of health industry professionals, the Law Institute, the Legal Services Commissioner, and other Bar Associations.

ONLINE SURVEY ON DEPRESSION AMONGST BARRISTERS

The University of Sydney Brain and Mind Research Institute is conducting a national and international health survey into depression. Part of this survey involves surveying Australian barristers. Several hundred barristers at the New South Wales Bar have completed the survey but so far only a handful from other Australian Bars.

Depression is a significant issue throughout the legal profession in Australia and overseas and can lead to tragedy – both professional and personal.

Other parts of the survey are directed to solicitors and to law students. Completion time for the survey is estimated at between 15 and 20 minutes.

It can be taken on-line at: <http://surveys.med.usyd.edu.au/limesurvey/index php?sid=54796&lang=en>. Alternatively, it can be obtained in hard copy from or through the Bar Office – contact James Mortley on extension 7942 or <admin.assistant@vicbar.com.au>.

I urge every member of our Bar, whether in practice or not, to complete this survey. This information and the link will be included in *In Brief* and posted on the Bar website.

PETER RIORDAN
Chairman

CIVIL JUSTICE REVIEW REPORT

This Report was launched on 28 May 2008 and contains 177 recommendations to the Attorney-General to make civil litigation in Victoria 'cheaper, simpler and fairer'.

The Report can be viewed – or downloaded (it is 753 pages) – at: <www.lawreform.vic.gov.au>.

Legal system not above workplace reform

The structure of Australian workplaces has changed dramatically over the last 30 years. The changing economy, new technologies and a diverse range of cultures and generations that make up today's workforce require organizations to re-examine and re-think their operations.

Our judicial institutions are not immune to these changes and we need to examine carefully how we can transform outdated workplace structures and the culture right across the justice system.

Whether it is private law firms, private practice, or the Bar, all our legal institutions need to be assessed as to whether they have structures that may discriminate against particular sections of the community – the most obvious being women and low-income earners.

There is no doubt that we have seen a change in what we once referred to as the legal 'fraternity'. Slowly, the archaic male-dominated legal culture is shifting towards a workplace that more accurately represents the diversity of talented and accomplished women in the sector.

Of course, there are still significant impediments to overcome in terms of equality of briefs provided to women and workplace structures that make it difficult for women to progress to senior levels.

Since coming to office, this Government has sought to address the gender imbalance across all parts of our legal system and I hope that we have contributed somewhat towards a shift away from the bad old days of male exclusivity.

The Government's Legal Services Panel has for some years now required equal

opportunity briefing practices for those firms seeking to undertake government work. Since we first started reporting the briefing arrangements, the overall percentage of briefs to women barristers under the panel arrangements has increased from 42% in 2003–04 to the latest figures released in June this year showing the number of briefs for women at 52% – with 28% of fees being invoiced by women.

In my view, one of the key problems for women lawyers is the lack of flexible working arrangements. At the moment, senior women lawyers are running the gauntlet at work while still maintaining the market share of running the home.

It is deplorable that working parents and carers may face discrimination for trying to find a decent balance between their work arrangements and their parental and carer responsibilities.

That is why I am pleased to say that from 1 September this year, discrimination by an employer unreasonably refusing to accommodate a worker's parental or carer responsibilities will be unlawful. The Government has amended the Equal Opportunity Act to assist parents with young children to return to work by including family responsibility as a ground of unlawful discrimination.

Many workplaces are slow to see it, but improving work and family balance benefits employers, employees and their families; it helps retain skilled staff; saves on recruitment and training costs and ultimately boosts productivity.

All modern companies and workplaces are moving to family friendly practices and legal organizations should be no exception. Just because practices have been in place for centuries does not mean they cannot be changed.

For example, in the UK, the Bar was facing a drain of young talent as its 'best and brightest' lawyers were unable to undertake pupillage training due to the huge debts incurred and a shortage of work during training.

As a result, in 2002, the English Bar Council introduced a funded pupillage scheme whereby lawyers training to become barristers received a financial payment until they finished the course.

All chambers in the UK are required to make an award of a financial payment of just over £800 per month to a pupil for

the non-practising period of pupillage and then guarantee certain receipts for the initial practising period during pupillage.

This is something that needs to be seriously considered here.

Presently in Victoria, lawyers seeking to be admitted to the Bar have to pay more than $3,500 to complete the Bar Readers' Course.

There is no provision for readers to receive any form of financial or other support during the 12-week course. For the final six months of reading a reader may accept briefs, but at this stage the reader will be looking to take on work that helps them to understand the practical application of things they have learnt, and this work may not provide a sustainable income.

A funded readership scheme could be established by the Victorian Bar to pay readers a nominated amount for the duration of their readership. The actual funded amount would have to be carefully considered but, for instance, could be linked to the minimum salary paid to legal trainees.

This could ensure entry to the Victorian Bar is not limited to those who have the financial means to sit the Course or who can afford to go without income or with limited income while reading.

There also appears to be little opportunity for lawyers to undertake the Victorian Bar Readers' Course on a part-time basis as is available in the UK. Having the ability to undertake the Readers' Course on a part-time basis, and having a course that is flexible enough to enable this to occur regularly, would I am sure attract a more diverse cross-section of the community, but particularly women, to a career at the Bar.

Like many other workplaces across the country, our judicial institutions should be encouraged to adopt more flexible workplace arrangements that respond to modern community demands and create a dynamic platform for the delivery of justice.

ROB HULLS MP
Attorney-General

LETTERS TO THE EDITORS

Dear Editors

In recording the death of the late Howard Ednie in *In Brief* No. 371 (3 April 2008), the author stated that Howard had signed the Bar Roll in October 1955 and 'read with Olaf Moodie-Heddle (later Judge Moodie-Heddle), a Common Lawyer' described as 'a very great advocate in the days when the Victorian Bar was described as vigorous'.

I compliment the author of *In Brief* on this apt description of Moodie-Heddle and the Victorian Bar back then.

Heddle was indeed a powerful advocate, affeared of nothing and no one, and one of the leaders of the Common Law Bar. I am not familiar with his antecedents, but the name Olaf suggests Viking ancestry.

After he took silk he successfully led me in a very difficult personal injuries case against the Tramways Board who were tough opponents. He led all the evidence and cross-examined all the witnesses. To emphasise the importance of the case to the plaintiff, he insisted we both maintain a severe composure in front of the jury. He forbore reading the transcript but knew all the evidence word for word.

I believe he regarded his spell as a County Court Judge as one of gentle retirement after many successful years at the 'vigorous' Common Law Bar. There did not seem to be as much pressure on the County Court then as there is nowadays.

GEOFFREY COLMAN QC

Dear Editors

I am a Senior Barrister, one-time Director of Barristers Chambers Limited and former Chairman of the Building Committee for the construction of Owen Dixon Chambers West.

When I came to the Bar in 1961, in less than prosperous circumstances, I was able to live at the Bar rent free whilst reading, and thereafter on a monthly tenancy. I moved from smaller to larger chambers on the same basis.

I am aghast at the front-page article of the *Financial Review* of 4 July. This '"O'Bryans" Advertisement' reveals a group of barristers who are not only intent on biting the hand that fed them but taking it off at the elbow.

It's almost certain that the O'Bryans and the other tenants of Melbourne and Dawson Chambers all came to the Bar as the beneficiaries of the system which, as above, allowed the young barrister a rent-free period whilst reading and thereafter a monthly tenancy. This did not require the put-up of money of tens and hundreds of thousands of dollars to gain admission, as was the case in the New South Wales Bar, the only relevant comparable Bar to Victoria. This Victorian system is now the one that they snipingly and hypocritically criticise, presumably to attract tenants to their Chambers.

In the light of current legislation, there can be no objection to barristers 'making a quid' by buying their own chambers. But to attempt to pull down the house in which they once lived by slanted and inaccurate comments is deplorable.

PETER J O'CALLAGHAN QC

GRANTS FOR LEGAL PROJECTS

The Legal Services Board Victoria is currently offering grants of up to $50,000 for projects that are relevant to Victoria and which:

- lead to improved laws and legal services;
- enhance access to justice; and
- better inform consumers of legal services.

Applications close on Friday 12 September 2008.

Application forms and program guidelines are available on the LSB website at <www.lsb.vic.gov.au> or by phoning (03) 9679 8000.

Applications for major grants (over $50,000) will be open again later in the year.

Supreme Court

Justice Peter Vickery

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Wednesday 28 May 2008

What an extraordinary country we live in. The announcement of your Honour's appointment was made on the same day as that of Justice Kyrou, and yet your backgrounds, while equally interesting, are so very different.

For example, Justice Kyrou's father was a shepherd who could not speak English but brought his family to Australia for his children's education. Your father was a judge, an army General and a war hero. That is not to say that you did not face obstacles in your path to success.

Your Honour was educated at Melbourne Grammar.

You recovered and graduated with a Bachelor of Laws from the University of Melbourne in 1971.

You served articles with Hugh Graham of Madden, Butler, Elder & Graham (now Deacons). You were admitted to practice in August 1973.

You remained with Madden Butler as an employee solicitor for about a year before you and Paul Elliott (now QC) tired of 1970s Melbourne and took off for London.

You had an inauspicious beginning. After training across the Nullarbor, the ship on which you had booked passage from Perth was seized for debt.

You negotiated a replacement flight on Pakistani airways, which was a nightmare: a milk run with stops at Singapore, Bangkok and Lahore, just to name a few.

Apart from a number of other disasters, Pakistani Airways was faithful to the Muslim prohibition against alcohol – not exactly what you two young men had in mind.

But London was great, and so was London House in Mecklenburgh Square, where you lived in graduate student housing. Your stated intentions, while in London, were to further your study of the law and…find yourselves the right woman to marry; and on arrival you set about both tasks with enthusiasm.

Ultimately you were both successful on the first. You at Kings College, and Elliott at the London School of Economics, each earned the London university degree, Master of Laws.

However, only Elliott was successful on the second. While in London, he met his future wife.

I am assured your failure in the second task was not due to any lack of dedication to the search. Your Honour even went to the lengths of joining a Scottish highland dancing group – possibly the ultimate in skirt chasing. Elliott mocked you, saying that the most attractive skirts there were on the men!

Elliott remained in London to teach at Queen Mary College at London University.

You did the summer program at The Hague Academy of International Law, then returned to Melbourne and taught in the Legal Studies Department at Latrobe University from 1975 to 1977.

You established and taught there a course in human rights from both national and international perspectives.

You came to the Bar in March 1978 and read with Michael Black, now the Chief Justice of the Federal Court of Australia.

Your practice at the Bar has been mainly in commercial and administrative law; and in engineering, environmental and planning law; and in human rights law.

You took silk in December 1995 – a year of strong appointments. Of the 11 silks that year, six have achieved judicial office so far,

five to this Court: the late Justice Flatman, Justices Whelan, Hargrave and Coghlan – and, of course, your Honour.

Throughout your time at the Bar, your Honour has excelled as a true trial advocate. You have been described as fearless and unrelenting; and as one of the bravest counsel at the Victorian Bar.

In *Fletcher Construction v Lines* you argued, in total, for an extraordinary 12 days in the Court of Appeal. Your junior describes the scene as the Court, constituted by Justices Charles, Buchanan and Chernov, attempting to corral you like a calf in a cattle yard. But just as they appeared to have you encircled, you would escape their clutches.

At trial, that case also illustrated your masterful cross-examination.

Your opponents worked with an expert engineering witness for days and days, preparing him for the expected marathon

cross-examination on the technical minutiae in his evidence.

In four or five questions, you demolished the witness's credibility – and sat down.

You virtually moved to Tasmania for a year for the Tasmanian Highway Case. You opened the case with quotations from a treatise on roman roads. *De Architectura* by Marcus Vitruvius, written in the first century before Christ. No wonder it became the longest civil case in Tasmanian legal history.

Your junior in that case was Lee Sealey, now Tasmania's Solicitor-General. He has flown in to be here this morning.

Despite your Honour's outstanding professional work, your career is marked by your *extra* professional contributions.

When the Fitzroy Legal Service opened its doors in December 1972 you were a volunteer.

Those who did found the service wish they'd had the resources of everyone that has since claimed to have been foundation volunteers.

You were a volunteer from the very outset in 1972, and continued to be a very active volunteer until 1980.

Your community contributions include your role as a founding member and patron of the Butterfly Foundation – a charitable foundation that supports young Victorians, particularly young women, with eating disorders. The Butterfly Foundation has established a public health day-care centre, the first in Australia.

You are also a member of the leadership council of Whitelion, which provides mentoring and employment programs for young people out of home care, or in the youth justice system.

Your human rights law work through the International Commission of Jurists has been extraordinary.

In 1999, you co-ordinated the assistance of

- the Australian Defence Forces,
- the Australian Federal Police,
- the Victoria Police,
- specialist trauma counsellors, and
- volunteer Victorian lawyers

to gather evidence of crimes against humanity in East Timor.

More recently, you were the ICJ Special Rapporteur in relation to the situation of David Hicks, Guantanamo Bay and the United States Military Commissions.

Your list of recent publications covers a range of issues, including:

- an appreciation of the judicial career of United States Justice Sandra Day O'Connor on her retirement;
- liquidated damages and penalties in contract law;
- complementary civil law remedies for destruction of documents;
- international sale of goods under the United Nations Convention;
- as well as many pieces on human rights and Guantanamo Bay.

You have been a scholar and a teacher. You have been an outstanding barrister, with a substantial practice of major cases, and have made time for the very substantial good works I have described, playing an important role in the public discussion of human rights and human rights law.

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

Supreme Court

Justice Emilios Kyrou

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Thursday 22 May 2008

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

Your Honour's intellect, meticulous care and thoroughness are legendary.

It has been reported that your Honour is 'only the second solicitor to be appointed to the Supreme Court bench'.

You are, in fact, the third.

Justice Rosemary Balmford practised for many years as a solicitor, and was a partner at Whiting & Byrne. She, of course, was appointed to this Court by the somewhat more circuitous route via the County Court.

Like your Honour, she was a winner of the Supreme Court prize.

The other solicitor on this Court was, of course, Justice Bernard Teague, who retired in February this year after more than 20 years distinguished service.

I understand that your first rotation in your articles year was in litigation, and that, on your first day at Corrs, you shared an office with Justice Teague – then a partner at Corrs.

I understand that Justice Teague became and remains a mentor and good friend.

Let me outline your extraordinary story.

Your Honour was born in the village of Sfikia in northern Greece where your parents were tobacco farmers. Your father says that as a child you were a bit slack working around the farm but you may be forgiven. You were less than eight years old and, as will be revealed, your work ethic picked up.

The family migrated to Australia in 1968 – the year after the April 1967 coup d'etat in which a military junta ousted the civilian government.

Yours was one of ten families to emigrate that year from your village.

You arrived in Australia aged eight and a half, speaking no English.

Your parents and brother, Dr Theo Kyrou – all in Court today – lived first in an army camp that doubled as a migrant hostel – then rented a succession of single rooms.

You attended three different primary schools: Eastmeadows, then Broadmeadows, then Dallas North.

Incredibly, for one who arrived in Australia speaking no English – and, in those first four unsettled years, attended three different primary schools – you were equal top-student of the Dallas North primary school.

You went on to be dux of the Upfield High School.

Your parents both worked on the assembly line of the Ford Factory. You once worked in a truck factory.

You won a Ford Motor Company Tertiary Scholarship, and held it for the whole five years of your combined Law/Commerce course at the University of Melbourne.

Apart from occasional absences to attend lectures, you worked in the law library from opening to closing pretty well every day.

You sat in the same place, near the periodicals and the toilet, on the first floor of the old law library on the quadrangle.

You were one of a group of five law students who have remained best friends now for more than 25 years.

Four of you are from immigrant working class backgrounds: Juan Martinez (whose family is from Spain – now managing partner of HWL Ebsworth, Solicitors), Mike Ferraro (whose family is from Italy – now global general counsel at BHP Billiton), and Joe Tsalanidis (whose family is from Greece, now at the Bar).

In contrast to the way you were treated in your youth by many other Australians, you included in this circle of friends Dan Brealey (now a partner at Freehills, Solicitors), a tall Anglo, whom you tease mercilessly on that account, and because he had gone to Haileybury College.

You valued the experience the four of you had in the state school system and you were all resolved that, when you had children, they would go to state schools.

Your eldest son John was the first child in the group. And you were the first to sell out on the idealism and send him to Scotch College.

The others followed suit, and all the children of those in the group ended up going to private schools.

You make and keep friends. Now, more than 25 years after law school, the five of you still get together for dinner at least a couple of times a year.

They're all here today. Indeed, Mike Ferraro returned from London early in order to be here – and only arrived in Melbourne early this morning. Juan Martinez also returned early to be here, but only from Sydney.

One of your vacation jobs through law school was in the office of Chief Parliamentary Counsel, John Finemore QC.

Another of your vacation jobs was in 1982 as research assistant to Gordon Lewis at the Law Institute – later Judge Lewis, who was then Secretary of the Law Institute.

This was before you even began articles or worked in a law firm.

Judge Lewis recognized your intellect and extraordinary industry and put you to work on research for what became the book, Lewis and Kyrou's *Handy Hints on Legal Practice*.

That book is now in its third Australian edition, with its second South African edition forthcoming.

You were not only researcher and co-author – you were the business manager, and arranged the South African publication.

A distinctive feature of *Handy Hints* is the flash of humour that begins each chapter.

For example the chapter *Instructing in Court* begins with: 'Lawyers are people who write a 20,000 word document, and call it a "brief"'.

The chapter on *Learning From Mistakes* starts: 'Lawyers, unlike doctors, are unable to bury their mistakes'.

I have digressed. Let me return to the chronological account. You were at the University.

Although enrolled in the pass-degree Commerce course, you obtained Honours in all nine Commerce subjects, and won the exhibition in six of them.

You obtained Honours in all 16 Law subjects – the exhibition in 11 of them. You won the Supreme Court Prize, and graduated Bachelor of Laws with first class Honours, and Bachelor of Commerce.

You served articles at Corr & Corr (now Corrs Chambers Westgarth), and were there for more than seven years, becoming a partner in that firm.

You then moved to Mallesons Stephen Jaques, where you have been a partner for some 17 years.

An impeccable career, made a little nauseating by the fact that I could not find a person who could say anything critical of you.

My hopes did rise when I heard that in your home you have a very large cellar, but they were dashed when I learned that it is full of law books.

However, there was one case lost and it was your fault.

It was a case in Sydney and you were to fly up on the morning with Ray Finkelstein (now Justice Finkelstein).

He picked you up in his 1960s Daimler very early in the morning. It was still pitch black!

The Daimler got a flat tyre on the Eastern Freeway.

Finkelstein didn't have the tool for taking off the ornate wheel spinners – so you called the RACV to change the tyre.

An hour went by – you both waited for the RACV with increasing irritation – and rising panic.

You cancelled one flight and re-booked on a later flight.

Finally, Finkelstein in a rage called the RACV only to be told that the man who called had said he was on the *South*-Eastern Freeway and the serviceman was still driving up and down looking for you.

You finally got there at least in time to reinstate the case and live to fight another day.

Otherwise, counsel you have briefed speak only of your high intellect, your meticulous care, your thoroughness and your courtesy. All this promises distinguished service as a Judge of this Court.

On behalf of the Victorian Bar, I wish your Honour long and satisfying service.

County Court

Judge Paul Lacava

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Thursday 5 June

So who would have thought? When I said you might want to do the next welcome – this is not what I had in mind.

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

You bring to the Court more than 34 years experience in the law – 6½ years as a solicitor, then 27½ years as a barrister – of those, 7½ years as Senior Counsel.

May I say, you also bring integrity; reserve with passion; professional commitment with a little life balance.

In an age of ever-narrowing specialization, your Honour is in the grand tradition of the all-rounder-silk – appearing one day in a major criminal trial; and, when that's over, in a major commercial cause; appearing for the prosecution; and for the defence.

Your success has been well deserved, earned through hard work.

You were educated in Pascoe Vale at the Blessed Oliver Plunkett Primary School, then at St Joseph's CBC North Melbourne.

St Joseph's has produced its share of eminent judges, including Sir James Gobbo (who served some 16 years on the Supreme Court), recently retired Judge Len Ostrowski (who served nearly 24 years on this Court) and Justice Paul Coghlan (appointed to the Supreme Court last year).

By all accounts you were a hard-working student at Melbourne University Law School and served articles with Michael Roet of Herbert Geer & Rundle.

After admission in March 1974, you remained with the firm, and became a partner there.

In your professional life you have always been one to get quietly on with the job. Early in your career you demonstrated this attribute in a different context. In fact you were downright sneaky.

While at Herbert Geer & Rundle you struck up a relationship with the attractive young secretary to one of your partners, Graham Robertson. Neither Graham nor anybody else at the firm knew what you were up to – until you announced your engagement to Anna – now your wife of almost 30 years.

Your decision to come to the Bar must have been driven by a desire to be able to express yourself to somebody prepared to listen. This was obviously never a phenomenon of your home life because you have always been subject to female domination.

Growing up, you were the middle child between two sisters, and with Anna you have had four gorgeous daughters – whom I am told play you on a break and about whom, Frank Costigan says, you speak with 'the kind of warmth that only an unbiased father has'.

However, the precipitating event that led you to chance your arm at the Bar was apparently a conference in Hawaii. It was a family law conference (I knew you had a broad practice but I didn't know it extended to family law). Anyway, at the Hawaii conference there were the usual hard-working recognized family law barristers like Jeff Sher, Bill Gillard and Glen Waldron.

I am not sure what they told you about the similarities between life in Hawaii and life at the Bar but you were converted. You arranged for Roger Gillard, another of

those hard-working family law barristers at the conference, to be your Master and you came to the Bar in October 1980.

You established a remarkably broad general practice in crime, including murder and complex fraud; in commercial causes, arbitrations and appeals, and lengthy building disputes; as counsel assisting, and representing witnesses, in inquiries by corporate regulators – most recently, of course, in the Cole Royal Commission into payments made to the Australian Wheat Board under the Oil For Food program conducted by the UN.

The Cole Commission was a challenging brief and the Commissioner did not make life easy for you. It was suggested that your client was involved in some largish inducements to the former Iraqi regime. You must have been working very hard and

not watching much television because you did not recognize the team from *Chaser's War on Everything* when they accosted you as you left the Court at a luncheon adjournment. You described the incident to the Commissioner after lunch as follows – I read from the transcript.

> As we were leaving the building just after the luncheon adjournment, the media were filming my client and myself and my junior – we don't make any complaint about that…save for this: there was a person who apparently has some sort of vendetta against the AWB who presented himself in the doorway downstairs, thrust himself in front of the cameras, and between the cameras and our client, to the extent that he was within two to three inches of his face, asking our client to sign a very large cheque – when I say 'large', about three feet wide – that was made out for many hundreds of millions of dollars, so that this person could send it to Saddam Hussein.

It's not only your daughters and the Chaser who can pull the wool over your eyes. One pre-season, you noticed a large scar on the back of the leg of one of the North Old Boys players (who is nicknamed 'Jex' because of his tight curly 'afro' hairstyle). Anyway, you enquired about the scar. The response from Jex was that he had had a hamstring transplant over the summer. It will warm the hearts of the Plaintiff Personal Injury Bar that you accepted without question that hamstring transplants were possible.

Opponents have had less luck in pulling the wool over your eyes. In 2000, just before taking silk, you teamed up with your good friend Doug Meagher in the Seal Rocks arbitration to give your new employer a terrible thumping.

You have the distinction of appearing (with Uren QC) in the last Victorian appeal to the Privy Council, *Montana Hotels v Fasson* in 1986.

You and the other counsel in that case enjoyed the personal hospitality of Lord Bridge in his London flat, and there got to meet other members of the Privy Council.

In the 7½ years since taking silk, you maintained the extraordinary breadth of your practice.

Those who had the privilege of working with you as your junior gained immensely from the association, and from your on-going friendship and willingness to share your knowledge and experience.

Your service to the Bar has been outstanding.

You come to the Bench from nearly four years on the Bar Council, the last two of those years as Junior and then Senior, Vice-Chairman.

You have been a tower of strength, through some difficult times; and you have always ended up with the tough jobs.

As Senior Vice-Chairman, you were the presumptive successor to the chairmanship – and, much as we delighted in your appointment to this Court, the Bar will sadly miss your leadership, your commitment; and your steady hand.

You served ten years on the Ethics Committee – the most important and onerous committee work at the Bar – and you were Chairman of that Committee for the last two of those years.

You also served on the Applications Review Committee; the Equality Before the Law Committee and a bucket load of others. You have undertaken the construction of the Bar Care Scheme.

You have always worked with Legal Aid. You did so as a solicitor – as we'll no doubt hear from Mr Burke. You did so as counsel.

You were briefed to represent VLA itself in a number of cases in which the application of the Dietrich Principles in section 360A of the *Victorian Crimes Act* were hammered out.

To your substantial cost, you have accepted briefs to represent legally aided clients – most recently in *R v Matthey* – the case of a woman charged with the murder of four of her five children.

No jury was ever empanelled because, after you successfully submitted to the trial judge that the inadmissible expert evidence should be excluded, the presentment was not proceeded with.

Your junior in that case was Frank Gucciardo. He apparently was excellent. – they should make him a judge one day.

The Senior Counsel Legal Aid Scheme, on which you've worked closely with VLA Managing Director Tony Parsons for about a year, is close to opening in final, polished form.

This is a modern revival of the tradition of silks committing to take one criminal Legal Aid brief a year at junior rates, with a criminal law junior.

In one stroke, the silks who enrol in this program will be serving the community; the juniors will have the experience of working with the silks; and legally aided clients will have the benefit of being represented by a silk with junior.

There are many instances I could quote of your adherence to principle but I will relate only one.

There is much talk about the Independent Bar and the cab-rank rule at Bar dinners; but you have walked the walk.

One authority for which you did a substantial amount of prosecution work learned that you had accepted a defence brief and demanded that it be returned. You explained your obligations under the cab-rank rule, and the importance of that principle and the place of the independent Bar in the administration of justice.

Suffice it to say that, following discussion with the authority, you honoured your obligations in place of your personal interests – and, as requested, you returned all prosecutorial briefs you were then holding.

Your Honour is principled, courageous and independent. You will be a great Judge.

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

On a personal note, I want to thank you for your support and say it has been an honour to work with you – and we must have that game of golf.

FORTHCOMING INTERNATIONAL CONFERENCE

Children and the Law: International approaches to children and their vulnerabilities

Prato, Tuscany,
7–10 September 2009

County Court

Judge Jane Patrick

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Friday 2 May 2008

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

Your Honour has served as a Victorian Magistrate for more than eight years. You have been an outstanding Magistrate. Only in November last year, you were assigned to be the Regional Co-ordinating Magistrate of the new Moorabbin Justice Centre.

You bring eight years of valuable experience as a Magistrate to your role as a Judge on this Court.

You went to school at Firbank, and to Law School at the University of Melbourne. After completing your degree you began articles; but the law, which had so engaged you at the University, became oppressively dreary – at least in those articles – so much so that you decided that you would change to a caring profession as a teacher.

You completed a Dip. Ed. and then taught General Studies and History to adolescent boys at the Watsonia Technical School.

A noble endeavour, to be sure – but even the dreariest conveyancing must have looked good when you were trying to impart the delights of humanities to the Watsonsia Tech boys.

In any event, you then moved to Sydney and Canberra for about ten years.

By the time you returned in 1985 you had three fine daughters: Narida, Marion and Georgina.

You started tutoring in the Economics Department of Latrobe University in early 1985.

You soon won appointment as a tutor, in the Law School of the University of Melbourne; and then promotion to senior tutor.

You tutored in, among other things, criminal law and torts.

While tutoring there, you met an Englishman, Robert Evans. His fields of particular interest and expertise were jurisprudence and contracts.

Such is the perversity of academic bureaucracy that, given he had those interests, he was of course assigned to criminal law and torts.

He says he learned a lot about criminal law from you.

You must be an absolutely fascinating criminal law teacher because not only has Robert become one of the principal criminal law teachers at Melbourne; but he is present in the jury box today as your husband.

Chief Magistrate Ian Gray described you as 'a hard worker, an engaging and a sometimes "feisty" presence, and a good colleague all round.'

I am told that, before leaving Melbourne Uni, you led the tutors' revolt which played a part in bringing down the then Dean of the Melbourne Law School.

Plainly your Honour should not be underestimated. However, that was more than 20 years ago.

You must have mellowed because at least when you moved from the Magistrates' Court, you left Ian Gray still in place as Chief Magistrate.

You left the Law School in May 1988 and this time completed your articles.

You also completed work for the Master of Laws degree at Melbourne that year.

You were admitted to practice in July 1989.

You worked as a solicitor in the Melbourne office of the Commonwealth Director of Public Prosecutions, and then

in the Victorian Equal Opportunity Commission.

You came to the Bar in May 1995. You read with Ramon Lopez.

Lopez recognized your aptitude for the Bar and its traditions very early in your reading – when you produced two crystal glasses, engraved 'his' and 'hers' for the after-work drop of scotch.

You enlivened your Readers' Course. You, John Buxton and Gerry Butcher were known as the Three Musketeers. Of all the Readers' Course photos, your class has the broadest smiles, and yours is the only photo in which everyone has a glass in hand.

You established a strong practice at the Bar, mainly in equal opportunity, employment law and crime.

No surprises there. As to crime, not only had you tutored in crime and been with the Commonwealth DPP, but your reading

with Lopez was on the fifth floor of Owen Dixon East – and you yourself were able to get chambers on that floor.

This was the floor of some outstanding criminal barristers including: Chris Dane, Geoff Flatman, Bob Kent, Betty King, Lillian Lieder, Remy Vanderwiel and Michelle Williams – in alphabetical order, of course.

You appeared before the Equal Opportunity Commission, the Anti-Discrimination Tribunal, the Australian Industrial Relations Commission and in the Magistrates', County and Supreme Courts.

In keeping with your reputation as a woman not to be underestimated, you appeared for the Commonwealth in a medifraud prosecution. Your opening line before commencing what turned out to be a particularly rigorous cross-examination of the accused was: 'Now doctor, this won't hurt a bit'.

At the Bar, you served two years on the Bar Human Rights Committee and two years on the Committee of the Women Barristers Association.

For the whole of your five years at the Bar, you were a Victorian Bar Conciliator for sexual harassment and vilification.

In 1998 you were appointed a Conciliator under the *Legal Practice Act 1996* for complaints against legal practitioners.

You were appointed to the Magistrates' Court in January 2000.

You were, as a Magistrate, fair, just and courageous. You were always well-prepared and thorough. You did the hard yards, delivering written reasons in appropriate civil cases.

I am told by one of your fellow readers, who has appeared before you that you are 'mostly tolerant of members of the Bar'.

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

WELCOME

County Court

Judge Peter Wischusen

Address by Peter Riordan SC, Chairman of the Victorian Bar Council, on Thursday 1 May 2008

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

Your Honour has been at the Bar 27 years. You have long been one of the leading barristers in the accident compensation jurisdiction.

Your appointment adds to the already formidable strength of this Court in that area.

You went to school at St Patrick's Wangaratta, St Mary's Bendigo, Bendigo High and Wattle Park High.

To avoid any misunderstanding, I should say that these frequent changes of school were not the result of the schools' dissatisfaction with you, but rather your family's moves.

You graduated in Economics and Law from Monash University.

Monash Uni in the 70s – I was sure that there would be some good dirt there. But your Honour has good friends; or else they just can't remember the 70s.

There is a story of a VW Beetle chock full of Monash Uni students pulled up late at night by the police. There was a strong smell of alcohol and the police had no doubt that they were about to lay a drink driving charge. But as the VW expelled numerous students, which one was the driver was not so clear. You stepped forward, declared yourself the driver (to the surprise of some) and, to the amazement of the constabulary, passed the breathalyser test with flying colours.

You served articles with Michael Stewart of Godfrey Stewart, Frank Curtain & Co.

You signed the Bar Roll in March 1981 and read with David Blackburn, now retired.

Your first accommodation out of reading was in Tait Chambers. You and Brian McCullough shared chambers and, in

fact, a telephone until you gerried up a functional split so you each had a line (of sorts).

You began in the old fashioned way with the usual variety of briefs in the Magistrates' Court.

You have, however, for many years now specialized in compensation cases.

Michael O'Loghlen QC, with whom you often appeared in cases, recalls two notable cases in which you obtained outcomes that so startled the Victorian WorkCover Authority that it persuaded the Government to amend the Act.

The first case is so well known that it is referred to, universally, as *Hegedis*.

One lunchtime, the unfortunate Mr Hegedis was relaxing in his employer's amenities room and peeling an apple with a knife. He somehow cut his hand. There was no doubt that Mr. Hegedis was in the course of his employment at the time – but:

- the apple was his apple;
- the knife was his knife;
- he wounded himself; and
- no employment activity caused the accident.

Though not serious, the wound required minor surgery; but WorkCover refused to cover the cost of that surgery, arguing that Mr Hegedis had not suffered 'injury' within the meaning of the *Accident Compensation Act* because his employment was not a significant contributing factor to his injury.

The Magistrate agreed.

However, you successfully appealed to the Supreme Court; and held it in the Court of Appeal; and again in the High Court.

The wider implications horrified WorkCover. It persuaded the Government to amend the Act in 2003, so as to require the employment to amount to a significant contributing factor to a large array of injuries and diseases.

However, even today, people who suffer from accidental traumatic injuries at work enjoy a statutory entitlement to WorkCover compensation, and the outcome in *Hegedis* is responsible for that entitlement.

The second case, is not so well known: *VWA v Syrad* in 2003.

The plaintiff worker had been badly disfigured by multiple acid burns in an explosion at his workplace.

WorkCover obtained reports from several independent medical specialists, who conducted independent medical examinations. Each assessed an 85% impairment.

WorkCover took issue with one of the independent assessments, and sought what it called 'clarification' from one of those medical specialists.

Prompted by Workcover, that specialist reduced the assessment to 57%.

You argued that the original assessment of 85% should stand, given that it was based on independent examinations and assessments; and should be accepted over the later assessment prompted by WorkCover.

Her Honour Judge Lewitan agreed, as did the Court of Appeal.

WorkCover was so spooked by the notion of being bound by independent medical assessments that it procured amendments to the Act in 2004, the effect of which was to install the VWA as the ultimate repository of medical knowledge.

Your wife, Ann McMahon, is also at the Bar.

She specializes in Commonwealth workers compensation in the Commonwealth Administrative Appeals Tribunal and the Federal Court.

It was not long after Ann came to the Bar that you bought a house in North Fitzroy, just around the corner from then Justice Merkel and soon-to-become Justices Buchanan, Warren, Whelan and Morgan.

It's taken a little longer for that salubrious address to work for you, but here you are today.

The house was, in fact, nearly your undoing. One day you were pruning the ivy cover on the brick wall surrounding your swimming pool.

Somehow, the legs of your ladder slipped into the pool – taking you, with your electric pruning shears in hand, with it. Fortunately, the ladder stuck firm with about a foot to spare before you would have become the subject of an experiment into the conductivity of chlorinated water.

You are a devoted husband and father to your wife and two daughters.

You are an exceptionally good recreational swimmer and snow-skier and a keen golfer.

I'm told that next year will be your tenth year in the Pier to Perignon Swim at Portsea, in which you always do well.

And you are a founding member of the Aardvark Ski Lodge at Mount Hotham.

You are, as I've said, a leading advocate in your field of accident compensation; and have been for many years; and the Bar has no doubt that you will make a great addition to the Court.

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

Douglas Graham QC

Douglas Graham, born on 25 August 1939, died at Cabrini Hospital on 16 April 2008. At the time, he was in private practice at the Bar, to which he had returned in 2003 after ten years as Solicitor-General of Victoria.

Upon Douglas's death, the Victorian Bar Council posted this obituary on its website:

> It is with deep regret that the Bar Council informs members of the Bar of the death today of Douglas Graham QC.
>
> Douglas Graham graduated with an Honours Law Degree from the University of Melbourne and served articles with Robin Elder of Madden Butler Elder & Graham. He was Associate to the Right Honourable Sir Victor Windeyer of the High Court. He signed the Bar Roll in October 1964, and read with Peter Brusey.
>
> In 1966, shortly after coming to the Bar, he became Assistant Honorary Secretary and then Honorary Secretary for a total of some five years. He and Chief Justice Michael Black were the first two barristers elected to the Bar Council in the newly created category of counsel of less than six years' standing. He served on the Council for six years – three years as a junior and three after taking silk, and as Vice-Chairman.
>
> Douglas Graham did important Bar Council Committee work. He chaired the Fees Committee, the Rules and Conduct Committee and the Law Reform Committee. He served on the Ethics Committee. He served on the Chief Justice's Supreme Court Library Committee for 17 years.
>
> He had a distinguished career at the Bar for more than 43 years, appearing before the Privy Council as a junior. He took silk in November 1978 and was Solicitor-General for Victoria for ten years (1992–2002), then returning to practice at the Bar.

Since then, The Honourable Clive Tadgell AO QC has written a fine obituary for publication in *The Age*. Those two obituaries cover admirably Douglas's professional career and some of his personal life. To avoid undue repetition, Sally, Douglas's wife, asked me to write this obituary from the different point of view of a friend and colleague of Douglas, who made a start with him at the Bar in 1964. In fact, telling of Douglas in his early Bar years tells much of Douglas when, long afterwards, as Solicitor-General, he was at its very head. Constancy was one of Douglas's virtues.

So many of Douglas's predilections were lifelong. From student days, Douglas loved Jaguar cars. There was an interlude in this pleasure, however, while he was Solicitor-General. An officious department message required him to suspend driving his Jaguar to work and to use his issue Toyota. When he set up his first chambers, Douglas procured a redoubtable polished wood desk. Typically, despite the advent of computers and changing fashions, Douglas retained it as his working desk throughout his career. Douglas always enjoyed golf and had a neat swing. In recent years, a dodgy knee forced him out of the game but it did not obstruct his enjoyment of his lifelong loves of listening to music, playing bridge and watching cricket and football.

In 1965, Douglas, Patrick Pender (also a Jaguar driver) and I secured our first chambers, beside one another, high on the front of Owen Dixon Chambers (long before designating them as 'East' was necessary). Douglas was a congenial neighbour and the three of us enjoyed warm companionship. Douglas was plainly cut out for the Bar, not only intellectually but through his deep appreciation of the collegiality that it offered. This appreciation also was a constant for the rest of his life. Douglas was a regular at lunch in the Owen Dixon dining room and enjoyed the company he found there and in chambers generally. He missed this Bar companionship while Solicitor-General, when he was located at the eastern end of the city.

In 1966, Douglas undertook the task of being the Bar's Assistant Honorary Secretary and then Honorary Secretary. Quite typically, he managed these roles with efficiency and without fuss. In the context of the Bar today, it is difficult to appreciate the unselfishness and scope of his contribution. At that time, apart from the loyal Miss Brennan, there was nothing of the administrative support that the Bar has today.

The chambers Douglas set up were dignified, well bookshelved and soft to sole and seat. Clients entering Douglas's room would have found a courteous man, conservatively dressed, in whom a fusion of modesty and confidence projected (until something tickled his sense of humour) an air of reserve. In the setting of that room, with the Supreme Court cupola as a background for Douglas as he sat at his desk, his clients would have felt confident that they were in safe hands.

Douglas was industrious and worked neatly, usually with his jacket on, and without making a hoo-hah about any work

burden. Mr Ron Beazley, the former Government Solicitor, remarked upon this quality at Douglas's farewell as Solicitor-General. Referring to the ultra-urgency and difficulty of work for the transfer by Victoria of industrial powers to the Commonwealth, he said: 'As always, Douglas worked at his best under extreme pressure and notwithstanding the importance of the issues and the size of the task, the job was done within the required time frame.'

From the start, Douglas never showed anxiety about whether work would come in. His confidence was justified. It was not all that long before tapes on the briefs on his desk included, among the red, an increasing number of white-taped Crown briefs on questions of law for advice or argument. There was ribbing (prescient, as it turned out) that he was 'marked out' by the Crown for big things. Douglas must have been pleased with the way his practice was developing but gave no sign of pride about it. Even at a time when he was receiving work interesting enough to make any junior excited, Douglas was never one to brag.

There was one occasion, however, when Douglas did talk about a brief that had come in at the last minute from his clerk. He mentioned after lunch one day that he had just been asked to appear before a Master in an adoption. He spoke more with puzzlement than anything else. None of us had ever heard of a barrister before a Master concerning an adoption. Sure enough, solicitor and female client soon appeared in the foyer, the woman carrying a baby. Not long afterwards, the little group emerged from Douglas's chambers and went down in the lift. Below, one saw the party emerge from the building and commence to cross William Street but, by then, the baby had changed hands and it was Douglas who was carrying the baby. Long after, if teased about his 'control' as a junior of the 'Undefended Adoption List', Douglas could share the joke.

Douglas had a wonderful, dry sense of humour and a warm chuckle to go with it. It is said that, having just taken silk and his new robe not yet ready, John Winneke had to borrow a silk robe from the diminutive Neil Forsyth QC for the silks' induction ceremony. Given John's height, there was an obvious problem with sizing. Going down in the lift for the ceremony, John was unfortunate enough to run into Douglas, who glanced across and said: 'What are you wearing Winneke? A mini skirt?'

Douglas's sense of humour apparently briefly deserted him, improbable as the occasion may seem, while he was being admitted to practise in the Australian Capital Territory. Douglas's admission fell to being moved by the junior solicitor who had handled the paperwork necessary in those days. On the morning of the admission hearing, the solicitor enquired of the senior litigation partner about the form of words he should use to move the motion. The partner, not knowing Douglas and assuming that Douglas had a middle name of some sort, recited the standard formula, commencing: 'I appear to move that Douglas, er, Quincy Graham be admitted to practise…'

At the admission, sitting in the seat behind the moving solicitor, Douglas was to hear the solicitor say, on cue: 'I appear to move that Douglas Quincy Graham be admitted…' . Apparently, Douglas Graham (no 'Quincy') had a distinctly odd look on his face as he rose to make his bow.

A high peak of Douglas's career as a junior was the brief for BP Refinery (Westernport) Pty Ltd in the 1977 legal proceedings between it and the Shire of Hastings. The Privy Council decision included the identification of five indicia for the implication of contractual terms. The indicia have been familiar to lawyers ever since. A few years ago, Douglas recounted to me a remarkable tale about the lead-up to that case, the way the five indicia came into being, and of events at the hearing before the Privy Council itself. Thinking that it was a piece of legal history that should not be lost, I made a record of what he told me and showed it to Douglas who confirmed its accuracy. What follows is based on that record.

The matter was heard first in the County Court and then, on a case stated, by the Full Court of the Supreme Court. The Full Court unanimously found an implied term contended for by the Shire. In both those hearings, Keith Aiken QC with Douglas as junior represented BP. The question was where should BP choose as its venue for an appeal. There were three possibilities: the High Court of Australia, the Privy Council, or arbitration pursuant to a relevant statutory provision. Since BP was an English company, the Privy Council was selected and leave to appeal was successfully sought in the Full Court. Before the appeal could be heard, Aiken QC was appointed a justice of the High Court of Australia, and Brian Shaw QC was briefed to lead Douglas in the Privy Council.

In London preparing for the appeal,

one evening before the fire after dinner at Brian Shaw's flat, Brian Shaw and Douglas prepared a list of five conditions which they would submit had to be satisfied to find an implied term.

The case commenced inauspiciously for BP. The hearing began on 25 April 1977 – Anzac Day. Just after eleven o'clock. Brian Shaw stood up to commence his submissions on behalf of the appellant. As he did so, the ominous sound of a bugle playing *The Last Post* in could be heard from an Anzac ceremony at the nearby cenotaph in Whitehall.

At lunchtime on the first day, Lord Simon 'meandered down from the dais' to speak to junior counsel for the respondent, John Winneke. The ageing Lord Simon, then frail after a stroke, had formerly been the United Kingdom Solicitor-General. John's father, Sir Henry Winneke, had formerly been Victorian Solicitor-General and was, at that time, Governor of Victoria. In a wavering voice, Lord Simon said to Winneke: 'I used to know your father when he was Solicitor-General. I believe that now he is the Governor of the colony.' As it happened, John's leader was Sir James Gobbo, who, himself, was later to become Governor of 'the colony.'

At the commencement of the second day of the hearing, Lord Wilberforce (who wrote the minority dissenting judgment), suggested to the appellants that they might have been better off if they had chosen to appeal by way of arbitration, rather than to the Privy Council. It was another bad start to the day.

In mid-morning on the second day, the case took a more benign turn for BP. In the course of argument, Viscount Dilhorne suggested to Brian Shaw that there might be properly found in the contract a different implied term. The term he suggested would have the effect of solving BP's problem. In fact, BP's legal representatives had previously considered the possibility of successfully contending for such a term. Both counsel and solicitors had rejected it as 'utterly hopeless'.

The picture changed, however, as a result of Viscount Dilhorne's suggestion. Given the earlier reservations, Shaw was reluctant at first to put the point. There was discussion as to whether Douglas would put it when, according to Privy Council practice, he made his submissions as junior counsel. Ultimately, Shaw put the argument suggested, although he did so as an 'alternative submission'. It was this 'alternative submission' that won the appeal, in a three to two majority decision: *BP Refinery (Westernport) Pty Limited v The Shire of Hastings* (1977) 180 CLR 266.

In his dissenting judgment, Lord Wilberforce was scathing about this argument suggested from the Bench which he said: 'had never been formulated in writing and has assumed a "protean" character'. Among other criticisms, he said that it 'was not put forward in either court below, nor taken or hinted at in the appellant's printed case'.

In the course of his earlier submissions, Brian Shaw had put the five conditions that he and Douglas had nutted out before the fire. They attracted no particular attention during the hearing, although Douglas recalled their being noted by at least one member of the panel. It was with amazement that Douglas read the conditions repeated almost verbatim in the reasons: at p. 283.

Altogether in the various hearings, nine judges heard the matter. Of those nine, six (including two in the Privy Council) held against BP, and, three, the critical three, held in its favour.

Douglas has left behind Sally, whom he married on 16 January 1969. It was a sunny wedding day with the reception held in the garden of his parents' house. In one of her seven published books, *The Card-Carrying Cook*, Sally wrote: 'I didn't actually meet my future husband at the bridge table but I certainly got to know him there. A year or so of weekly bridge gave me time to observe an admirable sense of humour, patience and good manners'.

Sally and Douglas shared much, particularly, according to Sally, sheer fun. From earliest days, they travelled the world widely, but especially to visit Sally's parents in her original homeland, England. They enjoyed their Portsea holiday house with its wicket gate on to the course of the Sorrento Golf Club. On the bay, the family played about in their motorboat, *Euphoria*, so named by Sally 'for its feeling of false buoyancy'.

Sally and Douglas had two children, Amanda and Virginia, who both live in Melbourne. Amanda has followed her father into the law. They had a fair and loving father whose judgment in family matters was as sound as in the law.

Douglas was diagnosed with leukaemia in January 2007. The ravages of the disease eventually brought a weakening of Douglas's resistance and a series of crises which Douglas bore with bravery and stoicism until the end.

Vale, Douglas Graham.

DAVID BENNETT

Charles Sweeney

Charles Augustine Sweeney (Sweeney), who died on 22 December 2007, adorned the Victorian Bar in a period when the Bar was replete with great advocates, appearing before strong and distinguished judges.

Sweeney was born in Tasmania on 27 April 1915. He was educated in Melbourne, finishing his schooling at St Kevin's College, Victoria Parade. He graduated from Melbourne University with Honours in Arts and Law and later completed a Master of Arts. He was President of the Newman College Students Club, captained the College First 18 and played for University Blues. He was an Australian Champion Handballer, a competent golfer, and in later times a keen bowler and bridge player. This incomplete list of his early achievements presaged a most distinguished career in the law.

Sweeney did articles with Oswald Burt and then joined the Bar in 1939. He read with J V Barry, later the renowned Justice Barry of the Supreme Court. He very quickly had a burgeoning practice, which was interrupted by the Second World War.

In 1942 Sweeney joined the Royal Naval Volunteer Reserve and served as an Officer until 1945.

On 21 October 1944 Sweeney was on board HMAS *Australia* in the battle of Leyte Gulf. The *Australia* was the first allied ship to be hit by a kamikaze ('divine wind') attack. An unknown pilot flew his plane into the ship's superstructure above the bridge, spraying burning fuel and debris over a large area. Captain Emile Dechaineux and 30 other seamen died and 64 were injured. Fortunately for Sweeney and other crew members, a 200 kg bomb failed to explode. Had it done so the ship would have been effectively destroyed.

In later years Sweeney told of the chaos of accompanying the wounded Commander Collins in a launch across choppy seas to HMAS *Shropshire*, as the battle continued to rage all around.

When Sweeney returned from the War, in December 1945 he married Betty Need and enjoyed a loving and fruitful marriage. He is survived by his wife and four children, Charles QC (a member of this Bar), Catherine (Walter) a solicitor, and William and Francis, both doctors.

Sweeney returned to the Bar and quickly became and remained an outstanding advocate. He developed a large all-round practice including common law, (particularly in running down cases), the Licensing Court, and appearing before the Australian Broadcasting Control Board for the then eagerly sought after television licences.

Of the many leading cases in which Sweeney appeared, there was none more notable than *R v Jenkins (ex parte Morrison)* 1949 VR 277 (The Whose Baby Case).

On 22nd June 1945 Mrs Jenkins and Mrs Morrison had each given birth to a female child in the same room at Kyneton Hospital within five to ten minutes of each other. Mrs Morrison alleged that she was given the child (Nola) to which Mrs Jenkins gave birth, and that her child (Johanne) was given to Mrs Jenkins. About four years later Mrs Morrison sought a writ of habeas corpus to have Nola delivered to her and her husband. Jack Galbally (for the Morrisons) briefed Sweeney led by R V Monahan KC and Bernard Nolan (for the Jenkins) briefed E Hudson QC and H Winneke.

The matter came before Barry J (assisted by assessor Dr H D Morgan). He found for the Morrisons, and the case then went on Appeal to the Full Court (Herring CJ, Lowe and Fullagar JS) who reversed the decision.

The Morrisons then unsuccessfully appealed by Special Leave to the High Court (Rich, Dixon and Webb JJ, in dissent Latham CJ and McTiernan J). The report records that

> Sweeney (with him R V Monahan KC) presented the argument for the Appellants, and Monahan the reply.

The saga continued. An Application for Leave to Appeal was made to the Privy Council. In *Whose Baby* (Duck and Thomas 1984) there appears

> Jack Galbally was questioned…about the possibility of a further Appeal to the Privy Council in London. He said 'If Mrs Morrison could walk to London I would have no doubt she would start this afternoon'. He said 'There is only one thing that is stopping her, money'.

This was overcome.

To that time Sweeney and the others had acted pro bono. When Galbally and Sweeney flew to London 'both of them had paid their own fares'.

Garfield Barwick KC happened to be in London for the Bank case, and he was briefed to lead Sweeney. Allan Taylor KC, (also there for the Bank case) with him Else Rae-Mitchell were the opposition. The Privy Council, after hearing argument, took just twenty minutes to deny Leave to Appeal.

Some months later Barwick wrote to Barry saying

> May I with very great respect, be permitted to say how well your Judgment read and how convincing and entirely satisfactory to my mind it appeared.

Barry's biographer writes of his great disappointment and concern at the appellate decisions. Sweeney was of the same view.

Sweeney took silk on 21 May 1955. His practice as a leader was wide and extensive. He was a brilliant advocate, urbane, concise, always imperturbable, and a most incisive cross-examiner.

This was demonstrated in many jurisdictions including the Licensing Court. Post-war legislation, having removed the numerical limitation on liquor licences, opened the floodgates of applications. These were pursued by a formidable Bar, including, R V Monahan QC, J P Bourke QC, J O'Driscoll QC, Don Campbell QC and of course Sweeney. The Licensing Court, chaired by Judge Archie Fraser with Magistrates Frank Field and Ron Atchison, was often a stressful Tribunal to appear before, particularly when the Judge was 'in form'. In that milieu the coolness and cogency of Sweeney was outstanding. Thus when, with typical derision, the Judge attacked the financial standing of Sweeney's client saying:

> There's hardly enough in this balance sheet to pay your fees.

Sweeney replied:

> I would be obliged if your Honour would not distract me with such doleful comments.

Sweeney was a courageous, competitive, but always cool advocate, of which coolness Kevin Anderson (later Sir Kevin) remarked:

> I have no doubt that behind those pale blue eyes there burns coals of fire.

Likewise in *Fossil in the Sandstone* Anderson writes of Sweeney appearing before a Board empowered to award Television Licences, of which it was said,' the successful applicant has a licence to print money'.

It was the practice of the Board to require the lodgement of a case, and the Board was 'reluctant to allow alterations to the contents of a case', except as to minor details, and any application to modify one's case was furiously opposed by all the other applicants.

Ten minutes before lunch Sweeney was asked whether he would prefer to commence his case after lunch. Sweeney said:

> I have no objection to starting now. I do not propose to make any opening address. Perhaps the formalities can be attended to before lunch, if I call my main witness and he can verify our case.
>
> 'Very well,' said the Chairman.
>
> Sweeney thereupon called the secretary of his client company who, having been sworn, verified the volume which was the case. By now, the exodus from the Boardroom was starting, papers were being gathered up, and Counsel were strolling out, with no one bothering about what was happening.
>
> 'Now witness,' said Sweeney unperturbed by the dwindling audience. 'For pages 7 to 21 do you substitute the pages I now hand you'.
>
> 'Yes,' said the witness.
>
> The same procedure was followed smoothly for very many of the other pages of the original case…which were admitted as part of his client's case without objection, nobody appreciating that what was being done was virtually the presentation of a new case.
>
> After lunch all fury broke out when his opponents discovered how smoothly Sweeney had effected his fait accompli. Their rage was the more so, because Sweeney was a Victorian Silk and the Counsel aggrieved hailed from Sydney. They did not know our Charlie.

Sweeney was appointed to the Commonwealth Conciliation and Arbitration Commission in 1963. Whilst one does not expect messages of congratulations to be less than effusive, from letters to 'Charles' or 'Charlie' the following excerpts reflect obvious respect and admiration.

> You would have graced any bench and I have some pangs of regret that we are to be deprived of your polish and ability. We will miss you.
>
> Sir Alistair Adam

> I must say that your departure from practice in our Court will be very much regretted.
>
> Sir Edward Hudson

> The Commonwealth has been fortunate enough to induce you to accept a position on the Arbitration Bench. May I congratulate you. I have always admired the logical presentation of your case…
>
> Sir Charles Lowe

> We shall miss you around the Courts, especially in the Bourke Street 'slums'. No more shall we hear you trying to cross-examine a Polish woman with her monosyllabic answers reported by the interpreter in long and eloquent English sentences complete with gesticulation.
>
> Sir Arthur Dean

> Before I resigned I thought you were a certainty for our Supreme Court and I regret you are not there.
>
> Sir Russell Martin

> As one who often had the pleasure of watching you work at close hand – usually to the detriment of my clients – I have no doubt that you will fill your role with distinction…
>
> John Starke

In his time on the Commission, Sweeney participated in a number of notable cases, including important basic wage decisions.

In 1970 Sweeney was appointed the Federal Judge in bankruptcy, replacing Sir Harry Gibbs.

On 2 November 1970 in somewhat wavering handwriting Sir Owen and Lady Dixon wrote:

> We send you our warm congratulations on your appointment to the Court of Bankruptcy. I, Owen Dixon, made friends with Judge Clyne, when we were students at the Melbourne University – and we remained friends until his death. You will find the jurisdiction interesting and I hope you enjoy a long tenure of office. If you chance to find it possible to visit me I shall be very pleased to see you.

Prior to and after this letter Sweeney visited Dixon on a number of occasions. The Federal Court of Australia was estab-

lished on 7 February 1977 when 17 of 18 judges were appointed, Sir Nigel Bowen as Chief Judge having been appointed one month earlier. Sweeney, who was fifth in seniority, eventually became the longest serving Judge, and sat in Courts across all the States and Territories of Australia.

David Habersberger QC at Sweeney's farewell extolled Sweeney's judicial attributes.

> Those qualities have always been evident in Your Honour's work as a Judge. Courtesy and civility to both practitioner and lay person, patience and tolerance of the inexperienced Junior Counsel, elegant phrasing of Reasons for Judgment were the hallmarks of Your Honour's judicial work.

There were many other tributes, and comments.

In the late forties Sweeney was a member of the Committee of Counsel, which in 1954 was renamed the Victorian Bar Council.

> Sweeney whose Chambers were in Equity was involved in the perennial problem of accommodation for the Bar. In 1931 Sir Eugene Gorman obtained from Equity Trustees Ltd a lease of the Third Floor of Equity Chambers. This greatly relieved the pressing problems of providing accommodation for the Bar. In 1931 there were 165 barristers at the Bar, 27 of whom were accommodated at Equity and the balance (save two at 480 Bourke Street) in Selborne Chambers. In later years, Counsel's Chambers Limited took leases of Chancery House, Saxon House and Eagle Star, the Fourth Floor of Equity Chambers and sub-let these Chambers to barristers.
>
> On 30th May 1958 a special meeting of the Bar authorized and directed the Bar Council 'to continue with efforts to obtain premises to house the whole Bar…' Sweeney and a number of other barristers in Equity objected to the idea that the Bar should be housed in one building, with the obvious consequence that Equity Chambers should be vacated.

When the Bar Council in March 1961 directed Counsel's Chambers to terminate its lease of the Fourth Floor of Equity Chambers, Sweeney indicated that he was prepared to take over the Fourth Floor.

In April 1961 Sweeney wrote to the Bar Council proposing the retention of Equity Chambers 'upon the basis that the accommodation will soon be necessary to house an overflow from Owen Dixon Chambers'.

After strenuous negotiations, the Bar Council resolved that Counsel's Chambers Limited should take a new lease of the Fourth Floor of Equity. Sweeney's powerful influence was a substantial reason in a number of renowned Silks and Juniors remaining in Equity. His efforts emulated those of Sir Eugene Gorman KC in 1931.

At his farewell he said of Equity Chambers that it 'had at least its fair share of talent, as may be seen from the fact that among its 39 occupants were 19 future Judges…'

Of 'Pat' Gorman he said at his farewell:

> I came there (to Equity) as a school boy with dreams of the Bar, having the opportunity to call on Eugene Gorman KC, then at the height of his great powers. He received me kindly, but I was not then to know that he was to be a generous guide, philosopher and friend to me for the rest of his life.

He concluded with typical wit and irony:

> I must say that I still recall the odd case here and there which I should have won, but did not. But on such a day as this I will permit myself the licence of saying, even in this distinguished company, that that was always the fault of the Court, even the Highest Court in the land… .
>
> I learned from the sage guidance of the solicitors who were adventurous enough to brief me and from their instructions in the running. To them I say in the words of the old music hall days, my wife thanks you, my children thank you, my grandchildren thank you and I thank you… I also learned from my opponent, from my leaders, and eventually from my juniors, that is from those who turned up.

Of his decision to retire he said:

> One of the advantages of a life appointment is the freedom to choose one's own time of retirement. It is not a choice I have made in haste as you will gather from the statistical details…But on the other hand, I had to take care not to deprive myself of a farewell.

It was a marvellous farewell befitting the retirement of the Federal Court's eminent and longest serving Judge.

This obituary does not refer to the many and notable services outside the law, which Sweeney so generously and efficiently provided. They have been referred to in the excellent and touching obituary by his daughter Catherine Walter, from whom she and her husband John, a deal of the material which appears herein came. Catherine wrote:

> His was a life characterized by rugged good health and no complaints. It was only in the last years of his life that a twelve-year battle with Parkinson's disease finally started to take its toll. Through all that period he was sustained in particular by the love, care and devotion of his wife, Betty, who selflessly looked after him in the final years of declining health. He died peacefully at the age of 92 years on 22 December 2007 surrounded by family. A private family funeral was conducted by Father Hayes for him at St Peter's, Toorak, the Church he attended for more than 50 years.

Thus ended a great life and career in the law, and one which met and easily complied with the highest standards and traditions.

Vale, Charles.

PETER J O'CALLAGHAN QC

BAR COUNCIL ELECTIONS COMING UP

Ballot papers will be forwarded to all members of the Bar on

22 September 2008

and must be returned to the Victorian Bar office by close of business on

9 October 2008

Remember to vote!

Bar Dinner June 2008

Speech by

Ross Gillies QC

GOOD EVENING, sisters and brothers. A year ago Chris O'Neill invited me to Join his table at the Bar Dinner and I accepted the invitation. He said to come along and give Ruskin a cheer along because he needed every bit of encouragement that was available.

I agreed to go because after forty years at the Bar I hadn't been to a Bar Dinner and I thought it was an appropriate time to break the ice. So I have sort of done okay in the last twelve months, coming from maiden attendee to holder of the main brief and I am happy to note that Judge O'Neill's done well too, because the last twelve months have been kind to him. He came to the dinner as a knock-about Common Law jury tyro and now he attends as an honoured guest, His Honour Judge Chris O'Neill.

Chris of course has embraced the job of Judge, He is immaculately charging juries and deciding cases and he is also engaged in the government of the Court, much to the glee of the Chief Judge. He and the multi-lingual and multi-talented Sandra Davis run the government side of the Civil List and if that accolade doesn't get me priority in getting my cases on nothing will.

When I agreed to take this brief to address you this evening, the Chairman Mr Riordan expressed some concern. He said, 'I want a draft of the speech because we have had misfortune in past years because of a perceived lack of political correctness which has been a propellant and certain people have left'. He confirmed, 'We must have no walk-outs this year. I have had a turbulent time in my time as Chairman of the Bar Council and I don't want anything to go wrong because this is my culminating event, I sort of feel like a bride planning a reception'. I replied, 'Riordan, if you're the bride I really pity the groom.'

He said, 'Just one thing, if you won't give me a draft of the speech, unreservedly undertake to be politically correct and absolutely millimetre perfect in that regard because we must have no walk-outs'. I promised and he said, 'I trust the promise will be

PREVIOUS PAGE: Crowd scene

Attorney-General Rob Hulls, Carolyn Burnside and Chief Judge Michael Rozenes

David Gillard with his father the Honourable E W Gillard QC

honoured' and I thought that if he believed that he was a fool.

I have a problem with political correctness because in this day and age basically the only section of the community that can be safely satirized is the majority. However, it is not so much fun satirizing the majority if you are a member of the majority. There are lots of protected minorities but they can't be touched. I would be required to apologise and receive special counselling and guidance for the rest of my days were I to breach a canon. It is unfortunate because minorities tend to be so fault ridden but I just mustn't do it.

On the other hand, if one is a member of a minority, it is permissible to satirize not only the majority but also any minority group. A minority member satirizing his own is not regarded as being discriminatory: he is seen to be engaging in ironical humour. I suppose I could secure such a freedom by joining a minority, but which one would have me?

If during the course of this speech there are walk-outs that would be bad luck and a source of upset to the Chairman but I suppose as a consolation there would be more chocolate soufflés for Simon Wilson at the end of the evening, and I can say that of Simon of course because he is a member of the majority and the big fellow will unblinkingly take it and probably have personal retribution against me before the evening is out but nevertheless not make me a candidate for special counselling.

There are many esteemed and honoured guests here this evening. It was in previous years a tradition for the speech maker in this position to specifically advert to all such guests. That's not possible tonight as we have over thirty honoured guests and I would be part-heard at midnight if I had to cover the field. In any event because someone is an honoured guest it does not make them a mortgage holder on eminence, importance, notoriety or being interesting. The honoured guests have all received accolades of their own. Judges have been welcomed to the Bench and people have stood and bowed and heard a detailed oration about their achievements and how grand it is that they've been appointed and they have basked in that deserved glory.

What I propose to do is to take random candidates from the audience. This miscellaneous approach will embrace some of our eminent and honoured guests who coincidentally are interesting enough to warrant a mention but essentially everyone is at risk. Everyone is a potential target and that is a device to ensure continued attention.

I have in front of me a detailed list of all in attendance this evening. It is an interesting list. It indicates who wants to eat a certain type of food, who is allergic to certain types of food and that is worth knowing. It details who wants to sit with whom and that means who wants to ingratiate themselves with whom. Certain tables are packed to the gills because such tables are much cooler to be on than others to be on. Then there is a more intriguing 'I do not want to sit near, I do not wish to be in the same quadrant of the hall as…'

So adopting that approach I'll miscellaneously refer to half a dozen or so or more of you during the course of this speech and we should start with the High Court. The High Court commands that sort of respect and hierarchical attention rather than being buried in the midriff of the speech or even lower.

Susan Crennan AC is the first member of the High Court to be mentioned, not because I am elevating her seniority wise above Justice Kirby and Justice Heydon but after all she has recently received her Australia Day Honour. I don't see much of Susan these days because I don't often appear in the High Court and I might say that is not a consequence of our Court of Appeal usually getting it right.

I last saw Her Honour when we together travelled Route 66 to Chicago to the Australian Bar Association Conference and I do think that there is a strong prospect that Her Honour will succeed the Honourable Ian Callinan as the roving international-conference-attending High Court

Justice Sue Crennan and Judge Paul Lacava

Judge. If she does that it would be good because not only is it always pleasing to see Susan, one always knows that when a High Court Judge attends a conference the taxation deduction is in the bag.

Justice Michael Kirby is the most famous judge in Australia, although I hear Bill Gillard interjecting saying 'only since I retired'.

Fiona McLeod has spoken about me having an inclination to say 'no'. Coincidentally I was eavesdropping on a conversation that his Honour was having with a waiter a moment ago and the waiter enquired, 'Is something wrong, your Honour?' Justice Kirby said, 'No' and the waiter persisted. 'Well, every time I ask you a question you tend to say "no"', and his Honour said, 'What do you mean by that?' and he said, 'Well, I have offered you this wine and that wine and this food and that one… and you keep on saying "no" and I'm a bit concerned you are not having a good time'. His Honour said, 'I like to say "no". I really like to say "no" and that means I am having an excellent time so just don't worry.' The waiter remarked and said, 'But I'd like you to say "yes".' His Honour said, 'Don't worry, I prefer to say "no",' and the waiter replied, 'Look, I note you're on a table for ten; if I were to put you on a table for three as an example, would that please you because then in addition to dissenting you

Chairman of the Bar, Peter Riordan SC

could be sitting in a very distinct minority'. His Honour said, 'Well, the word chokes around my vocal cords but I would concur with that proposal'.

Justice Dyson Heydon is here tonight. This must be a first for Dyson being in a room such as this with someone else who bears the some Christian name: Dyson Hore-Lacy. The similarities don't end therein because as an example his Honour Justice Heydon sits in a celestial jurisdiction, the High Court where the angels sing all gloria in excelcius as the jurisprudential atom is divided time and time again. Dyson Hore-Lacy on the other hand sat in a heavenly jurisdiction, albeit at the other end of the spectrum in the Coroner's Court, but work which was nevertheless suitably adjacent to the Good Lord. In addition, of course, Justice Heydon is a celebrated author of texts, including *Cross on Evidence*. Dyson Hore-Lacy knows all about the rules of evidence but he tends to break rather than comply with them, but that has nothing at all to do with his understanding of the topic. Other legendary works of his Honour Justice Heydon include his trade practices book, which is a standard reference, and again it might astonish you to know that Dyson Hore-Lacy has had a passionate and abiding interest in trade practices: he raced a horse by that name for four or five years.

I want to mention Barry Watson Beach because he is someone who is irresistible to me. Everyone here would remember Barry as a judge – a judge of great authority and capacity to get work done.

Not so many these days would remember him as a barrister and I can tell you he was a fine barrister. He was a top common law silk at a time when the Common Law Bar was exceptionally powerful, with numerous really strong advocates and he was more than competitive with each of them and I mention counsel such as Crockett, Kaye, Coldham, Wheelahan and the list goes on. Barry could more than accommodate all of them but his main aggression, his main courage was not in fighting Bill Kaye or Bill Crockett; it was in fighting one, Percy Roy Dever…, our clerk.

Percy Dever was a fine clerk but was also a bully, cajoler, a twister and a turner and one who rode his barristers very, very hard. I remember inspirationally listening to Barry saying to Percy one day how he would not take another brief. Percy maintained, 'Look, Barry, Chick Lander has got a brief for you on Monday in addition to the brief which you already hold,' Lander was the founder of Lander & Rogers and was a leading common law solicitor. Barry replied, 'I'm not interested. I don't want someone else's throwback. I won't do it.' Percy threatened, 'Well, that would make me angry and Chick angry', Barry retorted, 'Well, that doesn't concern me one bit, I'm off, goodbye and that is that', and he strode out of Percy's little rat hole that he called his office.

I was suitably impressed by this so I bowled up, regarding the direct approach as being the appropriate one, and said, 'Percy, I've got a bit of paperwork to do and I'm concerned that the work will become statute barred if I don't attend to it so I'm not going to Court next week.' He said, 'You're what?' I said, 'I'm not going to Court. I've got to do the paper work. I've got six or seven time bombs quietly ticking away on my desk and each one of them will bankrupt me if I get sued because they're statute barred' and then I used the Beach formula and said that is that and walked off.

I had been in my chambers for only a short while when the phone rang and it was Percy Dever. He said, 'You're sick'. I said, 'No I'm not'. He persisted, 'Yes, you are, you're sick. You don't want to go to court, you must be sick. You don't want to

Justice Sue Crennan and Andrew Maryniak

LEFT TO RIGHT David Shavin QC, Justice Michael Kirby, the Chairman, Jane Dixon SC and Fiona Ellis

Tom Bathhurst QC

Fiona McLeod SC

The Great Hall

make any money, you want to just sit up in your chambers like a commercial barrister drawing affidavits and stuff like that. In fact I'm so worried about you I've made an appointment for you to see a doctor.'

At this stage my bravado went and I reverted to being compliant and murmured, 'Yes, Percy'. He barked, 'Get up to 98 Collins Street and you'll see the doctor'.

I dutifully attended and was met by the physician who stated with a gleam in his eye, 'You've come here for a very thorough examination' as he snapped a latex glove onto his dominant right hand. Members, I saw stars.

When I got back to chambers after the medical examination, Percy said, 'Did you find the doctor very thorough?' I said, 'I certainly did'.

As a coincidental irony the doctor's name was 'Bottomley'. His name was Dr Keith Bottomley and he was well known to those in the common law and those in the compensation jurisdictions. However, he was a cardiologist and to this day I am wondering about what a cardiologist was doing with a latex glove. Barry, that's one I owe you.

As I go through the list of distinguished and other guests here tonight I see Allan Myers QC, holder of the Queen's Birthday Honour of AO. Allan is not easy to get out these days he is so busy. He is the richest lawyer in Australia but he can come here because he can have a meal with his friends, he can have a drink with his friends, he

Jason Pennell, Denise Bennett and John Riordan

can reminisce with his friends and he can also keep an eye on his paintings. In fact, I think Allan might even own this building. Allan is an altruist and a benefactor but I don't know that it includes throwing in the venue for tonight's dinner. Being present, Allan does not have to worry about a Caravaggio or a Canaletto walking during the course of the evening.

Justice Jack Forrest was kind enough in his welcome to invite me to the Bar table, I was very pleased to accept that honour. I sat up at the Bar table beneath the Forrest family in the jury box, and as the welcome unfolded I realized the true purpose of Jack placing me in a conspicuous position. It was so he could publicly humiliate me with talk of my greed and my preoccupation for the fee rather than for the legal principle.

Jack was very frequently my junior over a long period of time. On reflection I should have had Jack sitting at the edge of this stage as an equivalent to me sitting at the Bar table. I could then invite him to tell you of the many occasions when he said to me, 'Oh, I think your fees are a bit on the light side, it'll take a bit more, it'll take a bit more than you've got on it'.

The Honourable E.W. Gillard is here and he was the top trial Judge in this State up to the time of his retirement. He is getting a bit tired of his name being mentioned in the same breath as one Tony Mokbel. He says that his performances over the years both as leading counsel and as judge should not have him go down in history as the man who sprung Tony Mokbel. He was a much too grand a judge and a much too grand a barrister to have that epitaph. Don't forget that Bill was the one who above his chambers' door had the hardly self-effacing inscription 'The Great EW'. Gillard, because of his association with Tony Mokbel, has become something of the Melbourne equivalent of 'Laurel and Hardy'.

Mr Attorney is in attendance. Mr Attorney, Bill did advise me that he has a great embarrassment about the amount of money that has been spent locating and bringing Mokbel back to Australia. Gillard does have a reputation for meanness which I now wish to dispel, because Mr Attorney, and I would ask you to relay this to the Treasurer, Bill Gillard has chosen to partly defray the cost of bringing Mokbel back to Australia by entirely waiving his judge's pension.

I might say, Mr Attorney, it is very good to see you here this evening, I want to emphasise that you are only here as an acting guest and that as a consequence you get no dessert. On one view you are lucky to get the main course.

I have noted the recent publicity that has been given to your views about barristers' fees and in particular the issue of silks' fees of $14,000 per day. Now look I know you're joking about that and I know you're teasing us and I know you don't take it seriously and are trying to upset people like me who think there is a faint possibility that someone's getting it and they are not. So I am taking it as a joke and I do tell everyone else to take it as a joke and a tease, but just in case you have found someone who is getting $14,000 per day and just in case there is that sort of money around, would you give me just a slight clue as to where it is because I'll do the rest, I'll do the rest…I don't need much, I don't need much of a clue at all.

Mr Attorney is also a bit tired of suggestions that judicial appointments have been politically oriented, just as Justice Gillard dislikes the connection between him and Mokbel. The Attorney has had enough of the contention that those in favour with the Labor Party get a better go than those who are not. That's wrong of course but he wants to do something about it. He is not going to do anything drastic like appointing supporters of the Liberal Party to the Bench but he thinks that he might put a Tory into Government House. He thinks he might do that. He hasn't told me who is a candidate but I think that Sir Richard Stanley might be someone he has in mind. There is a logic to this because Sir Richard has been edging closer and closer to Government House over the years. He resides in Airley Street, South Yarra, and has been buying property after property moving down the hill and thus closer to the gardens surrounding Government House. I can see Sir Richard as Governor under the ostrich-plumed hat awarding bravery awards to those counsel who stand up in the Court of Appeal for the VWA, and absentmindedly stroking his mullet as he is wont to do.

Colin Lovitt is here tonight conveniently under a spotlight so I can see him on table 29. Colin Lovitt a colourful counsel and an aggressive counsel, as many judges have discovered, be they Supreme Court judges or Brisbane magistrates. His aggression hasn't been confined to vocal aggression. He has had to defend himself and the honour of his friends physically at the Carlton Football Club on more than one occasion. I have known Colin for many years. As a young barrister he was in every card game from one end of Lygon Street to the other. They were big card games and he was a big player and he rejoiced under

Sarah Fregon and Will Alstergren organizer of the dinner

the unflattering name, 'The Embarrister'. He was so called because of his conduct. It is good to see 'The Embarrister' here tonight and no doubt he'll be going off to shuffle the cards until 4am later on in the evening.

What I want to do at this stage, members, is move from the hilarious to something more serious. It relates to practice at the Bar and to the fact that whilst we regard ourselves as being a confederation it is nevertheless a very loose confederation within which there is a subconscious brutality and selfishness. These characteristics are probably spawned by the fact that we are sole practitioners and independent contractors. It is easy enough on an occasion like this to feel a strong sense of togetherness but it really should permeate our day to day lives much more. Whether one is a judge or a barrister there is no one really to look out for you like a partner or a fellow employee.

We have had situations where barristers' lives have got out of control. As an example, Brendan Griffin, a silk who was doing very, very well at the Bar died by his own hand. Further Peter Hayes QC, who did not die by his own hand but died in a situation where his life was pretty much out of control.

There is evidence of the same problem on the Bench. The late Judge Michael Higgins was an ornamental Judge, one who worked and worked and worked and obliged the litigant at every turn of the track. The index of suspicion is very high that he died from overwork.

The examples which I have stated are extreme. I argue cases with extravagance. However, there is a very real need for barristers and judges to keep an eye on one another. It is important to say to colleagues 'How are you going?' and a need to sit on the edge of someone's desk and enquire 'Are things all right with you?' It is important there be encouragement within the ranks. Thus if someone has heard good news about a barrister then such good news should be communicated. It may be for example that Justice David Harper has noted off the Bench that one Joe Bloggs did a very good job in a recent case before him. It would be a really good thing to do to advise Joe Bloggs that his Honour was impressed by his performance. This is all part of what I perceive to be an obligation to keep an eye on one another.

As an adjunct to this issue of life in a confederation, I wish to say something of the issue of barristers speaking out against barristers in a public forum. There have been instances where barristers, whether they be altruistically inspired or more likely self-promotionally inspired, talk to the press in a critical tenor as to what is going on at the Bar and about alleged conduct of certain counsel.

In my opinion public criticism of the Bar by a barrister is a deplorable thing to do. This is not a case of talking solidarity, it is not a case of pulling down the shutters on the system for fear of public scrutiny. We have in our Ethics Committee and Tribunal organizations which very jealously guard the standards and reputation of the Bar.

Anyone who has appeared before the Committee or Tribunal either as a defendant or as counsel will know what I mean. I regard it as a minor victory when I escape with my own right to practice intact after representing someone. There is thus no need for anyone, from a public viewpoint, to be concerned if someone doesn't speak freely to the press about what is going on at the Bar.

One problem attendant to a barrister speaking out against the Bar in public is that that barrister gives himself an elevated status. The public tends to think that the informant is reluctant to be speaking out against the Bar when usually the contrary will be the case. It thinks that there is a fair possibility that what the person is saying is true, for otherwise the risk would not be taken of speaking out.

Such presumptions of accuracy are ill-founded. Public critics of the Bar show no reluctance to make a statement.

However, my main reason for disapproving of counsel engaging in public criticism of the Bar reposes in the fact that you just don't do it. Whether it is your own religion, whether it is your own race or whether it is your own family, you don't turn on your own. You don't turn on your own because it is a really canine thing to do. It is deplorable.

Let me say in conclusion that we have all been blessed since we first walked up the steps of Owen Dixon Chambers on day one at the Bar. True it is that some have been more blessed than others but we have all been blessed. The very good reason for this rests on the fact that there is no better racket in the cosmos than being a barrister. The future is good. The future is iron clad for a very good reason, and enemies of the Bar should note it: God loves barristers.

Response on behalf of the Honoured Guests by the **Honourable John Coldrey QC**

THE HONOURABLE Justice Kirby, the Honourable Justice Heydon, the Honourable Justice Crennan, and the rest of youse. (I know where my bread is buttered. I might still have some appeals in the pipeline.)

I welcome this invitation from the Victorian Bar Council to speak to you tonight as part of my therapy for R.D.S. – R.D.S. being Relevance Deprivation Syndrome.

You have no idea how depressing it is for we retired judicial pensioners to take the piles of unused stationery, and alter them for future use. I can tell you that the simplest method is to cross out the letters 'ice' in the word Justice. So, for example, a With Compliments slip now reads: 'With the Compliments of Just John Coldrey.'

There appears to be a tradition for the speakers at these dinners to talk about themselves. In my case, in the ten minutes allotted to me, I'm not sure I can do justice to such a complex and fascinating subject – so I might take a little longer.

First, however, I am supposed to respond on behalf of the Honoured Guests. Whilst I have not consulted with any of them, I am sure that they would be grateful for the free feed and that some, or all, of those mentioned by Ross Gillies would be contemplating the obtaining of legal advice, if only they had access to a decent lawyer.

I am certain that all of them would be delighted at the choice of this venue, which is the repository of so much great art.

Regrettably, I must confess that there is no discernible link between my ancestors and art. In fact, my uncle frequently used to say, 'I don't know much about art, but I know what I like!' In my uncle's case what he liked were nudes. At this stage I really should apologize for not having a Power-Point presentation. Otherwise I could have illustrated my uncle's taste.

I think it was Oscar Wilde who said, 'Art must be obscene to be believed.' Certainly this sentiment would have reflected my uncle's views. Fortunately, I have been rescued by my family from this narrowness of vision. Over the years I have been taken to every major gallery in Europe where I have witnessed some magnificent hangings – some would say appropriately for a Judge.

Of course we visited the Louvre. Thinking about this I was reminded of the American who was telling his Texan friends of his trip to Paris where he visited the Louvre. 'Did you all see the Mona Lisa?' queried the intellectual in the group.

To which the traveller responded, 'If it was in there, I seen it!'

Some years ago at the Uffizi Palace in Florence, I encountered Jack Keenan QC – one of our Honoured Guests. I'm sorry about this name dropping – but it's not every day I get to meet Jack Keenan. He was dressed in a gaberdine coat and felt hat. This was surprising since it was mid-summer but, as they say in the Court of Appeal, 'nothing turns on this point.'

Anyway, Jack remarked, as he gazed up at the magnificent architecture, 'Amazing people these Medici, they remind me very much of the Galballys.' I could only agree.

The NGV has a unique facade which is quite a contrast to that of the art gallery of New South Wales. The front of that building is emblazoned with the names of the world's great classical artists. However, the skilled artisans responsible for this have produced something really special. If you ever go to look at it you will see that they have created the name Michel Angelo

in two parts. Mr Angelo, or Mick, as we might call him in the spirit of mateship, might even have been chuffed at this approach.

I must confess that had I the talent I would have loved to have been an artist. Nevertheless, some of my colleagues at the Bar were kind enough to say I partially succeeded in my artistic aspirations. To be quite frank with you, their actual comment was. 'You really have become a bullshit artist.'

Despite this assessment, I have persevered, and I can reveal that I have produced several paintings in my spare time. I have brought a photocopy of one of them here tonight in the hope of getting it assessed by Allan Myers as President of the National Gallery Trustees as a possible acquisition. I have entitled the work 'Head of a Man Number 11 – in the style of Van Gogh.'

Art has not escaped the attention of limerick writers. Their efforts cover a vast spectrum of artistic endeavour. To give a few examples:

Said the Duchess of Alba to Goya
'Paint some pictures to hang in my foya!'
So he painted her twice;
In the nude, to look nice,
And then in her clothes, to annoya.

Van Gogh feeling devil-may-care,
Labelled one of his efforts 'The Chair.'
No-one knows if the bloke
Perpetrated a joke,
Or the furniture needed repair.

That's a bit contentious, but at least it's not about a head.

And finally, my favourite of this artistic genre:

Whilst Titian was mixing rose madder,
His model posed nude on a ladder;
Her position to Titian suggested coition,
So he climbed up the ladder and had her.

As for my own attempts at verse, some sensitive person remarked that my poems would be remembered long after those of Shakespeare, Yeats, and T.S. Eliot were forgotten – but not until then.

However, I did win a small prize in *The Age* newspaper Wine Rhyme Contest. Since it has some connection with tonight's activities, I'd like to share it with you:

I just ignore those wine experts who think
You should lay down red wines before you drink;
No more for me the cellar, rack, or shelf,
I drink the stuff and then lay down myself!

You can see why it was a small prize!

While on the topic of poetry, Peter Cook and Dudley Moore had a wonderful sketch where Dud suggested a game called Sausage and Mash. You read a book or poem out loud, substituting the word 'sausage' for every word beginning with 'S' and 'mash' for every word beginning with 'M'. He gave this example:

'I mash go down to the sausage again
To the lonely sausage and the sausage
And all I ask is a tall sausage and a sausage
to sausage her by…'

Of course, the cultured amongst you will have picked that as *Sausage Fever* by John Mash.

Do you want to try another? 'Sausage / sausage / sausage/ sausage by the sausage / sausage.' She sells sea shells.

Of course any application of this technique to the criminal law would be quite inappropriate. I refer particularly to the heinous crime of mash and the various sausage offences.

That's enough 'arty' material.

Words are the currency of the law. Whilst the words of Judges have a degree of permanence, it is a sobering thought, (and I apologize for that), to realize that the forensic exploits of the heroes of this Bar are soon forgotten; their quotable quotes, or cross-examination, buried forever in reams of discarded transcript.

One of my own heroes was Judge Cairns Villeneuve-Smith, who was a fearlessly independent advocate. I had the privilege of working with him in the Beach Inquiry. As most of you will know, this was an inquiry into police misconduct chaired by our honoured guest Barry Beach. His courageous findings so outraged the Victoria Police Force that its members embarked upon a work-to-rule campaign. This was somewhat ironical, because if they had worked to rules in the first place, the inquiry would never have been necessary.

Villeneuve-Smith was renowned for his mischievous wit. It is alleged that on one occasion, probably after a Bar Dinner, he, together with some colleagues, was wandering down Collins Street at 2.00am, only to pause outside a resident chemist whose proprietor was a Mr Paul. Responding to the staccato rattle of gravel flung against an upstairs window, a head appeared and growled, 'What the hell do you want?'

'Are you Paul?' inquired Villeneuve-Smith sweetly.

'Yes', was the grunted reply.

Tell me, did you ever get a response to your charming little letter to the Ephesians?'

In his army days Cairns was confronted by a rather officious senior officer who tapped him on the chest with his baton, remarking at the same time, 'There's shit on the end of this stick, soldier', only to be met with a smart salute and the response, 'Not on this end, sir.'

He was subsequently charged with insubordination.

During the course of the Beach Inquiry, Villeneuve-Smith cross-examined many a hapless police officer. Some, who had difficulties with their memory, were met with the solicitous inquiry, 'Is there no small oasis of recollection in the vast desert of your mind?' It was bad enough to be burdened with an arid intellect, but even worse was to be a witness who, having ventured a particularly unfortunate answer, was psychologically shirt-fronted with the courteous query, 'May the Chairman use your last answer as a yardstick by which to measure your truthfulness as a witness?' Of course the poor bastard had to answer yes.

Villeneuve-Smith was more subtle in his treatment of instructing solicitors. On one occasion, one of that necessary breed failed to pick him up from the steps of Owen Dixon Chambers to transport him to the Supreme Court at Geelong for a running down case and he was forced to take a taxi. At the Court, an offer of settlement was soon forthcoming. Villeneuve-Smith reported that, whilst it was acceptable, before any settlement was announced to the Court, he would be seeking leave to amend the statement of claim. His bemused opponent agreed. Particular (e) 'Failing to sound a warning device' was duly added. Subsequently, the instructing solicitor received the back sheet which included the annotation: 'Amendment of statement of claim', followed by a dollar figure commensurate with the taxi fare to Geelong, together with a very generous tip.

Ross Gillies QC, Michelle Britbart, Paul Halley, Nikki Wolski and Ross Middleton

Judge Phillip Misso, Tim Ryan and Judge Iain Ross

Jeremy Twigg, Ailleen Ryan and Andrew Kincaid

Sometimes, it is the words used by the client that cause the problem.

One example I remember vividly was in a maintenance case. It was heard on the day that man first walked on the moon, although this event did not make any discernible impression on the Ferntree Gully Magistrates' Court. I was opposed to Justice Gillard, (as his Honour then obviously had the potential to be). My client, the defendant husband, had been left by his wife, whose major complaint related to his religious fanaticism. This assertion was vehemently denied. Ultimately, I called my client to give evidence. The Clerk of Courts requested him to take the Bible in his right hand and repeat 'I swear by Almighty God'. At this point, my client turned to the Magistrate, and in a loud voice, declaimed: 'Make ye not an oath! Matthew 5 verse 34'. We never quite recovered from this unfortunate forensic setback.

There are times when silence, or quasi silence, is the best course for the advocate. I was appearing before a Magistrate named Stott, who regarded himself as operating the Supreme Court at Oakleigh, or Moonee Ponds, or Fitzroy. My client had been charged with running a brothel. The prosecuting sergeant rose to his feet to be met immediately with the comment, 'How do you say this information sheet discloses an offence, sergeant?'

The information was imperiously handed down from the bench. The sergeant studied the original, and I studied my

Jane Dixon SC

copy. I could see absolutely nothing wrong with it.

'Is there anything you want to submit, sergeant?'

'No, Your Worship,' responded the bewildered sergeant.

'Is there anything you want to say, Mr Coldrey?'

A nasty moment! This is a situation requiring all of an advocate's forensic skills. I rose to my feet and, one third sycophant, one third hypocrite, and one third opportunist, I replied, 'There is nothing I could usefully add to what Your Worship has already said.'

'Very well', said His Worship, 'the information will be dismissed.'

In the foyer of the courthouse the prosecuting sergeant grabbed my arm and, with the look of desperation of a man who would be required to write a report for his superiors, inquired, 'What the hell was wrong with the information?'

In retrospect, I admit to a certain level of guilt that I derived some pleasure in responding, 'Wouldn't have a clue!'

Meeting Justice Kirby here tonight reminded me of the time I was forced to sit in the probate jurisdiction. I was faced with a woman seeking benefits for herself and young child under the will of her deceased partner. The only problem was that she had shot him. He was, however, a person who, as the Criminal Bar would say, 'needed killing.' The applicant had pleaded guilty to manslaughter and had been given a bond. Because of her low level of moral culpability, I decided that the forfeiture rule should not apply, and upheld her claim.

Some time later I received, from Justice Kirby, a copy of a judgment of the New South Wales Court of Appeal on the same topic. He was then the President. Justice Kirby described my judgment as 'principled yet flexible,' (or vice versa), and gave it his judicial approval. I was delighted until I read on and discovered that he was in the minority. His colleague, Justice Roddy Meagher, had written, 'There is something faintly comical about the spectacle of Equity Court Judges attempting to sort homicides into piles of conscionable and unconscionable ones.' He found my decision to be heresy. Well, at least I was described as 'an Equity Court Judge.' But, as history records, shortly after this judgment Justice Kirby was elevated to the High Court, whilst Justice Meagher remained stationary in New South Wales. So, your Honour, I think we got it right!

I'd like to finish with the story of the insanity/murder in which I was junior to Charles Francis QC – another icon of the Bar. It's one of my favourite anecdotes. I know a number of you have heard it before, but not in the Great Hall NGV International. Our client, who I will call Harry, (since that was indeed his name), suffered from alcoholic dementia. When, in the middle of a drinking bout, he and his friends were faced with a liquidity problem, Harry, who exhibited leadership qualities, fatally despatched a rooming house colleague called Bert, with an axe. He and his friends were drinking the flagons purchased with Bert's money, when police broke up the party.

At my first meeting with Harry he announced, 'What I desire is oblivion.' I had to inform him that this was beyond the capacity of Legal Aid Victoria.

On reflection, I am not certain all their clients would agree with that assessment. Harry went on to explain his actions: 'There was a full moon on that night, Mr Coldrey, and a full moon does strange things to men's minds.' The trial in Melbourne before Mr Justice Anderson went so well that, at the end of the psychiatric evidence, and before any final jury addresses, Charlie Francis persuaded the Judge to charge the jury briefly, and send

them out to determine whether they needed to hear any more, or whether they were prepared, at that stage, to find Harry not guilty on the grounds of insanity.

At 12.55pm after Mr Justice Anderson had completed a mini-charge which forcefully emphasized Harry's mental shortcomings and, as the jury were about to retire, Harry stood up in the dock and called out, 'Your Honour, I would like to make a statement.' (This was the era of the unsworn statement.)

Not to be outdone, Charlie Francis leapt to his feet and announced that, since we had closed our case no statement was possible. The Judge was not so sure that Harry could be shut out that easily. Fortunately, at that point, he adjourned for lunch. We met Harry in the cells and explained that the case was going well and there was absolutely no need for him to make any statement.

'It's my case, isn't it?'

'Yes.'

'Well, I want to make a statement. I'm not as silly as they say. I've had a lot to do with psychiatrists, and I can fool them.'

'Listen, Harry,' said Charlie, 'Nobody's saying you're insane at the moment. If you needed money for grog now, you wouldn't go killing someone with an axe to get it.'

'Bloody oath, I would!'

Somewhat depressed we left Harry to his lunch. Before Court resumed I encountered Harry in the anteroom.

'I'm sorry for my outburst before lunch, Mr Coldrey,' he said, the screws hadn't given me my Valium, and I was a bit upset.'

'That's OK, Harry, I understand.'

'It's still my case isn't it?'

'Yes.'

'Then I still want to make a statement.'

What followed was one of the few genuinely unscripted, unsworn statements of the decade.

Harry told the jury: 'I killed Bert. I done it with the axe. He was a mongrel and a dog. I knew what I was doing. There's nothing wrong with me. I have had a lot to do with psychiatrists and I can fool them. Thank you.'

Mr Justice Anderson then enquired what should next occur. Charlie Francis urged him to add to his mini-charge by informing the jury of the weight to be attached to an unsworn statement, compared with evidence on oath. This his Honour duly did. Once again the jury rose to retire, at which point Harry interjected, 'Your Honour, I would like to give evidence on oath.' Not to be outdone, Charlie leapt to his feet. 'He can't do both,' said Charlie, 'he's already had his go.'

But his Honour was not so sure Harry could be shut out that easily.

Harry took the oath with all the aplomb of a senior sergeant: 'Ladies and gentlemen, I killed Bert, I done it with the axe. He was a mongrel and a dog and he deserved to die. I knew what I was doing. There's nothing wrong with me. I've had a lot to do with psychiatrists and I can fool them.' For good measure Harry added, 'I'm a Roman Catholic and I knew what I was doing was wrong.'

By that stage Harry's desire for oblivion was being shared by his counsel.

The jury finally retired and Harry sat relaxed in the dock. 'Well, you've had your say, Harry, what do you think will happen?' 'Ah, Mr Coldrey, they'll find me not guilty on the grounds of insanity.'

And 15 minutes later they did.

One week after the trial I ran into the Judge's Associate who was one of those retired naval types.

'I was very interested about that business of the full moon,' he said. 'So I looked it up in Moore's Almanac. You might be interested to know that it was a new moon that night.'

My time is up! Good night and good luck!

Gabi Crafti and Josh Wilson

Michelle Florenini and Matthew Stirling

Michael Gronow, Paul Connor and Fiona Connor

Improving the dialogue between courts and the media

A speech given by **Justice Michael Kirby** at the Law Foundation's Legal Reporting Awards, Melbourne, 8 May 2008

There is a problem between the media and the courts. It is a source of frustration in both camps. Many in the media think that judges are pompous out-of-touch gits who have insufficient love for free speech and inadequate respect for the free press. Things are not helped by the strange dress that judges sometimes have to wear, the elevated platform on which they are seen doing their job, the obtuse language they often use and the power they wield – including over the media. Although increasingly relics of the past, wigs are a special target of media comments. Even the High Court judges are usually portrayed in cartoons wearing wigs, although we have not done so since 1986.

When media comes into direct contact with the judiciary, it tends to dislike the fact that judges are less susceptible than other branches of government to media pressure and seduction. In defamation cases, contempt proceedings, decisions on FOI disputes and cases affecting the big commercial investments of the media, the judiciary of Australia comprise the untouchables. If you have as much power in society as the Australian media have, and you meet an immovable object like the judiciary, the shock to the system can cause frustration and anger. This sometimes spills over into the unworthy thought that this is a group of over-mighty officials who need to be cut down to size. It is a very Australian reaction.

For their part, the judges are often disillusioned with the media: their bold-as-brass assertions of high motives and their supposed dedication to truth, justice and the Australian way. For judges, seeing media coverage of cases in which they participate, they know that there is often a big gap between what the public gets told and the actuality at the workface.

Judges lament the disappearance of most dedicated legal correspondents. They realise the power that the print media still has (despite the falling sales) over the daily agenda of talk-back radio, and hence political discourse. Yet secretly, judges are rather proud that they are the one branch of government, and one of the few places in society, that cannot be overborne by media power.

There is some merit in the perspectives on both sides of this divide. It is the nature of the judicial role that judges must be cut off from daily contact with the media and similar sources of influence. Too close an association might lead to the same degree of contamination that can be seen with the political branches of government, occasionally the bureaucracy and sometimes with other formerly respected institutions, such as the universities and the churches. The lesson of life seems to be that getting too close to the media exposes those who do so to the peril of dancing to the media's tune. That is why most judges realise that it is best to keep a distance.

I suspect that this is the reason that most judges are not in favour of television cameras in courtrooms. For me, this is just a natural development, adapting to the alterations in modern communication. But for many judges, they are afraid that over-close proximity will lead to manipulation. Tiny grabs from complex trials will be extracted to maximise shock, horror and outrage. Distortion of news about the courts will be increased. Some judges might be tempted to play to the gallery and forget the most important people in the courtroom – the parties to the case.

The Australian judiciary has recently become aware of the research findings of a legal researcher, Dr Pamela Schulz. She has studied newspaper headlines and stories in her home State, South Australia, from 2002 to 2006. Her study produced a consistent pattern of reporting which, she believes, amounts to an attempt by headlines to establish what she calls 'discourses of disapproval and disrespect'. She thinks that this is designed to intensify criticism of the courts, to enlarge disapproval and disrespect for their work and to promote a damaging public attitude of fear and mistrust. Piled on top of distrust of politicians, churches, the monarch and officials, who will be left to protect the public in the dire predicament described in the headlines? You guessed it: only the media and their editorialists – supported perhaps by one or two politicians who dance to the dismal tune.

Dr Schulz collects the many screaming headlines that give rise to this reaction. A lot of these concern the tried and trusted field of sentencing of offenders. Everyone

can have an opinion on this subject. Although Australia's imprisonment rate is now edging to be one of the higher rates in the world – much higher than most European countries – few sentences are sufficient for certain commentators. 'An outrage', the banner screams. 'Call for inquiry grows'. 'Premier orders DPP to appeal'. This is the 'fear discourse'. But it is backed up by an attack discourse with descriptions of judges as 'Holidaying at taxpayer's expense' or 'Summer nick-off'. More 'Outrage'. 'This is not justice'. And so forth.

In interviews recorded by Dr Schulz, Australian judges reacted to these attacks in an generally restrained way. They supported the principles of a liberal democracy. They expressed acceptance of the media's right to report and also to criticise. But they regretted the lack of real understanding about the courts. They cared about criticism and puzzled about how to counter ignorant and inaccurate reporting. They admitted that being a judge in Australia is not being in 'a popularity contest'. Judges know that they generally have to 'cop it sweet'. After all, their oath is to administer justice 'without fear and favour'.

Still, there are things that we can do to improve the relationship between courts and the media, without getting so close that judicial, or for that matter media, independence would be endangered.

- Judges need to understand media pressures – especially deadlines and brevity.
- Judicial reasons need to include pithy summaries that can be picked up to give an accurate idea to the public of what the courts are on about.
- Media liaison officers in the courts need to be more proactive.
- Maybe judges need to reconsider cameras in the courts under strict conditions. Indeed, this is already happening at all levels.
- The appointment of specialist court reporters is an urgent requirement. Specialist court reporting has actually fallen off during my thirty years' service in the judiciary.
- The media need to understand better the judicial role, and maybe judges need to take more time to explain it.
- In the age of electronic media, sticking to printed handouts is no longer good enough. The judiciary somehow needs to get into the electronic age and to speak directly about the dedication, wisdom and devotion that judges usually display in their often tedious and stressful daily work.

Justice Michael Kirby

One of the interesting reports in Dr Schulz's study describes how courts in the Netherlands have been prepared to redirect justice reporting by appointing *Persrechters* or 'press judges'. These are serving members of the judiciary who will go on television and radio to explain justice messages accurately. According to Dr Schulz, these commentators have helped develop a keener sense of the actual work that judges do, of its difficulty, of its importance and of why superficial reports and alarmist headlines are often false and misleading.

Maybe it is time for us in Australia to work towards something similar. Sadly, if we wait for most media outlets to provide quality reports of what really goes on in our courts, we may wait a very long time. Media want it short, sweet and interesting. Judges know, it is often not like that.

The age of infotainment is upon us. But the judiciary itself needs to help find a workable antidote. I respect the small group of legal journalists who try hard to report the law as it really is, including with justifiable criticism where that is warranted, as it sometimes is. I honour notable journalists in this class who have died in the last year – including the outstanding Roderick Campbell of the *Canberra Times*. I acknowledge a few fine exemplars who have left the media for greener pastures, like Marcus Priest of the *Australian Financial Review*. I congratulate the winners of this year's Legal Reporting Awards. Awarding prizes for good journalism on legal matters is admirable and a step in the right direction. But more is needed. For the good of our society and its institutions of justice, it is time to think of radical solutions. We all have a stake in raising the standards.

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Ending the Ten O'Clock Rush

The Magistrates' Court has been working on modernising its listing practices. The purpose has been to develop greater listing flexibility to manage the high volume case-load and achieve delay reduction. The traditional 'ten o'clock rush' has intensified many pressures at the Court. It is obvious that bulk listing affects a number of factors:

- waiting times
- separation of parties
- case scheduling
- making the best use of magistrates time, and
- managing the expectations of court users.

If the Court is to meet its obligations to the public, it has a responsibility to utilize its resources efficiently and to provide the best service for the community. To this end, we have been consulting widely with all court users to identify areas of concern and potential improvements.

The significant role that professional users will play in assisting the Court to make the most of the potential gains offered by greater listing flexibility in managing a high volume caseload cannot be underestimated.

WHY ARE THESE CHANGES NECESSARY?

For many years, the Court has published its listing protocols for the general information of the public and professional users of the Court. It has also been the operational principle guiding registrars in listing the Court's high volume caseload.

The need to move beyond the crude ten o'clock rush has been supported by comments made within the court user community. Recent research conducted for the Magistrates' Court 2015 Court User Consultation Project showed that the greatest cause of diminished confidence in the Court is delay. Waiting to get heard is only one facet of delay, but it is a recurring source of criticism of the Court.

The question posed by the research was should this matter be addressed by this Court and if so, in what way. In my view, it has to be, and measures are needed to list in ways that reduce the time people are waiting at Court for cases to be reached and heard. It has become apparent from work done by the Court on safety and security that reducing the numbers of people waiting around for their cases also reduces the likelihood and risk of incidents occurring at courts, which benefits everyone.

It is simply no longer acceptable for Courts to bulk list virtually all matters at ten o'clock. The new listing protocols introduce a more sophisticated, more calibrated and better way to handle this important procedure of the Court.

WHAT WILL THE NEW LISTING PROTOCOLS DO?

The two main aspects of the initiatives introduced by the new listing protocols are:

1. *A Wider Listing Timeframe*: A wider overall timeframe has been implemented, within which cases are listed day by day for the purposes of accommodating certain sorts of cases earlier in the day or at other specified time periods.
2. *Time Certainty*: Measures have been included to introduce as much time certainty as is reasonable and practicable in a volume court environment.

The new listing protocols will consolidate the early gains already made in reduction of delays, standardize case listing throughout the State while maintaining some flexibility for smaller and country courts, and ensure greater time certainty with less waiting demanded of parties to court proceedings.

The inclusion of these initiatives in the new listing protocols has been based on the positive results of their piloted introduction at several venues of the Court. The Geelong Court piloted a 9.30am mention list and a listing of all driving applications at either 9.30am or 2pm. Prosecutors and legal practitioners have embraced these staggered listing arrangements. There has also been very positive feedback from the court user groups at Geelong because of the introduction of a 2pm listing time for single and consolidated guilty pleas, and some family violence matters.

The positive effect of staggered listing times in improving time certainty and the experience of the court user community has been evident at the Sunshine, Frankston, Heidelberg and Broadmeadows Courts. There has been encouraging feedback at court user group meetings held by these courts.

Following on from these early successes the Melbourne Court introduced a program of staggered listing on 28 April 2008. This program includes the listing of all first mention hearings at 9.30am, and subsequent mention hearings and guilty pleas at 11am. Specific listing times now apply to individual courts following observation of where the main delays were occurring at the Melbourne Court. For instance in Court 1 all summary contest callover matters are listed at 9.30am. Parties are now offered time certainty that their matter will be heard within 30 minutes of a specified time in Court 7 and Court 8 where parties make a request for this no later than the day before their hearing. Similarly, Court 12 offers staggered listing and time certainty for committal summary pleas of guilty.

Many of the Court registry staff have reported that the success of these piloted

initiatives has only been possible due to the support of legal practitioners and barristers. These professional groups have assisted the Court by informing and explaining the new listing timeframes to their clients. I am very encouraged by the support and engagement of legal practitioners and barristers in making a success of the piloted listing initiatives and look forward to continuing to work with them.

WORKING WITH THE PROFESSIONAL USERS OF THE COURT

Readiness for hearing is an issue that continues to be of concern for both the Court and professional user groups in terms of managing time effectively and efficiently. The Court is always interested in consulting legal practitioners and barristers to discuss and consider ways of addressing issues that affect the timely readiness for hearing.

Recently the Court has been in the process of developing an electronic filing appearance system (EFAS) to work with professional users to achieve time efficiencies for the Court and greater convenience for parties to proceedings. The Court appreciates the very productive consultation forums held with the profession about the EFAS application. EFAS will be a web-based application that allows professional users of the Court to access the Court list to add representation to a case, enter an appearance and request an adjournment, or enter an appearance and update hearing details. Court registry staff will be able to better coordinate the list at each venue of the Court by using the online entered information.

I invite your comments and suggestions as we move forward with the introduction of the new listing protocols and encourage you to discuss these changes with your clients and colleagues. The success of the protocols is dependent on the continuing productive and collaborative relationship between the Court, prosecuting agencies and the legal profession.

IAN L GRAY
Chief Magistrate

New barristers' clerk appointed

The Victorian Bar has appointed and granted a licence to a new approved clerk, Mark Laurence, who commences 1 July 2008. Mark follows in the footsteps of Peter Roberts who retired on 30 June 2008.

Mark is well known around legal circles to many barristers, solicitors and legal personnel after almost 31 years in the legal arena. He started as a Clerk of Courts working at numerous magistrates' courts then was seconded in 1981 to help set up the Criminal Trial Listing Directorate as an independent body responsible for the listing of criminal trials in the Supreme and County Courts.

He commenced working as assistant clerk to Peter Roberts in November 1987 and has continued in that position until his appointment. He also worked in the financial services industry from 2001 to 2003 as a risk planner, providing advice to lawyers. Mark has a thorough knowledge of the courts, barristers and solicitors' practices as well as a comprehensive knowledge of the law and its operations and disposition. Also he knows the legal structures in place to give informed communication to help the courts in case flow management.

Mark states that he is well aware of the need for change to bring clerking services into the 21st century, for example, the use of electronic payment systems and fee collection systems to facilitate multiple payment options including eftpos and credit card collection.

His list is open to applications from barristers and solicitors and adopts an equal opportunity policy.

The List will be known as Laurence's List, Clerk P, Lower Ground Floor, Owen Dixon Chambers West.

Law Week 2008
more popular than ever

Each year Law Week finds new ways to promote greater understanding of the law within the community. We aim to reach new audiences, raising understanding and access to the law and legal services. This year our theme of 'Reaching Out' had us focusing on reaching people with special needs, and others who may not otherwise find easy access to legal information and services such as rural Victorians, seniors, youth, Indigenous Australians and multicultural communities.

Law Week is coordinated by Victoria Law Foundation and the Law Institute of Victoria and is supported by the City of Melbourne. Held from 12–18 May, this year's Law Week proved to be the biggest ever, with more events and more organizations coming on board to host events. This year 150 organizations including law firms, courts, government departments and a range of public benefit organizations provided over 200 events across the State. Attendance numbers were also up with many events boasting a packed house.

The range of events on offer was broad as ever, including a fully subscribed session held by Deborah Randa from Disability Discrimination Legal Service on 'Disclosing Disability in Employment'; a one-day seminar by the Law Institute of Victoria on 'Legal Essentials for Seniors'; and a lively and highly entertaining Monash Great Law Week Debate, which once again was extremely well attended. All of these events contribute to a message of invitation, for people to discover the rich culture of our law and justice system and celebrate the vital role it plays in our society.

The Honourable Chief Justice Marilyn Warren AC addresses the launch audience in the Supreme Court Library.

The Arts Law Centre of Australia, Multicultural Arts Victoria and the Victorian Arts Law Consortium brought us Arts Law Week in the week following Law Week. They provided a range of free legal information seminars for artists, arts organisations and the creative community. This year a joint launch was held for Law Week and Arts Law Week at the Supreme Court of Victoria, with the 'Passion exhibition' as inspiration. 'Passion' is a unique Arts Law Week initiative combining the forces of law professionals and visual artists to create visual art work. By uniting the legal profession and artists, two seemingly disparate communities, 'Passion' stimulated new ways of raising awareness and understanding of cultural identity and human rights.

On the Education front, the focus on 'Reaching Out' was also reflected in the thoughtful entries received in the annual Law Week school poster competition. Deakin University, Victoria University and the Commonwealth Bank provided sponsorship, and 250 students entered from 50 schools across the State. Prizes were awarded by Chief Magistrate Ian Gray to a crowd of students, their proud families and visitors at the Courts Open Day. VCAT's Mediation Moot provided a humourous exploration of the processes

Judge Felicity Hampel, Professor The Honourable George Hampel AM QC and Passion Artist, Suteaul Althe

involved in hearing a building dispute at VCAT, and many questions were received from a clearly engaged audience afterwards.

The Victoria Law Foundation Legal Reporting Awards proved a very special occasion this year. The Honourable Justice Kirby AC CMG presented a stimulating address in which he quoted research by Dr Pamela Schulz that shows much media coverage amounts to 'discourses of disapproval and disrespect'. In holding journalists accountable the judge asked journalists to reflect on how this affects the work of the courts in implementing and promoting justice. The Honourable Chief Justice Marilyn Warren AC joined Justice Kirby in recognizing the recipients of the various awards.

For the first time ever, all courts were open with tours on Courts Open Day held on Saturday 17 May. The Supreme Court alone recorded 450 entries through security. There was a mock trial at the Supreme Court that was presided over by Justice Harper, and at the County Court tours were offered of the high-security, high-tech 'smart-courts' and an explanation of the jury process by Rudy Monteleone, the Juries Commissioner. Whilst at the Magistrates' Court a Mock Court Hearing of an historic early case was held to celebrate the Court's 170th Anniversary and Chief Magistrate Ian Gray awarded prizes to the winners of the School Poster competition. At the Children's Court a tour was offered of the court complex and a presentation made by the President, Judge Paul Grant. In regional Victoria, tours were offered of local courts throughout the week.

Thank you to all who participated in or contributed to the best Law Week ever. We look forward to seeing and working with you again in Law Week 11–17 May 2009.

JOADY DONOVAN

Chief Magistrate Ian Gray with Nimue Shirvington, winner of the regional prize in the Law Week School Poster Competition, and Johann Kirby, Executive Director, Victoria Law Foundation

The Honourable Chief Justice Marilyn Warren AC, Katy Alexander, Law Institute of Victoria (accepting Best Illustration award won by Nigel Buchanan of the Law Institute Journal for 'The tort of deceit and misrepresentations of paternity'), and The Honourable Justice Michael Kirby

The Honourable Chief Justice Marilyn Warren AC was the Legal Professional who teamed up with Georgia Metaxas, the Passion Artist, pictured here with her artwork

Hugh de Kretser, Executive Officer, Federation of Community Legal Centres (Vic) Inc, and Alexandra Richards QC, Board Member of Victoria Law Foundation, with portrait of Legal Professional Judge Felicity Hampel by Passion Artist, Suteaul Althe

The County Court provided guided tours of the high-security, high-tech 'smart-courts as well as an explanation of the jury process by Rudy Monteleone, the Juries Commissioner

Litigation and ADR Construction Law Conference 22 May 2008

'…not to praise him'[1]

G.T. Pagone*

I have a sense that we are all saturated with hearing about the problems of litigation and ADR in construction disputes and in commercial disputes generally. In the short time that I have been the Judge in Charge of the Building Cases List, I have been struck by the level of dissatisfaction frequently expressed about the way in which construction disputes are resolved. The dissatisfaction appears to be deep, widespread and found throughout the world.[2] Various and varying solutions have been put forward over time,[3] with new or different acronyms giving enticing glimpses into some new hope.[4] Earlier this month the Victorian Attorney-General announced a $198.3 million justice package as part of the State budget to secure 'faster access to justice services and new ways to resolve disputes'.[5] On 23 April former Federal Court Justice Madgwick was reported as calling for the adversarial system to be bypassed in favour of a more European-style investigatory system for smaller disputes because litigation costs in such matters are 'out of control'.[6] The Victorian Law Reform Commission Civil Justice review currently underway can be expected to bring some fresh ideas about our system in Victoria as a whole and how it might be improved.

I can add little to the debate and am conscious that I should refrain from doing so. I will, of course, say something about my own Court's recent practice direction,[7] but I want mainly to express some purely personal, and perhaps idiosyncratic, views about some of the current problems with litigation and dispute resolution (whether alternative or otherwise). I do not come to praise the adversarial system but there may still be much we can do to make it work better.

INEFFICIENT, COSTLY AND SLOW

Dissatisfaction with the current process of dispute resolution is, in short, that it is inefficient, costly and slow. Some measure of inefficiency, expense and delay is inevitable and (although it may be seen as inappropriate to say so) may even be desirable as a matter of public policy. Inefficiency, expense and delay deter litigation to some extent and in part encourage individuals to absorb loss or to put up with some level of damage without compensation, and, in part, encourage other non-litigious resolution or accommodation. There is a body of learning about the social utility of some bar to discourage litigation and prevent the redress of wrongs. However, every system of dispute resolution should aim to be efficient, cost effective and quick. It must also ensure fairness between the parties and should not permit its inefficiency, cost and slowness to be used as a tool to advantage some of the disputants to the disadvantage of others; nor, of course, should its apparent efficiency, cheapness and speed give unfair advantages the other way. It is, unsurprisingly, a question of balance and neutrality. The details of any system may favour one party over another and the hard task for anyone designing a system is to strike the right balance between all of the different interests so that the system itself is neutral and does not favour one set of interests over another.

Attempts to improve the system should also take special care to ensure that the improvement does not bring new inefficiencies, costs and delay. It is important to look at what makes the system inefficient, costly and slow to see whether those causes can be removed with improved outcomes. One of the disappointing discoveries is that some of the problems may be caused by past attempts to make things better. I will give you some random, and idiosyncratic, examples.

Witness statements

It is now common in much litigation, especially in commercial and construction cases, for the parties to file and serve witness statements or affidavits before the trial. This practice comes with much hope of efficiency: it should avoid ambush, it permits (where possible) the judge to read the material in advance of the hearing without the need to occupy court time to learn about the material for the first time, it potentially limits areas of dispute and could save hearing time in court and, therefore, in theory should make the system work more smoothly. Sometimes this hope may be realized, but too often there is disappointment.

The reasons for disappointment are not hard to find and lie in the dynamics of the task which comes with the design fix. Witness statements tend never to be the words of the witnesses themselves. They are frequently the words of a lawyer put in the witness statement or affidavit with an eye to the client's ultimate objective. One consequence of this is that the content of a witness statement or affidavit may not reliably convey the evidence of the witness. In one case I had there were two witness statements by two different witnesses (one

an expert and the other a lay witness) which contained several sentences that were identical to the point of including the same grammatical errors. The words were not the kind of words which the lay witness would use and the expert witness agreed that there were errors. A judge reading witness statements which are obviously not written by the witness may hesitate in accepting the written word as equivalent to hearing testimony from the witness directly.

The very process of production of witness statements has elements which may undermine the integrity of the trial process. That is because the production by lawyers of witness statements, often junior lawyers, unconsciously substitutes the lawyer's evidence for that of the witness. The language, expression and syntax of the witness statement or affidavit is often that of the lawyer, rather than that of the witness; as is (more worryingly) the 'spin' given by selection and expression of facts. In short, all too frequently what happens is the very thing which is not supposed to happen: the evidence given to the judge, and to the other parties, is that of the lawyer rather than of the witness. In my view the role of the lawyer, and especially that of the barristers, should be focussed and confined to conveying the actual words of the witness and ensuring that they are strictly relevant, admissible in evidence and probative.

To this problem can be added that of the length and content of witness statements. In many cases there is a tendency for witness statements to be overly long, repetitive and to contain much that is inadmissible. The cause of this is in part an attempt to assist in readability and in part a perfectly understandable caution on the part of those preparing the witness statements; but the consequence is unnecessary distraction, additional argument, delay and further costs. I am frequently told that large slabs of witness statements, plainly inadmissible in form or plainly not relevant to an issue in dispute, are there to assist the judge by giving context and making the evidence readable. That may be the motive for its insertion, but frequently it adds to the length of the material and, equally understandably, provokes objections which take additional time to formulate, argue about and then to determine. Thus, material which began with the hope of helping becomes the cause of new disputes, cost and delay.

The caution of advisers in preparing for litigation is, in my view, a major cause of inefficiency, cost and delay. In saying that I intend no rebuke but, rather, sympathise with the practitioners. They are frequently faced with having to make difficult judgments in circumstances where caution will often (if not more often than not) tend to result in decisions which make things longer, slower and more complex. A decision, for example, about what facts to include in a witness statement is often difficult. A fact need only be established once by only one witness, but there may be more than one person capable of doing so. A lawyer preparing witness statements may be reluctant to have some fact included only in one witness statement; or, to put the matter differently, the natural caution of lawyers will be to have each witness give evidence of all facts which each is capable of deposing to (if only to protect the witness from criticism of having deliberately failed to deal with some factual matter). Allied to this is the tendency of including at least as much as may arguably be admissible. In other words, that the lawyer's caution will tend to put in more rather than less material and in doing so may be relying, perhaps, on the safeguard that anything which turns out to be inadmissible may be ruled out (albeit after objection, argument, consideration, delay and cost).

One can see by this brief overview how the production of an aid to efficient litigation may readily be the cause of new and lengthy disputes. It is not uncommon for trials to have large blocks of time devoted to disputes about admissibility due largely to what had been put in the witness statements by the lawyers to be 'on the safe side'. Objections to admissibility are, for their part, also often taken out of caution and to be 'on the safe side'. Some litigators may be encouraged to object to at least as much as may reasonably be argued to be objectionable to be 'on the safe side'. The sum total, of course, is more time, more cost and less efficiency. What is often absent is a robust confidence to keep issues, facts and disputes to a strict minimum.

Pre-trial mediation

Mediation and alternative dispute resolution were not common when I began to practise law. They have become a common feature of litigation and provide an opportunity to resolve disputes before trial. Where successful in resolving disputes, they have achieved an important objective. Where, however, disputes have not been solved by mediation, the enforced step of mediation or of other ADR will necessarily have added to the total cost and delay of the ultimate resolution of the dispute. Indeed, in some cases, the additional cost added by the step may, ironically, have added to the difficulty of settling at 'the doors of the court' immediately before a hearing. Many cases that go to trial have by that time become disputes about costs. Each party may have 'invested' so much time and money into the preparation of the trial that the chance of winning a costs order becomes the important 'possibility' sustaining a litigator's apparent 'addiction' to the dispute.

Discovery

The discovery process is another, if not the major, cause of inefficiency, cost and delay. The purpose of discovery is fundamental to a common law system designed to achieve a just and fair result. Ironic as it may seem, the many explanations of the function of discovery include many good reasons which suggest that discovery will make litigation efficient. Simpson SB Bailey DL and Evans EW[8] say that '[t]he main function of discovery is to provide the parties to civil litigation with relevant documents before trial to assist them in preparing their case for trial or in determining whether or not to settle before trial.'[9] The learned authors reason that amongst the benefits provided by discovery are (a) an early appraisal of the respective cases of the parties and promotion of settlement ('thereby saving time and cost and relieving pressure on court lists'[10]), (b) a reduction or savings of costs by 'reducing the issues in dispute and limiting the scope of the trial',[11] and (c) preventing surprise and thereby ensuring the determination of cases on their 'merit rather than on their tactics'.[12] So much for theory!

We should, however, be slow to dismiss such justifications as unrealized wishful thinking. Indeed, we must be careful not to allow our thinking to be clouded by the dysfunctional cases when we evaluate the effectiveness of discovery. It is probable that the process of discovery does achieve its objective in most, indeed perhaps in the

vast bulk, of cases in which discovery is compulsory or available. The obligation to give discovery is, in any event, an important pillar upon which justice is secured. Judges, the public and litigants can have confidence in decisions where truth and inconvenient facts cannot be concealed. On the other hand, there are undoubtedly some cases, be they a minority or not, where discovery represents an unreasonable burden. The challenge for an efficient, cost effective, timely and fair system is what to do in those cases.

PROPOSALS FOR CHANGE

Recently there have been many calls for change and improvement ranging from more 'hands on' case management by judges to more referrals to mediation or other non-judicial dispute resolution mechanisms.[13] The drivers and dynamics of each suggestion are different, and the cost and benefit analysis of adopting one or other is intrinsically difficult, and the outcomes are difficult to predict. They all sound good, they are all worth considering, but none comes without risk and cost.

An overriding concern must be that no 'improvement' should come at the cost of undermining the impartiality of decision making. It is important that any decision against the interests of a person be by a process that demonstrably guarantees fairness between winner and loser. It is common for lawyers to repeat the line about the importance of justice 'being seen to be done', but, however commonplace or trite, it remains an essential objective. Contested decision making occurs when individuals have inconsistent and conflicting views and claims about their respective rights. The odds are that any decision will be made against the interests and against the wishes of one of them. The losing party, or parties, will be unhappy about the outcome, and has, or have, a right to expect that their 'legitimate rights' (because that is how it will seem to the loser) were not taken away otherwise than in a process that is fair to all and by a person who both is, and can be seen to be, truly impartial.

One of the many fears expressed, often privately, about a judge-managed case system is a loss of impartiality by the decision maker. The fear may have little foundation but it should not surprise us that there should be such a fear, because from the very start of any case there will be a tussle between the parties to persuade the decision maker. Every word said, every submission made, each document filed, each criticism levelled, all evidence tendered, will appear to the other side as a tactic 'to poison the well' of the decision maker's mind. It is, after all, the very purpose of the exercise: to create impressions by fact, evidence, conduct, selection and persuasion to bring about a favourable outcome.

The judge managing a case ensures that management does not pre-empt decision making by proceeding down a path which may be quick and efficient but is achieved at the cost of unfairness to the losing party and at the cost of loss of integrity for the system. The party commencing the proceeding may, usually will, and in any event usually should, be much better advanced in the preparation of a case than the party responding. Those acting for the responding side may have had such little familiarity with the facts and issues that they need time at the commencement of the proceeding get 'up to speed', work out how best to put the facts and issues for their client, and to be of meaningful assistance to the decision maker. This is not always so, because in some instances, the cases only get to court after a lengthy period of disputation between the parties; each with teams of lawyers. In such cases, the disputants may all be well prepared and can be pressed to a swiftly managed timetable, but it would be wrong to assume that the impressions created from hearing from the moving party at the commencement of a proceeding will be sufficient for a managing judge to know how best the proceeding should be managed at that stage. Indeed, it is a frequent tactic for litigators to choose deliberately the timing of a proceeding to suit the initiating party. A well-prepared plaintiff will have a great advantage at the commencement of a proceeding: the case will have been thought through, some evidence will have been gathered, and (significantly) the plaintiff will have presented the issues in the pleadings for the judge in a favourable way. To some extent any advantage thus gained is removed in a non-managed case list, because the general rules of court provide a process and a timetable (subject, of course, to exceptions and modifications where necessary orders are desirable) for the parties set at what might be thought to be a standard norm. Where that fixed and independent standard is replaced by the decision maker managing the process, it will be necessary for care to be taken to ensure fairness and impartiality.

...the expenditure of money in litigation will have had a seriously distorting effect upon rational decision making about the settlement of a dispute.

Another objective should be to minimise additional cost in the process of trying to make things cheaper. Commercial and construction disputes are often fundamentally about money. In those cases there is a real risk that the costs expended in litigation make it financially difficult to resolve the dispute for no other reason than because of the amount of money invested in pursuing the initial claim. There are many ways about thinking about this phenomenon but in the end it is always the same set of dynamics: how much have I got at risk (or might I win) and how much more will it cost me. A litigant who has already spent $300,000 to pursue a $300,000 claim will have little doubt that it is worth spending another $50,000 rather than give up both the initial claim and the investment to date even on a claim assessed at only 40 percent chance of success. The betting odds might have seemed different at the outset if told they would have cost

all up $350,000 to pursue a $300,000 claim on a 40 percent chance of success.

In too many cases what is at stake in the end is the costs spent: so much may have been spent in getting to the hearing that the 'investment' is too great an amount to forgo for the parties to settle. In other words, the expenditure of money in litigation will have had a seriously distorting effect upon rational decision making about the settlement of a dispute. There is, however, a real risk that reform directed to improving case management will condemn litigants to such pre-trial expenditure that the effect will be to make the overall cost appreciably worse rather than better. Huge costs incurred in discovery, creation of court books, preparation of witness statements, etc, do (at least in part) have the effect of locking the parties in to a dispute which they may once have found it easier to resolve.

ADVERSARIAL SYSTEM

The adversarial system has much that is wrong with it. Common lawyers frequently defend it with unreasonable passion and by reference to high principle that sometimes seems unconnected with the real world. Such passioned defences seem also to ignore that many civilized, fair and just countries do not base their judicial decision making on an adversarial system. That said, however, there is much in what we have that is worth keeping, not just because it may philosophically be a superior system, but because it has (or can have) practical utility and cost efficiencies.

A clear example of usefulness and efficiency in the adversarial system is the placement upon the parties of the task of identifying the issues and evidence. The State's role (through judges or other decision makers) in deciding a dispute involves investigation of a complaint. The adversarial system places upon the parties the practical cost and burden of working out what is relevant to determine the complaint, where to find the facts and evidence, and how best to present it to the person who must decide. Shifting that role from the parties and placing it on to the decision maker, may be neither more efficient nor cheaper. Judicial case management, which has the judge become the initiating investigating inquirer into issues, fact and evidence is, rather, likely to produce a slower, less efficient and, ultimately, more costly process. As always, the critical issue will be that of striking the right balance between competing objectives.

The reality is that the adversarial system has, or at least can have, a robust vigour that may need changing and moulding, but still has much to offer to litigation in the modern commercial world. Leaving to the parties the task of identifying issues, gathering and investigating facts and evidence, testing the evidence by cross-examination, etc, has the desirable effect of leaving to those who know the dispute, and who have an interest in the outcome, with the control of what goes into the decision making. They, and not the State, bear the primary cost of preparation, investigation and research. Evidence of fact is put forward, and tested, by those who know the facts and who care about the decision maker getting it 'right'. Expert evidence is sought, after detailed and at times extensive searches, by those with an interest in getting the information right and with an interest in excluding information which is wrong. The decision maker will usually be in no position to know what evidence to seek, who to ask, where to find it, or how to test it. Making the decision maker also the primary investigator gives the task to someone with insufficient time and resources to do the job properly. Under the current arrangement the parties, through their lawyers, may be seen as a kind of subcontractor to the judge who undertake the time-consuming, costly and difficult tasks that the decision maker would otherwise need to embark upon personally and directly. The lawyers do the investigating, checking, testing and analysis which otherwise the judge would have to do. It enables the decision maker to undertake the final task without directly incurring investigation costs that would otherwise need to be paid from some source and, importantly, enables the decision maker to continue to maintain an actual impartiality in the process leading to an outcome where there will be a winner and a loser.

There is, however, much room for improvement and I do not wish either to suggest otherwise or to discourage improvements. Some improvement is capable of being achieved under the current system with little more than a willingness to change and an eye to the ultimate objectives. On 4 May 2008, the Attorney-General announced a pilot project to permit judges to send disputes out of the court room and into mediation.[14] I have not yet seen the details of the project but there are existing rules which already permit a great deal to be done in this direction. Indeed, on 23 April 2008 (not knowing of the Attorney-General's pilot project) I ordered a matter to mediation which I had commenced to hear. Order 50.07 of the *Supreme Court Rules* already empowers a judge 'with or without the consent of any party' to order any part of a proceeding to be referred to a mediator. It would not have been appropriate for me to be the mediator because, if mediation had failed, I might not then have been able to resume the task of hearing and deciding it without an appearance of having prejudged the outcome by reason of what may have been said to me on a without prejudice basis by either party during the course of the mediation. I am pleased to say that the mediator in that case succeeded in having the parties reach an agreement about how to deal with their dispute.

In the context of construction disputes, the court has this year issued a Practice Note heralding a new approach to dispute resolution. It has been set up on a pilot basis to test the viability of a new approach to litigation designed to explore the possibility that the time presently being consumed, and the expense presently being incurred,

by the parties might be moderated by a more intense involvement by the court. Critical, however, to its success will be the cooperation of the legal profession and the parties. The practice direction is available on the Court's website and its features are described in paragraph 2:

a. A building case should be approached like any building project, with time and cost budgeting.
b. Parties will be expected to have engaged in serious settlement discussions before the commencement of the proceeding.
c. At an early stage a Judge will be assigned to assume responsibility for the management and trial of the case.
d. Judges will be more active and proactive in exercising their powers in order to seek to achieve a just resolution of building disputes in a speedy and efficient manner.
e. Judges will be mindful of the need not to apply the resources of the parties and of the Court needlessly or in a manner which is out of proportion to the matters in issue.
f. Lawyers will be expected to approach their cases co-operatively and with the objective of not using the resources of the Court and of the parties needlessly or in a manner which is out of proportion to the matters in issue;
g. Lawyers will be encouraged to focus on the central issues in the case.
h. Judges will keep the number of directions hearings to a minimum.
i. Where possible, interlocutory applications should be determined on the papers.
j. Opposed interlocutory applications will, where appropriate, be referred to a Master.
k. Where costs of a directions hearing are ordered to be paid, they will, if possible, be fixed.

An important feature of the new approach is what is called 'a resources conference' to be convened shortly after the pleadings are closed. The point of the resources conference is for the parties to focus on the proper management of the dispute in a timely, efficient and costly basis.

It is too early to see what effect the new approach will have on the conduct of proceedings. What is important, however, is the clear and unequivocal signal from the Court of its willingness to do its part in making litigation less costly, more efficient and faster.

For its part, the profession will need to step up and perhaps to reassert its role in producing a more efficient, less costly and faster product for clients and Courts alike. It has long been the law that the barrister presenting a case in Court 'is personally responsible for the conduct and presentation of [the] case and must exercise personal judgment'.[15] Many of the rules of Court are directed at attempts to produce efficiency. The requirement that a pleading be signed, for instance, acts as a voucher that the case is not a mere fiction,[16] giving some assurance to the court by a barrister, as an officer of the Court, that there is substance in the claim. Rules of pleadings, rules of evidence and rules of conduct are all ultimately directed to the legal profession presenting materials to the decision maker in a way that limits the dispute for decision making. By the time a case comes to trial the issues for decision making ought to have been reduced rather than increased. The role of the legal profession, and the responsibility of the legal profession, is to help in the process of decision making by reducing what is left for the judge to decide. The lawyers ought, in the process of preparing for the trial, to have identified what is in dispute between the parties, to have reduced the dispute to that which cannot be agreed between the parties, to have reduced the evidence before the decision maker to that which is relevant, necessary and admissible. The skill of the lawyer, and the value which lawyers should add to the preparation for litigation, is in predicting the outcomes and applying predictable rules to the issues and facts in dispute. Much of the work which the decision maker is asked to do in sifting facts, issues and evidence should, in my view, have been done by the legal profession before the case comes on for hearing. The best outcome of a judge-managed case may perhaps be in aspects of the preparation of a case which enables the lawyers to limit areas ultimately for resolution by the judge.

It is likely that no change will lead to a lasting improvement without all involved in litigation playing their part in the same direction. I have said nothing about one serious obstacle to improvement that should not go unremarked. The fact is that it is not always in everyone's interest for a dispute to move smoothly, quickly and without cost. Claims or defences are sometimes without merit and sometimes it is in the interest of one or more of the parties to produce delay at whatever cost it may require. In other words, we should not forget that sometimes someone benefits from delay and cost and wants to encourage delay and cost. No system should ignore that as an active dynamic. However, putting that to one side, there is much room for improvement in the system as it is, and both that and any change to it will need the willing co-operation of all participants to make it work.

*Judge of the Supreme Court of Victoria, Judge in Charge of the Building Cases List.

NOTES

1 'Friends, Romans, countrymen, lend me your ears; I come to bury Caesar, not to praise him. The evil that men do lives after them, the good is oft interred with their bones'. Shakespeare, *Julius Caesar III*, ii (79).
2 See for example, Giudice Marcello Marinari 'ADR and the Role of Courts' (2006) 72 Arbitration 49–52.
3 Paula Gerber and Bevan Mailman 'Construction Litigation: Can We Do It Better?' (2005) 31 Mon LR 237–257; Justice D Byrne 'Building Cases – Some Thoughts on Innovation'; Supreme Court Practice Note No. 1 of 2008; Justice D Byrne 'The Building Contractor and Practice Direction Note 1 of 2008', Paper Presented to the Master Builders Association, 16 April 2008.
4 ADR (Alternative Dispute Resolution), PAP (Pre Action Protocol) etc.
5 'State Budget 2008', from the Deputy Premier and Attorney-General, 6 May 2008.
6 'Relief for small litigators urged' *The Australian Financial Review* (23 April 2008) 5.
7 'Building Cases – A new approach', Supreme Court Practice Note No. 1 of 2008.
8 *Discovery and Interrogatories* (1984).
9 lbid,1.
10 Ibid, 1–2.
11 Ibid, 2.
12 Ibid, 2.
13 See above at p. 1.
14 Melissa Fyfe, 'Judgment day looms for overloaded legal system', *The Age,* 4 May 2008.
15 *Halsbury's Laws of England* Volume 3(1) (2005 reissue) para 550.
16 *Great Australian Gold Mining Co v Martin* (1877) 5 Ch D 1, 10 (James LJ).

The anniversary of the Essoign Club

It does not seem five years since the 'new' opening of the Essoign Club on the first floor of the refurbished Owen Dixon Chambers. Many take for granted that the Victorian Bar has its own modern and successful club with a vibrant restaurant and bar.

Club Vice Chairman Philip Dunn QC addressed those who came to celebrate the five years of successful operation of the club. He reminded all of the past. Of the early dining room on the 13th floor of Owen Dixon Chambers. Of the fight to gain a liquor licence, opposed by all and sundry public houses in the vicinity of William Street and the more wowserish members of the Bar who feared wanton drunkenness and a deterioration of the moral standards within the Bar. Of how the club flourished on the 13th floor, becoming the social and collegiate centre of the Bar, not only for lunch and drinks, but dinners, list drinks, and all manner of functions for the rapidly expanding specialized group and associations of the Bar.

But the 13th floor premises were fraying at the edges. Even the famous orange net curtains (chosen after much searching and discussion by life member Judge Frank Walsh, and then being the height of fashion in the seventies) were looking a little forlorn, as forlorn as Owen Dixon Chambers itself.

So Owen Dixon was to be refurbished and revitalized floor by floor. But where did that leave the Essoign Club? Acceptance of a sleek new fitout on the first floor was *not* plain sailing. Many argued that the Bar could not afford to have such a large space occupied without rent. That rent must be paid or the Club disappear. But with strong support from Barristers Chambers Ltd, plans for the club went ahead and the successful club premises of today are the result.

Philip reminded the assembled gathering that ours was the last Barristers Club to continue in operation in Australia. The New South Wales Club, with that Bar's scheme of scattered chambers, not under the control of a central company, closed its doors some years ago. The other States do not have similar clubs. He reminded all that the club is central to the collegiate spirit of the Bar – a place where barristers and judges can escape, where juniors can meet seniors, and where all can unwind with war stories and idle gossip. He emphasized that the club has gone from strength to strength in the five years since revelation. Not only is lunch and bar use increased, but the club is very much the centre at night for special dinners, drinks, conferences and functions.

It was fitting that the centre of the celebrations was a very large chocolate cake (pictured on this page). The cake featured 'the dancing barristers', the symbol of the club created by Judge Graham Crossley (Croc), which featured greatly in the 1984 Victorian Bar Review. Those present partook of the cake, various libations, and excellent finger food – a memorable evening.

One can only trust that the Essoign Club will continue on and flourish for many decades, and it remains in a building containing the vast majority of the Bar (both East and West). The clamour of a few of

the whispering ilk to break up chambers and 'leave the business of barristers chambers to the commercial market', would eventually lead to the end of the Essoign Club. But those folk live in a tiny section within the commercial law bar, not caring for the majority nor the benefits of Barristers Chambers. It is doubtful that they are members of the club, nor indeed that they are real barristers.

Of great significance to the success of the club is the work of the club Manager Nick Kalogeropoulos. Without him the club would not have been the success it is today. It was a little unfortunate that club Chairman Colin Lovitt QC could not attend. It is his personality and drive along with former chairmen and committee members that will see five years' success turn into ten, twenty and perhaps forever. May the Essoign Club continue to prosper.

Martin Randall, David Beach SC, Gerry Butcher, and Graeme Clark SC

Paul Elliott QC and Robin Brett QC

Bill Pinner and Rohan Hamilton

Philip Dunn QC, Bill Coady and Judge Michael McInerney

David Gillard and Anthea MacTiernan

Fiona Ryan, Thomas Ashton, Deborah Mandie and Jennifer Digby

Judge Katherine Bourke and Richard Smith SC

Vice Chairman Dunn QC addresses the gathering

Nick Kalogeropoulos, Manager of the Essoign Club cutting the cake

Creating Justice

Australian Women Lawyers (AWL) held its second national conference in Melbourne on 12–14 June 2008.
The conference was well attended by delegates and speakers from around Australia and New Zealand.

Attorney-General Rob Hulls, Chief Justice Marilyn Warren, Fiona McLeod SC and Caroline Kirton at the opening reception

The theme of the conference, *Creating Justice*, was inspired by the challenge issued by AWL Patron, the Honourable Mary Gaudron QC who said at the AWL ten-year anniversary in September 2007 that 'the real task that lies ahead is the work of creating justice, and creating justice not just for a section of the community, but for all of it.'

Chief Justice Marilyn Warren AC and Attorney-General Rob Hulls welcomed delegates at the opening reception in the Supreme Court of Victoria Library on Thursday 12 June. At the opening, Chief Justice Warren spoke of the challenges and the privilege of appointment to judicial office, while the Attorney affirmed his commitment to appointments and equal opportunity briefing principles and called on the Bar to consider financial support for Bar readers and a part-time Readers' Course.

Keynote speaker and incoming patron of AWL, Chief Justice Diana Bryant, spoke on how women working in the law might shape our personal response to the challenging environment in which we live. She referred to women who had been publicly and privately mistreated by the legal system and proposed 'the Teresa Brennan Award' to recognize the woman worst treated by the law, in memory of the feminist academic allegedly named post-mortem as the speeding driver of the car of a well-known NSW judicial officer.

The Chief Justice of New Zealand, the Right Honourable Dame Sian Elias, attended the conference and delivered an inspiring keynote address. Her Honour spoke of the difficulties of participation of women in the legal profession in New Zealand and the role of women lawyers in shaping the law and legal method.

Other speakers included Justice Marcia Neave; Pamela Tate SC, Solicitor-General for Victoria; Elizabeth Broderick, the Sex Discrimination Commissioner; and Chief Commissioner of Police, Christine Nixon. Associate Professor Judith Fordham spoke of her research on the influences on juries inside the jury room and the impact of fear and intimidation on verdicts. Michele Williams SC spoke of the work of the Victorian Sexual Offences unit, providing delegates with an overview of the changing way that sexual offences are investigated and prosecuted in Victoria.

Solicitor-General Pamela Tate SC, Fran O'Brien SC, Elizabeth Wentworth and Karin Emerton SC

Justice Marcia Neave

An Indigenous Forum was also held, discussing the impact of the intervention legislation on Aboriginal communities and raising serious concerns at the lack of consultation with local communities. The speakers called for compensation for the stolen generation, with moving stories of hurt and humiliation.

The final sessions included presentations by Professor Gillian Triggs, Justice Shan Tennent, Justice Susan Kenny and Justice Katharine Williams.

The conference produced a communiqué which commits to the elimination of direct and indirect discrimination against women in the legal system and in the administration of justice. It proposes national and international measures supporting gender equality and the empowerment of women. The statement includes a call for a statutory bill of rights, parental leave policies, specific immigration and discrimination reforms, measures to improve the representation of women including Aboriginal and Torres Strait Islanders in decision-making roles, and a range of international human rights measures including support for the UN Millennium Development Goals. The statement is intended to guide the direction of AWL policies and activities in the future. A copy of the statement is available on the AWL website at <www.australianwomenlawyers.com.au>.

Magistrate Felicity Broughton, Michele Williams SC and Robin Hanigan

AWL is extremely grateful for the support of their sponsors, including their Silver Sponsors LexisNexis and the Attorney-General's Department, and the Supporting Sponsors which included the Victorian Bar, the Women Barristers Association of Victoria, the Queensland Law Society, the Bar Association of Queensland, the Law Council of Australia and Mallesons Stephen Jaques. Our next conference is scheduled to be held in Brisbane in 2010.

Fiona McLeod SC is the President of Australian Women Lawyers.

Support for Indigenous barristers

The Indigenous Lawyers Committee of the Bar has held its annual function for Indigenous lawyers and law students. The function was attended by almost all of Melbourne's 30 Indigenous law students.

The function was very well supported by members of the Bar, including the judiciary (with a number of Federal, Supreme and County Court judges in attendance, as well as Justice Susan Crennan of the High Court).

This year's function was held in conjunction with the Law Institute of Victoria. The involvement of the Law Institute is seen as vitally important to the success of the Bar's campaign to attract Indigenous lawyers.

There are three Indigenous barristers at the Bar, Hans Bokelund, Brendan Louizou and Munya Andrews, with more expected in coming Readers' intakes.

Despite this success, Hans Bokelund observed in his speech at the function that for the Bar to properly reflect the proportion of Indigenous people in the population, there would be in excess of 50 Indigenous barristers at the Victorian Bar.

Dr Mark Rose, Hans Bokelund, Iresha Herath and Colin Golvan SC

Helen Christensen, Justice Sue Crennan AC and Daniel Brigg

Hans called on solicitors and barristers to contribute to the project by assisting the new Indigenous barristers in getting briefs. He proposed an affirmative briefing policy in the manner of the policy adopted in favour of women barristers.

Dr Mark Rose, the General Manager of the Victorian Aboriginal Education Association, spoke on the importance of educational and professional opportunities in addressing issues of reconciliation. He praised the legal profession for its programs to promote Indigenous representation in the profession.

The function also provided an opportunity to further promote the Indigenous Barristers Fund, which was established in 2007 to assist new Indigenous barristers in overcoming some of the financial obstacles in commencing their careers at the Bar. The Fund is tax deductible and continuing support is sought from members of the Bar (details are available on the Bar's website).

The Bar has extensive contact with Indigenous lawyers and law students through its long-established mentoring program for students, as well as a paid summer clerkship program (which is run in conjunction with the Supreme Court and the Judicial College). This year, three Indigenous law students participated in the program: Angelic Martin and Josie Clements (studying at Deakin University) and Joseph Clifford (studying at Melbourne University). The Bar also has reserved a place in each Readers' intake for an Indigenous Reader and has waived the Readers' Course fees for Indigenous participants.

Members of the Indigenous Lawyers Committee have also attended this year at Deakin University to speak with Indigenous law students about the Bar's involvement with Indigenous lawyers. The Committee also works closely with the Victorian Indigenous Lawyers and Law Students Association, Tarwirri.

In September, the Bar will be hosting a major welcome function for delegates to the National Indigenous Legal Conference (being held for the first time in Melbourne), and will be providing significant administrative support for the Conference as well as financial assistance (through a grant obtained by the Bar from the Victorian Law Foundation) for the setting up of a Conference website.

COLIN GOVAN SC

Inaugural Patron of the Women Barristers Association

On 21 April 2008, 50 women barristers gathered at a function on the 11th floor of Owen Dixon Chambers West to celebrate the Chief Justice becoming the first patron of the WBA.

Caroline Kirton, current convenor of the WBA, welcomed to the function the members and friends of the WBA; the honoured guest, the Chief Justice; past convenors of the WBA, being Judge Rachel Lewitan QC from the County Court, the founding convenor, Fran O'Brien SC, Helen Symon SC, Simone Jacobson and Fiona Mcleod SC; two past presidents of Australian Women Lawyers, Alexandra Richards QC and Jennifer Batrouney SC; and Judge Sue Pullen from the County Court.

Caroline went on to give the following address:

WBA has never had a patron before. The Honourable Mary Gaudron QC has been the patron of AWL since it was founded over a decade ago. The Chief Justice is the patron of Victorian Women Lawyers.

Why do we need a patron? I think it is about symbolism.

In the decade since WBA was formed, it has achieved many things. WBA has:

- sought to advance equality and equality of opportunity for women at the Bar. This has been achieved especially by promoting awareness of issues which particularly affect women at the Bar;
- provided a social network for women barristers;
- highlighted and worked towards eliminating discrimination against women in the law.

No better example of WBA's continued support of these objectives is its financial sponsorship of AWL's Second National Conference (held in Melbourne on Friday 13 and Saturday 14 June 2008. The theme of the conference was 'Creating Justice').

The Chief Justice is one of the leading female members in Australia.

She was appointed Chief Justice of the Supreme Court of Victoria in November 2003. She is the first woman to have been appointed as a Chief Justice in Australia. She is a graduate of Monash University.

Fiona McLeod SC with the Chief Justice Marilyn Warren AC

Simone Jacobson and Sarah Mansfield

Caroline Kirton addressing the gathering

Michelle Quigley SC, Alexandra Richards QC and Susan Brennan

The Chief Justice commenced her legal career in the Victorian Public service and was admitted to practice in 1975. She signed the Roll of the Victorian Bar in 1985 and practiced predominantly in the areas of administrative law, commercial law and town planning. In 1997 she was appointed Queen's Counsel. In 1998 she was appointed to the Supreme Court of Victoria and presided in all jurisdictions, in particular the corporations list and the commercial list of which she was judge in charge.

The Chief Justice was admitted to the Degree of Doctor of Laws by Monash University in 2004. In June 2005, the Chief Justice was made a Companion in the Order of Australia for her services to the judiciary and the legal profession in the delivery and administration of law in Victoria; to social and economic conditions of women; and to forensic medicine internationally.

The Chief Justice is the President of the Victoria Law Foundation, Chair of the Judicial College of Victoria, Chair of the Council of Legal Education and Chair of the Victorian institute of Forensic Medicine.

On 7 April 2006 the Chief Justice assumed the role of Lieutenent Govenor of Victoria.

The Chief Justice has been a long-standing supporter of WBA and VWL. With the Chief Justice as our Patron it sends a clear symbolic message to the Bar, the legal profession and to the wider community that the Chief Justice supports the objectives of WBA.

We thank the Chief Justice for agreeing to be our Patron.

A toast to the Chief Justice followed. Thereafter the Chief Justice responded informally, noting that if women barristers were offered judicial appointment by the Attorney-General they should accept it. She also spoke of the rewards and challenges of being on the bench.

SIMONE JACOBSON

Cornelia Fourfouris-Mack, Amanda Wynne, Fotini Panagiotidis

Fiona Alpins and Alexandra Richards QC

Jennifer Digby, Meg O'Sullivan (and child) and Leonie Englefield

The WORLD GAME at the Bar

Group shot of all players in both games, with Melbourne Victory's Grant Brebner at far right

On Saturday 5 April there were two soccer matches of note played at Darebin International Sports Centre.

In both matches the barristers played against the solicitors.

The matches were played in perfect conditions on artificial grass. The older members of the teams wished their legs were as new as the grass. The referee was an official appointed by Football Federation Victoria. Whilst assuming the role of keeping barristers in line is something a judge could have done, no judge volunteered to wear the required referee's shorts.

After dismissing submissions by the women barristers' team for shorter halves, the women's match commenced. Some of you may be surprised to learn that despite only having a team of three (Rebecca Leshinsky, Julia Greenham and Georgina Costello) the women barristers' team beat the solicitors' team. This was because the solicitors kindly allowed the barristers to swell their numbers with various solicitors and a paralegal who stepped in to help out. Thus, without undergoing the ordeal of video exercises, several solicitors transformed into barristers temporarily and appeared for the Bar on Saturday. Some complained later of a headache, which may have been from cranium swelling experienced after solicitors became barristers, or it might have been from dehydration.

The winning goals in the women's match were not scored by a barrister or solicitor but by Angela Talevska, who is studying Legal and Dispute Studies at RMIT and plays soccer in a women's indoor soccer team sponsored by Greens List each Sunday. It was extremely fair of the solicitors not to reverse their decision and claim back some of the solicitors playing for the barristers' team after Angela scored the first goal. In addition, Tiffany Veschetti of Clayton Utz dominated the Bar's back line and Annabel Haslam, a solicitor at the Victorian Institute of Teaching, was very handy in the midfield. Unfortunately for the Bar, Tiffany and Annabel have so far resisted pressure to sign up for the Readers' Course next year.

The second match was the men's match. The Bar had a full team and a few reserves.

The solicitors won 3:2 after a tight contest. The game was played in good spirit. There were no yellow or red cards brandished and even less sledging from the

Hamish Austin with a shot on goal

The men's Bar team

barristers' team than can sometimes be heard at Bar tables.

The solicitors scored the first two goals.

The Bar team fought back to level the scores. Hamish Austin scored first, followed by Sebastian Clarke (son of Marcus). The solicitors struck again with a few minutes to spare. The goal scorers for the solicitors were their captain, Chris Ketsakidis of Maurice Blackburn, who scored twice, and John Pesutto of DLA Phillips Fox.

Magistrate Brian Wynn-Mackenzie presented the inaugural 'Barristers v Solicitors' shield to the captain of the solicitors. Brian also presented the Man of the Match medallion to the Bar captain, Nick Terziovski. Nick had been nominated by the referee.

Peter Agardy was the coach of the men's Bar team. Chris Nikou, a partner of Middletons, was the coach of the solicitors' team. On the day the solicitors had the assistance of Grant Brebner, who plays for Melbourne Victory. The women barristers were without a coach (but somehow won anyway).

The Bar won the first match 2:0 and lost the second 3:2. One of our players calculated that the Bar won the day on aggregate.

It was a great event, and we look forward to many more like it.

GEORGINA COSTELLO
AND PETER AGARDY

Anabel Haslam (left) and Suzy Wilson

Equitable Obligations: Duties Defences and Remedies

By Malcolm Cope
Lawbook Co 2007
Pages i–iv, Preface v–vi, Acknowledgments vii–viii, Contents ix, Table of Cases xi–xl, Table of Statutes xli–xliv, 1–470, Index 471–488

Equitable Obligations is one of a flurry of recent books dealing with the practical aspects of equity. The author confines himself to analysing the particular duties of fiduciaries, including trustees. Broader equitable obligations which arise from non-fiduciary relationships (such as those giving rise to the duties to avoid acting unconscionably or exercising undue influence) fall outside the scope of the book, as do the common law duties which attach to fiduciaries (for example, the contractual and tortious duties owed by professional trustees).

Chapter 1 provides a short analysis of the equitable duties owed by trustees. The broader general fiduciary duties of loyalty and fidelity are explored in Chapter 2. This discussion allows the author to explore the distinction between the natures of fiduciary and tortious duties, and the need for claimants to carefully delineate between alleging a failure to do some positive act (which might give rise to tortious liability) and an allegation that one of the proscriptive fiduciary duties has been breached.

Chapter 3 deals with the identification of fiduciaries, and describes the recognized classes of fiduciaries. Chapters 4 and 5 consider breaches of the duties owed by trustees and fiduciaries, respectively. Chapter 6 deals with third parties' liability for such breaches. Chapter 7 deals with defences. Chapter 8 describes the range of personal liabilities created by a breach of the duties.

Chapters 9 and 10 set out the requirements for proprietary relief for breaches of the duties, building on the author's earlier work, *Proprietary Claims and Remedies*. Perhaps for that reason, the two chapters are a more comprehensive analysis of equitable proprietary remedies than is strictly necessary for a book of this sort. Far from being cause for criticism, the detailed analysis provided by those chapters adds to the book's practical utility. Chapter 10 includes a discussion of the processes of tracing and following – doctrines often invoked in claims against defaulting fiduciaries or their cronies, particularly those who have received the proceeds of a defalcation. Unsurprisingly, many words are also devoted to the essential topic of competing priorities.

Equitable Obligations is an excellent work. It provides a lucid outline of the principles governing the obligations of fiduciaries and the consequences of a breach of those obligations. This outline is supported by ample reference to recent authority. The book is a valuable reference for those practising in any of the many areas of law in which fiduciaries are involved.

STEWART MAIDEN

Climate Law in Australia

Editors: Tim Bonyhady and Peter Christoff
The Federation Press, 2007
Softcover 315 pages

The editors of *Climate Law in Australia* argue a number of factors including a lack of political will has resulted in Australia's poor greenhouse performance. It was not until 2006 that climate change became a major political issue. A number of factors, including the most severe drought since European settlement, and the appreciation of the economic consequences of global warming, have generated widespread media coverage. Whilst climate legislation in Australia remains modest it has been left to courts and tribunals to test weakness in government policy. This comprehensive text examines, through the work of various authors, key federal and State legislation and the main cases brought before Australian courts.

Authors include leading academics such as Professors Robyn Eckersley, David Farrier, Rob Fowler and Jan McDonald, as well as leading practitioners Charles Berger, Kristy Ruddock, Chris McGrath, Allison Warburton and Martijn Wilder.

Whilst addressing international aspects of climate law the main focus of the text is Australian legislation and case law. Topics include the Kyoto Protocol and its alternatives, the greenhouse trigger, carbon emissions and trading, and geological sequestration law in Australia. There is also a chapter dedicated to nuclear law.

A number of important climate cases have been determined since 2004, including the Hazelwood Power Station case here in Victoria, the Bowen Basin and Xstrata Coal Mines cases in Queensland, and the Anvil Hill open cut mine case in New South Wales. Each of these cases has a dedicated chapter, revealing the torturous path that conservation organizations have had to take in protecting the environment.

An interesting chapter deals with what author James Prest describes as the Bald Hill Wind Farm debacle, which many will recall shot the orange-bellied parrot to fame yet again. In what could be best described as an episode from *Yes, Minister*, Dr Prest analyses how Bald Hill not only highlighted the state of climate law in Australia, under the previous Howard government, but also showed generally the lack of legislative response to climate change to date.

Whilst the subject matter is at times dense, *Climate Law in Australia* is a thoroughly readable text which provides not only a history of the legislation and cases to date but which also argues that Australia still has a very long way to go in response to climate change.

Principles of Australian Succession Law

By Ken Mackie
LexisNexis Butterworths, Australia, 2007
Pages i–liv; 1–316; Index 317–325

Principles of Australian Succession Law is the successor to an earlier text, *Outline of Succession* by Burton & Mackie (first ed. 1995, second ed. 2000).

In his Preface to *Principles of Australian Succession Law*, the author states that 'the aim of the text is to provide a concise, but reasonably comprehensive, coverage of the current law of succession in Australia…It

is aimed primarily at the undergraduate law student…but may also prove helpful to others involved in the area of succession …' The author has well exceeded this modest aim and this concise text will be of use not just to law students but also practising lawyers and others, including testators, executors and administrators (personal representatives), beneficiaries and others interested in the will making and estate administration processes.

The text provides an initial analysis of various aspects of will making including mental elements, formal requirements, revocation and alteration, re-publication and revival of a will. (See generally chapters 2 to 6). A specific chapter is devoted to construction of wills, although clearly the coverage of this topic is not as comprehensive as that found in the new work by David M Haines QC, *Construction of Wills in Australia* (LexisNexis Butterworths 2007).

Chapter 10 is devoted to family provision in the context of testamentary dispositions and deals with the 'new law' in this area in all jurisdictions in Australia. Although there are distinct differences between the various State family provision regimes there is also much similarity. It is also true that each specific State provision must be read in light of specific State court decisions, nevertheless the coverage in this chapter is comprehensive if necessarily general.

Further chapters deal with distribution, personal representatives and grants of representation (see chapters 9, 11 & 12).

Chapters 13 and 14 deal with the administration process, particularly the duties, powers, rights and liabilities of personal representatives charged with the responsibility of administering a deceased estate. This chapter is not limited to the mechanisms for the collection and distribution of the assets of the deceased but includes discussion of duties in relation to the funeral and disposal of the deceased's body.

Principles of Australian Succession Law is a most useful work. It provides the reader with access and understanding to principles of succession law on an Australia-wide basis. By use of the index and footnotes specific areas of interest in the text can be accessed and avenues of further enquiry developed. While the work is aimed at students, it is clearly a work that will be of use to a wider audience. *Principles of Australian Succession Law* should find a niche on the shelves of practitioners as well as others interested in specific aspects of Australian succession law.

P W LITHGOW

Commonwealth Legislation Collection (2nd edition)

By LexisNexis, Butterworths, 2007
Pages iii–v; 1–92

The LexisNexis Commonwealth Legislation Collection combines the *Commonwealth of Australia Constitution Act, Statute of Westminster Adoption Act 1942*, *Australia Act 1986* and the *Acts Interpretation Act 1901* in one convenient portable edition and is 5mm thick × 236 × 166mm. Whilst not pocket sized, it will slip into a brief case, backpack or A4 folder and is much simpler than having four separate pieces of legislation. The text is clearly set out in Times Roman with bold headings, making it easy to read.

As the legislation is the foundation of the Australian legal system and federal system of government, it is ideal for students and those who are commencing their studies in Constitutional Law. Practitioners will also find it a convenient reference tool because of its size and portability.

The publisher has also provided a link to its site containing a selection of relevant State legislation that can be viewed or downloaded in pdf format.

CJ KING

The Law of Rescission

Dominic O'Sullivan, Steven Elliott, and Rafal Zakrzewski
Oxford University Press, Oxford 2008
lxxiii + 699 pages, including index

The foreword to this book describes it as 'an ambitious, even a courageous work'. The writer may or may not be using the word 'courageous' in the sense of *Yes, Minister*. Apart from the frequent confusion and ambiguity about the use of the term 'rescission', and the multiple meanings which lawyers give it, the legal difficulties surrounding the concept of rescission are often considerable, and the cases complex.

The authors of this book have also attempted to provide a comprehensive work with references to authorities from many of the main common law jurisdictions, including Australia, Canada, Hong Kong, Ireland and New Zealand as well as the United Kingdom. Even more impressively, they have been able to express their views in concise and comprehensible propositions which are well organized into paragraphs and subject headings. The result is a clear, concise and authoritative text which is easy to use. One can only take one's hat off to them.

The work commences with introductory paragraphs setting out the authors' position about the terminology of 'rescission', including the different meanings of the word itself, and the contractual and transactional situations when it will be available. They also consider its interaction with independent claims for damages, equitable compensation and account of profits, and the historical foundations of rescission both at law and at equity. The authors then consider the grounds on which rescission will be available, including misrepresentation, non-disclosure, duress, undue influence, mistake, impaired capacity and unconscionable bargains, conflict of interest and third party wrongdoing.

A third part of the book considers rescission by election and by Court order, and a fourth part, the doctrine of *restitutio in integrum*, including mutual restitution at law and equity, proprietary claims and other matters. There is also consideration of the role of third party rights in the doctrine of rescission, and other bars to rescission including affirmation, delay, estoppel, insolvency, contractual provisions and other matters. A final section deals with gifts and deeds.

Overall, this is a work of considerable scholarship and utility. These features are rarely combined in a legal textbook. Notwithstanding its hefty price (even though an Australian dollar buys more of a pound than it used to), this is a book which I would recommend for the library of any chambers where contractual or commercial work is done.

MICHAEL GRONOW

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