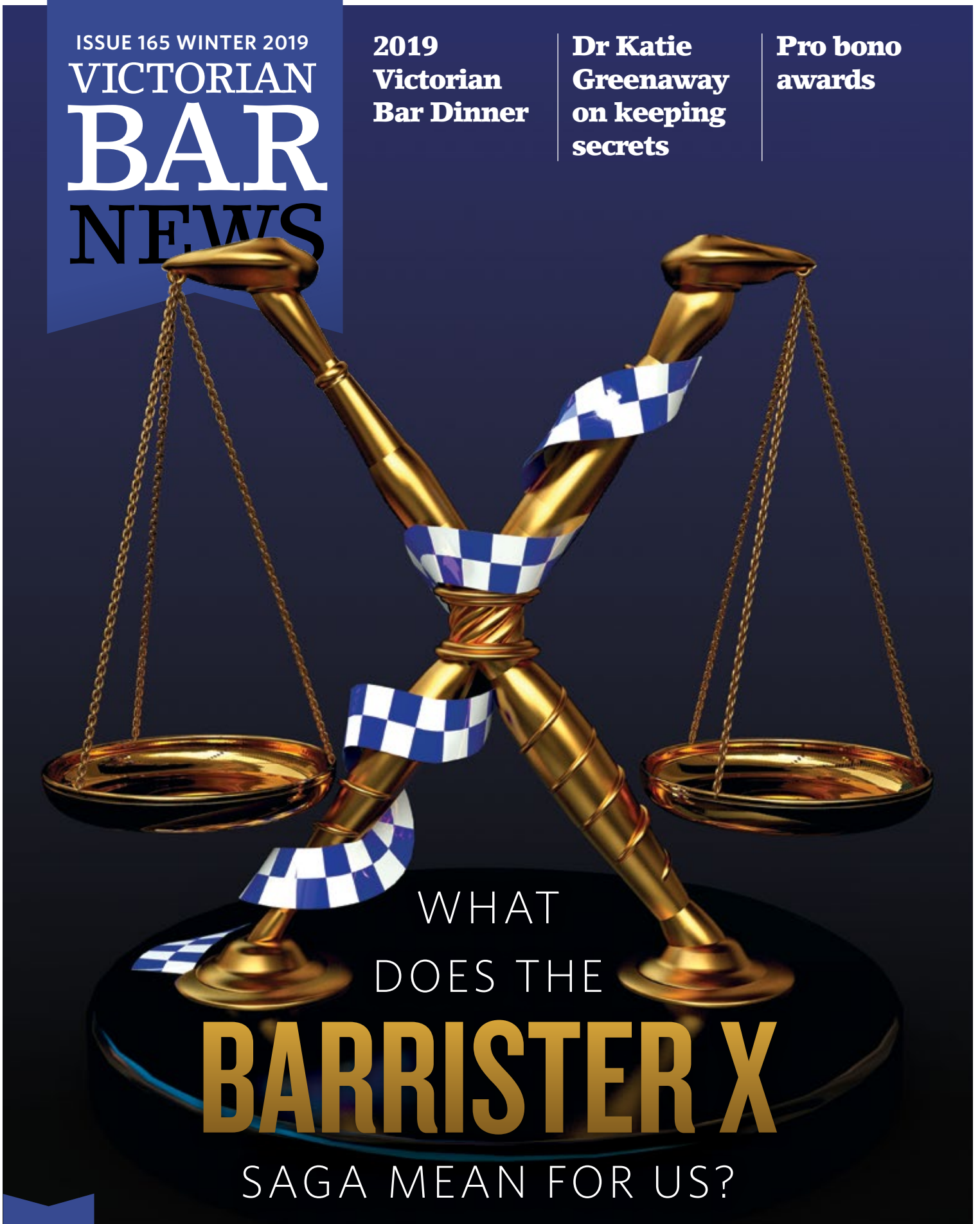
ISSUE 165 WINTER 2019

# VICTORIAN BAR NEWS

**2019 Victorian Bar Dinner**

**Dr Katie Greenaway on keeping secrets**

**Pro bono awards**



# WHAT DOES THE BARRISTER X SAGA MEAN FOR US?



**Plus:** Where do we come from? The diverse backgrounds of our barristers.

ISSUE 165 WINTER 2019

# VICTORIAN BAR NEWS

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ISSUE 165 WINTER 2019
VICTORIAN BAR NEWS

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# Editorial

## Confronting the challenges before us

NATALIE HICKEY, JUSTIN WHEELAHAN, ANNETTE CHARAK, EDITORS

"Informant 3838", "EF" or "Lawyer X". Whether it be the Victorian Police, the High Court of Australia or the popular press, each has its own acronym for Nicola Gobbo. Our choice, "Barrister X", was intended to reflect the particular consequences of the past seven months of revelations for the Victorian Bar as a community sharing common values.

Ms Gobbo was previously an active member of our community. She made contributions such as organising the 2003 Criminal Bar Association dinner. She was a *Victorian Bar News* committee member from at least 2000 until 2003. Ms Gobbo ceased to practise in 2009.

For the Victorian Bar, there has been a serious challenge to its reputation. In December 2018, the High Court labelled one of our former members as a person who had committed fundamental and appalling contraventions of her ethical obligations. The Bar had to make important and potentially far-reaching decisions about how to respond to that decision and to deal with its implications.

> "One of our strengths as a professional organisation is our ability to confront difficult issues."

When launching our Summer 2018 issue, VBN 164, the High Court decision had just been handed down. Attendees at the launch suggested we commission an article on "Lawyer X" for VBN 165. That would be premature. It is for the Royal Commission, currently underway and with its term now extended, to determine the legal implications of Ms Gobbo's conduct and to make recommendations.

Nonetheless, we believe there remain issues that are important for us to ventilate now as a guild. One of our strengths as a professional organisation is our ability to confront difficult issues. We have sought to respect the ethical foundation of our collegiate identity by addressing the topic of 'Barrister X' to the extent we can. In doing so, we have endeavoured to strike an appropriate balance in our desire to respect a range of sensitivities.

In our cover story, "What does the 'Barrister X' saga mean for us?", we have explored with Matt Collins, President of the Victorian Bar, the considerations which led to the Bar adopting a front-foot media strategy.

Separately, Roisin Annesley, chair of the Ethics Committee, reminds us of our client confidentiality obligations, in an appropriately nuanced manner. There are, for instance, limited exceptions to this rule, including where a client threatens the safety of a person and the barrister believes on reasonable grounds that there is a risk to a person's safety.

Nicola Gobbo at the 2008 Criminal Bar Association dinner (Source: VBN 146)

In recognition of the human aspects of being a barrister (not as a comment on Ms Gobbo's individual circumstances), we approached Dr Katie Greenaway, a lecturer and research fellow in social psychology at the University of Melbourne. Dr Greenaway has just completed a landmark study on the effect of keeping others' secrets with Dr Michael Slepian from Columbia Business School. Their study provides important insights into the mental health benefits and burdens of keeping other people's secrets. Dr Greenaway also provides barristers with practical suggestions to help maintain client confidentiality without psychological strain.

While the past six months have involved challenges, there have also been celebrations. The pro bono awards enable us to acknowledge our colleagues who, put simply, work for free to help other people. Such work is truly a calling, and typically unsung. The photos of these worthy recipients being recognised for their efforts is a delight to see.

On more prosaic matters, for what seems like a lifetime many of us have trodden the well-worn navy carpet of Owen Dixon Chambers, and directed lost clients from East to West, and vice versa. How remarkable to see our foyer transformed into a dramatically lit portrait gallery, with new carpet and clear signage! The Peter O'Callaghan QC Gallery extension, and its new space, the Hartog Berkeley QC room, are rightly a focus in this issue. The photographs, some of which show the subjects with their accompanying portraits, are tremendous. That Chief Justice Susan Kiefel permitted us to publish for posterity her speech launching the new space, reflects the occasion's importance.

Many of our barristers are from culturally and linguistically diverse backgrounds. In "Where we come from", seven barristers (Colin Golvan QC, Shanta Martin, Minal Vohra SC, Fatmir Badali, Premala Thiagarajan, Cam Truong QC and William Lye QC) tell us what called them to the Bar, the challenges they faced and overcame, and above all else, the importance of family. Our new editorial committee members, Haroon Hassan and Veronica Holt were responsible for germinating the seed of an idea planted by Colin Golvan QC. We think Haroon and Veronica have done a great job in their first assignment as staff reporters.

VICTORIAN BAR NEWS EDITORIAL COMMITTEE (Standing L-R): Tony Horan, Jesse Rudd, Annette Charak (Editor), Haroon Hassan, Hadi Mazloum. (Seated L-R) Campbell Thomson, Justin Wheelahan (Editor), Natalie Hickey (Editor), Carmella Ben-Simon (Absent - Maree Norton, Brad Barr, Veronica Holt, Reiko Okazaki, Meg O'Sullivan [Bar Council representative], Denise Bennet, Amanda Utt, Sarah Harrison Gordon).

In "The more things change, the more they stay the same", Jack Rush QC shares with us his research into the 1939 Bushfires Royal Commission, its commissioner, Leonard Stretton, and his counsel assisting, Gregory Gowans. Thanks to the efforts of Guy Shield, without whom *Bar News* would not be published, we have also sourced some images of the bushfires and their aftermath from the Australian Disaster Resilience Knowledge Hub. You will see from these images how the landscape of 80 years ago has barely changed.

We celebrate and congratulate a record number of our members for their court appointments—30 in total—to the Federal Court, Family Court, Supreme Court, County Court, Magistrates' Court, Federal Circuit Court, and Family Court of Western Australia. We also celebrate and bid farewell to a dozen former members, some of whom left us far too soon, and all of whom are remembered and missed by those who knew and loved them.

In Julian Burnside QC's regular column, "A bit about words", the editors have done a collective gulp and published the 'c-word' for what may be the first time in *Bar News* history. If Julian thinks it is now sufficiently *de rigeur* for us to 'go there', then we're up for it. Eagle eyed readers may notice that our courage rapidly dissipated when settling another article in this issue which refers more obliquely to 'c…'. One step at a time.

Caroline Paterson also reminds us that there are times to clock on, and times to clock off. Her golfing and bowls reports may not reflect scintillating sporting success, but the camaraderie is there for all to see!

Otherwise, this is your magazine. As a magazine that reflects our history and our members' challenges, viewpoints, reflections—as well as the times when we have fun—we look forward to hearing from you. Please tell us your stories or ideas at vbneditors@vicbar.com.au.

The Editors

PHOTO COURTESY OF NEIL PRIETO





# Letters TO THE Editors

## *Oh, the line, the line!*

### COMMONWEALTH LAW COURTS 9.32 AM ON THURSDAY 31 JANUARY 2019

Caroline Paterson submitted this photo shortly after taking it back in January. She said the line was about 20 minutes long (which seems quite efficient in the circumstances). She said, "We need a dedicated entry for professionals." She attributed the problem to the busy nature of the courts, referring to the divorce list and three Federal Circuit Court duty lists. "Many clients bring at least one support person", she added. She suggested that some of the delay is due to people being unfamiliar with the security process so that "contraband stuff" has to be confiscated.

A spokesperson for the Commonwealth Law Courts building provided the following statement, after being approached for comment by VBN:

**The Federal Courts have been working with the building owner, the Department of Finance, to investigate ways of improving entry into and out of the Owen Dixon building in Melbourne.**

**A major challenge is the space limitation imposed by the Flagstaff Gardens Station air intake and the design of the atrium.**

**Investigations have involved the assessment of how matters are listed as well as reviewing structural changes to the entrance atrium to allow the installation of an extra security point that can be used at peak times.**

**An architect has been appointed to assess solutions and we are expecting an options paper to be completed by the end of May (2019).**

**The Courts will then need to discuss the preferred option with the building owner and seek appropriate funding to complete the works.**

## *"If I were a judge, I could use the rear entrance!"*

Congratulations to Nicholas Green who submitted the above caption. He managed to capture the general sentiment of barristers confronted by the security line to enter the Commonwealth Law Courts Building from time to time … without epithets.

# Cultural intelligence at the Bar

ARUSHAN PILLAY AND RICHARD INGLEBY*

**Setting:** Supreme Court call-over before Bongiorno J in 2005.
**Court:** Calling the matter of *Tenace*.
**Barrister:** *I appear on behalf of Ms "Tenas [sic]".*
**Bongiorno J:** *No... That is not how you pronounce the surname. It is an Italian surname and it is a Latin language and the vowel is pronounced at the end of the name. So, it is properly pronounced "Ten-ah-chay" to your ears. It is not good enough ... to not know the correct pronunciation of your client's name.*

The Victorian Bar was established in 1884. The first barrister of south-east Asian heritage was called to the Bar in 1904. After this, the trail of culturally and linguistically diverse barristers at the Bar grows harder to read, but a perusal of the honour boards and Bar Council papers reveals progressive waves of barristers from diverse backgrounds coming to the Bar. Notable amongst these are strong contingents from Jewish, Greek and Italian backgrounds.

More recently, the Bar has become home to increasing numbers of barristers of Asian descent, including those from Chinese, Indian, Sri Lankan and Vietnamese backgrounds. That said, whilst 9.6 per cent of Australia's population identifies as Asian-Australian, only 1.6 per cent of barristers and 0.8 per cent of the judiciary are from this demographic.[1]

You might think this is nothing particularly unusual and simply reflects what is happening in the broader Australian community. But, does the Bar properly appreciate this diversity, its obligations and also its benefits?

It appears to many at the Bar that the answer to that question is no. The Race, Ethnicity and Cultural Diversity Working Group (forming the not-exactly-mellifluous acronym, RECDWG) is working to change this. Formed in 2018, the working group aims to foster greater diversity and inclusion at the Bar. It was established under, and reports to, the Equality and Diversity Committee of the Victorian Bar.

Numerous studies in the business world have highlighted the ways business performance can improve when people feel included.[2]

For many barristers from culturally and linguistically diverse backgrounds, their experience at the Victorian Bar has often resulted in them feeling lonely, marginalised and unsure of their place.

**Setting:** Conference between senior counsel and junior counsel (who is black) to discuss the opposing case:

**Comment:** Senior to junior counsel: *"I think the nigger in the woodpile is really the plaintiff's doctor X".*

**How it made me feel:** *I felt lonely. I wondered why he used that word. Maybe he thinks I'm a nigger too. Maybe it's some old expression that I don't understand. Maybe it's just me. Maybe I'm just dumb.*

**Setting:** Settlement discussions between senior counsel and junior counsel (who is Jewish) during the period when the matter is being stood down. Opposing senior counsel makes innocuous and pragmatic statement about the possible machinery for proposed settlement.

**Comment:** Response by senior counsel in the normal course of conversation and as naturally as leaves to a tree: *Don't be Jewish with me about this".*

**How it made me feel:** *Concerned for the workplace culture of the Victorian Bar as to the defects in education and awareness which would have to exist before any member of counsel could even consider making such a statement.*

This experience is reflected in the recent Quality of Working Life survey,[3] based on responses from 40 per cent of the Bar's 2160 members:

- 20 of the 840 respondents reported discrimination on the basis of race or ethnicity;
- 3 per cent of those who identified as belonging to an ethnic minority group reported workplace bullying on the grounds of race;
- 33 per cent (being 36 out of 110 respondents who identified as belonging to an ethnic minority group) reported workplace bullying in the past five years.

It goes without saying there is no place in our profession for discriminatory conduct.

There is certainly a school of thought at the Bar and perhaps in the wider community that we simply need to wait for the passage of time to ensure a more accurate reflection of the wider community in the membership of the Bar. Two factors strongly suggest that this is unlikely to happen without a change in awareness or active steps to promote an appreciation of cultural diversity at the Bar. These factors are over and above the extent to which a welcoming and inclusive environment is a necessary ingredient of a safe workplace.





PHOTOS COURTESY OF GARTH ORIANDER

Consider the experience of women at the Bar. That women have constituted a significant part (if not the majority) of the general working population for several generations, yet occupy only a relatively small percentage of the overall numbers at the Bar and senior Bar and on the Bench, suggests that change does not come without a level of active intervention.

Further, it seems obvious from observing human nature that, historically, those with power and entrenched interests in privilege, prestige and wealth are loathe to give those things away. At the Victorian Bar, in our view, we lag behind the broader community, government, business and even other Bars in recognising the value of diversity and actively promoting the benefits it will provide. By way of comparison, the Bar Council of England and Wales has incorporated into its rules a sub-set of enforceable 'Bar Equality Rules', which focus, not just on gender, but on broader cultural, racial and linguistic diversity.

Further, since at least 2012, the Bar Council of England and Wales has issued detailed guidance in its Bar Standards Handbook on equality and diversity (for example, the handbook requires chambers to have at least one equality and diversity officer and involves the regular collection and publication of anonymous data on diversity).

In 2017 the Solicitors' Regulation Authority of England and Wales stated:

> The demographic profile of ... the population is changing and a diverse workforce may help to better understand the needs of diverse clients in terms of language, cultural and religious influences. Promoting diversity increases both the profession's legitimacy in the eyes of the broader public ... and just as importantly within the ranks of the profession itself.

It seems to us that the Victorian Bar is in exactly the same position.

In short, it is obvious to us that those from culturally diverse backgrounds are under-represented at the Bar, that change is not coming soon and that if we do not hasten that change, the Bar will be a poorer place both in terms of its representation of the community for whom we, as members, perform work, and also as a positive place at which we can work. With this appreciation, the Race, Ethnicity and Cultural Diversity Working Group will be working to assist the Bar to embrace this change.

Finally, if you do not know how to pronounce your client's name, this can be easily remedied by asking the client, or a colleague, how to do so.

Note: If you are experiencing discrimination or harassment, the Bar has detailed policies about dealing with discrimination and grievances. A list of conciliators is available on the Bar's website.[4]

** Arushan and Richard are members of the Race, Ethnicity and Cultural Diversity Working Group.*

1. Asian-Australian Lawyers 2015 National Study.
2. *Waiter, is that inclusion in my soup?:A new recipe to improve business performance* (VEOHRC and Deloitte), Research report, November 2012 (available at: https://www.humanrightscommission.vic.gov.au/.../6650_cb45beefee65afca77234b8cb2ce6646).
3. Available at https://www.vicbar.com.au/sites/default/files/Wellbeing per cent20of per cent20the per cent20Victorian per cent20Bar per cent20report per cent20final per cent20Oct per cent202018.pdf. All references are to this document unless otherwise stated.
4. https://www.vicbar.com.au/public/about/governance/internal-conduct-policies-and-reports.

PHOTO COURTESY OF NEIL PRIETO

PRESIDENT'S REPORT

# Putting your Bar subscription to work

MATT COLLINS

I was first elected to Bar Council in November 2014, and have served successively as a councillor, vice-president and president since that date. Despite—at the time of my first election—having been a barrister for more than 15 unbroken years and a silk for almost three, I was constantly struck in my first year on the council by just how little I knew about our remarkable institution, in all its complexity, including how it is managed and governed. I was one of those members who, each year, grumbled about paying my subscription fee, and was cynical as to the value it represented.

Members often ask me (usually skeptically) about what value they get from the payment of their annual Bar subscription fee. Having once shared this skepticism, I thought I should offer an explanation.

Annual subscription fees are set by the Bar Council in May each year for the 12-month period commencing on 1 July. For 2018–19, the fees ranged from $471 for juniors who earned less than $50,000, to $3,980 for silks who earned more than $300,000. In 2017–18, the average fee paid per practising member was $1,835, and total subscription income was $3,805,293.

To give some context, the average fee paid per practising member of the NSW Bar in 2017–18 was $2,702, resulting in total income of $6,480,276. The NSW Bar had 15 per cent more (2,398) practising members as at 30 June 2018 than the Victorian Bar (2,073).

The Victorian Bar derives income from a number of other sources, including readers' course fees, mediation fees and seminar fees. We also receive a grant each year from the Victorian Legal Services Board. These sources of income, for the most part, offset the cost of providing particular services.

Major expenses of the Victorian Bar include: employee and supplier costs—there were 17 employees in the Bar Office at the time of writing; rent for the space occupied by the Bar Office, the library, the education and conference spaces on the first floor of Owen Dixon Chambers East, the Essoign Club and the mediation centre; and capitation fees paid to the two national representative bodies of which we are an active member: the Law Council of Australia (LCA) and the Australian Bar Association (ABA).

Just to keep the ship afloat each year, we have to perform a vast range of functions (see opposite). These activities go on year-in, year-out.

Apart from those matters, the Bar Office, with support from members of Bar Council and many others, executes the Bar Council's agenda to further the purpose of the Bar, as articulated in our strategic plan: "to ensure the Bar and its members thrive and continue to do so".

To that end, the Bar Council has approved for 2019 key initiatives including:

- managing the Bar's engagement with the Royal Commission into the Management of Informants;
- reviewing, in conjunction with the Legal Services Commissioner and Board, the Bar's processes for handling complaints, disclosures and investigations of member conduct;
- continuing an ambitious program of work aimed at increasing the direct briefing and early briefing of counsel;
- an increased focus on issues faced by members of the Criminal Bar;
- initiatives aimed at improving the health and wellbeing of members, drawing upon the lessons learned from last year's Wellbeing at the Bar survey;
- new diversity and inclusion initiatives, including an Australian-first gender pay gap analysis for barristers, and a focus on cultural diversity and the difficulties faced by non-cis gendered barristers and barristers with disabilities;
- continuing work commenced last year on referrals of pro bono requests from courts and tribunals, including the launch of an innovative pro bono portal;
- the Bar's ongoing governance review, including a proposal to members for a package of reforms to the Bar's constitution;
- commencing work on a new strategic plan to commence following the expiration of the current strategic plan in 2020; and
- reviews of the Bar entrance exam, Barrister Connect and direct access arrangements for criminal work in the Magistrates' Court, and the operations and services provided by the Essoign Club.

I have not, in the above summary, touched on the work of the various Bar associations, the work of the Bar's many active committees, or the Richard Griffith Library, which now forms part of the Law Library of Victoria. Nor have I mentioned that every speech, invitation, letter, and communication with members, from the smallest notice in the lifts to the largest conference, is supported by the Bar Office.

I am convinced that we get remarkable value, because of the dedicated efforts of the hardworking staff of the Bar Office, supported by countless hours of voluntary work done by our generous members. I will leave you to make up your own mind.

## How your subscription works for you: day-to-day activities of the Victorian Bar (not including special projects)

**Bar governance activities (including Bar Council)** – This covers all the activities associated with managing ourselves appropriately, including the annual election; approximately 12 Bar Council meetings per year; preparation of an annual report; budgeting and preparation of audited accounts; AGM and special general meetings; strategic planning; management of operational, reputational and business continuity risks; and management of committees and committee membership, among many other matters.

**Regulatory and compliance activities** – This includes:

- helping manage the annual issue of practising certificates, movements between divisions on the Bar Roll, approval of readers to sign the Bar Roll and mediator accreditations;
- through the work of the Ethics Committee and the Counsel Committee, managing member education and guidance on ethical matters, and complaints, investigations and fit and proper person inquiries; and
- overseeing compliance in a range of contexts including regulatory compliance, professional standards scheme compliance, CPD compliance and clerk compliance.

**Education and professional development** – This includes:

- the two readers' courses and readers' exams held each year and the Bar's busy CPD program;
- support for conferences held by the Victorian Bar, the ABA and various Bar associations;
- the Indictable Crime Certificate; and
- the Bar's international advocacy work to support our colleagues facing rule of law challenges in the region.

**Activities relating to the community of the Bar** – This includes:

- arranging the annual Bar dinner and countless functions associated with activities sponsored by the Bar, its associations and committees, and groups of counsel;
- maintaining the Bar website, the biannual *Victorian Bar News* and the weekly *InBrief*;
- support for the work of the Bar's charitable and philanthropic entities, namely the Bar Benevolent Fund, the Victorian Bar Foundation, the Peter O'Callaghan QC Gallery and the Indigenous Barristers Fund;
- support for the Essoign Club;
- arranging activities in relation to the health and wellbeing of members; and
- support for the appointment of silks through the work of the Chief Justice's Preliminary Evaluation Committee.

**Policy work** – This includes contributing to policy debates at a State level, by the Bar itself or in association with 12+ Bar associations and 20+ committees, and at the Commonwealth level via the LCA and the ABA.

**Stakeholder engagement** – This includes actively participating in the work of the LCA and the ABA; and engaging with people and bodies, such as courts and heads of jurisdiction, State and Commonwealth attorneys-general and shadow attorneys-general, the Legal Services Commissioner and Board, the Law Institute of Victoria, Victoria Legal Aid, the Victoria Law Foundation and the media.

**Barristers Chambers Ltd** – This includes managing the relationship between the Bar and BCL, including the appointment and removal of directors, as well as regular consultations between both bodies.

CEO REPORT

# Barristers as trusted advisors to corporate counsel

KATHERINE LORENZ

The Bar's ultimate purpose, and a key element of the strategic plan, is to focus our activities and resources on ensuring that the Bar and its members thrive. My role, as CEO, is to drive programs which support the Bar's strategic plan.

The 2018 State of the Bar report identified some significant and worrying downward trends. Over the past decade, the Bar's share of the commercial legal services market has diminished. We are spending less time with our corporate clients. Being briefed later to do a narrower range of work has become commonplace.

To better understand these findings, Vice-President Wendy Harris QC undertook a listening tour late last year, meeting with general counsel from major Australian companies and industry bodies. The purpose of the listening tour was to find out what corporate counsel know about the Bar, why they don't use barristers more often (including by way of direct briefs) and what we can do to communicate barristers' offerings better.

One of the key messages we received from the listening tour was that the Bar's value proposition is not well understood by corporate counsel. This is reflected in their briefing practices.

We are confronted with the stark reality that the relationship between corporate counsel and barristers is mediated by other people—mainly solicitors. Whilst the relationship between barristers and solicitors is central, of course, it benefits all of us to ask, how can clients get the *best* value out of their external legal spend? One of the most frequently cited issues was that in-house counsel do not know who to contact at the Bar, which is why their 'go-to' law firm will be the first port of call.

A current perception amongst corporate counsel is that barristers are expensive, which exacerbates the perception that they should be used only for court-based work. For the most part, the corporate counsel were not aware that for the cost of a junior solicitor, an experienced barrister can be briefed, which may prevent costly strategic missteps and inefficiencies, particularly if the matter later goes to court. Further, we found that we were not clearly communicating that briefing a barrister early in a matter for strategic advice can have extraordinary benefits for clients.

In May 2019, Wendy Harris QC presented findings from the listening tour to more than 200 senior corporate counsel from some of the largest companies in Australia, at the General Counsel Summit in Sydney. Wendy's presentation was well received by corporate counsel and the feedback suggests there is enormous opportunity for our members to add value to corporate counsel, both directly, and indirectly through firms of solicitors.

The Bar is looking at a range of initiatives to arrest some of the briefing trends identified in the State of the Bar report and during the listening tour. The Bar has entered into a corporate alliance agreement with Australian Corporate Counsel (Victoria) to provide networking opportunities for Victorian barristers with corporate counsel, and to facilitate CPD sessions so that corporate counsel can see the range of talent and expertise the Bar has to offer.

We have also launched a pilot program, asking members from a diverse range of seniority, experience and backgrounds to be involved. The pilot is aimed at testing a better engagement model and by showcasing the excellence of the Bar through barristers committed to doing things differently, and better.

The pilot involves:

> "The pilot is aimed at testing a better engagement model and by showcasing the excellence of the Bar through barristers committed to doing things differently, and better."

**Two-way education:**
- Understanding better, and delivering, what clients want
- Demonstrating our value proposition
- Showcasing subject matter expertise

**Direct engagement:**
- Conferences, industry seminars, sponsorships and networking events
- Exposing the diversity at the Bar and all it has to offer

**Profile building:**
- Ensuring our members have readily searchable, consistent and realistic profiles
- Openness by our members to direct briefing
- Testimonials and other "confidence indicators"

**Improving the information suite:**
- Website content, toolkits

**Encouraging an enhanced user-friendly approach:**
- Accessibility
- Advice formulation
- Proactively cultivating relationships with corporate counsel

**Secondment opportunities:**
- Assisting our barristers to identify suitable secondment opportunities (subject to conduct rules)

We hope that these initiatives will assist to connect barristers to corporate counsel, facilitate easy transactions between the two, and ultimately, see our members generate strong and lasting relationships with in-house counsel, rightly reasserting their place as the trusted, 'go-to' advisors to corporate counsel. I look forward to working with our members on these initiatives.

AROUND Town

# Giving back to the community: the 2019 Pro Bono Awards

VBN

The Victorian Bar's lauded pro bono scheme was established to serve the general community. On 20 February 2019, nominees for the Victorian Bar 2019 Pro Bono Awards and guests including Chief Justice Anne Ferguson of the Supreme Court and Chief Justice James Allsop of the Federal Court, gathered to honour a group of outstanding finalists and deserving winners.

Most of the thousands of hours of pro bono work that are donated by members of our Bar go largely unseen. As Richard Wilson (chair of the Pro Bono Committee) noted in his opening remarks, the awards:

> …seek to recognise and celebrate some of the remarkable contributions of individual practitioners and teams of barristers who have been nominated for an award for the pro bono work they have done within the past two years…
>
> The nominees are just the tip of the pro bono iceberg of legal services that are volunteered each and every week by members of the Victorian Bar.

Michael Gronow QC was the humble recipient of the night's highest honour, the Pro Bono Trophy.

(L-R) Ian Freckelton QC, Chief Justice Ferguson, Dr Adam McBeth, Sarala Fitzgerald, Claire Harris QC and Brian Walters AM QC.

Chief Justice Ferguson with Evelyn Tadros.

## Victorian Bar Pro Bono Trophy

*For outstanding individual achievement in pro bono advocacy over a long period.*

Michael Gronow QC was a deserving recipient of the evening's most prestigious award. His nomination cited his enduring support of the Court of Appeal pro bono duty barrister scheme and other pro bono programs supported by the Bar. In particular, Michael was praised for his willingness to take on difficult cases as part of his long-standing commitment to pro bono advocacy over many years.

## Daniel Pollak Readers Award

*For pro bono work undertaken by barristers who have completed their readers' course within the previous 12 months.*

Sarah Zeleznikow was recognised for her exceptional work in highly complex and multi-faceted extradition proceedings relating to the violation of US sanctions under Commonwealth extradition legislation. During the life of this matter, Sarah has been led by Rowena Orr QC, Clare Harris QC and Lisa De Ferrari SC.

## Ron Castan AM QC Award

*For pro bono work undertaken by barristers who are between 1 and 6 years' call.*

Evelyn Tadros emerged as the winner in this hotly contested category with no less than nine nominees undertaking a vast array of significant pro bono work.

Evelyn was cited for:

» her pro bono representation of the plaintiff in the important human rights case of *Matsoukatidou v Yarra Ranges Council*,[1] where the Supreme Court confirmed that courts have a responsibility under the Charter of Human Rights to ensure that self-represented litigants can participate effectively in legal proceedings; and

» her unstinting work representing vulnerable asylum seekers on Nauru.

## Susan Crennan AC QC Award

*For pro bono work undertaken by barristers who are between 7 and 15 years' call but are not silks.*

A richly deserving recipient for this award, Matthew Albert (a past winner of the Ron Castan AM QC Award) was a finalist in three separate categories (winning two).

He was praised for his tireless work as the lead barrister for Justice Connect referrals for Nauru High Court appeals. Matthew ran no less than 10 matters in the High Court in 2018, including five victories for asylum seekers on Nauru, in addition to other significant pro bono advocacy in the tenancy and immigration fields.

> "These contributions are too often unheralded, and yet can make the most profound difference to the lives of those who are assisted…"
>
> DR MATT COLLINS QC PRESIDENT, VICTORIAN BAR

## Ron Merkel QC Award

*For pro bono work undertaken by barristers who are more than 15 years' call or silks.*

Lisa De Ferrari SC was recognised for her long-standing commitment to pro bono work. It was estimated that Lisa and her team of hard-working junior counsel contributed to more than 35 individuals and their families being transferred off Nauru to receive medical treatment in Australia. With her typical humility, Lisa was quick to praise the efforts of her able juniors and instructors in accepting the award.

Chief Justice Ferguson with Sarah Zeleznikow.

Chief Justice Ferguson pictured with Lisa De Ferrari SC.

Chief Justice Ferguson pictured with Michael Gronow QC, the winner of the Pro Bono Trophy and previous recipient, Christopher Horan QC.

> "As an institution, the Victorian Bar regards this longstanding tradition of performing pro bono work to be in its finest tradition…"
>
> RICHARD WILSON. CHAIR OF THE PRO BONO COMMITTEE OF THE VICTORIAN BAR

## The Public Interest/Justice Innovation Award

*For pro bono work which has a strong public interest element or has involved a procedural or substantive innovation in the law likely to enhance access to justice.*

This was award was ultimately shared by an eminent team of pro bono counsel (Brian Walters AM QC, Peter Morrissey SC, Dr Ian Freckelton QC, Claire Harris QC, Matthew Albert, Sarala Fitzgerald and Dr Adam McBeth).

The team was recognised for its work (instructed by the Human Rights Law Centre) on behalf of a number of detained children, concerning a challenge to the decision of the Victorian Government to gazette part of the maximum security Barwon Prison as a youth justice centre and to transfer children there in breach of their human rights.

The team was assembled in November 2016 and called upon to run a four-day trial in mid-December of that year, then successfully defend an urgent appeal to the Court of Appeal over the Christmas break followed by a further six-day Supreme Court trial in April of 2017.

The efforts of the team resulted in a series of landmark decisions under the *Charter of Human Rights and Responsibilities* which protected the rights of the detained children.

A detailed list of this year's nominees is available at: https://www.vicbar.com.au/sites/default/files/Pro%20Bono%20Awards%20Nominees%20Brochure%20final.pdf

Please note: Matthew Albert who won the Susan Crennan AC QC award was not present on the night (he was overseas). His award was accepted by Evelyn Tadros. Peter Morrissey SC was also absent.

1 [2017] VSC 61. Evelyn's co-counsel, Kylie Evans, was a finalist for the Susan Crennan AC QC award.

# 2019
## VICTORIAN BAR DINNER

On Friday, 17 May 2019, assembled barristers and guests attended the annual Bar Dinner. There was much socialising, catching up with old and new friends, and dancing.

The guest of honour, the Hon Anne Ferguson, Chief Justice of Victoria, was the undisputed highlight of the night with a keynote speech bringing new meaning to a 'Q&A'. Highlights included:

**Q: Have you ever slept at work and if so, where?**
A: No. But in my nine years on the Bench, there have been a few submissions that have threatened to send me to sleep. In fact, I'm reminded of a former judge (definitely not me) who said to counsel, 'Mr Smith, I am going to sleep now….and when I wake up, I don't want you to still be speaking'.

**Q: When you were a partner at Allens, you judged the barristers you briefed on their performance. How does this differ to what you do now?**
A: I was tempted to say that as a solicitor if you don't like a barrister you never brief them again, but as a judge you're stuck with them forever. Now I judge them on brevity.

**Q: I want to be Chief Justice one day. Any tips?**
A: Simple – two things. First, get prepared to answer questions like this; second, start preparing your speech for the Bar dinner.

Other highlights of the night included the toast to the rule of law, by the Attorney-General, the Hon Jill Hennessy MP; the address by Senior Vice-President Wendy Harris QC, who introduced the Chief Justice, and the response to the Chief Justices' speech by ABA President Jennifer Batrouney QC, who also proposed a toast to the independent Bars of Australia.

L-R Travis McKay, Sarah Harrison-Gordon, Amanda Utt, Alannah Jones, Katherine Lorenz, Liz Ingham, Denise Bennett

# 2019
VICTORIAN BAR DINNER

01. Jennifer Batrouney QC; Chief Justice William Alstergren; Ian Robertson 02. Judge Elizabeth Brimer; Jason Pennell; Judge Phillip Ginnane; Roisin Annesley QC 03. Anna Svenson; John Kelly 04. (L-R seated) Antony Berger; Scott Cromb; Sarah Damon; Ben Gahan; Carlin Grant (L-R standing) Angelo Germano; Chris Hender; Laura Mills; James Moore 05. Dr Matt Collins QC 06. Travis Brown; Tom Battersby; William Blake 07. (L-R seated) Gayann Walker; Erica Lawson; Annie Yuan; Ashleigh Harrold; Michelle Bennett, (L -R standing) Nick Bird; Sean McArdle; Vince Murano; Emma Harold 08. The Hon Chief Justice Anne Ferguson.

# 2019
## VICTORIAN BAR DINNER

01. Dugald McWilliams; Ffyona Livingstone Clark; Lachlan Armstrong QC 02. Her Excellency, the Hon Linda Dessau AC, Governor of Victoria; Matt Collins QC 03. Veronika Drago; Lachlan Molesworth; Abeline Singh; Bill Stephenson; James Stoller and Stephen Scully. 04. (L-R standing): Anastasia Smietanka; Megan Cameron; Stephanie De Guio (L-R seated): Megan Fitzgerald; Catherine Kusiak; Natasha Crowe; Amanda Ryan 05. Alex Solomon Bridge; Nicole Papaleo; Helen Tiplady; Neale Paterson; Andrew Barraclough; Dion Fahey 06 Katherine Lorenz; Andrew Bell 07. Jennifer Batrouney QC 08. Rishi Nathwani; Jess Willard 09. The Hon Chief Justice Anne Ferguson; Judge Irene Lawson; Kerri Judd QC (DPP); Brendan Kissane QC (CCP); Diana Piekusis QC and Matt Collins QC 10. Ben Fry; Suganya Pathan; Rachel Amamoo; Annie Yuan 11. Stewart J Maiden QC; Reegan Grayson Morison.

# Peter O'Callaghan QC Gallery extension

SIOBHAN RYAN

There was a gathering of interesting and important people at the Peter O'Callaghan QC Gallery on 28 March 2019. We were pleased to welcome the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia, to inaugurate the gallery's new space, the Hartog Berkeley QC Room, and to unveil the Victorian Bar Memorial. A lone piper piped the guests to attention as Bar members who are active in the armed services gathered around the memorial. Brig Douglas Laidlaw CSC, Commander of the 4th brigade, read from John McCrae's poem "In Flanders Fields". Other important guests included the governor of Victoria, the Hon Linda Dessau AC, who laid a wreath, and the gallery's patron, the Hon Michelle Gordon AC. It was a moving and sombre moment.

The rest of the night belonged to the artists and sitters of eight new portraits, which were also unveiled. Anyone interested in the arts will agree it was a coup to have Moran and Archibald Prize winner Louise Hearman and finalist Sally Ross in the room with Lianne Gough (whose portrait of Jeff Sher QC almost seems to dance off the wall), as well as the renowned photographers David Rosetsky, Earl Carter and John Gollings AM (Polly Borland sent her apologies from Los Angeles) and two extraordinarily accomplished weavers from the Australian Tapestry Workshop, Chris Cochius and Pamela Joyce. This talented group was joined by Bill Henson and Martin Tighe, whose portraits of the Hon Ken Hayne AC QC and of Philip Dunn QC and Robert Richter QC were unveiled last year. For the sitters, it was a chance to meet their artists once again and to catch up on conversations which, in some cases, had taken place over the space of years.

And what a room it is! BCL has transformed the foyer of Owen Dixon Chambers into a fluid space that extends the gallery from East to West. Carr Design conceived of and oversaw the construction of the Hartog Berkeley QC Room and the memorial. The gallery has been brought to life by guest curator, Murray White and his team, who worked with the existing collection (several works had been in storage) and the new acquisitions, finding the perfect place for each and displaying the works and the space to their best advantage.

The extension also accommodates displays of artefacts in the Bar's collection. In the current display are items which belonged to Sir Owen Dixon, including his tricorn and court shoes, as seen in the Bar's full-length portrait by Archibald Colquhoun. Sir Owen's ceremonial sword is also on display for the first time in many years. Joan Rosanove QC's cherished rosette is there, as is Sir Isaac Isaacs' Ede & Ravenscroft wig box and Sir James Tait QC's wing collars and studs. It is a welcome distraction for the barristers and all who pass through Owen Dixon Chambers.

01. Keith Wolahan, Gerard O'Shea, Paul Willee RFD QC, Andrew Kirkham AM RFD QC 02. Peter Jopling AM QC (Chair, Art & Collection Committee), Katherine Lorenz, John Karkar QC, Paul Clark, Cheryl Kirk-Hogan, Mary Hayes, James Campbell, Murray White, Amanda Utt, Alannah Jones 03. Robert Richter QC, the Hon Ray Finkelstein, Kate Anderson, Peter Murdoch QC 04. Hamish Glaspole (Jeffrey's grandson), Dr Julia Sher, Diana Sher OAM, Jeffery L Sher QC and Kate Richards 05. Diana Bryant AO QC, Marilyn Warren AC, Michael Black AC QC 06. The Hon. Chief Justice Susan Kiefel AC 07. The Hon Linda Dessau AC laying a wreath.





# The Gallery's new space—The Hartog Berkeley QC Room

THE HON SUSAN KIEFEL AC, CHIEF JUSTICE OF THE HIGH COURT OF AUSTRALIA

Your Excellency, Mr President, Madam Patron, judicial colleagues past and present, members of the Bar, families and artists.

It is a privilege to be here this evening for this important occasion in the life of the Bar.

The Victorian Bar is well known for its collegiality and for the strong bonds which exist between its members. For a long time, those at the helm of the Bar have fostered in its members a sense of history, of belonging. How fitting then that this evening the Bar recognises those of its members who have given service to their country in the armed forces and in peace-keeping and humanitarian operations. Some of the names which are now recorded are well known in the law but the Memorial Wall commemorates the service of all. In particular it is a memorial to the eight men who died in active service.

Hartog Berkeley was too young to have taken part in World War II. Born in London in 1928, his parents were part of the post-War migration from England to Australia in 1947. He had a more interesting background than most barristers: a sheep roustabout and, later, involvement in trucking, concrete, clothing and finally the law. He read with Tom Hughes but ventured south to Melbourne in 1959 and read with Bill Harris. He was successful, developing a large commercial practice specialising in taxation. He took silk in 1972. He was solicitor-general for the years between 1982 and 1992, returning to practice at the Bar until his retirement in 2005.

Following his death in February 2017, my dear friend and former colleague Sue Crennan

Bill Henson and his subject, Kenneth Hayne AC QC

> "The Chief Justice kindly reconvened in the afternoon to admit him on condition that Hartog give an undertaking to read the Law List in *The Age* every day thereafter."

spoke of him at an occasion at the Essoign Club. Sue thought he might have named the club after idly leafing through a law dictionary, such was his capacity to find amusement and to share it. One meaning of "essoign" is the excuse given for non-attendance at court, usually given by a defendant. I wonder whether when Hartog named the Club he may have had in the back of his mind what Sue described as the "rocky start" of his career at the Bar. Apparently he failed to appear for his admission because he mistook the appointed time. The Chief Justice kindly reconvened in the afternoon to admit him on condition that Hartog give an undertaking to read the Law List in *The Age* every day thereafter.

There can be no doubt that Hartog loved the Bar. He gave it great service: on numerous committees, as vice-chairman and chairman and then as president of the Bar Association.

It was during his time as vice-chairman that I came to know him. I was a very junior member of the Queensland Bar Association and had been enlisted to act as its honorary secretary. I can still recall this larger than life person who seemed to fill the room. And I seem to recall a long lunch or two.

Many years later I was fly-fishing on the Rubicon River in northern Victoria. Our fishing guide was rather annoyed that we could not fish a particular stretch because some blighter called Hartog Berkeley had the riparian rights to it. This was of course his farm "Shifty Nooking". This name he took from Lord Denning's judgment about "bluebell time in Kent". I assured the guide that Hartog would not mind if we enjoyed his bit of river. He was by all accounts a generous man.

His devotion to the Bar led to the creation with Peter Jopling QC and Graeme Thompson in 1998 of the Bar Legends, of which he was named one in 2003. He fostered many major Bar enterprises such as the Centenary in 1984, the readers' course, the silks tapestry and the silks sculpture.

I have the great honour to open the extension to the Peter O'Callaghan QC Gallery and to name the Hartog Berkeley QC Room.

## Unveiling of seven portraits

I have the privilege to unveil portraits of former members of the Bar of special standing.

**ALEX CHERNOV** arrived in Australia from Lithuania via Salzburg and was on an upward trajectory ever since. Admitted in 1968, he took silk in 1980, became chairman of the Victorian Bar, vice-president of the Australian Bar Association, president of the Law Council, vice-president of Law Asia. He was appointed to the trial division of the Supreme Court of Victoria and then to the Court of Appeal.

Following his retirement in 2008, he was elected chancellor of the University of Melbourne, where he had earlier studied, until he resigned to take up the office of Governor of Victoria. In 2012 he was named a Companion of the Order of Australia.

I had two encounters with Alex Chernov as a young barrister. The first was indirect—I purchased a copy of Brooking & Chernov's *Tenancy Law and Practice*. More directly, I seem to recall meeting him in intra-Bar Association dealings.

He is nowadays patron of the Australia India Institute, which he was instrumental in founding and he chairs the Grattan Institute. These are testaments to his wider world vision and to an intellectual life.

Alex, with his usual courtesy, wrote to me this week to explain that he was overseas and unable to attend this evening.

The artist who has so well captured the inner strength of the young emigrant who became a public figure is David Rosetzky. He is a Melbourne-based contemporary artist who works across photography, video and installation. In his black and white photographs and double exposures, human behaviour, identity, subjectivity and community come under intimate observation. Known for the elegance and the aesthetic rigour of his work, he has been commissioned to create distinctive portraits of some of Australia's most prominent figures and his work is held by every major public institution in Australia as well as numerous private collections.

The next subject also arrived in Australia from foreign parts. **MICHAEL BLACK** was born in Egypt, when his father was serving as an officer in the RAF at the beginning of the Second World War.

He was called to the Bar in 1964, read with E D Lloyd and developed a broad common law, commercial and public law practice. Amongst his ten readers were Ray Finkelstein and Peter Jopling. He took silk in 1980. His appearances as a silk in the High Court included the famous *Tasmanian Dam Case*.

He was a member of the Victorian Bar Council and various committees. In 1981 he was appointed the foundation chair of the Victorian Bar course, now known as the readers' course, was the Bar's representative on the committee of the Leo Cussen Institute and was a member of the council of Legal Aid Victoria.

In 1991 he was appointed Chief Justice of the Federal Court of Australia and he served in that office for more than 19 years. In 1998 he was appointed a Companion of the Order of Australia.

Michael Black is of course well known to me from the time I also served on the Federal Court. During his tenure, he undertook many significant procedural and case management reforms. But there were other undertakings perhaps for which Federal Court judges are most grateful. Most obviously, he combined an abiding interest in and understanding of architecture with skills which enabled him to negotiate budgetary matters with government to transform ideas about court buildings and judges' accommodation. Less obvious to the outside eye is the understanding he had of the need for a court to be truly collegiate if it is to work well and his ability, gently, to bring others to this view.

He is a man deeply concerned about society, its institutions and the welfare of individuals. This is evident to me in his portrait by Louise Hearman, another Melbourne artist, who has won both the Doug Moran National Portrait Prize and more recently, the Archibald—with that wonderful portrait of Barry Humphries.

Her works are characterised by surreal juxtapositions, eerie light and strong emotive emphasis. Her paintings are visually haunting.

Louise Hearman with Michael Black AC QC

Sally Ross with Diana Bryant AO QC

The portrait of **DIANA BRYANT** is by Sally Ross, who is a four-time Archibald Prize finalist. It has just been completed and I had not seen it or a photograph of it until a moment ago. It impresses immediately as vibrant and colourful—a perfect reflection of its subject. It too will be another significant addition to this gallery's collection.

Diana has over the years moved between her birthplace of Perth and Melbourne but since the 1990s, Melbourne has been home. It is where she established a significant family law practice and took silk. She was appointed the first Chief Federal Magistrate in 2000 and then Chief Justice of the Family Court of Australia in 2004 where she remained until her retirement in 2017. In 2012 she was made an Officer of the Order of Australia.

Diana has been a passionate advocate for women in the legal profession and in 2009 was appointed patron of the Australian Women Lawyers, taking the place of the founding patron, Mary Gaudron. She was inducted into the Western Australian Women's Hall of Fame in 2018.

The time of Diana's retirement coincided with my first meeting of the Council of chief justices of Australia and New Zealand. A photograph was taken of the women chief justices there present. It was an historic occasion when, for the first time, we numbered five.

The subject of the next portrait is well known to me—**RAYMOND FINKELSTEIN**—aka 'Fink'. Another emigrant, Fink was born in Germany post-war and came to Australia with his parents. He was called to the Bar in 1975 and appointed QC only 11 years later. He then focused his broad commercial and equity practice on appellate work and was acting solicitor-general for Victoria during 1992. That was not the only time when he appeared before the High Court.

In 1997 he was appointed a judge of the Federal Court. He took a particular interest in insolvency and commercial law and held additional appointments as deputy president and later president of the Copyright Tribunal and deputy president of the Australian Competition Tribunal. He showed strong leadership in organising fast track commercial lists, though it was perhaps not so evident at the launch of that programme, when he offered free steak knives as an incentive.

Following his retirement from the Bench, Fink was appointed an adjunct professor in the Law Faculty at Monash University and was made an Officer of the Order of Australia in 2016.

Fink and I have remained good friends over the years. It is surprising really because we have almost never agreed on anything to do with the law. He has more often regarded my approach as too cautious; my complaint of his approach is that it is not. The many post-it notes I passed to him on Full Court appeals, suggesting he leave the parties to argue the matter, were largely ignored.

It may be observed that in the photographic portrait by Polly Borland he is not wearing a tie. But this is a rather modest form of defiance of convention. After all, he is wearing an obviously expensive, pinstriped suit! This image is a perfect fit for Fink with his city, Melbourne, as backdrop, though it could have been New York.

Polly Borland is based in Los Angeles, having left Melbourne to pursue a remarkable international career. Her portraits are much sought after. One of the most celebrated is that of Queen Elizabeth II, commissioned to mark the Golden Jubilee; another is of Nick Cave in a blue wig which is nearby in the NGV. Fink finds himself amongst an impressive array of sitters who include Kylie Minogue—but alas not Bruce Springsteen.


The Hon Linda Dessau AC & Raymond Finkelstein AO QC


Alan Archibald QC

The subject of the tapestry portrait which was commissioned for the gallery is of course **ALAN ARCHIBALD**. His retirement at the end of 2018 marked the conclusion of an unbroken period of active practice at the Victorian Bar of over 48 years, the last 35 of them as a silk. Before signing the Bar Roll in Victoria, and reading with Clive Tadgell, Alan Archibald had been called to the English Bar at Gray's Inn, on the introduction of Sir Robert Menzies and after he completed the BCL at Oxford on a scholarship—something not commonly undertaken in those days.

Alan Archibald's time at the Bar appears to have been marked by leadership—of the junior commercial Bar and then the inner commercial Bar after taking silk. He was for many decades regarded as one of Australia's pre-eminent counsel—even by legal affairs journalists. I, amongst other judges, have been the grateful recipient of his sparse, but compelling, oral argument, the basis for which could only have been meticulous preparation and deep learning.


Jeff Sher QC

AROUND TOWN

> "When he retired from the Supreme Court in 1997, he was believed to be Australia's longest-serving judge (at 28 years)."

Alan's wife of 47 years, Mary-Lou, is here this evening. Serendipitously, their wedding photographer was John Gollings AM, who was commissioned to take the photograph which forms the basis of this magnificent tapestry portrait, a gift of his long time clerking list, List A Barristers.

John Gollings is an adjunct professor at the School of Media and Communications, RMIT University. He works in the Asia-Pacific region as an architectural photographer and has a special interest in the Australian landscape. His work is held in both national and international collections.

The Australian Tapestry Workshop was established in 1976. It has since built a worldwide reputation for the creation of contemporary tapestries in collaboration with living artists and architects. Significant works include the Great Hall tapestry, designed by Arthur Boyd for Parliament House, Canberra; Homage to Carl Emmanuel Bach, designed by Jørn Utzon for the Sydney Opera House; the two Victorian Bar tapestries, or the silks tapestries; and the State Badges and Commonwealth Arms tapestry, which is in the collection of the High Court.

The portrait of the late **ALEC SOUTHWELL** is a gift by his children, Kay and Peter, to the gallery. The unveiling of his portrait could not have been better timed for he is one of those named in the Memorial Wall, having served in World War II.

Alec Southwell's legal studies were interrupted by the War. He saw service in New Guinea and Morotai. After completing his studies, he commenced at the Bar in 1951 and took silk in 1968. The following year, he was appointed to the County Court. The portrait of him is in the robes of that court. He served there for 10 years, after which he was appointed to the Supreme Court. When he retired from the Supreme Court in 1997, he was believed to be Australia's longest-serving judge (at 28 years). He served a further five years as a reserve judge.

He was by all accounts an excellent sportsman and sailor.

In 2003, 42 years after signing the Bar Roll, **JEFF SHER** was made a Living Legend of the Bar. Speaking that evening, the late Alan Goldberg said that legends were honoured because they exemplified the standards for which a strong and independent Bar stands: integrity, hard work, ability and an absolute commitment to acting in their clients' interests.

Sher QC's practice was unusually broad-ranging over both civil and criminal work and, within those large areas, extraordinarily diverse matters: personal injuries, commercial law, estates, land claims and a defamation practice unequalled at the Victoria Bar, I am told. A practice such as this suggests a level of ability as an advocate which could only be regarded as formidable. Yet his friends describe him not only as warrior-like but also as disarming and humorous.

He looks like a person happy in his work in the portrait by Lianne Gough, which is a gift to the gallery. It is an appropriately strong, vigorous painting; the colour bold and the technique neither underworked nor overworked.

## Conclusion

It has been my honour to lay a wreath, name the gallery room and to unveil the portraits which will hang there. The Victorian Bar are right to honour their own. To do so serves to remind its members of that sense of history and of belonging which are defining characteristics of this Bar.

# Testing their mettle: Prospective arbitration professionals moot in Melbourne

CAROLINE KENNY, CIARB AUSTRALIA PRESIDENT

CIArb Australia (The Chartered Institute of Arbitrators Australia) continues to proudly support Australian teams participating in international arbitration moots including the annual Willem C Vis International Commercial Arbitration Moot held in Vienna and Willem C Vis (East) International Commercial Arbitration Moot held in Hong Kong. The goal of these moots is to foster the study of international commercial law and arbitration for resolution of international business disputes through its application to a problem of a client. It also aims to train law leaders of tomorrow in methods of alternative dispute resolution.

Launched in 2017, the annual CIArb Australia Vis Pre-Moot gives Australian teams an unprecedented opportunity to test and develop their skills before experienced arbitration professionals and to network with fellow students and practitioners, before leaving Australia for Vienna or Hong Kong.

Organised by the CIArb Australia Young Members Group (YMG)—comprising Kristian Maley, General Counsel, John Holland and CIArb Australia Councillor, Victorian barrister, Andrew Di Pasquale, and ASIC's James Sullivan—the pre-moot drew on the support of over 50 volunteers from Melbourne's arbitration community. This included Victorian Bar members Paul Hayes QC, Albert Monichino QC, Paul Santamaria QC, Michael Sweeney, Dr Vicky Priskich, Eugenia Levine, Justin Carter, Michael Whitten QC, Andrew Broadfoot QC and Elizabeth Brimer SC (now Judge Brimer), to name a few. The level of support confirms that Melbourne will be the permanent venue for the national competition.

The Australia-wide competition attracted 10 university teams: Australian Catholic University, Deakin University, Griffith University, La Trobe University, Monash University, RMIT University, University of New South Wales, University of Notre Dame Australia, University of Queensland, and University of Sydney. Teams travelling from interstate received support for travel and accommodation costs thanks to major sponsor, DLA Piper, RMIT University, Epiq Australia and the Federal Court of Australia.

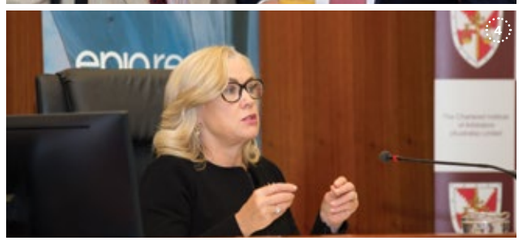
Following closely fought rounds, the University of Queensland was victorious for the second consecutive year, narrowly prevailing over Griffith University in the grand final round. It was a thrilling contest of presentation skills at the Federal Court of Australia. The grand final panel comprised Justice Croft of the Supreme Court, Ms Gowri Kangeson, partner at DLA Piper and myself.

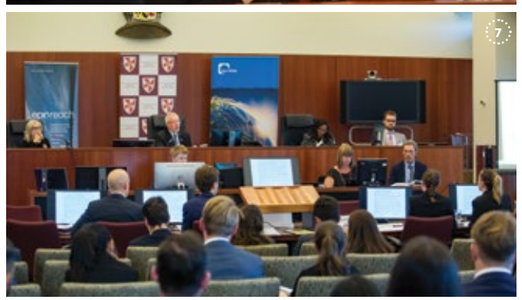
In recognition of their winning performance, the members of the University of Queensland team have secured places at CIArb Australia's Introduction to International Arbitration course. This course is tutored by leading arbitration practitioners and provides a pathway to associate membership of CIArb.

As an invited judge for the Vis Moot in Vienna (12–18 April), I can attest how critical pre-moot competitions are for students. A record 379 teams from universities around the world participated and the arbitrators who judged the moot also reflected the global profile. The competition was heavily supported by law institutions and law firms which hosted networking events every evening.

It was a privilege to be involved in the moot. The enthusiasm and excitement of the students was contagious. As the teams entered the elimination and final rounds, the standard of the competitors became so high that it was almost impossible to judge the winners. I was so proud that seven Australian teams made it into the elimination rounds. At the awards banquet held on the final day of the competition, Monash University won an award for claimant memorandum and for respondent memorandum, and one of the mooters on the team won an individual oralist honourable mention award.

It is gratifying to see once again the success of the Vis Pre-Moot. CIArb Australia will continue to invest in the professional development and engagement of younger professionals by providing a professional pathway through programs such as this, in addition to offering free student membership.





1. Official Opening Reception of the 26th Annual Willem C Vis International Commercial Arbitration Moot held on 12 April at Wiener Konzerthaus. 2. Dr Rajesh Sharma (RMIT University) and David Robertson QC 3. Caroline Kenny QC and delegates in Vienna 4. Caroline Kenny QC 5. Back row (L-R): University of Queensland team - Liam Inglis, Adam Lukacs, Riley Quinn, Mia Campbell, Ben Wilson, Griffith University team - Grace Norris, Madaline Hartwig, Neha Gangaram, Kristian Maley and James Sullivan. Front row (L-R): Caroline Kenny QC, CIArb Australia, the Hon Justice Clyde Croft AM and Gowri Kangeson, DLA Piper. 6. Dr Vicky Priskich, Andrew Di Pasquale, Andrew Broadfoot QC and Michael Sweeney 7. Front row, Grand Final Panel: Caroline Kenny QC, the Hon Justice Clyde Croft AM and Gowri Kangeson, DLA Piper.



(R-L) Roona Nida, the Hon Justice Forbes, Nina Springle former MP

Afghan traditional music

# Launch of United Chambers in Dandenong: access to justice for the Afghani community

ROONA NIDA WITH NATALIE HICKEY

Roona Nida believes she is one of the first Afghanis to join the Victorian Bar. Before coming to Australia in 1990, she was studying medicine at the University of Kabul. She explains she came to Australia on a spouse visa after her marriage was arranged with her former husband.

Roona speaks (in addition to English): Dari, Pashtoo, Persian/Pharsi and Hazaragi. After coming to Australia, these language skills led to a career in interpreting and translating. She worked as a language instructor with the Australian Defence Force. She taught professional interpreting and translating at RMIT. And she worked as a NAATI-accredited legal interpreter and translator.

Roona then decided to study law. Shortly after her admission, Roona signed the Bar Roll in 2006.

Much of her work is in Dandenong, which has a population of approximately 152,000 people, more than 60 per cent of whom were born overseas, with 64 per cent of households speaking a language other than English. Refugees from Afghanistan represent the largest refugee community in the area, with more than 2,000 settling in Dandenong over the past decade.

Roona notes that it is hard for members of the Afghani community to access the legal system. "Community violence and corruption are just examples of the types of problems that affect the country's most poor and marginalised people."

Illiteracy, financial barriers, institutional causes and lack of legal aid funding are systemic problems, she says. She will often act pro bono to help Afghani refugees and migrants achieve access to justice.





Roona Nida


PHOTOS COURTESY OF CHAMIK BANDARA (KREATIV AGENCY)

> "Illiteracy, financial barriers, institutional causes and lack of legal aid funding are systemic problems."

Roona refers to a case that involved a newly arrived Afghani mother who almost lost her children as a result of a recommendation by the Department of Health and Human Services (DHHS). She says that DHHS initially intervened after the woman's husband allegedly inflicted family violence. The children had been placed with separate foster families with incompatible cultural backgrounds. Their mother was initially only able to see her children for one-hour stints in the DHHS office. Roona contested the order, and after a long battle the court was satisfied that the family should not be separated. The family were reunited. However, she says that newly arrived mothers are often reluctant to report family violence because they fear that their children will be taken from them.

On another occasion, Roona was approached by an Afghani mother from the south-eastern community whose son was imprisoned for alleged family violence offences. The mother was a pensioner receiving income support from Centrelink and could not afford to pay legal fees. The son was in custody for four months before he was eventually freed on bail, following an appeal to the Supreme Court. There had been multiple hearings in the Dandenong Magistrates' Court before then.

After bail was given, the prosecution decided to run the contest at the Magistrates' Court in Dandenong. On the day of the final hearing, just before it started, the prosecution decided to drop all criminal charges but one. The court found Roona's client guilty of the remaining offence, which did not warrant any term of imprisonment. Were it not for legal intervention, Roona thinks her client would have been in jail for much longer.

About giving back to her community, Roona says:

> From my personal experience I have to say the happiest times in my life were when I helped people who did not give themselves much hope. I feel fulfilled knowing that I made a positive difference and this is a feeling that has never faded.

In 2018, Roona made the important decision to launch barristers' chambers in Dandenong. She decided to name the chambers "United Chambers" because of the values the name represents: cohesiveness, unity and diversity.

# Richter & Dunn portrait unveiling

CAMPBELL THOMSON

Robert and Philip are legends of our Bar.

Many of their greatest battles took place over the other side of William Street. In the film *Master and Commander*, a lieutenant remarks of his Captain, "there's enough of his blood soaked into the deck for the ship to be almost a relative…".

You could swab any Bar table in the Supreme Court and find the DNA of both Richter and Dunn.

As juniors, Michael Rozenes and Philip Dunn acted for co-accused in an armed robbery trial in Court 4. In Court 3, Howard Nathan was hearing a matrimonial cause. The disgruntled husband smuggled a pistol into court and let loose, killing two people. Eventually police tackled the gunman into submission.

Anxious barristers stood on the steps of Owen Dixon Chambers waiting to see if their colleagues had survived. The rumour was that the shooting had taken place in Court 4.

When Michael and Philip emerged unscathed out onto William Street a huge cheer went up.

Philip Dunn QC and Robert Richter QC standing beside their portrait , painted by Martin Tighe

## Paul Holdenson QC

In 1994 Justice Vincent presided over the trial of Lockwood and Avon in the Fourth Court. Lockwood and Avon were two police officers charged with the murder of Gary Abdallah. Abdallah was suspected of having stolen the Commodore left in Walsh Street, South Yarra to lure Constables Steven Tynan and Damian Eyre to their deaths.

Lockwood and Avon arrested Abdallah and took him back to his Drummond Street flat. The Crown case was that they took him there to execute him. The defence case was that they took him back to his flat and, in his bedroom, when Lockwood turned away for a moment, Abdallah produced a .357 Magnum and pointed it at Lockwood. Lockwood believed that he and Avon would be killed and fired six shots from his revolver at Abdallah. He then grabbed Avon's revolver and fired a further shot with it.

Abdallah's firearm turned out to be a replica. The Crown argued that this imitation fire arm was a plant and that experienced criminals like Abdallah don't point imitation firearms at armed police officers.

Jack Winneke QC and Colin Hillman, appeared for the Crown. Richter was for Lockwood and Dunn for Avon.

Dunn called Avon. While leading Avon through his evidence in chief, largely by leading questions, coupled with the phrase, 'what happened next?' Avon gave an account of what happened in Abdallah's flat. Dunn then asked how he felt about it. Avon became quite emotional, as did Dunny, who ever so subtly, removed his glasses, took a handkerchief from his pocket, and wiped a tear from both eyes.

Dunn applied for a Prasad direction. Justice Vincent gave the direction, the jury retired and soon returned with a verdict of not guilty for Avon.

Richter then made his final address. The Fourth Court was packed when Richter brandished Lockwood's police revolver and demonstrated just how quickly the shots could have been fired. The jury later acquitted Lockwood. Winneke then removed his wig, went to the dock, shook Lockwood's hand and wished him good luck.

Paul Holdenson QC, Campbell Thomson and the Hon Michael Rozenes QC

## Campbell Thomson

When introduced to Philip I asked how he was. "I'm absolutely fabulous!", he replied. When told I was scared of heights, he jumped into the floor to ceiling windows of the 27th floor to show I had nothing to worry about.

When junior to Brian Nettlefold in a murder before Bill Kaye in Court Eleven, Phillip spied a rat scuttling across a canopy above the judge. He pointed this out to Brian who loudly said "There's a rat up there!" Justice Kaye took it very personally and dismissed the jury. Brian called in Stephen Charles, then the Bar Chairman, to explain what had happened to the angry Judge. There really was a curious rodent in the court!

We should all follow Philip's RAT theory. You find the Rational Alternative Theory to the prosecution case and there has to be a reasonable doubt.

Behind the theatrical flair and panache of Philip and Robert lie laborious preparation and analysis. When you present Robert with an insoluble problem, he turns it sideways, upside down and inside out to find the solution. He appears a gambler, asking open ended questions in cross-examination but each risk is calculated to the Nth degree.

The speed of the sequence of shots in the Lockwood was crucial. Timing is everything.

In a painting called The Anatomy Lesson of Dr Tulp, Rembrandt painted a surgeon dissecting a cadaver with a group of students. Tulp turns to face the painter. Martin Tighe's portrait captures a similar moment of suspense before Robert's final address.

It is also a meditation on time. The Red Baron is no longer red. Robert and Phillip have seen many prisoners in the dock since Lockwood and Avon.

### Robert Richter QC

This painting gives a sense of the combat at the criminal bar. I timed it at 1.2 seconds to fire off six shots, get Avon's gun and fire the seventh. You've got to have faith in your own reflexes.

The Lockwood trial was a turning point for me. I used to be public enemy number one with the Constabulary. After this trial, Danny Walsh, secretary of the Police Association, came up to me. "Where are your keys?", he said gruffly. I gave him my keys. "Come with us", he said.

They took me down to the Police Association and got me drunk! Then they put me in a car with a motorcycle escort all the way home. After that there was a change in atmosphere. It had to do with the recognition of professionalism. You don't judge the client, you do what you've got to do.

I'm in the middle of a trial which is taking its toll. We live on stress. Some of us die with it and some of us grow bigger. I'm hoping to continue for years to come.

### Philip Dunn QC

Robert and I didn't go to Scotch College or Xavier. We didn't have connections in the law. We'd been educated on Commonwealth Scholarships. We didn't come with a sense of entitlement. We chose to work in the criminal law which was unfashionable.

I knew then that Robert and I would not be judges because we didn't have strong middle names. In the Law Reports you find Gregory Urban Gowans, George Augustus Pape and Clifford Inch Menhennitt. In the lift in the County Court today, I saw the notice for the welcome for Judge Sarah Kingsley Dawes. Some things don't change.

But we and the Bar have changed a lot. The Red Baron is no longer red. He's the White Knight. I've slipped on a kilo or two...

The Bar is a great place and I'll let you in on a little secret: God loves barristers.

Philip Dunn QC, artist Martin Tighe and Robert Richter QC

Robert Richter QC and his granddaughter.

His Honour Judge Paul Grant, Philip Dunn QC and Gill Dunn.

Wendy Harris QC, Barbara Rozenes, the Hon Michael Rozenes QC and Dr Matt Collins QC




Artist In Residence, Bogabilla Central School

# Playing for the inaugural Serviceton trophy at Royal Adelaide, returning empty-handed

CAROLINE PATERSON

When you spend four to five hours on a golf course, you get to know people fairly quickly. You become forced to adopt mindfulness techniques whilst trying not to fixate on their seemingly insane routines or their preferred method of sledging you and the opposition. You learn a lot about an opponent by how they berate themselves after they stuff up a shot. If you add to the mix an interstate trip, a minibus, unfamiliar courses and an inaugural trophy to play for, things get interesting.

A motley crew of 15 Victorian lawyers (including retired Family Court judge Peter Young, current and retired barristers, and solicitors) went to Adelaide over the weekend of 3–6 May 2019 with the primary focus of playing the newly formed South Australian Golfing Lawyers Society for the inaugural Serviceton trophy. This was held on Monday, 6 May at Royal Adelaide Golf Club. The trophy has been named after Serviceton, a border town between the two states on which a railway station was built and paid for equally by Victoria and South Australia during a protracted legal dispute about the exact location of the official border. The town and the railway station are still there.

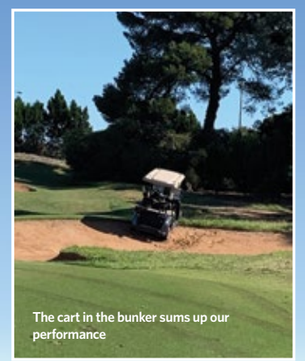
Our bus driver, Dennis Ingram, told of when, as an apprentice professional aged 17 years, he caddied for Jack Nicklaus at the Australian Open in 1965. He was an expressive storyteller who didn't really keep his eyes on the road at all times. I was relieved when we made it to Links Lady Bay in one piece early on the Sunday morning for one of our warm-up games.

During the speeches which came later, no mention was made of Victorians Tony Kenna and Tom Swinburne holding up play after they drove their cart into one of the magnificently manicured bunkers, and how they required reinforcements to tow it out.

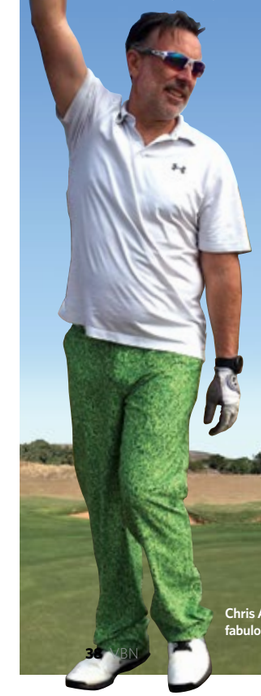
Chris Arnold's pants, on the other hand, were noticed straight away during the course briefing before the start of play. Chris has become notorious for his pants. He has form for wearing shorts covered in glazed donuts to Royal Melbourne and did not disappoint on this trip, wearing pants covered with hundred-dollar bills at The Grange Golf Club on the Saturday; pants digitally printed with grass at Links Lady Bay on the Sunday, and pants covered with some of Roy Lichtenstein's pop art at Royal Adelaide Golf Club. His opponent, Greg Howe, captain of the SA team, commented that he had never seen such outrageous pants at Royal Adelaide, but that they were most welcome.

The parochial South Australians beat us 4-2 in a match play format off the Stableford card. I graciously presented the Serviceton trophy to Greg Howe, following which we all had a wonderful lunch and started planning the rematch, which will be in Victoria next year in May.

> "If you add to the mix an interstate trip, a minibus, unfamiliar courses and an inaugural trophy to play for, things get interesting."



The cart in the bunker sums up our performance



Chris Arnold in his fabulous pants

Links Lady Bay in the morning sun







View of the Melbourne Lawn Bowls Club with players in the distance

The winning team for the Bar and Bench (L-R) Mary McNamee, barrister; Sarah Damon, barrister; Judge Evelyn Bender; Judge Grant Riethmuller; Jason Glass, associate to Judge Bender.

Mary McNamee, captain of the Bar and Bench team, being presented with the Flagstaff Bell

# The Flagstaff Bell

CAROLINE PATERSON

The Family Law Bar Association has worked very hard over the past couple of years to advocate on behalf of our members. However, no submission to the Senate, or dry analysis of yet another proposal for reform of the family law system, can really compete with lawn bowls on a balmy night, a spit roast, and beer tokens.

One hundred and fifty barristers, solicitors, judges and judicial associates from the Family Court and the Federal Circuit Court thoroughly enjoyed the inaugural running of the "Flagstaff Bell"—a lawn bowls tournament between the Bar and Bench and solicitors.

Jason Walker, Victorian solicitor representative on the family law section of the Law Council of Australia, captained the solicitors' team. Barrister Mary McNamee led the team for the Bar and Bench.

As the sister of tennis champion Paul McNamee, Mary has sporting blood running through her veins (and the added bonus of being the only person we could think of with "no known enemies"). She joined forces with (ex-Olympian) Judge Bender and bowls aficionado Judge Riethmuller. Combined with the youthful enthusiasm and beginner's luck of Sarah Damon (barrister) and Jason Glass (judicial associate), Mary led the Bar and Bench to a glorious victory in a sudden death play-off.

The inaugural event was a resounding success and a wonderful way for members of our profession to mingle and get to know each other better in a relaxed setting. The second Flagstaff Bell has already been booked in for next February.

# What does the 'Barrister X' saga mean for us?

NATALIE HICKEY WITH MATT COLLINS

In 2003, 140 members of the Criminal Bar Association descended on Matteo's Restaurant in North Fitzroy for its annual dinner. The *Bar News* report concluded, "In all another great dinner. Thanks to Nicola Gobbo for her tireless work in helping to make it happen".

The last annual Criminal Bar Association dinner that Nicola Gobbo attended, once again held at Matteo's, appears to have been in 2008. She ceased to practise in 2009. A decade later, Nicola Gobbo was described by the Victorian Bar as a person who had committed fundamental and appalling breaches of her ethical obligations that were "unprecedented in the 135-year history of the Victorian Bar".

The Royal Commission into the Management of Informants is currently examining Nicola Gobbo's conduct as a police informer, and its implications for her former clients and for the justice system. For members of the Victorian Bar, this is an opportunity to reflect on the implications for us and what we can do to ensure this can never happen again.

There were two media releases issued by the Victorian Bar concerning Nicola Gobbo's conduct. The first was issued immediately after the High Court decision was handed down in December 2018 (*AB v CD; EF v CD* [2018] HCA 58) which revealed that 'EF' (her identity then suppressed) was a police informer who had acted as counsel for Tony Mokbel and some of his criminal associates.

This media release referred to the strict code of ethics to which Victoria's barristers are bound and the fact that the Victorian Bar holds its members to these standards.

The second media release, issued in March 2019, was able to refer to Nicola Gobbo by name. In this context, Victorian Bar President, Dr Matt Collins QC, stated:

> Nicola Gobbo's conduct was egregious. All Victorian barristers are bound by a strict code of ethics under which their paramount obligation is to the administration of justice, and all are subject to a robust and rigorous disciplinary framework that applies equally to all, without fear or favour.

Matt Collins, with his President's hat on, helpfully provides insights into the considerations that motivated the Bar Council to act in the way that it did.

In relation to the first media release, Matt says, "we knew in general terms what was going on but the effect of the suppression orders was that we did not have precise details and were constrained from speaking either publicly or to members". When the High Court delivered its judgment on 5 November 2018, certain matters entered the public domain for the first time, including that IBAC had conducted an investigation that concluded that Nicola Gobbo had breached her professional obligations in a way which potentially undermined her clients' defence to criminal charges. As the High Court put it (at [10]):

> EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court… As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.

With those findings, Matt says, the Bar entered uncharted territory. The conduct—debasing the very premises of the criminal justice system—went to the core of being a trusted independent adviser. There could be no equivocation as a result. As Matt Collins puts it, "If conduct of that kind could be established against any of our members, then that person was not fit to be a barrister". In other words, the nature of the conduct is disqualifying, no matter how useful one's other contributions might be.

As for the tone, the litmus test was what the High Court had concluded. Matt observes that, "anything we said would pale into insignificance given what the High Court had said".

Matt explains the considerations that were factored into the Bar's public relations strategy.

"The conduct—debasing the very premises of the criminal justice system—went to the core of being a trusted independent adviser."

First, he observes that the offending conduct "goes to the heart of being a barrister".

Secondly, he refers to the partly self-regulating nature of the Bar, including over its own disciplinary processes. For the public to have confidence in our ability to preside over our own disciplinary processes, we must have the strength to administer them dispassionately and objectively, he says.

Thirdly, appreciative that there is potentially a pastoral care component, he notes that the Bar has not had access to Nicola Gobbo. For a considerable period of time, the Bar was not even entitled to know her identity. He says that she has been "completely outside the reach of the Bar's collegiate and support structures for almost a decade". In any event, he says:

> Our regulatory function has as its objective the protection of the public interest and the interests of consumers of the legal services provided by our members. Pastoral care is vital, but it must not take priority over the public interest.

Matt Collins also refers to the risk of contagion, particularly when Nicola Gobbo's identity was suppressed. Our community includes many female barristers with a criminal law practice, who act for defendants. Stories had come to Matt's ears suggesting that a number of junior members were doing it tough. He heard of barristers being asked by their clients, "Are you ratting on me you c…?" or "Are you Lawyer X?". Whilst direct evidence was scant, which Matt partly attributes to our desire not to display vulnerability, there was sufficient evidence for him to be concerned that clients and the broader community thought, or might think, that Ms Gobbo's conduct was widespread among barristers or tolerated by the Victorian Bar.

Accordingly, it was vital that the public be assured that barristers are trusted advisers who keep their client's secrets, and who were appalled by the revelations of what had occurred. It was equally vital that barristers be assured, particularly those under the critical gaze of their clients, that their association stood up for them.

Matt says that while different views about the Bar's response have been expressed, "overwhelmingly, the reaction from members has been one of support for the strong stance we have taken."

There has plainly been significant time occupying the minds of all those involved in managing the messaging on this. Matt Collins says that nothing has been done without a huge amount of thought, consideration and external advice. He refers to the weight of responsibility felt by Bar Council and the Executive to protect the Bar. At a strategy day in February 2019, staff and senior members of Bar Council were canvassed for their views. This was a consensus-driven approach.

Matt also notes that the Bar is in a position to speak against the popular narrative that "the ends justify the means". The Bar can and, he feels, should explain publicly why the sanctity of privilege is important, and the reasons for strict adherence to the 'rules of the game'.

That the way to proceed was on the front foot appears never to have been in doubt. As Matt Collins concludes:

> This is a serious challenge to the reputation of the Bar as an institution and to its 2100 members. In crises, there are opportunities as well. This has presented us with an opportunity to undertake a comprehensive review of our processes in relation to the handling of disclosures, complaints and investigations. Change may be necessary and we think all members should, and will, embrace it.

# The mental health benefits and burdens of keeping other people's secrets

NATALIE HICKEY

At any given moment the average person has about 13 secrets of their own. New research has revealed that people also keep an average of almost 17 secrets for others at any one time. For lawyers, our obligation to retain client confidentiality means that this number may be much higher.

Why do we keep secrets? To whom do we tell our secrets? What happens when we reveal a secret? To the last question, a facetious lawyer's response might be "a royal commission". Psychologists, however, are taking a different slant, leading to some fascinating research results.

It appears that keeping others' secrets can have mixed impacts on mental health. The upside may lie in a sense of intimacy with the confider. The downside is that the confidant may feel a sense of burden. Navigating this seeming contradiction is plainly important for people such as barristers, who must keep people's secrets as part of their job.

Dr Katie Greenaway, a lecturer and research fellow in social psychology at the University of Melbourne, has just completed a landmark study on the effect of keeping others' secrets with Dr Michael Slepian from Columbia Business School (*Journal of Experimental Social Psychology 78* (2018) 220-232). Currently funded by an award granted by the Australian Research Council to outstanding early career scholars, Katie's work is also attracting media interest.

## Keeping our own secrets can be bad for us

Before this most recent research project, existing knowledge in the field was mainly focussed on the impact of keeping one's *own* secrets. And the news there is not good. Personal secrecy has been associated with lower well-being. Katie calls it, "being alone in your head". She says that this can stymie social bonds because it means we are not interacting. We can become inclined to conceal. We can ruminate. She refers to rumination as "the worst". It is bad for us, she says, and can lead to bad outcomes.

## Sharing personal information with others can make us feel good

By contrast, sharing things about ourselves can make us feel good. When people disclose personal information about themselves, such as hobbies, where they grew up, and information about common friends, this can increase familiarity. It means we tend to like that person more. We disclose more to them. In turn, this increases feelings of intimacy and closeness.

## Being part of the circle of trust may be a mixed blessing

What happens, though, when strings are attached to the disclosure of personal information? Given that the subject intends the secrecy of the information to be maintained, the confidant must carry the secret too. In such a case, as lawyers know only too well, to be a confidant also involves responsibility.

To examine the effect on the holders of secrets, Katie Greenaway and Michael Slepian conducted three studies with more than 600 participants (approximately 200 in each study) holding more than 10,000 secrets between them. Many of those secrets were of a very intimate nature, such as infidelity, sexual orientation, a prior abortion, lack of sex or sexual addiction. Other types of secrets included finances, illegal conduct, theft, trauma, or a violation of trust.

The researchers found that people can find themselves burdened when they hold others' secrets, through both spontaneously thinking about the secret and having to actively conceal it on the other's behalf. But independently and simultaneously, being confided in can give a relational boost, increasing feelings of intimacy.

## What can we do to ease the burden of holding confidential information?

Katie, Michael, and other researchers have secured funding for more detailed research to understand how we can help those who feel burdened by secrecy. Pending the outcome of that research, Katie's views are cautiously expressed, drawing on existing strategies intended to correct "maladaptive thoughts". She refers to concepts which are foreign land for many lawyers, such as "emotional regulation strategies" and "cognitive reappraisal".

For the confidant, a level of detachment may help. This runs counter to the notion that we should not suppress our emotions. In the spirit of information is power, participants in one of the studies conducted by Katie and Michael were told to think of "mind wandering" (which is common when keeping a secret) as the mind's attempt





to work through unsolved problems, which can lead people to become fixated on a problem which has no solution. Framing mind wandering in this way seemed to have a mitigating effect on the reported burden felt by participants in secret-keeping.

It may also help to think about the information which constitutes the secret differently. To reduce the significance of the content, Katie suggests recasting ruminations to something like, "Oh wow, that person really trusts me."

Research also suggests that it may help for confidants literally to unburden themselves by sharing the information with another person. For a person who receives social support from confiding in others, Katie suggests that this can lead to healthier ways to think about the secret. The mind may wander to it less often, leading to improved well-being.

> "Katie suggests venting about *feelings* rather than the content. In other words, she recommends venting, but "without going into the why"."

However, for barristers, we are limited by our professional obligations in what we can confide to others about our matters. Asked about techniques to help unburden without disclosing content, Katie suggests venting about *feelings* rather than the content. In other words, she recommends venting, but "without going into the why".

She further suggests "emotional differentiation" when doing this. The more specific we are in articulating our emotions, the more constructive the result. After a toxic client experience, one might initially think, "I feel really bad". But analysed further, a more specific response might be, "I'm anxious but I'm not outraged".

When asked for other suggestions that might help barristers maintain client confidentiality without psychological strain, Katie suggests that our collective ideals are a good start, referring to concepts such as, "we should or must do this as a profession". In this context, she recommends that we "focus on the *best* of what we have to offer". Having a positive approach appears to be the key.

BARRISTER

# A barrister's obligations to keep client information confidential

ROISIN ANNESLEY, CHAIR ETHICS COMMITTEE

A barrister's obligations in relation to client confidentiality are informed by the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (the Rules). The Rules came into effect on 1 July 2015.

The relationship between barrister and client is a fiduciary one and the obligation to keep confidential information of the client imparted in the course of that relationship arises both as a result of that fiduciary relationship and as an implied term of the retainer.[1] The duty to keep client information confidential is enshrined in the Rules.[2] The duty is complementary to the principle of legal professional privilege, although is generally regarded as being wider. It includes any information which is privileged, private, personal and/or not properly in the public domain. The duty is ongoing and extends after formal termination of the relationship.[3]

A barrister must keep the information confidential unless the client has consented to its use or disclosure.[4] If a barrister becomes aware they possess information confidential to a person other than their client, which would be helpful to the client's case, they must return the brief (other than a brief to appear) unless the party to the confidential information gives consent for the barrister to use the information.[5]

There are some limited exceptions to the duty to keep information confidential. They are:

- Consent is given by the person to whom the duty is owed to disclose the information.
- Information is later obtained by the barrister from another person who does not owe any obligation of confidentiality to the client, provided the information is not given confidentially to the barrister.[6]
- Information is disclosed to the barrister's instructing solicitors in the matter, to a member of the barrister's staff, to a reader or for the purposes of devilling.[7]

Where a client threatens the safety of any person and the barrister believes on reasonable grounds that there is a risk to any person's safety, the barrister may advise the police or other appropriate authority.[8]

A barrister who is shown a brief as a reader, in the course of a devilling arrangement or in circumstances where a colleague has sought advice on a strategic or


legal issue, is bound by the same duties of confidentiality that bind the barrister who is retained by the client and who owes the obligation to keep information confidential.[9] A barrister who receives confidential information in such circumstances cannot subsequently accept an opposing brief without the consent of the client to whom the obligation is owed.[10]

The collegiate atmosphere of the Victorian Bar lends itself to discussion of cases and clients with fellow barristers. Such discussion is not to be discouraged. Barristers should, however, be aware that the obligation to keep information of the client confidential exists and extends to these discussions. Barristers should be careful when discussing their clients with other barristers not briefed in the matter, to avoid any inadvertent or intentional disclosure of confidential information.

1. *Ansell Rubber v Allied Rubber Industries* [1967] VR 37 at 40
2. Rules 114 and 115
3. *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065, *Halsbury's Laws of Australia* at [13,004]
4. Rule 115
5. Rule 118
6. Rule 114(a)
7. Rule 113
8. Rule 82
9. Rule 117
10. Rule 101(a)

George and Colin Golvan and their mother Helen at the ceremony for George taking silk in 1991.

# Where we come from

COLIN GOLVAN QC

The Bar is obviously a place of privilege and opportunity. We practise our craft with considerable independence, and with special access to the inner workings of justice. It is at the opposite corner of experience to the subjugated circumstances of the refugee.

My parents arrived in Australia in 1951 as stateless Jewish refugees from Poland. Opportunity fell the way of their sons, who both ended up at the Bar.

When I came to the Bar in 1988, it had a proud legacy of Jewish membership—not least Isaac Isaacs, Morris Ashkenazy and Bill Kaye, then a senior Supreme Court judge. In the contemporary period of leading counsel, Alan Goldberg, Ron Merkel, Ray Finkelstein, Ron Castan, Jeff Sher, Mark Weinberg and Stephen Kaye (son of Bill) come to mind. The first three just mentioned took judicial appointments at the Federal Court, while Mark Weinberg took appointments first at the Federal and then at the Supreme Court. Stephen Kaye also took an appointment at the Supreme Court. Ron Castan had a celebrated career as the instigator of, and lead counsel in, the *Mabo* case. Jeff Sher was a model of the fearless courtroom advocate. Jewish advocates had a natural and welcoming home at the Victorian Bar. They were nurtured in the practice of learning and argument from the earliest age by demanding forebears who, in a number of cases, knew all about loss and prejudice.

This picture did not emerge without some hardship. The Irish Catholic and Jewish lineage at the Bar can well be seen as a response to the problems of prejudice in firms of solicitors in their day—fortunately, a day that to my reckoning is well behind us. The meritocratic nature of the Bar meant that it held obvious attractions for those improperly excluded from opportunities in practice as solicitors. That experience helps to understand the emergence of Jewish barristers in the period since the Second World War.

Speaking for myself, if I had to say what it was like as a young (or older) Jewish barrister at the Bar, I would say it was fine. Have I experienced prejudice or discrimination? No. To the contrary, I have experienced only courtesy and understanding from courts and opponents in, for example, managing clashes with important Jewish festivals—like adjourning for Yom Kippur. Have I heard about other Jewish barristers facing discrimination? No. Am I being naïve? I don't think so (and certainly hope not!) with respect to Jewish barristers, but I wouldn't be quite as sanguine about discrimination against other minority groups.

The emergence of barristers from non-establishment—including immigrant—backgrounds directs attention to the predicament of groups that are still establishing their presence at the Bar, for instance, barristers of Chinese ethnic backgrounds, with two such members of our Bar taking silk in 2018. It is extraordinary to think that this recognition has only just occurred.

In turn, we are now seeing the emergence of barristers from Muslim backgrounds and the first barrister from a black African background. The wheels of diversification turn slowly as the opportunity of the Bar becomes apparent and accessible to the latest bunch of the bright and able pushing at the doors of privilege and opportunity.

The position of Indigenous barristers at our Bar is especially worthy of consideration. Mick Dodson practised as a barrister for a short period in the late 1980s. He tells the story of how he could not get work. Due to the considerable efforts of the Bar, starting with Stephen Kaye, the Bar commenced a mentoring program for Indigenous law students in the mid-2000s and has for some years had a number of Indigenous barristers. There is still a long way to go to achieve a proper balance of Indigenous members amongst our ranks, but progress has been made.

> "The wheels of diversification turn slowly as the opportunity of the Bar becomes apparent and accessible to the latest bunch of the bright and able pushing at the doors of privilege and opportunity."

One final thought: does ethnic and racial diversity at the Bar matter, including proper representation of Indigenous members? In a city as diverse and integrated as Melbourne, and with a Bar concerned about presenting a representative face to the community, in my view, the answer is obvious.

## WHERE WE COME FROM

Many of our barristers are from culturally and linguistically diverse backgrounds. Here we learn what called them to the Bar, challenges faced and overcome and, above all else, the importance of family.

### Shanta Martin

It is the second day of the Bar readers' course in September 2018. The presenter states: "Stand up if you have wanted to be a lawyer since you were, let's say, 12 years old." In a room full of 42 bemused strangers, two lonely readers stand up and look around the room. One of them is Shanta Martin.

Shanta's mother was born in Malaysia and is of Indian descent. She travelled to Australia in the 1960s as part of a Commonwealth training program for nurses. Whilst studying, she met Shanta's father at a party in Melbourne. The rest, as they say, is history.

Growing up, Shanta said that she was conscious she was "different" but notes that she was a "fairly robust and sporty child". "I was a keen sportswoman and a school leader. Being different didn't hold me back."

As we already know, Shanta has wanted to be a lawyer since the age of 12. "Law was always an interest for me and I knew what I needed to do from an early age", she says. Shanta was particularly inspired by family friends who were in the law and also by the fact that "my mother was often dismissed and not heard. I could see it. I knew it wasn't right."

She forged a career with a deep and abiding commitment to human rights. She started her career at Mallesons Stephen Jaques in Melbourne (now King & Wood Mallesons). She then left to work in South America with Oxfam. She later worked in London with Amnesty International, before finally returning to private practice in London with Leigh Day (a firm that practises in human rights law).

In three short years she was elevated to the partnership, running many prominent cases, including the first modern slavery case in the High Court of England and Wales.

Shanta says that she was excited to return home late last year to pursue her career, as it offers a unique opportunity to work in both social justice and commercial contexts. Of diversity at the Bar, Shanta notes that whilst "there is a real focus on the need for diversity, which is heartening, we still have a long way to go."

## Minal Vohra SC

Minal Vohra was appointed senior counsel in 2017, following a distinguished career as a junior, practising principally in family law.

Minal is originally from Bombay (now known as Mumbai) in India. She arrived in Australia in 1969 when she was just two and a half years old. The White Australia Policy was still in force but her family was permitted to emigrate as her father had been appointed as a cardiologist at the Royal Melbourne Hospital (a role he fulfilled for precisely 50 years – retiring from the RMH earlier this year).

"I don't remember much from my early days in Melbourne," she says, "but I do recall arriving in Melbourne in July … it was both freezing and grey."

She left behind a large and loving extended family in India. There were "very few Indians in Melbourne at the time, literally, a handful of families. I know for my parents, and particularly my mother, it was a very isolating and depressing time. Australia has changed immensely since. It is still surprising to me how many Indians live here now."

Reflecting on her own experiences she can understand the "feeling of being different and on the outside looking in. That is something many clients feel when confronted with the legal system and legal language in court that they do not understand."

However, hailing from a culturally diverse background has proven to be an asset in her practice. She says, "I can instinctively understand the extended family system and interweaving of money and assets that so many immigrant communities still do. I hope my background also makes me more empathetic as counsel."

She also readily acknowledges that being raised in Australia has been an advantage. "I grew up here, which helps. I speak with an Australian accent, I went to school and university here, so I have those networks and friends. I have always practised here. I imagine professional life is harder for those who migrate here later in their careers."

WHERE WE COME FROM

## Fatmir Badali

Fatmir Badali was a partner at Gadens for several years before being called to the Bar in 2017.

Fatmir was born at the old Preston and Northcote Community Hospital in Bell Street, Preston, in February 1974. His parents were born in the former Yugoslavia. His mother is from a village called "Plav" in Montenegro and his father is from a village called "Zhur" in Kosovo. Fatmir's family are ethnic Albanian Muslims.

His father migrated first, arriving in 1969 and settling in Myrtleford, where he worked on tobacco farms before getting factory work in Melbourne's northern suburbs. His mother migrated in July 1973, literally weeks after meeting his father and marrying him. When his parents arrived, they had no family in Australia.

Fatmir says that, "the story of migrating en masse to a foreign land and making a go of it, whilst not uncommon, still leaves me amazed when I reflect on it". He continues:

> I can't say that I grew up suffering any prejudice that was an impediment to me reaching my potential personally or professionally. Whilst I grew up in a fairly rough area (the west wall of my high school was the east wall of Pentridge Prison), and the social divisions at that time were along the lines of being branded a 'wog' or Aussie, I was blessed with incredibly supportive parents who pushed hard and wanted to see me and my younger sister succeed.
>
> I have the odd memory of my parents being subjected to some racism whilst I was young. I have one memory of my Mum being told to stop speaking 'wog' whilst she was speaking to me in Coles. That idiocy largely died away in the late 80s and 90s, though has unfortunately returned in the form of very public and open anti-immigration and anti-Muslim rhetoric. In a lot of ways, it feels a lot more spiteful today than I recall whilst growing up.

Fatmir says that whilst growing up, his parents were very big on education and his mother wanted him and his sister to pursue law. Fatmir has grown to love law:

> Professionally, I have never suffered prejudice as a result of being non-Anglo or Muslim. It's actually been quite the opposite, having started my career at an incredible firm of very talented, interesting and highly intelligent people and most recently coming to a collegiate Bar filled with amazing and supportive people.
>
> I've had judicial officers offer me and a client space to pray in a courtroom. I've had a silk generously offer me use of a room to pray in during witness conferences. I've had judges very kindly and generously adjust the lunch recess on a Friday to allow me to attend the Friday prayer, and I've broken my fast with a judicial registrar and her associate when a judicial resolution conference went late into the evening last Ramadan. I even had a couple of good friends at the Bar reach out after what happened in Christchurch. I feel incredibly fortunate to be part of such an amazing and welcoming Bar.

In relation to diversity at the Bar, Fatmir says, "When I started out, I could count on one hand the number of Muslim lawyers in the profession. It's great to see that number growing and the considerable pool of talent out there. Hopefully, a few more will make the move to the Bar."

## Premala Thiagarajan

Premala Thiagarajan was born in London to Tamil-speaking parents. Premala's mother is originally from Malaysia and her father is from South India.

Her family experienced racially motivated violence whilst in London (in an unhappy coincidence, her family happened to live near the National Front headquarters in the South East of the city). Her parents eventually opted to emigrate to Australia in 1987 in search of better economic and educational opportunities for their two daughters.

In Australia, Premala's family first settled in the country town of Yarrawonga, later moving to Melbourne. Both of Premala's parents are fluent in Tamil and whilst she grew up in a bilingual home, she understands but does not speak her parents' mother tongue.

Premala says that unlike the UK, Australia in 1987 did not have the same historical ties with India:

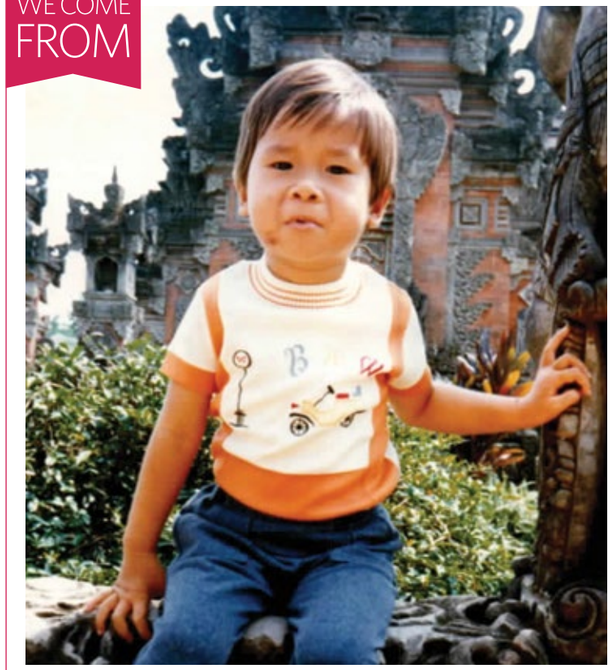
> In workplaces and schools, my sense was that we were understood to be from "somewhere else", but without there being much understanding or curiosity about what that place was, or the various steps in the journey that might have brought us to Australia. Obviously much has changed since then, and my experience now is that people are much more interested in understanding the complex stories which make up migrant experiences.

After attending Monash Law School, Premala secured articles at Freehills (now Herbert Smith Freehills), leaving in 2004 for Oxford and then onto a litigation practice at Clifford Chance in London. In 2012 she was called to the Victorian Bar. Premala's decision to become a lawyer (and later, a barrister) stems from her parents' passion for education:

> I think it's fair to say that my background and their sacrifice and dedication to my education helped sow the seeds and provide opportunities for me to become a lawyer. There's also no doubt that my mother was very influential in instilling the idea that my sister and I were to be educated and independent—and be motivated to work hard to that end. I was fortunate to grow up in an educated house with strong views expressed about politics and social issues—so the practice of thinking and arguing was, I suppose, ingrained from a young age.

On the question of diversity at the Bar, Premala says that on a handful of occasions she has experienced challenges because of perceptions about her cultural background. She says:

> There's a tendency towards self-replication in the professions, which is no doubt a complex phenomenon on a broad scale. But it has a simple solution at the personal level, which is to universally suspend assumptions and, instead, get to know one's colleagues as people. I have been incredibly fortunate to have met and worked with some of the most wonderful leaders and colleagues of the Victorian Bar, who are interested in me as a person and for what I can bring as a barrister. That's one area in which the Bar—because of the very flexible way we can work with one another—offers up a much richer range of opportunities to get to know each other than might exist in other working environments. The challenge is to use that flexibility in a way which opens opportunities for people of culturally diverse backgrounds, rather than in a way which excludes them.



Top: 1978 Jakarta, Cam, 3 years old.
Above: 1978 Jakarta, Cam, in the front, with his siblings, Dinh, Jardin and Huy.

## Cam Truong QC

It was a telegram that changed the course of three-year-old Cam Truong's life.

Cam was born in Vietnam just before the fall of Saigon, but his family is originally from Guangdong Province in southern China. His family (along with several others) fled by boat in 1978. Three times his family tried to make the treacherous journey across the Timor Sea from Indonesia in a fishing trawler. On each occasion, bad weather and large waves forced them to turn back.

Stranded in Jakarta, and with growing concern for his family's well-being, Cam's father (the only English-speaking refugee amongst the group they were travelling with) wrote a telegram to the Australian consulate in Jakarta, pleading for help. Fortunately, the Fraser Government agreed to accept the stranded refugees and fly them to Australia (including Cam and his family).

Cam, his parents, two sisters and his brother eventually settled in the outer eastern suburb of Ringwood. He recalls they were the first Chinese family in the area and were even featured in the local paper at the time.

We could have gone to a more culturally diverse suburb but my dad wanted us to integrate. Looking different, people are obviously going to see you differently. We were different, so we experienced some prejudice, mostly initially, but also formed strong friendships. It taught me to have some backbone as well as strength and resilience.

The decision to study law can also be traced back to his youth, those experiences instilling in him a great appreciation for the importance of equality and fairness. It was during work experience in his formative years that he saw what solicitors and barristers did.

> I said to myself, I think I can do that. To me, the job of a barrister looked immensely satisfying.

After excelling at his studies, Cam became a solicitor at a leading national firm, Corrs Chambers Westgarth. However, even though this was an impressive achievement in its own right, when Cam signed the Bar Roll, he found that he had to work hard to convince solicitors that he was a safe pair of hands and worth briefing.

I was non-white, and not from a private school. I had to prove myself. Also, back then, there were few other Chinese barristers at the Bar besides William Lye. The legal industry back then was perhaps more cautious. Over time, I received briefs from large and small firms and government agencies. I was also fortunate to receive referrals from senior and junior counsel.

Now a commercial silk, Cam acknowledges those formative experiences have shaped who he is today: "I didn't appreciate it at the time, but I appreciate it now."



Above Left: William Lye, aged 16 or 17,
Above Right: William Lye (second row, seated, first from the left), softball, under 16/17s.
Right: (from left to right) William Lye, his wife Cheri Ong, his sister Esther Lye, and his parents, Shirley Lye and Tower Lye.
Far right: Cheri Ong (wife).

## William Lye OAM QC

William Lye was born and spent his formative years living in Penang. At age 6 his parents moved to Kuala Lumpur. William recalls that in his youth:

> At home, we would speak a combination of the English language, the Hokkien and Cantonese dialects. While at school, it would be a mixture of English, Bahasa Melayu, and Cantonese. I also grew up listening to the Hindi language being spoken amongst my Indian friends.

William's late father was an educator. It was his experience of studying in the UK that persuaded him to send William and his sister abroad for part of their education. William arrived in Melbourne as a fresh faced 18-year-old, an experience he remembers well as it was his first time on a plane. His sister was studying in Adelaide and he didn't know a soul in Melbourne.

> I was pretty much on my own and had to make new friends. I also had to find work to support myself. I worked part-time in a restaurant and as a cleaner; and in the summer holidays did manual labour either in the strawberry farms or in a factory making helmets for bicycles.

He says it was his mother's influence (she came from a family of entrepreneurs) that stood him in good stead:

> She was good at identifying, pitching for and creating business opportunities. She was always willing to venture out to try new things and had great resilience in the face of failures and adversity.

As a third-generation Malaysian born of Chinese descendent, William says his cultural background has certainly enriched his practice as a barrister but has also brought challenges:

> The challenges I have faced range from getting the right type of work to having the right type of support in one's career development and progression. It is not enough to just have mentors, but it is important to have the right mentors: people who will believe in you and who will act as a champion or sponsor.
>
> That said, I bring a different perspective when looking at a legal problem to find the answers and deliver a solution. I have found that there is definitely greater cultural intelligence that comes into play when the legal team tackling the problem is truly diverse.

Whilst his father had the foresight to send him to Australia (despite knowing that he might never return home) William credits his mother for encouraging him never to give up on the things he believed in:

> When I signed the Victorian Bar Roll on 26 May 1988, I did not know of any other barristers of Chinese background at the Victorian Bar or at any other Bar Associations in Australia.
>
> There is a saying "You cannot be what you cannot see." When there are role models, people who break through barriers, that inspires others to follow their dreams because they know that with commitment, determination and persistence, they will also make it.

*Vignettes compiled by Veronica Holt and Haroon Hassan*

American legal writing guru James Raymond with koala.


Jim Raymond with the welcome committee on a legal writing tour of Botswana.


Jim Raymond teaching legal writing to members of our Bar with the assistance of the Hon Peter Heerey AM QC



# Delusions of certitude

## An interview with Dr James Raymond

JUSTIN WHEELAHAN

Jim Raymond was a professor of writing and rhetoric for about 28 years at the University of Alabama. Early on in that career, someone called him from out of the blue, and asked him if he would teach appellate judges from different American states.

"I would be happy to do this," Jim responded, "but I have never read a judgment in my life." The person on the other end said "That's great! We want someone who is uncontaminated by the language of the law." Jim replied, "If ignorance is the qualification for this job, I'm your man." It was thought judges were more likely to listen to an academic talk about writing than a judge. Since then, the job has taken him to 35 countries to teach the practical aspects of legal writing. In February, Jim conducted a workshop with Victorian barristers.

Back in the days when Jim began teaching judges, the plain English movement was in vogue. The notion was that if you just got the grammar right, and avoided Latin and the passive voice—then all of a sudden, legal prose would be clear.

Jim realised pretty soon that style was not the main problem. It was poor structure and swaths of irrelevant material. So he developed a method for identifying the relevant issues early on and using them as a pruning device, like Occam's razor. "Eliminate anything that does not pertain to at least one of the issues," Jim advised. "If nothing turns on it, get rid of it."

> "Use plain English, as if you were talking to a non-lawyer neighbour over the back fence."

Jim is a big fan of spilling the beans on the first page. "In the first paragraph, tell the story from which the issues arise. Use plain English, as if you were talking to a non-lawyer neighbour over the back fence. Don't begin with pages of citations that no one needs at that point, or procedural history that has no relevance to the issues currently being decided." As Jim's friend Peter Heerey said during the workshop, "The first page is prime real estate. Don't put a hot dog stand on it."

After the story, list the issues in the order in which you intend to discuss them. This provides a roadmap for what follows, particularly if the issues are then used as headings, making the submission as a whole both "readable", and "raidable."

He described legal logic as "soft beneath the hard surface". He borrowed a metaphor from a US Federal Judge, Richard Posner, who called the logic of jurisprudence a "veneer" concealing "the real motives", which Posner described as a "'grab bag' including anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience', intuition, and induction."

Jim also cited the distinguished jurist, Albee Sachs, formerly a member of the Supreme Constitutional Court of South Africa. In *A Strange Alchemy of Life and Law*, Sachs wrote that "every judgement I write is a lie" because of the discrepancy between the calm and apparently ordered way a judgment reads, and the "intense and troubled jumping backwards and forwards that has actually taken place while it is being written."

"Writing is not just a means of communication," Jim said. "It is a technology for seeing what you think, and then determining whether your thinking makes any sense."

*VBN* asked Jim a few questions about what he has been thinking lately. The title of the paper he is currently working on, "From Pragmatism to Existentialism: Logic, Language, Science, and Their Limits in Law", gives a clue.

Jim says that there is a universal craving for certitude. But because the language of the law is rotten with ambiguity and its logic is, well, "mushy", legal judgments cannot always be as precise and irrefutable as equations in pure mathematics. Still, judges and lawyers have a social responsibility to make it seem that way.

Most of us have read our arguments being described as "wrong" or "fundamentally misconceived" by our opponents, or by judges. Jim says, "It is a dangerous intellectual disease—delusions of certitude."

So next time your opponents describe your submissions as "plainly wrong, atextual, and demonstrating an impoverished understanding of the law…", don't take it so hard. They have a right to delusions of their own.

PHOTOS COURTESY OF JAMES RAYMOND AND PETER BONGIORNO

# Disruption and innovation in the family law space

TALYA FAIGENBAUM* & ANNETTE CHARAK

## Growing access to justice gap

Separation and family breakdown give rise to many demands and stresses for Australian families. Changes in our economic climate and social fabric have made these pressures increasingly complex and difficult to resolve, often overlapping with issues of family violence, mental illness, drug and alcohol abuse, financial insecurity and housing uncertainty.

Changing family structures have also expanded the range of people who may be affected by family breakdowns. Increasingly grandparents, same-sex families, blended-families, inter-generational families and other related care providers are becoming involved in family law disputes.

This rising demand for family law services has driven legal costs upwards and placed significant pressure on the community justice sector. As a result, a serious and significant access to justice gap has emerged. Those who face the most severe financial disadvantage can access legal support through state-based legal aid schemes. Wealthier individuals are able to engage private legal representation. However, there is a sizeable and growing group of people in the middle, who struggle to obtain the legal services they need.

Although there is substantial diversity within this group, legal aid funding cutbacks have meant that more and more families from disadvantaged or vulnerable communities with complex needs and high-risk issues are being driven into this 'gap' group. Community legal centres play an integral role in assisting these families; however, the financial and resourcing pressures on community legal centres mean that many are unable to access legal assistance.

Similarly, those in the gap group may be screened out of accessing family dispute resolution in government-funded mediation centres because they do not meet the stringent criteria. As a result, more matters reach the Family Court and Federal Circuit Court that could potentially be resolved without litigation. In some matters that reach trial, one or both parties are self-represented, making the just, timely, and cost-effective resolution of the dispute more challenging.

## Could legal innovation provide some relief?

Disruption and new technologies are transforming the way business is done, including legal business. Features like e-discovery, document automation and fixed fee billing are becoming a natural part of commercial law; however, family law lags far behind. The College of Law wants this to change. Its Centre for Legal Innovation, an innovation-focused think tank established in 2016, aims to support legal professionals as they navigate the evolving legal landscape. One of the centre's current projects is looking at ways that disruption and new technologies can be harnessed to achieve greater access to justice in family law.

The project is only in the early research phase, but one idea being bounced around is the establishment of 'mediation clinics', to be conducted at participating community legal centres. The clinics would service those clients that cannot afford private mediation but have been excluded from accessing government-funded family dispute resolution services. The mediations could be facilitated by family law barristers, possibly on a modest, fixed-fee basis. In some circumstances, it may be possible to conduct the mediations using online 'meeting rooms', like Zoom, Webex or Legaler.

Integral to the project is the exploration and application of emerging legal technologies. The disruptive effect of the 'gig-economy' on traditional business models presents exciting possibilities to make it easier to select, access and engage with barristers and mediators.

## Family law future forecasting

An increased use of mediation would tie in well with the findings of the Australian Law Reform Commission, which released its final report in April 2019, following an extensive review of the family law system. The ALRC report comments that "a policy shift to support greater use of non court-based mechanisms in order to support families to use a lower-cost, lower-conflict avenue for property and financial matters is generally thought to be desirable". The report has made several recommendations for enhancing pre-litigation family dispute resolution, particularly in non-complex property matters. This suggests that funding and additional resources may be forthcoming in the future to expand alternative low-cost models.

It is well recognised that pro bono or 'low bono' legal assistance provides essential support to those unable to pay full fees for legal or mediation services. While the central purpose of these systems is to increase access to justice by addressing unmet legal needs, there are tangible flow-on benefits to the legal sector as well. Low bono briefs give counsel the opportunity to develop new referral pathways and professional networks, to build relationships with solicitors across different sectors and to gain exposure to a diverse range of clients and matters within and across a practice area. For mediators, a community-focused mediation model would expand the options for completion of mandatory accreditation hours.

With court intervention seen as the last resort, in most cases, for disputing families, innovation in pre-litigation family dispute resolution is to be watched with interest: seeking a less adversarial resolution of property disputes—and possibly also parenting disputes—may create a whole new world of opportunities for barristers.

** Talya Faigenbaum is a family lawyer and a research fellow at the Centre for Legal Innovation*

BAR Lore

# The more things change, the more they stay the same

## Leonard Stretton, Gregory Gowans and the 1939 Bushfires Royal Commission. JACK RUSH

In 2009 during the Bushfires Royal Commission I was asked to deliver a paper on Judge Stretton. The manuscripts of the royal commission into the catastrophic bushfires of 1939 had just been discovered, I think in the archives of the Department of Forestry at Melbourne University. Stretton was the royal commissioner. This task led me to research in more detail the life of Leonard Stretton and his counsel assisting, Gregory Gowans. It was a fascinating exercise. This brief dalliance into Bar history demonstrated a huge contrast with the manner in which contemporary inquiries are conducted. It also provided an insight into the lives of two remarkable members of this Bar, and a picture of a very different Australia.

It should not be thought that the recent profusion in the appointment of royal commissions is unusual. There were numerous royal commissions in the 1930s and 1940s. But these royal commissions ran for weeks rather than years and by the standards of today, were under resourced. Yet it is apparent the commissioners inevitably considered the central issues required by the terms of reference and produced effective and practical recommendations and outcomes. There is a lesson in this.

Opposite is an abridged version of the paper I prepared.

Bushfire at back of Wye River during Black Friday, 1939

Leonard Stretton was a remarkable man. Graduate in law in 1916 from Melbourne University, solicitor, then barrister. Appointed County Court judge in 1937 at the then young age of 44, he served as an Acting Judge of the Supreme Court—he refused a permanent appointment. He was president of Industrial Appeals, judge of Marine Courts, chairman of the Workers Compensation Board; he drafted the *Workers Compensation Act* of 1946.

He is described by contemporaries as a bon vivant and diner at notable restaurants in the 1950s. One anecdote a junior barrister reported went as follows:

He was a big man in size, humour and achievements, capable of quick and devastating comment. At a party he attended, the guests were playing charades. One of his guests was Henry Pitt, the Victorian under treasurer, a man of tremendous physical proportions. His part in the charade was to move around in an inclined attitude as though searching for something on the ground. As Pitt gyrated in this fashion, Stretton said, "I don't know what he is meant to be, but certainly, he is not the 'bottomless Pitt'."

Stretton was appointed commissioner in five royal commissions. He was refreshingly direct in his approach and writing; he was capable of peremptory comment, explosions of anger—judicial conduct that now would carry with it the very real potential of an application for disqualification from the disaffected person.

> "He was refreshingly direct in his approach and writing; he was capable of peremptory comment, explosions of anger—judicial conduct that now would carry with it the very real potential of an application for disqualification from the disaffected person."

Yet in many respects, Stretton stated the obvious—said what needed to be said in an effort to expose the truth.

The transcripts of the 1939 Royal Commission demonstrate his sometimes confrontational, forthright, commanding manner.

It is apparent Stretton over the first days of hearings of the 1939 Royal Commission suspected witnesses from the Forest Commission—the government agency responsible for fire generally and permits to light fires and undertake burning in Victoria's crown lands specifically—were less than frank, attempting to cover up deficiencies in organisation and conduct.

On the sixth day of hearings on 9 February 1939 during examination of a Forest Commission witness by the solicitor, in-house, acting as counsel for the commission, Mr Lawrence, Judge Stretton interrupted:

> I can see what is happening in this inquiry Mr Lawrence. This evidence confirms what I thought previously. It is not much good bringing forward these handpicked witnesses each one patting the other on the back. We are not getting anywhere near the truth … It is a solemn farce going on day after day with some of the witnesses we have had.

The following hearing day, Mr Lawrence informed Judge Stretton that the Forest Commission had instructed him to refute, in the clearest terms, the implication that the Forest Commission energies were not being directed at the truth. Lawrence went on:

> My [Forests] Commission would be grateful to your Honour to reconsider your attitude. Failing your Honour's desire so to do, would it please you to indicate in precise terms the evidence or conduct on which these observations are based.

Stretton responded with almost disdain: "I shall note your statement. Proceed with the inquiry."

And so it went on. In later questioning of a Forest Commission witness, counsel assisting, Mr Gregory Gowans, suggested that the Forest Commission had failed to institute a fire protection scheme not only for a particular part of Victoria but indeed the whole state. The witness, a Mr Hore, replied:

> I shall have to ask you to come closer than that before I can answer. I think I can see where you are making for, but I do not want to agree with something …

Stretton interrupted:

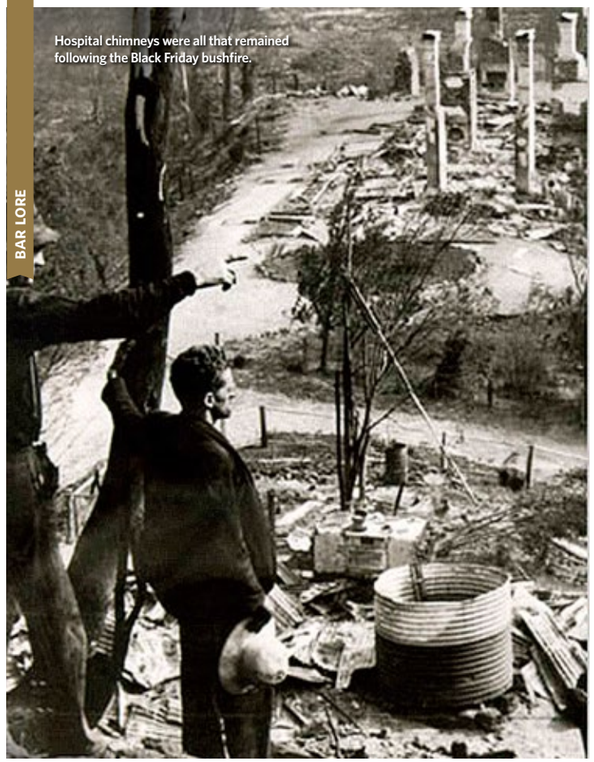
> Just answer the question you are asked, do not mind what Mr Gowans is making for. Cannot you answer the question? This witness seems to be trying to be clever, saying that he can see what is being approached … These witnesses come in here and propose to take charge of the proceedings. It is being shot through, his whole evidence, the whole thing is evident.

Stretton's findings, early in the report, did not spare the Forest Commission, the graziers, settlers, mill owners. "The truth was hard to find" he stated. "Much of the evidence was false, little of it was wholly truthful."

Of the Forest Commission chairman, Alfred Galbraith, he said:

> [He] alone was called to speak for the commission. He found himself in the embarrassing position of being the truthful sponsor of what he thought was a bad case. If he was freed from the preoccupations attendant upon a life of enforced mendicancy on behalf of his department and if his commission were placed beyond the reach of the sort of political authority to which he and his department have for some time past been subjected, he would be of greater value to the State.

This career and life might suggest Leonard Stretton came from a background of privilege. Far from it. At his Moreland Primary School in the late 1890s, there was one water tap "… in the crumbling asphalt yard serving



Hospital chimneys were all that remained following the Black Friday bushfire.



several hundred children". The toilets were unsewered, the gutter running to nowhere. The education at best could be described as basic.

The family moved to Campbellfield, and Stretton wrote of the boys with whom he mixed there:

> ...undernourished, dull, cruel to animals who were not their friends but articles of use in a life of unending drudgery on the mixed farms of crops, dairies and pig breeding.

For me, contemporary Australia has little appreciation of the harshness of these times. Stretton writes:

> In the working suburbs of Melbourne, as in the country, the majority of children were poorly clothed and barefoot until the Second World War.

Stretton's father ran the pub at Campbellfield as well as holding a job as a clerk at the Castlemaine Breweries in South Melbourne to which he drove the 20 miles there and back in a buggy each day. His father was well spoken, eschewed bad language, and was a teetotaller and nonsmoker with a fine bearing. As Stretton in his reminiscences stated:

> With this description you might have thought he was a man of good address and respectability. How wrong you would be.
>
> He was a mad gambler on horses and bike racing, which kept the family in ungenteel poverty and on the run from creditors. Whatever the family fortunes were, they were also varied and extreme. I have seen dad, home from the races piling sovereigns on the kitchen table, jovial, jubilant, transfixed by short-lived success which they brought him—or absolutely skun, beaten into the ground, desperate, angry and better left alone.

It was Cup Day 1902 that turned the family fortunes. A horse called "The Victory" won the Melbourne Cup. Stretton's father had drawn that horse in the Tatts sweep and won 6,750 pounds. A fortune. The basic wage around this time was 2 pounds 2 shillings a week—meant to be sufficient for a working man, wife and two children. Stretton recalls:

> After dad won the Tattersalls sweep we returned to the Brunswick district and lived in one of those streets in Moreland, between Brunswick and Coburg. Dad has chosen it because of course, he wanted to "show 'em" and he did "show 'em" with uninhibited relish, good will and vulgarity.

Stretton was bright, and attended what is now University High School and Melbourne University. His reminiscences disclose a person of great insight, an understanding of hardship, a regard for the battler. Stretton was a sentimentalist with a love of the culture of the Australian bush. It is said he treasured the works of Charles Dickens and particularly liked CJ Dennis's *The Songs of a Sentimental Bloke*.

Stretton concluded his reminiscences published in the LaTrobe Library journal in April 1976 with the following:

> The garlands are dead, the lights fluorescent, the music of the spheres jazzed up and the world racing to an unknown destination; but the law of growth and decay abides. Yesterday has become today and today will be tomorrow. I am happy to leave it at that; much happier than might have been expected.

Gregory Gowans was born in 1904 and was raised in the gold fields of Western Australia at Boulder, the son of a butcher. He died in 1994. Gowans lived a rich and diverse life. A candidate for Parliament, advocate for the unions, horseman, bushman, connoisseur of art, food and wine. He loved the Victorian bush; it is said his lucky wife spent her honeymoon walking the Victorian high country.

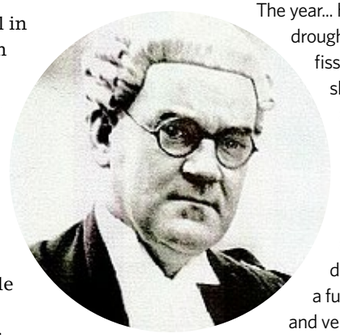
Sir Gregory's knowledge and experience of the bush was widened by his appearance as counsel assisting Judge Stretton in the 1939 commission. After strenuous and long sitting days in rural Victoria he was taken to the underground cellars at Great Western and was shown sites, including the spot where Dame Nellie Melba had sung "Home Sweet Home". For years after this visit, there was a new place of interest pointed out by the guide—the spot where Sir Gregory Gowans was bitten by a snake. Brandy was the medication for the ensuing ailment.

In 1939 the Victorian Bar was a different institution from that of today. The Bar was small, comprising 109 members. Briefing policy was different. At the commencement of the Royal Commission of 1939 the Forest Commission and MMBW were represented by in-house solicitors.

Gowans was quiet, determined, intelligent. Gowans was a very different personality to Stretton. He took a very different, quieter approach to witnesses; then I remember he was 34 years of age when he took on the brief, sure to be the biggest brief of his then short legal career. The standing of Gowans in the profession in 1939 is demonstrated by his appointment to a second royal commission in 1939 as counsel assisting that ran for 16 days. This inquiry examined the financial affairs of the Milk Board and members of the Victorian Parliament and the manner of the passing of the Milk Board Bill. Allegations of bribery against some members of Parliament had been made in the Melbourne newspaper, *The Truth*. Royal Commissioner Justice Gavan Duffy, found there was insufficient evidence, having regard to the standard of proof, to support the bribery allegations against the parliamentarians. He found, however, that members of the Milk Board had entered an agreement to bribe members of Parliament.

The breadth of the personal attributes of Gowans are demonstrated by his World War II appointment as director of War Organisation of Industry and his later appointment to the Overseas Telecommunications Commission.

Gowans appeared in the Privy Council in London on five occasions in the 1950s on constitutional and criminal law appeals. He was appointed to the Supreme Court in 1961 and retired from the Bench in 1976. In August 1977 he was appointed commissioner in the Victorian land scandals; this hearing lasted 62 sitting days and called 35 witnesses. He made, in his findings, strong criticisms of the Housing Commission and the responsible minister, Mr Vance Dickie.



Upon my signing of the Bar Roll, I was presented with a book authored by Sir Gregory *The Bar Rules and Professional Etiquette*. I always envisaged him as a bit of a stickler for rules, form and procedure. This perception is reinforced by the following anecdote I found concerning Sir Gregory:

> In his early days on the Bench, it was said of Sir Gregory that when he delivered judgment, his demeanour was that of a man who would not be happy unless he could find against both parties.

To compare the royal commission of 1939 with the royal commissions of today is really to compare two different eras. I think it is like an attempt to compare the football of Gary Ablett Jr with the champion of the 1930s Haydn Bunton; that is not possible. The game has changed: the training, the tactics, the skills, the expectations are all different.

There were very few documents considered in the 1939 commission; that commission commenced on 31 January 1939, less than three weeks after Friday 13th. It concluded on 17 April 1939. Judge Stretton's 36-page report was delivered to the lieutenant-governor some six weeks later. Yet the 1939 transcripts and the report of Judge Stretton demonstrate that core issues in relation to Victorian bushfires in many ways remain the same, showing that fundamental features of what Stretton described as calamitous appalling fires remain the same.

Examine the map of fire affected regions of the 1939 bushfires and compare it with, for example, 2009. Issues considered in 1939 and under consideration in 2009 include:

- the utility and adequacy of prescribed burning and fuel reduction
- forestry practice
- dug outs and refuges
- clearing on private land
- the importance of early detection and warning of fires
- organisation of response and brigades
- even the use of air craft for fire detection and monitoring of fire.

So much is the same. I conclude with the following description of fire in Victoria:

> The year... had been of one of exceptional heat and drought. Pastures had withered; creeks had become fissured clay-pans; waterholes had disappeared; sheep and cattle had perished in great numbers, and the sunburnt plains were strewn with their bleached skeletons; the very leaves upon the trees crackled in the heat, and appeared to be as inflammable as tinder. As the summer advanced, the temperature became torrid, and on the morning ... the air which blew down from the north resembled the breath of a furnace, A fierce wind arose, gathered strength and velocity from hour to hour, until about noon it blew with the violence of a tornado. By some inexplicable means it wrapped the whole country in a sheet of flame: fierce, awful, and irresistible. Men, women and children, sheep and cattle, birds and snakes, fled before the fire in common panic. The air was darkened by volumes of smoke, relieved by showers of sparks; the forests were ablaze, and, on the ranges, the conflagration transformed their wooded slopes into appalling masses of incandescent columns and arches. Farmhouses, fences, crops, orchards, gardens, haystacks, bridges, woolsheds were swept away by the impetuous on rush of the flames, which left behind them nothing but a charred heap of ruins and a scene of pitiable desolation.

This is a description of the fires of Black Thursday, 6 February 1851. It could be a description of 1939; it could be a description of 2009. We would be fools to think such events will not happen again. We must be prepared.

inset: Leonard Stretton

# Back of the lift

*In this Back of the lift section of the* Victorian Bar News, *the Bar acknowledges the appointments, retirements, deaths and other honours of past and present members of our Bar.*



# Back of the lift
## Silence All Stand

### Federal Court of Australia

## The Hon Justice Paul Anastassiou

*Bar Roll No 2148*

Paul Anastassiou arrived in Australia in 1967 as a "ten-pound Pom", the son of a British mother and a Greek father who met in England during the War. It's a long way from the dock in Port Melbourne to the No 1 Court in the Federal Court of Australia, where the Honourable Justice Anastassiou was welcomed on 1 February 2019.

Coming to the Bar via Sunshine West High School, Melbourne University and articles at Phillips Fox & Masel, his Honour read with the late Peter Hayes QC. This surely enhanced his Honour's capacity to take any challenge or setback in his stride. As a barrister, he was never intimidated by anyone or anything, other than the prospect of even slight flight turbulence!

His Honour's courage was always coupled with sensitivity, traits that he displayed throughout his career. He established himself early as an expert in complex commercial litigation, including many significant cases interstate. His Honour's presence in court was commanding and persuasive. He had a quiet authority which engaged judges and onlookers alike.

His contribution to the profession deserves special attention. He has a deep and steadfast belief in the college of the Bar. He considers it a unique institution, dependent on current members investing their time and resources for the benefit of current and future generations of barristers. He led by example in his low-key, dedicated way from the beginning of his career.

He served for many years as a director of Barristers' Chambers Limited, including two separate stints as chairman. His Honour recognised the vital importance of BCL as the bedrock on which our Bar is built. He served on numerous Bar committees, and on Bar Council for five years, including one year as president. He was a champion of diversity and inclusion within the profession. A consistent theme was his quiet and unwavering support for women at the Bar.

Many have praised his Honour's generosity and humanity. His reluctance to condemn human failings has caused him to be both the first port of call and the refuge of last resort for many who are struggling. These qualities—along with his Honour's intellect, diligence and learning—will stand him in excellent stead in his new judicial role.

His Honour is passionate about many things, including his home away from home on Lefkada, Greece, and his collection of 'boys' toys': powerful cars, motorbikes and boats. His Honour's Mercedes is the size of a small armoured personnel carrier, making it hard to miss in the Federal Court car park. Any hope of anonymity vanished when this 'Stuttgart behemoth' failed to start only days after his Honour's arrival, necessitating the assistance of two tow trucks. His Honour's replacement transport, a 1200cc touring motorcycle, was scarcely more discreet. It was so loud that it set off the car park's alarm system!

And with that, one might say, his Honour has well and truly arrived.

WENDY HARRIS QC

## The Hon Justice Michael O'Bryan

*Bar Roll No 3519*

Michael O'Bryan was appointed to the Federal Court of Australia on 26 February 2019, opening another chapter in a distinguished career.

Michael's interest in the law runs in the family; his grandfather Sir Norman O'Bryan (1894-1968) and father Norman O'Bryan (1930-2013) were both justices of the Supreme Court of Victoria (1939-1966 and 1977-1992 respectively) and his brothers (Stephen and Norman) are both senior members of the Victorian Bar.

Within that family, it was assumed that Michael might follow a different career trajectory. He completed his secondary education by studying pure and applied mathematics, chemistry and physics, as well as theoretical music. His uncle Richard O'Bryan worked as a GP, and it was thought that Michael might be more likely to follow his lead. In reality, any calling to the medical sciences was curtailed by his strong aversion to blood and his tendency to faint at the sight of a needle. Instead, he graduated from Melbourne University in 1985 with a Bachelor of Laws (with honours) and a Bachelor of Science, majoring in mathematics, computer programming, data structures, operating systems and programming applications. Those who appear before him in cases concerning copyright in computer software might be surprised at his Honour's background knowledge and understanding.

He commenced his articles with one of Minter Ellison's predecessor firms, Gillotts, in Melbourne in January 1986. It quickly became clear that he was an exceptionally talented young lawyer, combining high intellect, faultless judgement and the willingness to work hard.

He had a special interest in competition law and developed expertise and a strong reputation in the area at a very young age. In 1987, as a 24-year-old, first year solicitor, he presented a paper to the Trade Practices Workshop of the Law Council on the interface between intellectual property and trade practices principles. This annual workshop is attended by the doyens of competition law, including members of the Federal Court and representatives of the ACCC, previously the Trade Practices Commission. Bob Baxt, then the chairman of the Trade Practices Commission, was so impressed that he briefed Michael and a Minter Ellison partner to prepare a discussion paper for the commission on the subject. Michael prepared the paper, which was ultimately published by the commission with full recognition of his role. That also led to Michael being significantly involved in the preparation of a substantial appendix to the discussion paper of the Law Reform Commission of Victoria on possible reforms to the *Trade Practices Act*. Michael went on to chair the Law Council's trade practices committee, which conducted the workshop at which he debuted more than 30 years ago. In 2014, he was a commissioner for the Competition Policy Review, known as the Harper Review, which led to important reforms in competition law.

Michael became a partner of Minter Ellison in 1992 at the age of 29. For a long time, he insisted that there were enough O'Bryan's at the Victorian Bar, but he eventually succumbed, signing the Bar Roll in 2002, after reading with now Justice Stewart Anderson. He took silk in 2011.

Michael is a talented athlete. A runner from an early age, he continues to play tennis and to surf. He begins each working day by checking Swellnet.com, just to remind himself that the ocean is still out there somewhere. Each Friday morning, he can be found slugging it out with a group of former Minter Ellison colleagues and others at Melbourne Park, a tradition going back more than twenty years. His playing partners report that he brings to the game an elegant serve and a top spin backhand feared only by the ball. His line calls are always generous to his opponents, perhaps demonstrating a disinclination to being overruled on appeal, which he may bring to the Bench.

Behind Michael's placid demeanour there lies a ferocious allegiance to the Collingwood Football Club. Michael's uncle, Frank Galbally, played for Collingwood under Jock McHale in 1942 whilst on furlough from the navy. While Uncle Frank's tenure at the club was cut short by a leg injury sustained while chopping wood, the impact of his time at the VFL has cast a long shadow. Michael assumes a different persona when his team is on, or under, fire. There will never be much evidence of judicial impartiality at the MCG when the 'Pies are playing.

Michael O'Bryan is consistently described as a person of great





BACK OF THE LIFT

integrity, exceptional intellectual ability, conscientiousness and capacity for sustained hard work. He is modest to a fault—you will never hear from Michael any of his exceptional achievements. He has a great sense of humour, always accompanied by his infectious laugh. To the chagrin of his peers, he doesn't seem to have aged since the day he started in the law. He is a wonderful addition to the Federal Court.

JOHN STEVEN, TOM O'BRYAN

## The Hon Justice John Snaden

*Bar Roll No 3836*

His Honour was born in Melbourne, but grew up and was educated in Perth, Western Australia. He undertook law and commerce degrees at the University of Western Australia, majoring in general management and graduating in 1998. The first in his family to study law, he chose to do so in the belief that it was a solid degree that would prove the foundation for his future career path. Indeed it did.

After graduating, his Honour secured articles at Tanya Cirkovic & Associates with Tanya Cirkovic (now Commissioner Cirkovic of the Fair Work Commission). He spent his early years as a solicitor developing a specialisation in industrial relations law. His Honour had enjoyed the subject at university, achieving a high mark, and sees industrial relations as having the capacity to make a difference in the lives of many.

Following a short time at Clayton Utz, his Honour came to the Bar in 2005. He read with Stuart Wood QC. He come to the Bar at a fortuitous time for one practising in industrial relations. It was the eve of the Work Choices legislation coming into force, which gave rise to challenging and interesting work. A change in government a few years later resulted in further and significant legislative change in the form of the *Fair Work Act 2009*.

It was not long before his Honour was recognised as one of the best juniors in the field. His client list covered the field on the employer side, with both state and federal governments and large corporations regularly briefing him. He has the rare ability to sit on both sides of the political fence, briefed by governments of all persuasions in a jurisdiction that is inherently political.

His Honour has been described as "bullish as to legal principle". As counsel, he was a jurist in the true sense, focusing on the exact words deployed in a judgment to highlight where a statement of obiter relied on by the other side had not been interpreted correctly. He was never shy of an argument, pursuing his points forcefully but without animus.

His Honour is described as extremely hard working; so much so that he had to hand back around 30 briefs upon his appointment, causing the recent disappearance from social circles of a couple of his peers. Such was the weight of his Honour's workload.

Outside of work, his Honour is dedicated to his wife, Fiona, and children, Chloe and Thomas. He also manages time for his passions: European cars, *The Simpsons* and AFL football, the latter allowing him to maintain his connection with the West in the form of regular interstate trips to watch his beloved Eagles play.

*Victorian Bar News* wishes his Honour the best as he continues his contribution to industrial relations law, now as a member of the judiciary.

VBN

## The Hon Justice Stewart Anderson

*Bar Roll No 2179*

Justice Anderson has had a career at the Bar practising in commercial law for 32 years. He wasted little time coming to the Bar after admission in 1985, signing the Bar Roll two years later. Whilst at the Bar, his Honour accepted a variety of briefs, from corporations law, to banking and finance, superannuation, property, contracts, equity and trusts, reflecting a broad, general commercial practice.

His Honour often acted for public company directors, officers at examinations conducted by ASIC, and inquiries conducted by APRA into the conduct of participants in the Australian financial system. He acted in numerous royal commissions: as a junior for the directors of the State Bank of Victoria in the Tricontinental Royal Commission; for the State of Victoria in the Longford Royal Commission; as counsel assisting in the Metropolitan Ambulance Service Royal Commission; and for executive officers of the Emergency Services Telecommunications Authority in the Bushfires Royal Commission. Most recently, his Honour appeared on behalf of Mercer Superannuation (Australia) Limited at the Hayne Royal Commission into misconduct in the banking, superannuation and financial services industry.

His Honour's reputation at the Bar was one of hard work, ability and diligence. The interests of his clients were always paramount and led to his accepting difficult and complex matters. However, it is his Honour's personal qualities which are those for which he is probably most well known and regarded.

He is well known for his outgoing and gregarious nature and has forged many deep friendships at the Bar. He is immensely loyal to his friends and colleagues. Ever a great believer and supporter of the Bar, he has been involved in many aspects of Bar life including the Bar Council and the Commercial Bar Association. His Honour was also mentor to eight readers, taking a reader every year from achieving the minimum 10 years' call until he was appointed silk in 2005. He is described as a fantastic mentor who is incredibly generous with his time and knowledge.

In chambers, his Honour was engaged and interested in those around him, often spending time discussing personal as well as professional matters, moving from room to room.

Outside the Bar, his Honour's interests include wine, food (preferably of the Michelin Star variety), cooking (at which he excels), travel (which he does frequently), gardening, architecture and art. Exotic motor vehicles have been a recent interest, most latterly Italian sports cars, of which one may be expected to be seen in the court car park. He was most pleased to learn that the vehicle was able to traverse the ramp and narrows of that car park.

His Honour will join great friends on the court: Justices Middleton, Anastassiou, O'Callaghan and Wheelahan, to name a few.

His Honour will be a safe pair of hands on the court, and the community will be the better for the appointment.

A fierce opponent and even fiercer friend, he will be missed by his colleagues at the Bar.

PETER BOOTH

# Supreme Court of Victoria

## The Hon Justice Jacinta Forbes

*Bar Roll No 3412*

On 16 April 2019, Justice Jacinta Forbes was appointed a justice of the Supreme Court of Victoria. Her Honour was admitted to practice on 4 April 1990 after serving articles with Jonathon Rothfield at Slater & Gordon.

Her Honour learnt early the importance of representation and access to advice in the protection of rights. Whilst at university, her Honour became part-time co-ordinator of the newly established Refugee Advice and Casework Service. Her Honour remained on the committee of management of that service for many years as it grew into an established and funded legal service for refugees and those seeking asylum.

Her Honour developed a busy practice as a solicitor over a decade, practising in all aspects of common law as well as in large-scale product liability litigation on behalf of Australian clients with defective eye and breast implants.

Her Honour signed the Bar Roll on 23 November 2000 and read with David Martin.

Her Honour quickly grew a busy practice, sought by plaintiff and defendant solicitors alike. The need to juggle not only paperwork and appearances, but also the demands of a growing young family meant her Honour became adept at multi-tasking. The volume of work and calls upon her time never seemed to interrupt the attention to detail and mastery of each brief. Her Honour even undertook circuit work for a number of years while at the junior Bar—in Warrnambool, Wangaratta and Wodonga, where preparation for court could be done from the veranda of the vineyard at Everton.

Her chambers door and phone at Owen Dixon East often brought requests "can I ask you a quick question", to which her Honour's response was unfailingly generous in time and advice.

Her Honour never feared difficult cases, she was unflappable and fair minded, highly respected by her opponents, and fought hard for her clients' rights.

Her Honour took silk in November 2014 and her practice thrived. The junior common law Bar enjoyed the generosity of her support and mentoring, as did her four readers.

In 2017, her Honour stood for Bar Council and has since contributed to the leadership of the Bar as chair of the equality and diversity committee and of the standing committee on diversity and inclusion.

Her Honour is held in high regard by the legal profession. The Supreme Court, the profession and the community will benefit from her appointment.

JULIA FREDERICO

# Family Court of Australia

## The Hon Justice Jillian Williams

*Bar Roll No 4120*

Justice Jillian Williams was appointed a judge of the Family Court of Australia on 8 February 2019. Her Honour had previously served with distinction as a judge of the Federal Circuit Court since 2015. Before that, her Honour had practised as a solicitor for some 22 years and worked as a registrar of the Family Court and the Federal Magistrates' Court for three years. She was subsequently called to the Bar, where her Honour specialised in family law for eight years until her elevation to the Bench.

To say that Justice Williams' elevation to the Family Court was enthusiastically welcomed by the family law community would be an understatement. At the ceremonial welcome on 27 February 2019, speakers praised her Honour for the dignity and care with which she conducts her court, for her extensive experience and knowledge of the law, and for being calm, rational and fair to practitioners and litigants alike.

It was also apparent to all those in attendance that, in addition to the respect which her Honour commands, Justice Williams is genuinely liked by those with whom she has worked. The warmth and sincerity of the praise in the speeches delivered on that occasion, together with the personal anecdotes told by the speakers, made it clear that she is personally as well as professionally popular.

Other themes that came out of the speeches delivered at her Honour's welcome were her lifelong passion

for fairness, inspired by her late father and her mother; the value which she places upon her close relationships with family and friends; and, certainly not least, her love for her cocker spaniel, Lily, who is said to have become a regular (and welcome) presence in the judges' chambers of the Family Court. Reference was also made to her Honour's resistance to her husband's well-intentioned attempts to coach her on the golf course, which are now recorded on transcript for posterity.

Justice Williams was an exemplary appointment to the Federal Circuit Court, where the attributes described above meant that she was uniquely placed to deal with the challenging, voluminous and often emotional case load that is placed upon judges of that court. She will be missed by her colleagues, for whom she was often the 'go-to' person for queries and to whom she gave her time generously, both for advice and for a chat. The Federal Circuit Court's loss, however, is the Family Court's gain.

Her Honour has received universal praise from the family law community for her judicial work. It only remains to be said that her own family is exceptionally proud of her.

WILLIAM THOMAS

## The Hon Justice Joshua Wilson

*Bar Roll No 2124*

I first met Josh Wilson in the late 1970s when I was dean of International House and Josh was a student at Melbourne University. I could not believe his boundless energy. Over the ensuing 40 years, Josh has harnessed that energy into a successful career as a solicitor, barrister and judge. On 18 March this year, a large body of friends and colleagues gathered to welcome his Honour upon his latest appointment, as a justice of the Family Court of Australia.

Josh was an excellent student at university and contributed significantly to the life of the college, especially in debating. He won the exhibition in constitutional law. In his six years at Arthur Robinson & Hedderwicks, now Allens Linklaters, he specialised in commercial law, often starting work at 4am and finishing late in the evening. From 1985 to 1987, he was associate to Justice Ken Marks, the judge in charge of the commercial list.

Josh came to the Bar in the March 1987 readers' course and read with Ross Robson, later QC and a justice of the Supreme Court of Victoria. Almost immediately he was briefed by major firms in substantial commercial matters, including construction, bankruptcy, competition, corporate insolvency, real property, and securities and investments disputes. Josh took silk in 2008.

On the day of the announcement of silk, he took another title: he was awarded a PhD from Deakin University. He had completed his thesis in eight months and it was the basis for the publication in 2010 of *Extradition Law in Australia: Time for a Rational Approach*.

At the Bar, Josh chaired the health & wellbeing committee, was deputy chair of the South Pacific education committee and served on the international arbitration committee and the pro bono committee. He was a trustee of Law Aid. In 2010, his outstanding pro bono work was recognised with the award of the Ron Merkel QC Pro Bono Award. He lectured in advocacy at the Australian Advocacy Institute in Papua New Guinea and at Keble College, Oxford University.

In 2015 Josh was appointed a judge of the Federal Circuit Court and embraced the many areas of the work of that court, in particular family law.

He is married to Silvana, herself a member of the Bar and senior member of VCAT. He has three daughters, all of whom are practising lawyers.

The Bar wishes his Honour well upon his appointment to the Family Court of Australia.

PATRICK TEHAN QC

## The Hon Justice Timothy McEvoy

*Bar Roll No 3586*

One day, after he had been at the Bar for several years, Timothy McEvoy was referred to in court by a judge as "Mr McEvoy". The judge then apologised, referred to "Dr McEvoy", and noted that he had been unaware of his Honour's doctorate. Polite and charming to a fault, Dr McEvoy quipped that no offence had been taken and that he tried to wear his learning lightly. Many a true statement is said in jest.

At Justice McEvoy's well-attended welcome as a judge of the Family Court, a list of his Honour's academic achievements was read out. It was a formidable list. It was difficult not to be impressed, and even close friends and family members who had a longstanding policy of not being impressed by his Honour were close to conceding. At times, it was difficult to reconcile the academically brilliant high-flyer in the speeches with the warm, approachable and self-deprecating personality, much loved by his friends and colleagues. His Honour's sister was heard to ask sotto voce who they were talking about because he sounded extraordinary and she'd like to meet him.

His Honour attended Parade Christian Brothers' College and was dux of the school in 1987. From there, he attended Ormond College and studied law and arts at the University of Melbourne, graduating in 1994. Following that, his Honour was an associate to the chief justice of the Federal Court, then a solicitor with Freehill Hollingdale & Page. While working as a solicitor, his Honour continued to prosper academically, completing a Master of Laws at the University of Melbourne and a Doctor of Juridical Science from the University of Virginia in the USA. In 2001, his Honour commenced as a visiting professor at the University of Virginia, where he continues to teach conflict of laws. In 1998, his Honour was appointed to the Australian delegation of experts to the Special Commission of the Hague Conference on Private International Law and also assisted the Permanent Bureau of the Hague Conference with a comparative study of provisional and protective measures.

These preliminaries out of the way, in 2002 his Honour declined what would doubtless have continued to be a successful career at Freehills to come to the Bar. He read with Michael Wheelahan (now Justice Wheelahan of the Federal Court), and soon developed a wide and busy practice. In 2011, both his Honour and his wife Elizabeth were awarded Fulbright scholarships and the family decamped to the US for a further period of study. In 2016 his Honour took silk. He flourished in that role. He was at the height of his powers, appearing as one of two senior counsel assisting the Aged Care Royal Commission, when he accepted the appointment to become a judge of the Family Court.

Despite his enormous achievements as an academic and as a barrister, at the Bar his Honour was perhaps best known as a wonderful colleague and friend to many. Renowned for inherent decency and instinctive fairness, with a wonderful sense of humour, his Honour's appointment has been universally applauded. Only one group has expressed anxiety. It is said that Melbourne's restaurateurs are concerned. But as was observed at his welcome, his Honour still has the hunger that he brought to the Bar as a younger man; there is little doubt that he will continue as one of the legal scene's great gastronomes.

The Bar wishes his Honour best wishes for a long and satisfying career as a judge of the Family Court of Australia.

VBN

## The Hon Justice Norah Hartnett

*Bar Roll No 1943*

On 10 April 2019, the profession welcomed Justice Norah Hartnett as a judge of the Family Court. It was a welcoming back of one of our own, given her Honour has been acting as a judge in family law matters for 19 years in the Federal Circuit Court.

Her Honour was one of the original judges of the Federal Magistrates' Court, as it was then known, appointed to that court shortly after its creation in 2000. That appointment followed some 15 years of practice at the Bar, specialising in the area of family law. As a barrister, her Honour enjoyed a reputation as a courteous, dedicated and diligent practitioner. These qualities translated immediately upon her elevation to the Bench. In the 19 years her Honour was a judge of the Federal Circuit Court, that court grew substantially, in the number of judges appointed to it and also in the number of cases it handled. The voluminous caseload was always managed with efficiency and practicality by her Honour.

Justice Hartnett is lauded for her prodigious capacity for work. In each of the 19 years she served as a Federal Circuit Court judge, she undertook circuit work, notably in Geelong and Mildura. On circuit she ensured cases were dealt with in a timely and just fashion. Her common sense and good humour will be much missed by the profession in those regions.

As well as running a busy Melbourne docket and travelling for circuits, her Honour served on numerous court committees including the policy advisory committee and the finance committee. She was at the time of her appointment to the Family Court its judge in charge of family law for the southern region.

Her Honour completed an MBA just before signing the Bar Roll. She balances her very busy judicial life with parenting her three children, including two young tennis prodigies.

Although her Honour left the Bar some 19 years ago, she is still regarded by those who practise at the Family Law Bar as 'one of us'. Her appointment has been universally celebrated as recognition of her merit and years of hard work. We wish her Honour success now as a judge of the Family Court.

MINAL VOHRA SC

# County Court of Victoria

## Her Honour Judge Elizabeth Brimer

*Bar Roll No 3283*

The recent appointment of Elizabeth Brimer SC as a judge of the County Court has had two equal but opposite consequences. It has enhanced the court and will well serve the public of this state by the better administration and dispensation of justice. Simultaneously, it has robbed the Victorian Bar of her Honour's various professional talents and the undoubted further valuable future contributions she would have made as a mature member of the inner Bar. The source of both outcomes is the same: her Honour's outstanding character and her demonstrated commitment, over nearly three decades, to the highest ideals in the service of the law.

Over the roughly 20 years that I have been privileged to call her Honour my friend, I have not encountered another colleague with greater passion for advocacy as the art of persuasion. Inspired by her long-term mentor, George Hampel QC, her Honour has extensively studied, written, lectured and taught advocacy at the highest levels in Australia and overseas.

Judge Brimer's significant contribution to the profession also deserves mention. Her Honour has had three readers and has been an informal mentor to many juniors. She served on the legal education and training committee (including the continuing legal education sub-committee) from 2001 to 2003 and then for most of the last decade on

the readers' course committee. Judge Brimer has also been an instructor on the readers' course, sharing her invaluable expertise and knowledge. Her Honour completed two terms on Bar Council; she also served as a member of the ethics committee.

Her Honour built a wide and varied practice at the Bar. Of note, she appeared on behalf of a utility services corporation in the 'Black Saturday' Bushfires Royal Commission in respect of the Beechworth fire and appeared as junior counsel to the late Ross Ray QC, also on behalf of this utility services corporation, in respect of the Kilmore fire.

Judge Brimer also developed an expertise in sports law. It commenced with the un-Australian prosecution of the test cricketer Shane Warne. The result of that hearing was that the Australian cricket team was deprived of Mr Warne's magic spinning fingers for 12 months for testing positive to banned diuretic drugs. From there, her Honour developed an enviable practice in the area; being briefed by many of the leading sports regulatory bodies in Australia. Her Honour has twice been appointed as a Cricket Australia code of conduct commissioner: in 2016 and in 2017.

Judge Brimer has a great love of travel and skiing, which has been shared with her family and friends. Paris is her favourite place, dictated inevitably by her love of great food and wine.

All who appear in her Honour's court can be assured of a fair, courteous and knowledgeable hearing.

S R SENATHIRAJAH QC

## His Honour Judge George Georgiou

*Bar Roll No 2496*

Throughout his career in the law, George Georgiou SC has been a champion of the underdog and a passionate defender of human rights.

Described in Sam Vincent's article in *The Monthly* on the retrial of David Eastman as "disarmingly avuncular", George's advocacy was characterised by the arts of industriousness, politeness and persuasiveness. With clients he was empathetic and compassionate. As a leader and mentor he was always caring and generous.

Growing up in the Western Suburbs of Melbourne, George attended Paisley and Burwood Heights High Schools and Monash University. George was admitted to practice in 1986 after completing articles with Maurice Blackburn. He then worked for a year in London, where he took time to watch cases and learnt the art of advocacy in the Old Bailey.

Called to the Bar in 1990, in 1994 George took a position as the principal legal officer at the Legal Aid office in Alice Springs. While that trip was only to be for a few months, he ended up staying in 'the Alice' for seven years. During this time, he appeared in many criminal matters, defending Indigenous people who in his words had suffered "a lot of injustices, a lot of prejudice, a lot of racism, a lot of poverty". Over this period, George nurtured his love of Indigenous art, especially the art of the Central Desert region, and anyone fortunate enough to spend time in his chambers would see his walls plastered with a wide range of artistic works, spanning the ancient and the new.

In 2001, George returned to Victoria as a senior public defender at Victoria Legal Aid, where he mentored countless criminal lawyers over the next six years, before returning to the Bar in 2007.

Having taken silk in 2012, George was always in strong demand, appearing in numerous murder and terrorism trials. Notable cases include his representation before the royal commission of three survivors of childhood sexual abuse from the Retta Dixon Home in Darwin, and successfully defending David Eastman in his retrial in Canberra.

George always sought to give back to the profession, whether that be through his presidency of Liberty Victoria or his involvement in advocacy training with the Australian Advocacy Institute. George had seven readers, with his final appearance at the Bar taking place before one of them, her Honour Michelle Mykytowycz.

Despite the demands of a busy trial practice, George always had time for his family and his shared passions, be it his love of art, literature and music (the work of Kinky Friedman being a particular favourite), black labradors or the Collingwood Football Club. He always made time to watch his son play football and to roll his arm over in the cricket nets. In the evenings, he would invariably retire to his study, with the company of a desk lamp and heater, to work late into the night.

George will be a loss to the Bar and an asset to the Bench. In the words of Kinky Friedman:

> There's a dark and a troubled side of life
> There's a bright and a sunny side, too
> Though we meet with the darkness and strife
> The sunny side we also may view

MICHAEL STANTON

## His Honour Judge Philip Ginnane

*Bar Roll No 2555*

Ceremonial Court 1 of the County Court was packed to standing on 14 September 2018 when the Bar, solicitors, and many judges and magistrates gathered to welcome Judge Philip John Ginnane as a judge of the County Court of Victoria. His Honour is only the second male magistrate to be elevated from the Magistrates' Court, where he had served with distinction since November 2011. The speeches were warmly appreciative and recognised both his Honour's long practice at the Bar and his successful service as a magistrate.

Graduating from the University of Melbourne in 1986, Judge Ginnane was admitted to practice in 1987. He served articles at Hall & Wilcox and was appointed associate to the Hon J A Keely of the Federal Court. He counts the late John Keely as one of the most influential people in his professional life and held him in the highest regard personally and professionally. He signed the Bar Roll in November 1990 as part of the memorable September 1990 readers group, which included the now Justice Wheelahan of the Federal Court, former Chief Justice of the Family Court, Diana Bryant, Judge Cahill of the County Court, Judge Kirton of the Federal Circuit Court and Member Rowland of VCAT.

He read with David Curtain QC and was a member of Dever's List for 20 years. A wide practice quickly developed across many jurisdictions, including commercial, industrial, administrative, and equal opportunity law, yet he found time for the Victorian Bar legal training course in PNG. He was always a great source of company, friendship and sage advice to his many friends at the Bar.

His time at the Bar was spent mainly as a member of the 11th floor of Owen Dixon Chambers West, forming lasting friendships with Kenneth Oliver, Ken McFarlane, Andrew Panna and John Mattin.

After appointment to the Magistrates' Court, he sat exclusively at Melbourne in all jurisdictions. Later he sat in its civil, industrial and WorkCover jurisdictions and was a member of the Municipal Electoral Tribunal.

Upon the retirement of Deputy Chief Magistrate Braun in 2016, he was appointed the supervising magistrate for the civil division.

He is brother to Justice Tim Ginnane of the Supreme Court and the son of the late John Ginnane, formerly of the Victorian Bar.

The Bar wishes his Honour a long and successful judicial career following what has been widely recognised as a well-suited appointment of a common law judge.

G L MEEHAN

# Vale

## Anthony (Tony) Eyres Radford

*Bar Roll No 801*

Tony Radford died on 8 December 2018, aged 77.

He was kind and supportive and warmly welcomed people into his world. He gave unstintingly of himself.

Educated at Mont Albert Central School, Wesley College and the University of Melbourne, he graduated with a BA and LLB and later completed an LLM.

After articles at Hedderwicks, Fookes & Alston (now Allens Linklaters), he was admitted to practice in March 1966 and signed the Bar Roll in February 1967. He read with E D ("Woods") Lloyd (later QC).

He was a resident law tutor at Whitely College, an examiner in torts for the Melbourne Law School (1966–73), and both a lecturer and tutor in the Council of Legal Education RMIT long articles course (1971–74). Sometime later, for several years, he became an adjudicator in Melbourne and Monash Law School moots.

After pupillage, Tony shared the old Vogue rooms on the eleventh floor with Paul Willee. This was a *B* sized room partitioned more spatially on its windowed side—which he generously allowed Paul to occupy, leaving himself with little more than a cupboard. They were opposed to each other twice. In those cases, Tony displayed the traits which made him such a powerful advocate: a mastery of thorough and meticulous preparation, argumentation, strategic patience and generosity of spirit. On one occasion, he almost brought his roommate undone when, in a maintenance case, he took the unanswerable point that the complainant's children were not within the jurisdiction.

Tony came to practise in planning and local government law, property and valuations, contracts, commercial law, and common law. He had four readers. He served many years on his list committee, including in the transition from Ken Spurr and the selection of Ross Gordon and Leigh Jackson. He served 10 years as the Bar representative on the Chief Justice's standing committee on religious observances, working on the opening of the legal year services. He was generous in pro bono work throughout his career, and organised several colleagues to do so for victims of the 1983 Ash Wednesday bushfires. He contributed several substantial articles to the *Victorian Bar News*.

Tony played cricket at school and university, for the Bar, and in what he described as "suburban" cricket. He played for the Bar from when he signed the Bar Roll into the early 2000s and captained the Bar second XI. He designed the Bar Cricket tie and was responsible for "the artistic arrangements and organisation" of three splendid Bar Cricket dinners "with his unique aplomb". Tony had a lifetime pleasure in choral singing, commencing with the Melbourne University Choral Society, and continuing with The Melbourne Chorale and Victoria Chorale. Politics and world events were a consuming interest, digested and discussed at length.

Tony was friendly, smiling and collegial; his door was always open, and nothing was too much trouble. He had a deep connection to people, words and the stories of colleagues, clients, family and friends.

Family was paramount to Tony. He took delight in writing lengthy poems to celebrate all occasions, and limericks were quick to flow from his pen. He is greatly missed by his wife Ria; children Christopher, Rebecca and Anita; son-in-law Tim; grandchildren Milly, Will and Elka; his wider family and friends.

He retired from practice on 1 July 2008—including retirement, a member nearly 52 years; a gentleman always.

MARIA RADFORD
AND PAUL WILLEE RFD QC





BACK OF THE LIFT


George Beaumont QC

## George Beaumont QC

*Bar Roll No 876*

Frederick George Albion Beaumont QC (known as George) was born on Black Friday, 13 November 1943, and lived his early years in Hawthorn. His mother Betty and father Alb loved 'Fred' and his little brother Brian. They worked hard to provide them with access to education. George worked numerous jobs to help with schooling and family finances, including selling pies at Princes Park and selling newspapers on the street corner to those going to and from work in the city.

George met the love of his life, Jayne, at one of those jobs and they were happily married for nearly 50 years before his sudden and untimely passing in November last year (two days shy of his 75th birthday).

George took a highly unusual route to the law, having never completed matriculation at school. George finished school after year 10 and then studied accountancy and tax at Swinburne Technical School. After much persistence and badgering of the law school registry and dean of law at Melbourne University, George sat and passed an entrance exam and was enrolled as a law student. He was the first person to graduate from law in Victoria without having completed matric. He completed his articles at Blake and Riggall and joined the Bar straight after articles, reading with Ken Jenkinson.

A true legend of the Bar (both in fact and as recognised by the Bar Council), George was a tenacious advocate, who revelled in the black art of witness cross-examination. His distinctive court style led to the penning of the nickname 'the bulldog'. Many an accountant was lulled into a false sense of security by his technique. George would carefully dissect a set of financial accounts before the court, starting with the very basics and drilling down and down, until the witness was metaphorically bloodied and scarred for life.

Unlike his tough professional persona, George, in a personal capacity, was the first to help a friend in need with support and advice, and often financially. Many friends attended George's funeral service held at St Aiden's in North Balwyn. The huge crowd there walked in the footsteps of George and his beloved childhood sweetheart Jayne, who had married in the same place.

George had a wicked sense of humour and a cheeky grin. He was passionate about travel and a devout Francophile. His favourite tipple was a glass of a "big, ballsy" shiraz.

George loved his three children and his six grandchildren unreservedly and is sorely missed by all of them.

MICHAEL BEAUMONT

## Glenn Holden

*Bar Roll No 2566*

Glenn Holden was a long-time criminal law barrister. He had a strong legal aid background where he learned and honed his skills as a duty solicitor. In his private life, he was a devoted, loving and deeply loved husband, father and grandfather.

He was born in Brisbane in 1950. He attended primary school in the Brisbane area, including a period as a boarder. He moved north to Gordonvale near Cairns to attend high school for a time before going even further north to finish his secondary schooling at Port Moresby High School.

The attraction of work at the Department of Civil Aviation in Port Moresby led him away from school before he matriculated. Glenn met his wife Judy at the DCA and it wasn't long before they married. Their life together got off to a great start with a two-year working holiday in Britain and Europe.

Judy was a Victorian, which caused a reversal in the northward trajectory at the end of the holiday and they settled in Melbourne. Glenn picked up his education again by completing his matriculation as a correspondence and night school student at University High School.

Glenn then took up law at Melbourne University and graduated in 1979. He was articled to Jack Heffernan OAM who was the first and only secretary of the legal aid committee. He was admitted to practice in May 1980 and was one of the foundation solicitors at the Legal Aid Commission of Victoria.

Glenn went on to head the LACV's General Law Division Magistrates' Court section. In that position, he trained and mentored numerous young lawyers, setting them up in many cases for long and successful careers. He wrote the LACV's first duty lawyer's manual.

Glenn was at Legal Aid for close to a decade. The duty lawyer service was the frontline for Legal Aid, requiring lawyers with a special set of skills. Fronting up each morning at the cells, taking instructions from clients who were more often than not suffering from drug addiction, alcohol addiction or mental illness, required strong legal skills and people skills and a determined methodical approach. Glenn ensured that the young lawyers he was responsible for developed these qualities and were able to exude calm control while surrounded by apparent chaos.

Glenn left Legal Aid for the Victorian Bar in 1990 and read with Remy van de Wiel. Glenn maintained a busy practice at the Bar over a long period, primarily in crime.

During the mid-2000s, he was a frequent traveller to the Northern Territory, being regularly briefed by the Northern Territory Legal Aid Commission. He is fondly remembered in that jurisdiction, particularly for the time he freely gave to mentoring the junior lawyers. Indeed, he enjoyed the people and climate of the NT so much that it also became one of his favourite holiday destinations.

Ultimately his greatest pride and joy were his three daughters and he thought himself immensely fortunate to have had the life he did.

Vale Glenn Holden.

GREG SMITH

## Patrick McCabe

*Bar Roll No 1195*

Pat was born on 1 March 1942 and raised in Glenthompson in the Western District of Victoria with his brother, David, and sisters, Liz and Margot. His parents, Tom and Cecilia, owned and ran Mac's Hotel. Pat's secondary education was at Xavier College.

Pat then worked in the Crown Solicitor's Office and completed his law course part time at Melbourne University. During his time at the Crown, he was appointed to the role of secretary to the Council of Attorneys-General (Federal, State and Territory).

Pat was admitted to practice on 1 March 1971, joined Madden Butler Elder & Graham as a solicitor and was made an associate in that firm in that year.

He signed the Bar Roll on 13 November 1976, reading with Jeffrey Sher (later QC) and Dick Stanley (later QC). For most of his six years at the Bar, he was an inspector appointed by the Victorian Government—with the late David Lafranchi, then a senior inspector at the Victorian Corporate Affairs Commission, later commissioner—to investigate what became known as 'bottom of the harbour' schemes: some 923 companies associated with one Brian Maher, which they concluded had defrauded the ATO of approximately $65 million. Frank Costigan, in his royal commission on the activities of the Federated Ship Painters & Dockers Union, credited the McCabe Lafranchi report with having exposed such activities in their successful investigation.

Pat left the Bar and returned to Madden Butler Elder & Graham in early 1982, where he was made a partner on 1 July that year. He remained with the firm through its various mergers and names—Dunhill Madden Butler; Deacons; and Norton Rose Fulbright—until his retirement in about 2013. He had an extensive general common law practice, including defendants' personal injury work. He also represented government clients in the Ambulance and Bushfires Royal Commissions.

Outside the law, apart from his family, Pat had a keen interest in growing and producing wine with his wife, Madeleine, in the Red Hill region on the Mornington Peninsula, and had a lifelong love of the turf.

Pat died on 19 January 2019 after a five-year battle with cancer, a battle conducted on his part with courage and good humour. He is survived by Madeleine, daughters Charlotte, Sophie and Alexandra, and three grandchildren.

TONY ELDER

## John Joseph Goodman

*Bar Roll Nos 1813 and 2208*

John was called to the Bar in May 1983 and read with Peter Murley.

Michelle Unsworth, who read with John, said he was known as a kind and generous master/mentor assisting and mentoring many junior barristers informally, as well as in his formal capacity.

He retired on 30 June 2011, after more than 27 years of practice as a barrister. He practised in criminal





BACK OF THE LIFT

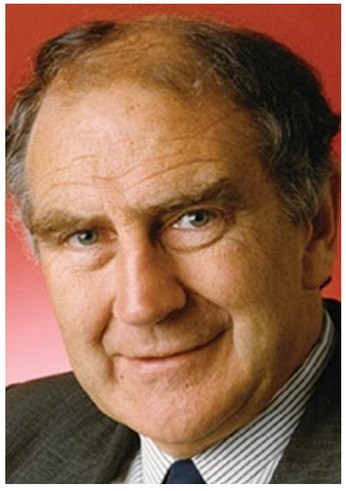
law, family law and the Children's Court. He also tutored and lectured and sat as an examiner at both Monash and Melbourne universities.

Before coming to the Bar, John served his articles with the Deputy Crown Solicitor and was admitted to practice in 1968. He worked at the Commonwealth Crown Solicitors Office and was a principal legal officer and registrar in bankruptcy.

He was educated at Christian Brothers' College, St Kilda. He left school to work in a science laboratory and studied science at the Royal Melbourne Institute of Technology. He then joined the Department of Customs, where he worked for about 14 years—while completing adult matriculation and graduating from the University of Melbourne with an Honours degree in law.

John was a devoted father and grandfather, a fine sportsman, and a passionate golfer and tennis player.

VBN



## Bernard Cornelius "Barney" Cooney

*Bar Roll No 621*

Early in 1959, shortly after Barney had completed his law degree at Melbourne University, he was given the task as an articled clerk of serving a notice of eviction. He was not happy about this. He asked his friend Frank Vincent to go with him. They attended a tiny run-down single-fronted terrace in a Fitzroy slum.

A tired, harassed woman with small children behind her answered the door. Barney explained the reason for his presence and handed her the notice. She trembled but said nothing. Frank was embarrassed, but Barney responded instantly by saying "Nothing is going to happen immediately. Maybe we can help?" Barney then gently and carefully explained her rights to her in the kitchen, tried to calm her, and gave advice as how best to handle the situation.

This concern for people in difficulty was central to Barney's personality and career. For him, the professions of law and politics in which he engaged were not to be pursued simply as vehicles for personal advancement, but because of the values for which they stood: values based on principles of human decency and fairness.

Barney was a very successful barrister. He possessed considerable ability that he felt no need to parade. Consequently, his skills were often underestimated. His opponents failed to understand why they lost to him. He was recognised by those who came in contact with him as a truly decent person who respected and valued them. The juries in the civil damages cases in which he appeared for injured workers loved him, and he had an amazing success rate.

Barney once appeared for members of a group called the 'Unemployed Workers of Australia' charged with resisting arrest after invading the Melbourne Club. The police had violently forced the protestors out at the request of the club secretary, without explanation. The secretary was cross-examined about how he identified them as non-members and authorised this treatment. The secretary got into great trouble avoiding speaking about the dress code, and the discriminatory membership rules of the club. Eventually he said he was concerned the protestors might steal some silverware. The magistrate dismissed the charges. The clients returned to further demonstrate outside the building.

Barney arrived in the Australian Parliament with a resolute determination to ensure the parliament delivered good government to the people of Australia. He understood that improving the integrity of our institutions through the parliamentary committee system was the best way to make this happen, and spent most of his energy as a senator for 17 years engaged in the committee system. He was steadfast in his view that the community was entitled to expect the best from the committee system. He believed the Senate's committees played an important role in our government, and took seriously his responsibility to use that system to produce far-reaching improvements for all Australians.

Barney's contribution to Australian politics was always guided by his instinct for social justice. Barney once said, "True conscience is a reliable guide in reaching the right conclusion". This of course was just common sense to Barney. Barney voiced very few personal criticisms of his opponents, and never publicly denigrated them. This did not always operate to his benefit in the political arena. He was not prepared to engage in posturing that can replace genuine parliamentary debate about the serious issues confronting our society during question time.

Barney exemplified Labor values and traditions. Barney's commitment to the values of fairness and working for the common good sum up Barney's values and his time in parliament, where he worked tirelessly for what is right and what is fair for the people of Australia. His openhearted approach, buttressed by what might be described as a 'bolshie determination' to achieve his goals, was irresistible.

Long after Barney's departure from parliament, he was still hard at work for the Australian people. He made a submission in 2010 to the Senate Legal and Constitutional Affairs Legislation Committee in which he eloquently reframed a challenging legislative debate into a simple statement about values and what really matters, when he said: "legislation should be examined in the light of what is fair".

Barney did unceasing background work advancing the need to develop protections for whistleblowers. The "Report of the Inquiry into whistleblowing protection within the Australian Government public sector", which built directly on work that Barney had done in Senate inquiries, was tabled in parliament 2009. Barney's enduring influence did not end there. In 2013, Labor introduced and passed the *Public Interest Disclosure Act*, which greatly strengthened the protections for those who report wrongdoing in the public sector—a reform which Barney had long advocated.

Barney never lost his concern for the vulnerable in our community. As soon as the Royal Commission into Aged Care was announced, he wanted to contribute his perspective to the formulation of the terms of reference, and then made a formal submission.

The significance of Barney's contribution to the Australian Parliament was immense and his readiness to support the most vulnerable people in our communities and his generosity is immeasurable. Barney was always willing and able to help make Australia a fairer place. He will be deeply missed.

FRANK VINCENT AO QC AND
MARK DREYFUS QC, MP

## Gerard Ryan

*Bar Roll No 2788*

Gerard Michael Ryan was born on 22 August 1941. He went to school at St Augustine's CBC Yarraville. At one point in his youth, Gerard worked in an abattoir. From that, he became a meat inspector and later moved to the public service. He was a late vocation lawyer, studying law part-time at Monash University, while working full-time with the Commonwealth Department of Primary Industry & Energy.

His articles were with the Australian Government Solicitor and he was admitted to practice in February 1991—in his 50th year. He remained with the Department of Primary Industry & Energy and occasionally appeared on behalf of the Department in the Australian Industrial Relations Commission (now Fair Work Australia). Before coming to the Bar, he was, for three years, a volunteer solicitor on Thursday nights at the Western Suburbs Legal Centre in Newport.

Gerard signed the Bar Roll in November 1992 and read with Garry Moore. He had a substantial general practice in the Magistrates' Court; and also practised in areas of family law. He loved the collegiality and camaraderie of the Bar.

He transferred to the List of Retired Counsel in March 2002, but maintained close ties with the Bar, calling in on his clerk before his regular lunches with friends at the Essoign. He was fond of red wine and recently enjoyed a bottle of Grange he'd been given.

Gerard practised at the Bar for more than nine years and, in retirement, remained a connected member—a member for a total of more than 26 years.

Taking after his father, Joe, a Footscray/Western Bulldogs Hall of Famer, Gerard played a good game of football and, for some years, coached the Footscray Football Club (now Western Bulldogs) Under 19s.

Gerard had a passionate interest in literature and history and was widely read. Devoted to his family, over many years, he took his children, then their families and his grandchildren, to a house in Rosebud and, from there, to the beaches up and down the Mornington Peninsula.

VBN

## The Hon Philip Damian Cummins AM

*Bar Roll No 751*

Philip Damian Cummins was educated at Xavier College and Melbourne University where he graduated in law and arts in 1957. He later obtained Masters degrees in psychiatry and law.

He was admitted to practice in 1964 after completing articles at Cleary Ross and Doherty and signed the Bar Roll in 1965. He read with Abe Monester and practised mainly in the criminal law until after taking silk in 1978, when he also appeared regularly in common law cases.

He served on the Bar Council for 11 consecutive years and was chairman when he was appointed to the Supreme Court in 1988. He served on 14 Bar committees and chaired seven of them.

In his farewell speech as a judge, he said:

> I have a great love for the Bar, and I hold it in the highest regard. The work of counsel not only is demanding, but it can be lonely too; and the ethos of the Bar—its commitment, its principles, its intelligence, and its collegiality—is a precious thing we must nurture and protect. The Bar plays an indispensable, constitutional function in the administration of justice.

Owen Dixon Chambers had been built on these principles in the late 1950s, as indeed was Owen Dixon West, which was planned and built during the time that Philip was on the Bar Council. There was a time in the mid-to-late-1970s when the influx of new barristers and the shortage of accommodation required the renting of a building which became known as Four Courts Chambers. Philip made a statement by moving into those chambers so that there was at least one senior barrister there.

Philip was a strong supporter of the jury system. As Justin Quill reported in the *Herald Sun*, "… he supported jurors through trials and

you could see the admiration and trust jurors who sat on his trials had for him".

During his farewell, Philip referred to what he called "a profound tribute to juries". He said:

> They are the community at its best. The symbiosis of judge and jury is democracy at work in the law. All judges who work with juries know how responsible and how astute juries are. All judges who work with juries also know the integrity that juries bring to their work in the fulfilment of their oaths or affirmations to give a true verdict according to the evidence.

Philip served with distinction on the Supreme Court between February 1988 and November 2009, both as a trial judge, and on the Full Court, before the Court of Appeal came into existence. He served from time to time as an acting judge of appeal and in the several years before his retirement he was the senior judge in the trial division and was the principal judge of the criminal division.

As a judge of the Supreme Court, he dealt with many of the most distressing cases that came before that court during his 21 years as a judge. However, he loved the challenge and the hard work that brought. He was a hard worker. If one sought some advice from him, one could be confident he could be approached in his chambers any time between 6.45 am and 7pm. He held a great respect for the institution of a fearless and independent judiciary, but at the same time held firm views as to how the judiciary could continue to be a significant force for good in the 21st century.

Over many years, Philip was instrumental in passing on his knowledge and experience to others and later, in particular, to newer appointees to Australian courts.

For over 20 years, he was an independent lecturer at Melbourne University on ethics and professional conduct. He co-conducted practical seminars on ethical problems for the National Judicial College of Australia for some years. In addition, he supported the Judicial College of Victoria by presenting sessions on victims of crime and family violence issues.

His interests went far beyond the law. He loved literature and read widely. At matriculation he won the exhibition in English literature and the Shakespearean Society prize. Indeed, later in his judicial life, he produced several papers dealing with Shakespeare and the law and Shakespeare and psychiatry. In 2011, he led a program for the Victorian Judicial College on "Shakespeare and the Art of Judging", which explored the universal themes of law, justice and ethics in Shakespeare's plays. In 2012, in the same vein, he led a program on "Justice and the Judiciary through the Eyes of Charles Dickens".

His interest in literature of all sorts occasionally led him to include a rhetorical flourish or two in his judgments. On one such occasion, in the course of sentencing a recidivist offender and in describing the locus of the crime, Philip said, "The hills around Colac are green and rolling…". Upon the handing down of a lengthy sentence, the offender stood up in the dock and told Philip (noting their joint Irish heritage) that the sentence was "so beautiful, he felt like grabbing a violin and playing Danny Boy!".

Another case in which Philip was involved, early on in his judicial career, was contempt proceedings brought by the prothonotary of the Supreme Court against a defendant who, having been served with an order of the court, used intemperate language about a much-loved senior judge of the court. Philip upon the hearing of the contempt charge, determined that, "It may be offensive, but it is not contempt of court, for a person to describe a judge as a wanker."

He loved travel and, in recent years, particularly his travels to Europe with Maree. He loved talking to people outside the law. During university vacations, he had been a jackaroo and a truck driver and was a cook in the Army during his national service. Perhaps by reason of that, he loved the outback and the people who live there. He enjoyed the outback pubs and invariably struck up a conversation with shearers, truckies or whoever was in the bar, and showed real interest in what they had to say. Philip made many 'new best friends' on his trips around Australia and beyond.

He was genial, witty and generous. He was generous to his staff both at the court and later at the Law Foundation and the Law Reform Commission.

Upon ceasing his judicial life in 2009 and after recovery from a stroke, he did what he had always done and that was to get to work. He became president of Court Network. Philip identified with the Court Network service philosophy, which is based firmly in the belief that anyone who comes to court is entitled to be treated with dignity and respect and to have information about court processes explained to them.

In addition, Philip chaired the Victoria Law Foundation from 2009 until 2014. He was particularly passionate about the education function of the foundation and its aim to assist Victorians to understand the law. Even after ceasing as chair in 2014, he continued to travel Victoria, speaking to school children about the law.

Philip had a long commitment to child protection. In 1993 he was the judge in the trial relating to the murder of Daniel Valerio. The circumstances which led to that case appalled Philip, and it was a catalyst for the introduction in Victoria of mandatory reporting of child abuse, which he recommended. Upon his retirement from judicial office in November 2009, he became co-patron of Child Abuse Prevention Research Australia, and also undertook research in the Faculty of Medicine at Monash University into child abuse, with a particular focus on children's experiences of the court process.

Consistent with his long-held concerns about the welfare of vulnerable children—a matter to which he had, regrettably, considerable exposure as a judge—he chaired the Protecting Victoria's Vulnerable Children inquiry. The inquiry was announced by the then premier on 31 January 2010. The inquiry presented its report to the government in January 2012. It was a mammoth achievement, the report being more than 700 pages and containing 90 recommendations. Philip's contribution to the welfare of vulnerable children in this State cannot be overstated.

That task done, Philip was appointed chair of the Victorian Law Reform Commission in September 2012, and led the commission over some 16 inquiries.

He later also became president of the Commonwealth Association of Law Reform Agencies in London. Significant changes to Victorian law resulted from commission reviews of the role of victims of crime in the criminal trial process, the legalisation of medicinal cannabis, adoption by same sex couples, and jury empanelment.

Philip was particularly committed to the commission's community law reform program, which enables it to take on reviews of the law as suggested by members of the community. He believed strongly in community consultation, and participated in numerous public consultations all over Victoria.

In its recent statement, the commission stated that Philip "provided the Commission with rigorous intellectual leadership. He showed warm and genuine concern for the well-being of those who worked alongside him, and will be truly missed."

Philip's work was unfortunately not finished, although perhaps no matter how long he might otherwise have lived, it might never have been finished. In 2016, he commenced part-time candidature for the degree of Doctor of Philosophy on Judicial Culture and Judicial Office in Australia. One of his supervisors was his long-time colleague and friend Professor Michael Crommelin. That work was well advanced and it is a great loss that Philip could not finish it.

In June 2014, Philip was included in the Queen's Birthday Honours list as a Member of the Order of Australia, the citation reading "For significant service to the judiciary and to the law, to criminal justice and legal reform, to education, and to professional associations."

That citation could not reveal the depth and width of that significant service.

MURRAY KELLAM
AND CAMPBELL THOMSON

## The Hon John Spence Winneke AC, RFD, QC

*Bar Roll No 658*

Universally known as Jack, he was part of a Melbourne dynasty. His grandfather, Henry Winneke, came from a German immigrant family and was a County Court judge. His father, Sir Henry Winneke, was solicitor-general, Chief Justice and governor of Victoria. His son Chris is counsel assisting the Witness X Royal Commission.

This legacy could be a burden. Once, as a young barrister in chambers working late, his mother rang from Government House needing urgent help. His father had been entertaining the premier, Sir Henry Bolte, and his deputy, Sir Arthur Rylah. Jack took each man upstairs with a fireman's lift to help them to bed.

When Jack walked down Glenferrie Road, he was always stopped by someone wanting to shake hands with Hawthorn royalty. Jack was the ruckman in the first Hawthorn VFL premiership team in 1961 and one of the best on ground.

Four players in that team had played for Scotch College in 1956: Jack, Malcolm Hill, Ian Law and Colin Youren. They were friends for life.

He played for the University Blacks and won the Cordner Medal as best and fairest player in 1959. He also took part in the Melbourne University Law Review.

The Dean of the Law School, Zelman Cowan, pressed Jack to apply for a Rhodes Scholarship but he wanted to play for Hawthorn and played 50 games between 1960 and 1962.

In the 1961 semi-final against Melbourne, the Demon star Laurie Mithen went down behind the play. Jack was nearby. Commentators sarcastically referred to Mithen

The Hon John Spence Winneke AC, RFD, QC





BACK OF THE LIFT

"fainting" or "lying down". Jack Dyer was heard to say "he done what had to be done".

Years later, Jack spoke of playing against South Melbourne at the Junction Oval. The opposing ruckman, Ken Boyd, said to Jack before the first bounce that his big nose would be broken before half time. It was. When Boyd became an insurance executive, he invited Jack to address his colleagues. He did. Life experience as a footballer was invaluable to the barrister and judge to come. He also chaired the VFL Players Tribunal and was a founding commissioner of the AFL.

Jack served articles with John Shaw at Middleton, McEarchern, Shaw and Birch and came to the Bar in 1962. He was a perceptive and peerless advocate. He was a compelling communicator in addressing a jury or arguing fine points of law before a judge. As a cross-examiner, he was capable of sizing up a witness on the spot.

In 1970, Jack was counsel assisting the board of inquiry into allegations of corruption in the homicide squad. His cross-examination unravelled serious criminal offending by three senior police officers who were involved in protecting an illegal abortion racket. They all went to jail. At the end of the inquiry, his leader, William Kaye QC, gave Jack a red bag.

Jack prosecuted four persons charged with a conspiracy involving the fraudulent sale of caravans. The principal accused—against the advice of his counsel, Phil Cummins QC and Lex Lasry—insisted on going into the witness box. Lex relates that Jack's cross-examination demolished the accused's evidence. All four accused were convicted.

In 1981, he chaired the Royal Commission into the Builders Labourers Federation. His report helped to produce important reforms in the building industry.

During a case in Darwin, Jack befriended the Supreme Court registrar, a man he called Flynny. Flynny arranged a fishing weekend on an island in the Arafura Sea. Flynny arrived at the airport with a huge esky. Jack had told Flynny to invite his junior, Stephen Kaye, because he was the "drinking champion of the South". Jack was in the front seat beside the pilot with Kaye, the esky and Flynny behind them. As the pilot taxied the Cessna down the runway, she peered at the dashboard and asked Jack "is that a six or a nine?" Jack responded, "It's a four!" As the plane lumbered into the air, Jack's door flew open. The pilot cried, "Hang onto the door Jack!" Jack, expletives deleted, responded, "that's what I'm trying to do." Flynny said to Kaye, "hang on to the esky, Steve!" Jack yelled, "forget the ####ing esky and hang onto me!"

Jack played a huge role in the Northern Territory as senior counsel for Lindy and Michael Chamberlain before the Morling Royal Commission. Jack told his junior, Brind Woinarski, that they needed to overturn every point on which the High Court had refused the Chamberlains' appeals. The scientific evidence that led to the convictions was complex. Jack totally mastered it and demonstrated not only that the Chamberlains had been wrongly convicted but that they were entirely innocent. Morling's report totally exonerated the Chamberlains.

Jack had nine readers. Four of them took silk and three became judges. One, Justice Stephen Kaye, says Jack never bothered to lock his room when he left chambers. If Stephen was conferring with a shady client, Jack would pause, look at Stephen's client, say "be sure to lock the door when you go, Steve!" and then exit with his characteristic chuckle.

Jack's good friends on the 10th floor of Owen Dixon Chambers included the legendary Woods Lloyd QC and Neil McPhee QC, plus Tim Wood and Stuart Campbell, who both became County Court judges.

He was on the Bar Council between 1988 and 1991 and chaired Foley's list.

Through appearing as junior to Daryl Dawson QC, he became involved in appearing in courts martial and eventually became a commander in the navy. He once appeared for a patrol boat captain who had cut a corner and hit a reef when trying to get back to Port Moresby in time for a cocktail party. Dawson was the judge advocate. The captain was found guilty and reprimanded. This was widely thought to be a lenient sentence. Jack had argued it was a great offence to be late for an official cocktail party and whatever measures had to be taken to avoid that were necessary.

He loved people and people loved him. He did not get along with machines by land or water.

On Western Port in the family tinny, he lined up identifying features on land to locate a favourite spot. Flathead were jumping into the boat before he realised the draining bung had not been replaced and water was rising above their ankles.

Jack was a member of the Tantangara Hunt Club and Madrigal Society that included Woods Lloyd, Peter Murphy, his son Frank, Jack Hedigan and Peter Galbally. They went fishing on Lake Peddar in Tasmania. Jack was nominated skipper of the rental boat. The proprietor wanted a demonstration. Jack reversed the boat into the wharf at high speed. The owner rebuffed Jack loudly and directly. Woods Lloyd shot back equally firmly that the man should show greater respect to a naval captain. Jack's son Andrew then took the helm.

Jack loved Italian cars and once left the car park of his flat in his white Alfa Giulietta. The exit involved the negotiation of a corner, a steep level change, a rock garden and a concrete wall. He ran hard against a boulder and gunned the accelerator with a thrilling Italian exhaust note but only managed to wedge the little car tight against the concrete wall with one wheel spinning uselessly in the air.

Jack's appointment in June 1995 as the first president of the Court of Appeal was enthusiastically welcomed by the legal profession, except by the solicitors who wanted to brief him and by the journalist Scotty Palmer who asked "why would Jack want to take that job when he's an AFL commissioner?"

He had mastered every jurisdiction the law could offer. His skill as a barrister was matched only by Murray Gleeson and Michael McHugh in New South Wales and Neil McPhee in Victoria.

He led a group of excellent lawyers in Brooking, Tadgell, Ormiston, J D Phillips, Charles, Hayne and Callaway. The appointments during Jack's presidency were of the same high calibre: Batt, Kenny, Buchanan, Chernov, Vincent, Eames, Nettle and Warren.

His sensitivity in exercising leadership and the respect which the whole legal community had for him made it possible for him to develop a united team. The hearing of appeals in Victoria had been a cumbersome process. It was impossible to get urgent appeals on quickly. Few at the Bar had been able to develop specialist appellate practices. All of this changed for the better.

There were occasional stumbles. After introducing a new electronic card for access to the courts, Jack and his brother and associate Michael were locked in after they lost the card. Mike's idea of using his David Jones credit card failed. Only their loud laughter alerted others to the fact that they were incarcerated in a courtroom. There was also a duress button under the Bench to call armed police in emergencies. Measured legal argument in court was occasionally interrupted by the SOG bursting in with guns at the ready when summonsed by the accidental pressing of the button.

Jack was a hard worker, in chambers by 7.30am and working until 6.30pm when he would send up a signal to his colleagues: "time for a drink?" He was highly disciplined and took home at least two loaded bags every night.

He masked his humour in court because litigation is a serious matter for the parties. He treated all with respect and humanity. No-one left court feeling their arguments had been unfairly dismissed. By contrast, a NSW Court of Appeal judge once interrupted boring submissions to say "I'm going to sleep now and I don't want you to be here when I wake up!"

Jack was good with unrepresented litigants, able to explain the strengths and weaknesses of their case and what the court could or could not do. He was once explaining to an appellant the difficulty with his case when the latter leapt up and shouted "you're a ####ing liar!" Other judges might have cited him for contempt but Jack said: "Mr Rich, you will go down to the cells, and we will go back to my chambers and have a cup of tea. When you have regained control of yourself, we will continue." There were no further interruptions.

The Court of Appeal's judgments in his decade faced only 10 reversals in the High Court, three in crime and seven in civil. This was a consistently lower figure than for any other state's appellate court.

Previously, the Full Court of three judges had never sat outside Melbourne. Jack took the Court of Appeal on four circuits every year, commencing with Geelong, Ballarat and Bendigo.

Jack was also president of the Melbourne Club. He was an entertaining speaker. On one occasion when discussing the Burke and Wills expedition, Jack reminded members that O'Hara Burke must have been the only club member to have died of thirst.

He always said he would limit his term to 10 years. He retired in June 2005 to the regret of his colleagues and the profession. He and Sue lived at Flinders, playing golf and watching football with their pug dogs, first Winston, then Rocco.

His health failed but Sue tended him heroically and was with him to the end. He was an inspiring leader, an exemplary judge and a great Australian.

COMPILED BY BARRISTERS PAST AND PRESENT


## Michael Houlihan

*Bar Roll No 1576*

Michael Houlihan was born on 5 October 1935 in Nar Nar Goon. For primary school, he would ride his fractious Shetland pony—in all weather—the length of the family's Pakenham farm property and then on to St Joseph's at Cora-Lynn. At school he did not agree with the strap so when he had the chance, he stole it, broke it up and dropped it down between the toilet walls. For secondary school, his parents sacrificed to send him as a boarder to St Patrick's College, Ballarat. He did well, but when he was 14, his mother died and he abandoned his studies to return to work with his ageing father (who had fought in World War I) on the family dairy farm.

In the 1970s, Monash University was offering a free early school leavers' scheme. Michael got through a tough selection process to get into law and economics. He and his wife Marie sold the dairy herd, leased out the farm and, with five children and

'one on the way', they both worked part-time while he completed the Bachelor of Economics and Bachelor of Laws degrees at Monash, studying alongside people like Mick Dodson, Peter Costello, Red Bingham and his friend Ron McCallum. He served articles with Jim Keogh at Keogh & Smith in Narre Warren and was admitted to practice in April 1980. He remained with the firm as a solicitor for only a couple of months, then came to the Bar, reading with John Keenan (later QC and now retired).

Michael was in the second Bar readers' course in June 1980; all 19 readers in that course were assigned to the newly established Howells' List. Michael began with a very general and largely Magistrates' Court practice, which developed into a criminal practice—largely County Court trials—with north-east Victoria circuit work. He was frequently junior to the late Charles Francis QC, including in the massive exorcism manslaughter prosecution of *Vollmer*: 45 days in the County Court at Horsham in 1994; and 15 days in the Court of Criminal Appeal in 1995. He practised at the Bar for more than 28 years.

All his life, Michael was a voracious reader of literature, poetry, history and philosophy. With his passing, we lose his mighty brain, his deep knowledge and wisdom, and his enormous vocabulary. He loved the comedic language of the Goons—words and sounds like *bung*, *kafoofer* and *spondoolik*—a love inherited by his children and grandchildren. Certain words would tickle his fancy: *assegai*, *vicissitudes*, *boulevardier*. And he was eloquent even on his deathbed. Two days before he died, he said to one of his sons: "I'm just enervated".

A man of great passions, his vast enthusiasms included: firearms, garlic, the primal howl of John Fogarty and Credence Clearwater Revival, ocean swimming in winter, bull's blood shiraz, boating, shooting foxes, ham and mustard sandwiches, braces instead of a belt, getting trailers of wood for the fire, storytelling, the rooster joke, Mozart, spitting, his pocket knife, Verdi's *Chorus of The Hebrew Slaves*, crispy bacon, shooting rabbits, Max Weber, the rosary, his overalls, the stoics, spaghetti westerns, the handy versatility of a good rag, porridge, polished shoes, *Quadrant* magazine, gulping down scalding hot tea, big gas-guzzling cars, and the medicinal qualities of silverbeet.

Michael died in hospital on Wednesday, 20 February 2019, at the age of 83. He is survived by his wife (Marie), two brothers (Tom and Paul), seven children (Delia, Francine, Benedict, Domenica, Luke, Bryanna and Liam) and 20 grandchildren.

VBN & LIAM HOULIHAN

## Richard Forsyth

*Bar Roll No 1157*

Richard Forsyth practised as a barrister at the Victorian Bar for 44 years. Before coming to the Bar, he was a partner at Russell Kennedy and then at Godfrey Stewart. For around 25 years, Richard practised in workers' compensation and common law, acting for defendant insurers. The countless cases he fought defending claims moved him to adopt what he called a "half time, change sides" policy and he then chose to act only for workers with serious injury applications for the later 20 years of his career. It was during that time that two of his four daughters read with him—first Jane in 2000 and then Annabel in 2001.

As children, Richard's daughters were exposed to legal concepts as Richard would explain to them the meaning of terms like arbitration, adjudication, settlement, jurisdiction and adjournment. Richard's strong work ethic both in the law and at his farm inspired three of his daughters to follow suit and study law. As his readers, his daughters greatly benefited from seeing their father as a person acting in a professional capacity with a gentlemanly manner and with integrity. He was fairly tough but always encouraging. His fourth daughter, Fleur, also followed him into the law and has built her career at ASIC.

Richard was the son of a Rhodes Scholar from Western Victoria who, after graduating from Oxford, joined the British Civil Service in Malaya. During the war, Richard's father was a prisoner of the Japanese in Changi, Singapore and, at that time, Richard was sent to boarding school in England at the age of two and then later to board at Glamorgan in Melbourne at the age of six. He saw his parents once every two years.

Richard built his own life and supported his way through Melbourne University with a Commonwealth Scholarship and then his first legal job at the Crown Solicitor's Office. At 23 he began a life-long romantic marriage with Christine and became a father at 25. He provided for and encouraged his daughters to be the best they could be, to study hard, work very hard and have a family of their own.

He was still working on cases and driving his tractor at Yarck two weeks before he died. He was a grandfather to six grandsons and five granddaughters, who all adored him. He will be greatly missed by his family, friends and work colleagues.

JANE FORSYTH & ANNABEL GLOVER

## Andrew Nigel Bristow

*Bar Roll No 1791*

The name "Andrew" is derived from the ancient Greek andreia meaning "manliness" and, often, referring to someone who is manly or brave.

Upon graduating from Melbourne University, Andrew was articled to Michael Winneke of Winneke & Rolf. After his admission in 1981, Andrew ventured to Mildura, where he worked as an employee-solicitor for David Messenger. Whilst employed as a solicitor in Mildura, he resolved to join the Bar.

Upon entering the portal of Owen Dixon Chambers, he commenced reading with Roger Gillard. He signed the Bar Roll. The year was 1982. He quickly established a practice and, like many of his fellow colleagues at that time, commenced practice by appearing in the Magistrates' Court and, over the ensuing years, in higher courts.

In 1993, Andrew appeared for the firm of solicitors Gray & Winter in a Federal Court proceeding that lasted almost 12 months. It involved a number of plaintiffs who were induced to enter into a tax scheme that focused on a block of apartments and the representation that they would appreciate in value. Gray & Winter's professional indemnity insurers were moved to pay $1 million in consideration of it ceasing to indemnify Gray & Winter under the terms of their professional indemnity insurance policy. Getting wind of this payment, the plaintiffs in the Federal Court proceeding initiated a claim against Gray & Winter in the Supreme Court to restrain the distribution of that payment until the proceeding in the Federal Court was resolved. Again, Andrew appeared for Gray & Winter, together with a leader, and was successful in resisting the plaintiffs' claim. Eventually, in the Federal Court proceeding, judgment was entered against Gray & Winter, together with judgments against a number of other defendants. At the trial, Andrew strongly contended that the apartments would eventually appreciate in value but this contention was rejected by the court. Ultimately, his contention turned out to be correct!

Despite bearing a name denoting "manliness" and "bravery" and being so, Andrew was, in every sense a polite, intelligent, witty and charming individual. In practice, he was sensitive, but perspicacious. These qualities not only endeared him to his fellow practitioners, but assisted him in forging trust with his clients and the judiciary.

For a number of years, Andrew penned a wine column for this publication, in which he would appraise a particular wine and compare it to the speciality of counsel, by reference to an area of practice, its overall complexity, seniority and maturity and how it should be drunk and, indeed, appreciated!

In 2012, Andrew assisted Josh Wilson and Ian Percy in conducting a three-day workshop on advanced advocacy skills, as part of a course hosted by the South Pacific education committee. He belonged to or served as chairman of several Bar committees and mentored Jonathan Sprott, who signed the Bar Roll in 2010.

Andrew died on 7 April 2019. After contracting a serious infection, during a visit to Bali, from which he made some recovery, he retired as a practising barrister in July 2015.

He is survived by his daughters Katy and Sarah, whose mother, Louise Crockett, was a member of the Victorian Bar until her premature death in 2005. He is also survived by his second wife, Jody, and her family.

The very large attendance at the funeral of Andrew at—appropriately—St Andrew's Church, Brighton, on 17 April 2019, testified to the high regard, esteem and affection in which Andrew was held by his family, friends and former colleagues. He was, in every sense, the exemplary gentleman and colleague!

ROGER C GILLARD QC

Many readers will remember the marvellous wine column that Andrew Bristow penned in association with the Essoign for the *Victorian Bar News* in the 2000s. After describing the wine's provenance and its bouquet, colour and palate, Andrew would finish each column by characterising the wine as a barrister.

He described a 2005 Darling Park Arthur Boyd Collection "Griognier" (a blend of pinot gris and viognier) as a "pleasant and attractive 'reader': young, enthusiastic and able to be enjoyed now". One suspects Andrew delighted in devising descriptions such as "a junior constitutional barrister, complex and full of him or herself and able to continue on for a long time" for the Jenke Vineyard's Barossa Shiraz 2000 or his rating of the 2006 Dawson's Patch Chardonnay as a "talented junior injuries barrister, who knows where she is and knows where she will end up". His serious and detailed description of each wine, coupled with the playful characterisation, is a lovely reflection of the kind of man Andrew Bristow was.





BACK OF THE LIFT

## Magistrates' Court of Victoria

*The editors echo the words of Chief Magistrate Lauritsen, who in 2018 described the "influx of smart, enthusiastic energetic magistrates with the positive effect that their energy will bring". The following appointments will continue to reinforce the court:*

Her Honour Magistrate Tara Hartnett

Her Honour Magistrate Mia Stylianou

His Honour Magistrate Kieran Gilligan

Her Honour Magistrate Olivia Trumble

Her Honour Magistrate Nahrain Warda

Her Honour Magistrate Michelle J Mykytowycz

His Honour Magistrate Russell Kelly

His Honour Magistrate Randall Kune

Her Honour Magistrate Letizia Torres

His Honour Magistrate Constantinos Kilias

His Honour Magistrate Timothy Hoare

Her Honour Magistrate Alanna Duffy

His Honour Magistrate Shiva Pillai

## Gonged!

### 2019 AUSTRALIA DAY AWARDS

The Hon Justice Geoff Nettle AC

The Hon Justice Michelle Gordon AC

Brian Lacy AO

Rex Wild AO QC

The Hon Justice Clyde Croft AM

The Hon John Coldrey AM QC

The Hon Peter Young AM QC

His Honour Anthony Howard AM QC

John De Wijn AM QC

Stuart Wood AM QC

### 2019 QUEEN'S BIRTHDAY HONOURS

The Hon Justice Paul Anthony Coghlan AO

Dr Matthew John Collins AM QC

James William Peters AM QC

Michael Warner Shand AM QC

Nicholas Richard Cowdery AO QC

The Hon Dennis Antill Cowdroy AO QC

Suzan Cox OAM QC

Clement Arundel Newton-Brown OAM

The Hon Dr Annabelle Claire Bennett AC SC

### OTHER APPOINTMENTS/AWARDS

The Hon Justice William Alstergren - Chief Justice of the Family Court of Australia

Anna Boymal - Judge of the Federal Circuit Court of Australia

Alice Carter - Judge of the Federal Circuit Court of Australia

Paul Glass - Magistrate of the Family Court of Western Australia

Dr Ben Gauntlett - Disability Discrimination Commissioner

## 2018 Silks Appointments

**BACK ROW:** Scott Smith; Francis O'Loughlin; Justin Hannebery; Diana Piekusis; Andrew Hanak; Tomo Boston; Raymond Gibson; Jennifer Firkin **MIDDLE ROW:** Richard Dalton; Fiona Forsyth; Michael Rush; Eugene Wheelahan; Catherine Button; Anthony Strahan; Andrew Palmer; Frances Dalziel; Elizabeth Brimer; William Lye. **FRONT ROW:** Christopher Archibald; Cam Truong; Peter Rozen; Andrew Ingram; Juliet Forsyth; David McAndrew; Colin Mandy.



## Victorian Bar Readers

March 2019

**BACK ROW:** Travis Brown; Benjamin Gahan; Kirsti Halcomb; Scott Cromb; Carlin Grant; Vince Murano; Christopher Hender; Christopher Oldham; Simon Frauenfelder; Dr Michael Taylor; Benjamin Fry; Lachlan Currie; Andrea Bannon; Peter Haddad **MIDDLE ROW:** Nina Massara (staff); Khai-Yin Lim; Emma Harold; Nicholas Bird; Annie Yuan; Antony Berger; Timothy Byrne; Jonathan Barreiro; Thomas Battersby; Andrew Crocker; Huw Whitwell; Thomas Wood; Angelo Germano; Andrew Healer; Felicity Fox; Huw Watkins; Conrad Banasik; Glyn Ayres; James Moore; Christina Mavropoulos (staff) **FRONT ROW:** Suganya Pathan; Rabea Khan; William Blake; Erica Lawson; Kristy Fisher; Gayann Walker; Sean McArdle; Alexandra Guild; Edwina Smith; Rachel Amamoo; Susanna Locke; Collette Mintz; Ashleigh Harrold; Sarah Damon; Michelle Bennett; Laura Mills

Rachel Weisz and Olivia Colman in *The Favourite*

A BIT ABOUT WORDS

# The C word

JULIAN BURNSIDE

By the time you read this, many people will have seen *The Favourite*, which is showing in cinemas now. It is directed by Yorgos Lanthimos. It premiered at the 75th Venice International Film Festival on 30 August 2018, and opened in UK cinemas on 1 January 2019. It was nominated for an Oscar as best film, but didn't win.

*The Favourite* tells the story of Queen Anne of England, and the rivalry between two of her closest personal maids: Sarah Churchill (the Duchess of Marlborough) and Abigail Hill (later Baroness Masham). Queen Anne is played by Olivia Colman (who *did* win an Oscar for her role). The film is surprising because it uses the words *okay* and *cunt*. Those words are ostensibly what this column is about, but first: a bit of history.

Queen Anne presents as a tragic figure: crippled by gout, apparently delusional, and head of the most powerful country in the world, at a time of tremendous historical upheaval. Anne was born in 1665, while Charles II was king of England. He was her uncle. Her father was James, who became James II when Charles died without issue. James II was immensely unpopular, in part because he was Roman Catholic.

## Some historical context

The split between Roman Catholics and Anglicans had emerged when Henry VIII left the Catholic Church in 1527 in order to get a divorce from Catherine of Aragon so he could marry Anne Boleyn. It intensified under Henry's daughter, Elizabeth I. The Tudor line ended on the death of Elizabeth. The throne was taken by James VI of Scotland who became James I of England (the first of the Stuart kings). He was the target of the Gunpowder Plot in 1605 (a plot by a group of pious Catholics who objected to his continued persecution of Catholics) and was followed by Charles I. Charles I triggered the English Civil War by trying to sideline Parliament, in a way strangely reminiscent of Donald Trump's current conduct, under cover of a "national emergency". He lost the war and his head, but Oliver Cromwell's subsequent reign did not work out, and the monarchy was genuinely restored in 1658 with Charles II as king. Charles II died in 1685. As he had no children, the throne was taken by his brother James, who became king as James II.

As noted above, Anne's father (James II) was immensely unpopular. The English Parliament in effect offered the throne to William of Orange, a Protestant. He accepted, and he and his wife Mary (the older daughter of James II) arrived in England in November 1688 to take the throne.

William reigned until his death in 1702, Mary having predeceased him in 1694. Anne was sister to Queen Mary. William and Mary had no children so, on William's death, Anne was heir presumptive. She reigned as Queen of England, Scotland and Ireland from 1702 to 1707. In 1707, the Act of Union created Great Britain, and Anne ruled as Queen of Great Britain until she died in 1714. (Notice that, even though she was a queen, she died aged 49).

Anne was second cousin to George of Hanover. When he visited England in 1680, there was a rumour that they would marry. They didn't. Instead, she married George of Denmark on 28 July 1683. Sarah Churchill was appointed one of Anne's ladies of the bedchamber.

During the early years of Anne's marriage, James II became king and (as noted above) he was removed and replaced by William of Orange and his wife, Anne's sister, Mary.

Anne had 17 pregnancies, but none of her children survived. When she died in 1712, the throne was taken by her cousin, George of Hanover. As George I, he was the first Hanoverian king of Great Britain.

> "*The Favourite* includes quite a lot of complicated (and enthusiastic) lesbian sex. I have no idea whether this is historically accurate."

The accession of George as king of Great Britain must have been a shock to George Frideric Handel. Handel had been appointed Kapellmeister to George of Hanover, and asked for leave of absence to visit England. He was successful very quickly in England and didn't return to Hanover. He received a grant of 200 pounds a year from Queen Anne, but in 1712 his former boss became George I of Great Britain. In 1717, Handel wrote *The Water Music*, which was performed several times for the entertainment of George I and his friends. It is said that *The Water Music* helped heal the rift which had developed between Handel and George as a result of him abandoning his role as Kapellmeister in favour of the lure of Queen Anne's England.

## *The Favourite*

*The Favourite* has a dazzling sound track and includes (not surprisingly) a number of pieces by Handel. It also includes work by Purcell, Vivaldi and JS Bach (who was born in the same year as Handel). A little less predictable is music written by Franz Schubert, who was born in 1797. Similarly surprising historical misfits include characters saying "okay", which is first recorded in use in 1919. In his *American Language*, H.L. Mencken noted: "Dr Woodrow Wilson is said to use *okeh* in endorsing government papers." (Yes: Wilson had a doctorate: he had received a PhD from Johns Hopkins University in 1886).

It is also surprising to hear some of the characters (especially the women) in *The Favourite* use what is arguably the last surviving taboo word *cunt*. Surprising precisely because of its taboo status to this day.

## The origins of the 'C-word'

Although it is rare to hear cunt in film or on TV these days, it is worth remembering that it is a very ancient word. It is derived from the Old Norse word *kunta* (female genitalia). Its first use in English dates to about 1230: Ekwall records a street in London called *Gropecuntlane*. The OED gives numerous quotations through to the early 19th century, where it is clearly used to give offence.

Use of *cunt* in written English peaked from about 1603 (was this in any way connected to the accession of James I?), and was widely used from then until about 1800. It was used (without apparently giving offence) by Horace Walpole in 1743. Similarly, the use of *fuck* in written English soared from about 1620 and did not substantially decline until about 1800.

That said, it may have fallen out of respectable use before then: Johnson (1755) and Webster (1864) do not record the word at all. Neither do they record the word *fuck*, which had existed as part of the English language since the early 16th century (the first four quotations using *fuck* in the OED date from the 16th century). However the *Universal Etymological English Dictionary* (1742) records cunt and defines it in Latin: *Pudendum Muliebre*. It also records *fuck*, and debates its origins, but ultimately defines it as *Foeminam subagitare* (!). The retreat into Latin for both words suggests a degree of coyness consistent with them having, by that time, acquired a poor reputation. *Grose's Dictionary of the Vulgar Tongue*, published in 1811, includes an entry: "*C*** a nasty word for a nasty thing", but it avoids *fuck* altogether.

*Cunt* fell into taboo status in the 1920s: the OED records its secondary meaning as follows; "Applied to a person, esp. a woman, as a term of vulgar abuse." The first quotation supporting that use dates from 1929.

In America at least, cunt may have been eclipsed as the worst possible word: a few years ago punk poet John Cooper Clarke (born 1949) wrote and performed "Some cunt used the N-word".

## A visually dazzling film

These things aside, *The Favourite* is a terrific film. It is visually dazzling: the sets are as sumptuous as might be expected. External scenes were filmed at Hatfield House in Hertfordshire, and many of the internal scenes are also set there: in the Marble Hall, the Long Gallery and the King James Drawing Room. Some scenes were shot at Hampton Court Palace. The costumes are dazzling, and the wigs of the parliamentarians are astonishing, but familiar from paintings of the time. The competition between Whigs and Tories show Parliament as it was during one of the most interesting stages of its development.

As well as some historically interesting language, and some neologisms, *The Favourite* includes quite a lot of complicated (and enthusiastic) lesbian sex. I have no idea whether this is historically accurate. When male homosexuality was criminalised in Queen Victoria's reign, female homosexuality was not criminalised, because (apparently) she did not recognise its existence as a form of behaviour. At the time of Queen Anne, homosexuality was not a criminal act. Whether that made it more common or less restrained I do not know. According to a biography by Anne Somerset, *Queen Anne: The Politics of Passion*, Anne was a reserved figure as she entered her physically frail old age. So, *The Favourite* may have taken liberties with the facts.

Nevertheless, it is a fact that her friendship with Sarah Churchill was very close, and finally cooled because of political, not etymological, differences.

PHOTOS COURTESY OF YORGOS LANTHIMOS/TWENTIETH CENTURY FOX

# Secret Judge

Junior members of the Bar are encouraged to contact vbneditors@vicbar.com.au if you have an ethics or etiquette question for our anonymous judge to answer.

## A question from junior counsel

The Junior/Judge is a good inclusion. As it so happens, I have a question which I'd love to have an answer to. The question is: how does one address a former judge? One bumps into ex-judges around chambers from time to time, and unless you know the ex-judge/now-barrister well, I don't feel that a first name is appropriate (unless invited). "Judge" doesn't seem right either, given that they're no longer on the Bench, and Ms X or Mr Y seems a bit stiff and formal. Some guidance would be much appreciated.

- Junior

## From the Secret Judge

Dear Junior Counsel,

This is a truly 21st century question. In the past, retirement was an absolute concept, an irrevocable step closer to imminent demise. Judges retired and were never heard of again. Many died soon after retirement. This was a relief to Treasury, as the contingency allowance for judicial pensions was kept low. To barristers, a judge's retirement meant withdrawal from life as we knew it. If the Retired Judge wasn't actually dead, he (and it was always he back then) was as good as dead—dead to the world of the practice of the law, where the thrill of the next brief, and the one after that, and the vagaries of the judge presiding over your current trial, and so forth, consumed your thoughts.

The old guard RJs, who had devoted their lives to the practice of the law, found their days were suddenly long and empty. They discovered that their wives (as they all were back then), who had uncomplainingly ministered to their needs when they appeared at table or in rare moments of leisure, had pursued their own interests while they were off judging, and were none too keen on giving them up. "I married you for life, but not for lunch" was such an oft repeated refrain that RJs might have been forgiven for rekindling their interest in coincidence reasoning. It was a rude shock to discover that other people didn't seem to find them as interesting or funny as their associates or the barristers appearing before them did. They bemoaned the decline in manners, as they found they were no longer treated with the respectful deference they had taken for granted. And, despite their relevance deprivation syndrome symptoms, they were living longer, but maybe grumpier, lives.

Baby boomer judges approaching mandatory retirement discovered their retired colleagues were still alive and, as baby boomers had always done, wanted to do things differently from the older generation. The age of 70 didn't seem so old, once they were approaching it themselves. Did life (as in, life as a lawyer) have to end at 70?

In 1997, Parliament enacted the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth).

This affected judicial pensions. Badly. Mobilising with remarkable speed, within five years, a challenge to the constitutionality of the legislation, as it affected state judicial pensions, was heard by the High Court[1]. Actuarial evidence was sought. It revealed that judges were better off financially if they retired as soon as they qualified for the judicial pension than they were if they remained in office for as long as they were able, by law, to serve.

It was argued in the High Court that the financial disincentive for a judge to remain in office for as long as he or she could would encourage judges to retire early. The High Court was doubtful financial incentives would encourage judges to retire early. They were right. The legislation was read down, the financial incentive to retire early was removed … and increasing numbers of judges started taking early retirement. Some retired too early to qualify for a pension. Others did their minimum term, and some their full term before joining their former judicial siblings at the Bar.

So, to your question. What do you call a retired judge who is back at the Bar? The short answer is, it depends.

Bar convention is that barristers address fellow barristers by name, not title[2].

Bar convention is also that members of the Bar are permitted to call a judge 'Judge' and not 'Your Honour' in informal settings. That is a special privilege for barristers, not extended to other branches of the profession, court staff, or the population at large. The convention extends to addressing retired judges as 'Judge', even though they lost their formal honorific of Justice or Judge on retirement.

Now, some retired judges like, and are accustomed to, being addressed as 'Judge'. Others do not. Some profess not to care what they are called, but beware if you make the wrong judgement call, and are all too quickly reminded of the icy stare they used to such effect in their judicial existence. Some take up new positions with titles. 'Commissioner' or 'Professor' can help you conveniently avoid the issue. Maybe the reintroduction of knighthoods was not such a bad idea.

But what about the rest? And who should decide on the form of address? Should you be the one to decide, or is it up to them? What if you pluck up the courage to ask how they want to be addressed, and they say it's up to you? In other words, that how to address them requires *a discretionary value judgement to be made by reference to undefined factual matters*[3].


"Some take up new positions with titles. 'Commissioner' or 'Professor' can help you conveniently avoid the issue. Maybe the reintroduction of knighthoods was not such a bad idea."

Clearly something more is needed. I pondered. The ABC was on in the background. There was a quiz. "Are Collingwood's stripes black on white, or white on black?", the questioner asked. And then I got it. Are they *barristers* who happen to have been, in a previous existence, judges? Or, are they *retired judges*, who, in a previous existence, were barristers?

This is not a simple identification of Bar conventions, or resolution of apparent conflicting principles. They are existential questions, requiring "fact-value complexes, not … mere facts to be applied by the decision maker."[4]

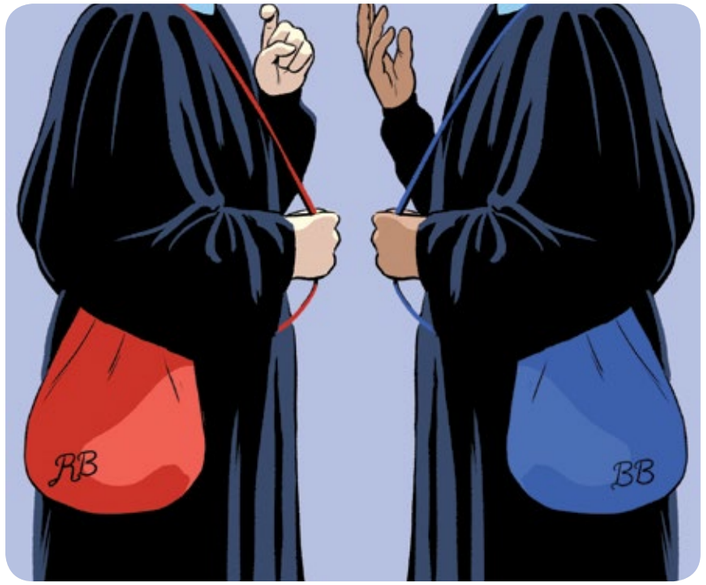
So, put yourselves into the shoes of a decision-maker. Did the person rush back to the Bar, too young in years of service to qualify for the judicial pension, and resume practice as a barrister? The fact/value complex would point to the former characterisation as more apt. Do they practise as a barrister, hold a practising certificate, and appear in court? Again, the fact/value complex would suggest they are, in their current incarnations, barristers. If they are barristers who happened in the past to have been judges, then you should feel free to call them by their name.

If, on the other hand, you think of them as retired judges who occupy chambers, then the judge, not barrister, convention may be more appropriate.

Just remember, discretionary decision-making can be tricky. Reasonable minds may differ, and no one wants to be called '*Wednesbury* unreasonable.'[5]

Yours,
SJ

1. *Austin v the Commonwealth* (2003) 215 CLR 185.
2. Name means first, or given, name. Now that barristers are not all products of boys only private schools where addressing pupils by last name only was the custom, the schoolboy alternative has all but disappeared.
3. *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*, (2012) 246 CLR 379, per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 42.
4. *Osland v Secretary to Department of Justice (No 2)*, (2010) 241 CLR 321, per French CJ, Gummow and Bell JJ at [14].
5. A reasoning or decision is *Wednesbury* unreasonable (or irrational) if it is so unreasonable that no reasonable person acting could reasonably have made it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.




RED BAG, BLUE BAG

# How can I get the best spot at the Bar table without it looking obvious?

For aspirational juniors yearning for the tips and tricks that may one day elevate them to senior counsel status, submit your questions to vbneditors@vicbar.com.au for our anonymous silk to answer.

*Dear Red Bag,*

*The Bar table may only be a table, but I'm working out that it's a lot more than that.*

*First, which side do I sit on? Sometimes barristers rock up for the plaintiff and sit on the right side, when I thought it was the left. I can't seriously believe it depends on the location of the 'witness box'. What does that even mean?*

*Secondly, any tips for spreading out my things so that I have plenty of elbow room (particularly when I am being led)?*

*Thirdly, I appreciate that more senior barristers have priority when it comes to being heard. But when we say 'senior', do you have a rule of thumb for 'how senior'?*

*Yours,*

*Blue Bag.*

Dear Blue Bag,

What an encouraging question! This means you're busy and frequently getting in to court. Plainly, you don't practise at the commercial Bar, given how rarely commercial law cases run nowadays.

So, where to sit? Depends on the brief and the court.

In the great state of Victoria, there is no real rule about who sits where. However, as a matter of practice, in common law or crime, should counsel for the plaintiff or the accused wish to sit closer to the jury box, then it is considered good form not to impede them. Here, substance always triumphs over form (unlike in Sydney, where the moving party always sits to the right at the Bar table and where silks do not carry so much as a lecture pad to court, their junior being consigned to the role of pack-horse).

Unsurprisingly, English courts betray an even more determined pre-occupation with form. In many such courts, there is no singular Bar table, but four rows of benches and tables. In the back row sit the solicitors. Next, in the third row, sit junior barristers, with silks sitting in the second row (or inner bar). Closest to the bench is the (often vacant) first row, which is reserved for those carrying a white-ribbon brief on behalf of the Crown.

Happily, no such hierarchies exist in egalitarian Australia where all participating advocates are seated at the same Bar table, which poignantly symbolises equality before the law.

Of course, the Victorian way is not without its problems. Consider a multi-party common law jury trial, say with three defendants. Such a case is heard in a larger court room with multiple Bar tables. Often the morning of day one will resemble something like the running of the bulls at Pamplona with juniors trying to secure the second Bar table, in an attempt to appear less conspicuous than the other defendants in the eyes of the jury. Plainly, it is too silly for the plaintiff to be seated alone at the first Bar table with all the defendants nestled in at the second Bar table. So, the convention is that the first defendant sits at the Bar table adjacent to the plaintiff, with the second defendant followed by the third defendant at the second Bar table, etc. This makes for a more orderly tableau for the conduct of the hearing and, in many instances, a more even apportionment of liability!

The most entertainment arising out of seating confusion, however, always occurs on admission days. The sight of solicitors awkwardly and self-consciously wearing robes and staying robed in front of the Supreme Court for as long as they can in the vain hope that someone they know might pass by and recognise them, and perhaps even think that they are really barristers, has always been a source of amusement for those taking in the view at the Essoign. Who would have thought that David Brent (with apologies to Ricky Gervais) was such a role model for so many Melbourne solicitors? Such mirth is only surpassed by the sight of those solicitors who choose to rush to court early in the office gown and jabot, occupy the Bar table in the Banco Court whilst distinguished, senior silks stand in the well of the court awaiting their turn to move an admission. Impressively, by contrast, on the rare occasion when a member of the Victorian Bar manages to secure a seat at the Bar table, that barrister will almost always forfeit the seat to the most senior member of counsel present, so that the court is afforded the maximum respect and courtesy.

Space at the Bar table is a different matter. Here, within the established norms of polite manners and decorum, good judgment is the order of the day. Many juniors now use iPad Pros in court which saves plenty of space for their leaders to spread out their folders. However, even now an impressive number of silks have also embraced technology and are using computers and iPads in court, which not only saves space at the Bar table, but is also an efficient way to work in many respects. The only drawback here is a Bar table flood when the water jug is accidentally knocked over, causing multiple short-circuited electronic devices and a risk of electrocution to all counsel and instructors in the vicinity, thereby resulting in a likely adjournment and a waste of valuable court time. Maybe 'Camelbaks' (black coloured) to be worn under robes might be a practical solution to this OH&S risk, which not only provides for a safer courtroom, but also allows counsel access to more immediate and convenient hydration.

"The two silks arrived at the Cabrini Hospital at approximately the same time, each with an attack of acute appendicitis requiring surgical intervention."

As for senior barristers getting priority in having their cases heard, back in the days of the two-thirds rule, cases in busy lists were often heard in order of seniority after consent orders and unopposed matters had been despatched. This often meant that juniors could be left in the back of the court waiting for their 20-30 minute matter to be called on while a pair of silks grandly played verbal ping-pong for a couple of hours beforehand.

Thankfully those days too have now passed as cases are now usually heard in order of estimated duration, with shorter matters being heard first. In 2019, seniority at the Victorian Bar only really matters in two respects. First, in terms of the allocation of the highly prized car-parks in Owen Dixon East and West. And second, in terms of hospital waiting times, as was evident from a recent incident involving two leading defamation silks. The two silks arrived at the Cabrini Hospital at approximately the same time, each with an attack of acute appendicitis requiring surgical intervention. As both silks, partially sedated, were lying supine on gurneys outside the operating theatre, the more senior of the two was overheard insisting to the surgeon and the charge nurse that they be operated on in order of seniority and that he be operated on first!

So Blue Bag, when it comes to the Bar table and life generally, take your place, take care and take charge!

And I so advise.

Yours ever,
Red Bag.





BOILERPLATE

# How storytelling is integral to justice

PETER HEEREY

Stories can evoke memories and pre-conceptions way beyond the actual story itself. A generation ago, English Court of Appeal judge Lord Denning was famous for his colourful literary style. One of his judgments, about a not particularly interesting road accident, commenced: "It was bluebell time in Kent."

*Miller v Jackson* [1977] QB 966 was another example. This was a case where a householder sued the local cricket club for the nuisance caused by balls being hit into his garden. Lord Denning said:

> In summertime, village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays... On other evenings after work they practise while the light lasts.
>
> Yet now after 70 years a Judge of the High Court ...has issued an injunction to stop them. He has done this at the instance of a newcomer who is no lover of cricket.

This passage had always conveyed to me a picture of the archetypical English village: Norman church, oaks and elms, stream, stone bridge, village pub and so forth.

That is until I spoke to Frank Bates, a legal academic, who has actually played cricket on the ground at Lintz. He said it was right in the middle of an industrial wasteland. Startled, I re-read the judgment. Sure enough, no Norman church, no oaks, elms, village pub etc.

Part of the story told is the insinuated—although in fact untrue—aesthetic aspect which resonates with the reader's preconception of cricket as, amongst other things, part of the classic English landscape enshrining English values. The story Lord Denning is telling is the importance of cricket. If the game had been baseball, and balls landed in the plaintiff's garden with exactly the same frequency, the litigation may well have had a different outcome.

Something deep in the human psyche responds to stories. Something about the rhythm of beginning, middle and ending captures readers and listeners.

Stories can be told in writing, or orally. The choice may be affected by perceptions of the objectives of the process or by competing power imperatives.

And stories are an effective way of teaching. They get across a message in a memorable way because a story, unlike abstract concepts, creates images in the mind's eye.

A vivid illustration is found in an article by Shoshana Felman (*A Ghost in the House of Justice: Death and the Language of the Law*) in the *Yale Journal of Law & the Humanities* (2001). The author contrasts the trial of Adolph Eichmann in Israel in 1961 (a monumental testimonial case) against the Nuremberg prosecution (a monumental documents case). At Nuremberg, the deliberate choice to shun witnesses and rely on documentary evidence was because, in the words of the chief prosecutor, US Supreme Court Justice Robert Jackson:

> The documents could not be accused of partiality, forgetfulness, or invention, and would make the sounder foundation, not only for the immediate guidance of the tribunal, but for the ultimate verdict of history.

But novelist Rebecca West, covering the trial for the *New Yorker,* found it "insufferably tedious" ("Extraordinary Exile," Sept. 7, 1946 at 34). One reporter described it as "an excruciatingly long and complex trial that failed to mesmerize a distracted world. Its mass of evidence created boredom, mixed occasionally with an abject horror before which ordinary justice seemed helpless" (Alex Ross, "Watching for a Judgment of Real Evil," *N.Y. Times*, Nov. 12, 1995).

The Israeli prosecutor in the Eichmann trial, Gideon Hausner, acknowledged the advantages of written proof when comparing it to the Nuremberg trial. He described the course adopted at the Nuremburg trials as 'efficient'. However, he also considered that those proceedings failed to reach the hearts of men. Accordingly, he decided on an approach in the Eichmann trial which would also accomplish political or educational objectives:

> In order merely to secure a conviction, it was obviously enough to let the archives speak; a fraction of them would have sufficed to get Eichmann sentenced ten times over. But I knew we needed more than a conviction; we needed a living record of a gigantic human and national disaster. [Gideon Hausner, *Justice in Jerusalem*, Harper & Row].

Is there place for levity or literary allusion in the story told by the judge in the judgment? My mysterious friend, Justice Anon, a descendant of the well-known poet, has some thoughts on this question.

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

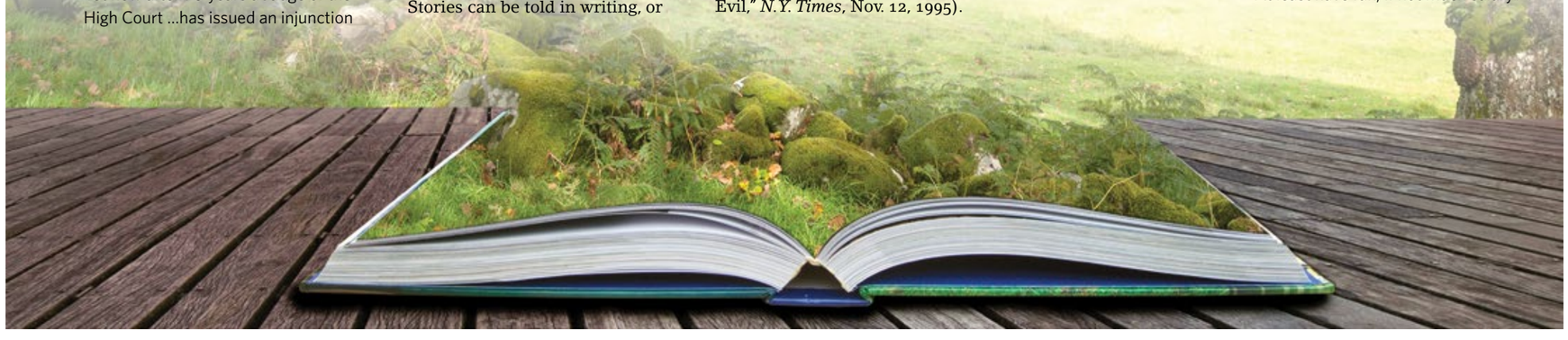


IMAGE COURTESY OF VENERATIO, BIGSTOCK 280855396

Author Jock Serong

BOOK REVIEW

# *Preservation* by Jock Serong

RAYMOND GIBSON

***Preservation***
by Jock Serong
Text Publishing, 2019
RRP: $29.99


It was pure serendipity that, early in the new year, I had pitched a tent in a coastal national park, about two hours north of the Victorian border, and, in my hands, to read in the peace I hoped would follow, was Jock Serong's new novel *Preservation*. For it was in this landscape, with its huge lace monitors, yellow belly black snakes, abundant fish and Aboriginal middens hidden along the coast, that much of the story of *Preservation* is set.

Ex-criminal lawyer, surfer and Port Fairy dweller, Serong's latest offering follows the fate of those aboard the *Sydney Cove* which set sail from Calcutta at the end of the 19th century with a cargo of rum bound for Sydney Cove. The profiteers, including Mr Figge posing as a tea merchant, Mr Clark and others, set out in a "lumbering old tub" full of "rats, worms and borers". Helped by a nameless crew of Indian labourers, "lascars", hired from the embarkation port, the vessel becomes shipwrecked near Preservation Island, just north of Tasmania. With a quantity of the booty salvaged and left on the island, the survivors split up, with Figge, Clark, a teenage Indian boy, and the lascar crew in a long-boat bound for the mainland. They reach an area near the Ninety Mile Beach and begin an arduous trek along the coast to Sydney.

The fledgling colony at Botany Bay was, at that time, under the command of Governor Hunter. When some of the original party arrive after their trek, it is the task of Lieutenant Grayling to investigate the circumstances leading to their arrival. Each witness has a different



BOILERPLATE

account; the truth proves elusive, but as the investigation progresses Grayling finds inconsistency and credibility issues among the narratives.

The central character, John Figge, emerges in the story as a powerful and dark force. His ruthlessness, confidence and general penchant for evil make him a wily target for the floundering Grayling, who seems ill-equipped to get to the bottom of things.

Much of the story follows the fate of the party as they inch their way north through the bush and dangerous river crossings to the colony. Serong dives headlong into something of an antipodean heart of darkness in describing their journey. Figge, casting a dark shadow over every page, sits alongside some of literature's best evil doers, think Judge Holden in Cormac McCarthy's *Blood Meridian* or Henry Drax in Ian McGuire's excellent *The North Water,* which also follows the fate of shipwreck survivors in a harsh and inhospitable wilderness.

Serong's maturity as a writer is evident in this, perhaps his most ambitious work. His feeling for nature and the sea has a visceral quality to it. The writing is strong and evocative without being lumpy or overblown. Importantly, the various Aboriginal tribes the wanderers encounter along the way are named and snippets of language learned are repeated in the witnesses' accounts. The effect is to reinforce that a vast and thriving indigenous population inhabited this abundant landscape before the march of white settlement. Like Kate Grenville's *The Secret River,* a writer whom Serong acknowledges, one comes away from this novel with a richer appreciation of the first contact.

> "Figge, casting a dark shadow over every page, sits alongside some of literature's best evil doers"

Whereas Serong's first novel *Quota,* a passable detective story set on the Victorian coast, had a Peter Temple flavour to it, his progression as a remarkable new Australian talent was evident in his next two offerings: *The Rules of Backyard Cricke*t and the gripping refugee story, *On the Java Ridge*.

The non-linear storyline of *Preservation* does not threaten one's grip on the plot. Nor does the idiom employed by the characters, which is fittingly formal and somewhat archaic, but not at the loss of narrative drive. It's no *Trainspotting* in this regard. Above all, Serong achieves a consistency in this representation; a reflection of time spent in careful study of the period.

The upside of noisy fellow campers is that it allows one to reflect on one of Sartre's maxims: Hell is other people. (Such must be true of shipwreck survivors.) Awoken from sleep and under head-torch light, one can delve into a novel that wrestles with the dark and perennial forces that motivate human kind: greed, sexual power, dominance over others and the violent means sometimes used to attain those ends.

A smiling headshot of the clean-cut author on the jacket of this book belies a writer unafraid to enter a psychic and physical heart of darkness. Part adventure, part mystery, the result is a powerful novel that unearths a dark tale of the early years of white settlement.

# *Ready, Aim, Fire: Major James Francis Thomas—The Fourth Victim in the Execution of Harry 'Breaker' Morant* by James Unkles

ANDREW KIRKHAM AND GARY HEVEY

On 21 February 1902, at Pietersburg, South Africa, three Australian officers were convicted by a British court martial of the murder of a number of Boer prisoners of war. The officers, members of the Bushveldt Carbineers, were Lieutenants Henry ('Breaker') Morant, Peter Handcock and George Witton.

On 26 February 1902, they were sentenced to death for their respective crimes. Lieutenant Witton's sentence was commuted to life imprisonment. He served three years in an English prison before being released and returned to Australia.

At dawn on 27 February 1902, the sentences in relation to Lieutenants Morant and Handcock were carried out. They were shot by firing squad.

James Unkles is a long-time campaigner for an official enquiry into the validity of these convictions and sentences. He has written a biography of Major James Thomas, the officers' legal representative at their courts martial, examining his role in the proceedings and the toll on him following the execution of two of his clients.

Major Thomas was in no sense an experienced advocate. At the time of his appearing at the courts martial he had practised law for 14 years as a solicitor in Tenterfield, New South Wales. He had no significant experience in criminal or military law. Specifically, he was not familiar with the 1899 British Manual of Military Law which governed his clients' courts martial.

During 1901 and 1902, aged 40, Mr Thomas had himself fought in the Boer War as a captain in the New South Wales Mounted Infantry, engaging in fierce fighting in Vlaksfontein, Mabalstaadt and Elands River, as a consequence of which he was three times mentioned in despatches. He was promoted to the rank of major on his return to Australia at the end of his first tour of duty in June 1901.

Major Thomas returned to the Boer War in August 1901, and after serving a short time with an irregular unit, made a decision that turned out to be life changing. Towards the end of 1902, a fellow Australian, Major Lenehan, asked Thomas to be his legal representative in his impending court martial. Major Lenehan was a member of the Bushveldt Carbineers, having been charged with the offence of failing to report the execution of Boer prisoners of war by members of his unit, including Lieutenants Morant and Handcock.

Not wishing to refuse this request, Major Thomas proceeded to Pietersburg on 15 January 1902, where Major Lenehan's court martial was scheduled to commence on the following day. On his arrival, Major Thomas was approached by four other Australians, including Lieutenants Morant and Handcock, all of whom had been imprisoned for three months before the commencement of court martial proceedings in relation to the execution of Boer prisoners of war. All of these officers asked Major Thomas to represent them. Obtaining permission to do so, Major Thomas asked the prosecuting authorities for an adjournment of one day so as to enable him to take instructions necessary to defend the five accused. The request was refused.

***Ready, Aim, Fire: Major James Francis—The Fourth Victim in the Execution of Harry 'Breaker' Morant***
by James Unkles | Sid Harta Publishers, 2018 | RRP: $24.95

*For more information, go to www.breakermorant.com. Copies of the book can be sourced from places such as the Law Institute Bookshop, online at Booktopia or contact James at jamesunkles@hotmail.com*


One wonders why Major Thomas did not ask for more than one day given the immense difficulties facing him in representing so many accused. Instructions needed to be obtained regarding issues such as potential conflicts of interests, the need for separate trials, obedience to orders (which had not been promulgated) from a superior officer who had died, provocation and the defence of honest and reasonable belief in a state of facts which, if true, might have afforded a defence. Making his task more difficult was the fact that the 1899 Manual of Military Law, which governed the proceedings, specifically prohibited the execution of enemies who had surrendered.

It was clear that Lieutenants Morant, Handcock and Witton had breached provisions of the Manual of Military Law. However, that same manual required that those charged with military offences be afforded a proper opportunity to prepare their defence, including free communication with any witness, friend or legal advisers with whom they wished to consult. The manual warned that a failure to comply with these requirements, as set out in rules 13, 14 and 33, may invalidate the subject proceedings. Rule 89 provided that counsel appearing for an accused person had, in this respect, exactly the same rights as the accused. Those rules containing such rights were, on their face, mandatory with the result that non-compliance would be fatal to the validity of the proceedings of a court martial.

There was apparently no reason given for the refusal of the request for time to properly prepare the case for each and all of the accused.

Mr Unkles' book questions the actions of the judge advocate, the members of the court martial and the prosecutor in denying or opposing Major Thomas's modest request for a short adjournment to prepare a defence for each of his clients. Clearly, by today's standards (see *Wilde v R* (1988) 164 CLR 365; *Dietrich v R* (1992) 177 CLR 292; *R v Fuller* (1997) 69 SASR 251, 95 A Crim R 554 at 559), and as Mr Unkles argues, even by the standards of the time, the failure to allow adequate time and resources to prepare a defence was fatal to any fair trial of any of the accused men.

From 16 January to 19 February 1902, Major Thomas represented his five clients before courts martial with three of those clients facing capital charges.

At the conclusion of the courts martial proceedings, Major Thomas had secured acquittals of his clients in respect of a number of serious charges but failed to secure acquittals for Lieutenants Morant, Handcock and Witton in the case concerning the deaths of the eight Boer prisoners. It was not in issue that the eight Boer prisoners had been executed. The unsuccessful defence advanced was that the accused officers believed that they were acting in accordance with the orders of superior officers.

During the courts martial, evidence was led that an officer (who was deceased by the time of trial) had given orders to the accused men that they should execute surrendered enemy combatants. The deceased officer's superior officer denied that any such order had been passed down the chain of command and no written version of such an order was produced at the proceedings.

There are many imponderables relating to these courts martial. There is no transcript, although a contemporaneous newspaper report of the proceedings remains. There is an indication that Lord Kitchener contemplated giving a General Instruction (which would have been treated as a lawful order by those to whom it was published) that Boer prisoners caught wearing British uniforms by way of disguise were to be shot. However, this was not the case in the courts martial. No record of such an order was ever produced, although oral evidence of like understandings was given during the trials. It is not apparent that such an order, if it existed, would have provided a total defence to the charges of murder, although it may have been relevant in relation to penalty.

During the trials, the Pietersburg Fort (the venue of the proceedings) came under attack by Boer soldiers. Each of the accused men was recalled to duty armed, and assisted in fighting off the attackers. Mr Unkles points out that the accused's participation in the defence of the fort and its occupants gave rise to a defence of 'condonation'. At military law a person placed in that position, as these accused were, could argue that any outstanding charges had been condoned by their being recalled to arms and placed in harm's way. That argument alone would normally have been sufficient to act as a bar to the courts martial continuing, or, if not accepted by the court, as a significant factor in mitigation of any penalty to be imposed.

All of the rulings given by the presiding judge advocate on matters of law are contained in Mr Unkles' book and seem unexceptional. However, the judge advocate had the role of ensuring that the accused received a fair trial and the question remains as to why no adjournment was granted to allow Major Thomas to prepare his various defences. Mr Unkles also argues that the issue of condonation, which does not appear to have been raised by Major Thomas or the judge advocate, may have been able to have been used as a bar to the prosecution or at least in mitigation of the respective sentences.

> "This is a book which will appeal to those with an interest in military history and an empathy with those seeking to right perceived past wrongs."

Mr Unkles explores the various political influences that might have contributed to the executions of Lieutenants Morant and Handcock being carried out within 18 hours of the penalty being notified to them and the apparent hurdles put in the way of Major Thomas being able to contact Lord Kitchener, the Australian Government or the King in his attempt to have the convictions and sentences reviewed. He describes the efforts of Isaac Isaacs KC (as he then was) on behalf of Lieutenant Witton, the release of Witton from prison and his return to Australia in 1904.

Mr Unkles' book seeks to rebut earlier criticisms of Major Thomas's representation of his clients. He points to the acquittals secured in respect of other significant charges and the recommendation for mercy for the three convicted officers. These recommendations were based on a number of grounds including provocation, previous good service and lack of any significant military experience.

Having regard to Major Thomas's lack of relevant forensic experience, the incredibly difficult circumstances in which he was placed from the moment his application for an adjournment was refused and the fact that he had no assistance whatsoever in the defence of his clients, it is suggested that retrospective criticism is misplaced. In Mr Unkles' book, Major Thomas is presented as a man prepared to accept the responsibility of appearing for persons who would otherwise not have received representation in significant court martial proceedings, who did the best he could in the context of a strong prosecution case and who, even after the proceedings had concluded, did all that he could to try and have the decisions and the sentences reviewed.

Mr Unkles' research has unearthed interesting paraphernalia that would otherwise have been lost, not least of which is a poignant photograph of Major Thomas standing over the graves of the newly interred Lieutenants Morant and Handcock.

On his return to Australia, Mr Thomas resumed his country legal practice and the running of the local Tenterfield newspaper. Having previously been a respected and active member of his local community, his life went into a decline, leading eventually to his name being removed from the roll of practitioners in New South Wales and him serving a short period in Long Bay Jail.

Mr Thomas's decline was attributed by his close contemporary 'Banjo' Patterson to his suffering grief as a consequence of the outcome of the courts martial.

On Armistice Day, 11 November 1942, James Francis Thomas, former solicitor, newspaper proprietor, army officer and sometime advocate in capital cases, died alone and impoverished.

This is a book which will appeal to those with an interest in military history and an empathy with those seeking to right perceived past wrongs.

Breaker Morant



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# Response to Christchurch—Towards a federal religious vilification law in the age of technology

## Review of an article by the Hon Peter Vickery QC* JENNIKA ANTHONY-SHAW

I had the privilege of being Justice Vickery's associate for two years. In addition to his considerable expertise as a commercial lawyer, and despite the demands of being the Technology, Engineering and Construction List judge, his Honour maintained an impressive contribution to social justice causes as a skilled human rights jurist and also by way of his art and poetry.

Now recently retired from the Supreme Court, Peter Vickery continues to apply his intellectual and creative resources to issues of human rights and multicultural inclusion in Australian society.

The article reviewed here will be published in the upcoming issue of the *Media and Arts Law Review*. In it, Peter Vickery presents a compelling argument for a new anti-religious vilification regime, calling for an expansion of Australia's current obligations in respect of domestic incorporation of the International Covenant on Civil and Political Rights (ICCPR), and drawing upon the deterrent force of the criminal law in order to address the serious problems facilitated by technology in this sphere.

The premise of the article was provoked by the recent horrific violence at the Al-Noor Mosque and Linwood Islamic Centre in Christchurch, which was live-streamed on social media, as well as the subsequent online publication and wide re-distribution by media sites of the contents of Senator Fraser Anning's 'press release', which sought to causally connect the massacre with Muslim immigration.

The legislative response to the events in Christchurch by the Australian federal government has been the hasty production of the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019*. As Mr Vickery observes in his article, there is little doubt that social media platforms and online discussion websites which permit publication of abhorrent violent material "should be made accountable to the laws of the democracy that enable them to function." The proposed Bill attempts to grapple with this issue. However, although well intentioned, the Bill has been criticised for significant drafting deficiencies.[1]

Drafting shortcomings aside, Peter Vickery points to a key substantive deficiency—the Bill fails to deal with the very evil illustrated by the events in Christchurch, namely the incitement and promulgation, by online publication, of religious hatred. While acknowledging the importance of free speech, Mr Vickery says, "Published words do matter. Some commentary is as divisive as it is dangerous, particularly when it emanates from an authority figure. Legitimising extreme thought legitimises extreme action."

The proposition advanced in the article is the introduction of a federal offence of serious religious vilification. It aims to deter an author of offending material at an early point, "before the horse has bolted", such as the release of live-streamed footage to social media.

Peter Vickery points to a range of factors which highlight the need for such legislation at a federal level, including:

- ICCPR obligations which, subject to the current reservations adopted, would otherwise oblige Australia to pass federal law dealing with religious vilification;
- the limitation in current technologies to effectively screen and block serious religious vilification material and other hate speech before it can be successfully uploaded to social media;
- shortcomings of the *Commonwealth Criminal Code 1995* and the *Racial Discrimination Act 1975* (Cth) in dealing with the specific problem of religious vilification;
- the wide divergency of approach in state and territory legislation on the subject, leading to a weak level of overall protection by international standards; and
- the published reports of the Australian Human Rights Commission, which have consistently advocated for the creation of a new federal offence of serious religious vilification.

1. *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019,* Second Reading Speech, House of Representatives, Hon Mark Dreyfus, Shadow Attorney-General, (Hansard 4 April 2019, 14).

**This article will appear in the* Media and Arts Law Review 2019

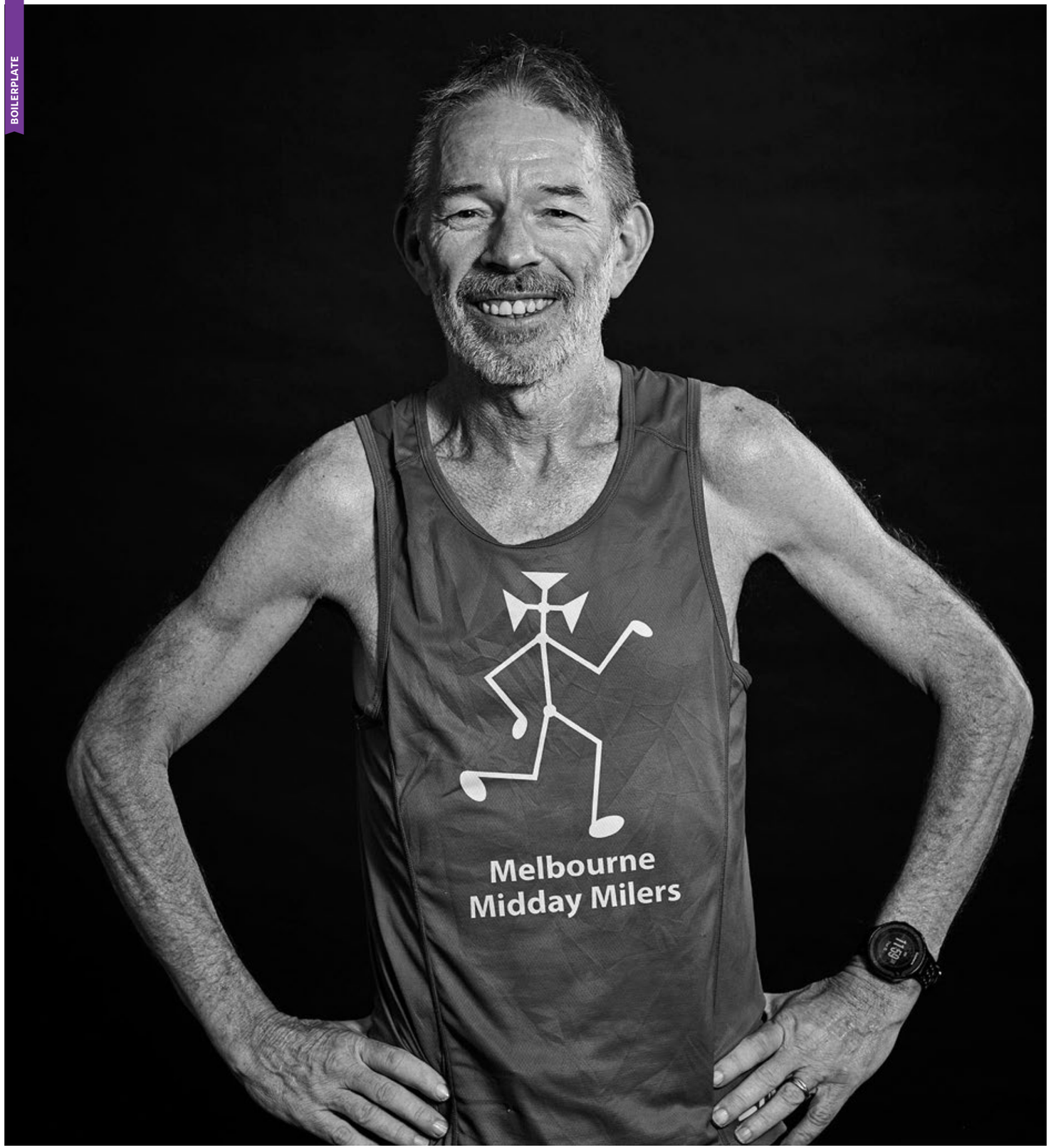


PHOTO COURTESY OF GARTH ORIANDER

# Her name is the marathon and she is dangerous

MARK PURVIS

We all know work/life balance is vital for mental and general health. Being a barrister requires commitment, discipline, concentration, single-mindedness, perseverance, effort and the ability to work alone. So does distance running, my hobby and stress reliever outside work.

Whether running a race or running a trial, the runner/barrister must be thoroughly prepared and aware of the traps and pitfalls along the way, including dangerous adversaries armed with seductive arguments.

In life, some are seduced by money, power, beauty or love. But for distance runners, there is another siren on the shore. Her name is the marathon and she is dangerous.

In September last year, the siren sang to me. The Melbourne Marathon was four weeks away. I decided that three weeks of high mileage training would be enough, on top of the previous eight months of around 80 kilometres per week, to have me ready to race 42.2 kilometres. This is what the marathon does. Like skilful opposing counsel, she distorts a runner's thinking, she makes him believe things that do not stand logical scrutiny.

What followed was like preparing a case with insufficient time. I pushed my weekly mileage above 100 km. It might sound a lot, but no serious marathon runner would consider three weeks of training to be an adequate preparation. I had been bewitched.

Then it became clear that the weather for the Melbourne Marathon was going to be very hot and windy. My siren had a solution to this. The first ever World Masters Marathon Championships was in Toronto on 21 October, a week after Melbourne. So, I decided to ditch Melbourne and go to Toronto, where it would be cool. The course appeared relatively flat and conducive to fast times. What could possibly go wrong?

I arrived in Toronto two days before the race. The weather was benign. I was feeling great. This is the marathon's seduction technique. Runners are filled with optimism, leaving them blind to the hazards, just like barristers who have not examined the opposing case carefully enough.

Race day dawned fine and cold, but it did not seem as cold as the forecast 2 degrees Celsius. The reason for this soon became apparent. It was windy. I wondered if I should alter my race plan, which was to run 5 km splits of 20:50 (4:10 per km) to reach halfway in 87:55, then run the second half of the race in around 89 minutes (at 4:15 per km) to finish with a total time of around 2:57, which would be a new Victorian record for age group 60-65. But under the marathon's spell, any thoughts of changing my race plan vanished almost as soon as they arrived.

I had a nice clean start. The field was small by international standards with fewer than 4,000 runners competing. I had heard that Gene Dykes, a 70-year-old from Philadelphia, was aiming to break the world M70-75 record of 2:54.48. Within a kilometre or two, I spotted a white-haired runner ahead of me, going at a very good pace. I heard an official photographer on the back of a motorbike say to the rider: "That's him, I'll get some shots." I knew that I had found Gene. I ran behind him and admired his fluent style and long, toned legs.

I fell in beside him for a chat. We discussed our respective goals and I suggested that we might run together. As the race went on, it became clear that Gene was the pacemaker. He



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was relentless. If the pace slowed, he would pick it up again. So that's how, at 61, I came to be chasing a 70-year-old in the Toronto Marathon!

A successful marathon, like a court case, requires being faithful to a plan despite distractions. Many runners expend too much energy in the first half of the race. I was strong, until I reached about halfway. This was 26 seconds ahead of my planned pace. I had not stuck to my plan. I justified this by telling myself that this was good, I now had more leeway for a slowdown later in the race.

After 30 km, Gene dropped me as I slowed to 4:18 per km into a significant headwind between 30 and 35km. The regular hills on the course, which was not as flat as I had thought, took their toll. At around 34km, I felt a wave of intense fatigue. I knew at once that I had hit the dreaded wall.

Hitting the wall is when the marathon loses her allure and you recognise her for the devious adversary that she is. Her invisible lasso brings down the reckless and overconfident. You suddenly move from running confidently and strongly into a state of physical and psychological meltdown. This is not a gradual happening to which you can adjust and then reset your goals. There is no warning. There is not a damn thing that you can do about it, except hang on for dear life, a bit like when your client makes some unexpected and fatal admissions under cross-examination.

My long marathon experience has taught me that hitting the wall can take many forms, from a simple loss of energy to something more serious like an injury of some kind.

This time, my meltdown was characterised by shooting pain in both quadriceps and adductor muscles. I blew out to more than 4:30 per km between 35 and 40km. At around 40km, there was a large bridge. As I ran downhill off the bridge, hot pokers were being jabbed into my quads with each step. It really, really hurt. Finally the road


Mark running next to his nemesis Gene Dykes

> "At around 34km, I felt a wave of intense fatigue. I knew at once that I had hit the dreaded wall."

flattened out and I ran the last kilometre swearing continuously under my breath in an effort to distract myself from the pain. But it worked. Suddenly I was there. It was over. My time was 2:58.48.5, under three hours, thank goodness.

Shortly after the race, I received the news that I had won a bronze medal. Third in the world for my age group! Race photos revealed that the winner of my division, Josef Siegel from Poland, had been running close to me for most of the race. They say that a marathon does not really start until after the 32km-mark. This was certainly true of my battle with Josef. His winning margin over me of 1:12 was gained entirely in the last 7km.

But I was well and truly trounced by Gene Dykes. He ran 2:55.18, missing the world record by just 30 seconds. His splits were 87:33/87:45. It was a truly remarkable performance. I congratulated him after the race. When I told him I was 61, he said: "Just imagine how good you'll be at 70!"

Two years ago, I set a goal of running under three hours for the marathon after my 60th birthday. There have been triumphs and setbacks along the road. A fairy tale ending in Toronto would have been to run under three hours, break the Victorian record and win the World Championship. And there's the rub—I now have unfinished business. So here is the marathon's final, carefully laid trap. She makes you believe that you can and will do better next time. So instead of lashing myself to the mast like Ulysses, I will return to her.

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At Oscar Hunt, we have created an environment to make tailoring a business suit easy and enjoyable altogether – crafted from our collection of beautiful cloths including the iconic Dormeuil, Loro Piana, Ariston, and Dugdale fabric houses.

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