



Forthcoming Events & Updates

CPD Seminars

9 February 2015

Duties of care in negligence to protect against pure economic loss - The High Court's re-statement in Brookfield
Presenters: Matthew Bell, Wayne Jolic

Building Dispute Practitioner's Society

10 September 2014, 6:30pm

Discussion Evening: QCAT / VCAT: Lessons from another jurisdiction

Guest speakers: VCAT Deputy President Catherine Aird and QCAT Senior Member Richard Oliver
RACV Club, Level 2, 502 Bourke St

19 November 2014, 6:30pm

AGM and Discussion Evening

Wrap up of the year's legal developments
RACV Club, Level 2, 502 Bourke St

President's Report



During the last few months, there have been a number of interesting CPD seminars conducted by CommBar and the Bar more generally. I make mention of just a few of them below.

We were honoured to have the President of the Supreme Court of the United Kingdom, Lord Neuberger, address the Bar on Friday 8 August 2014. His Lordship gave an engaging talk on a number of issues, including those concerning the cost of litigation. His Lordship had an extremely busy schedule in Australasia and we are very grateful that he found the time to address the Bar. Thanks to Paul Hayes and Rodney Garratt QC for their work in bringing this seminar together, as well as to Andrew Bailey and Ben Jellis for their work behind the scenes.

Meredith Schilling and Peter Heerey AM QC organised two entertaining sessions on legal writing, which were extremely well attended. It is hoped to make these sessions an annual event, with the involvement of the well-received external speakers Dana Rowan and Emeritus Professor Chris Wallace-Crabbe AM. Thanks are also due to Peter

Hanks QC for his involvement in one of the sessions during the week of the ASADA case in which Peter was involved.

Albert Monichino QC and Caroline Kenny QC organised a very successful "fireside chat" and drinks with prominent international arbitration practitioner Karyl Naim QC. Justice Peter Vickery explained the new Electronic Case Management System for the Commercial Court of the Supreme Court at a session chaired by Caroline Kirton QC. Please note that Red Crest has become mandatory for all matters filed in the Commercial Court from 1 August 2014.

On 21 August Francis Curry (Director-General of the World Intellectual Property Organisation) addressed the Bar at a seminar chaired by Peter Heerey AM QC. The seminar was an initiative of the Intellectual Property Society of Australia and New Zealand, the Arts Law Centre of Australia and run in conjunction with CommBar.

There were a number of other seminars run, a full list of which appears on the VicBar website. The Executive Committee thanks all of those members who have been involved in the organisation of the Bar's CPD program.

A new Civil Procedure Section of CommBar has been established; the new office holders are:

- Chair David O'Callaghan QC
- Deputy Chair Mark Robins QC
- Secretary Andrew Downie
- Monitors Helen Tiplady and Timothy Goodwin

Thanks are due to Andrew Downie for initiating this new section.

One of the matters the new section will be involved in is the ongoing work in connection with the Federal Court Case Management Handbook.

The CommBar Executive has organised a private workshop aimed at increasing the representation of women in commercial litigation.

For years, concern has been expressed about the underrepresentation of women in commercial matters. There remains obvious underrepresentation of women counsel in commercial litigation. Against this background, and in the light of the Victorian Bar's Equality Project ('Quantum Leap'), the CommBar Executive is determined to take an active role to address this problem.

A process of informal consultation made it clear there would be benefit in bringing together judges and senior members of the profession (in particular, partners of commercial law firms) to canvass the issue. Judges have a unique perspective, seeing the underrepresentation of women barristers appearing before them in commercial matters. Commercial law firms have a critical role in decision-making when it comes to briefing counsel in commercial matters. Particular thanks are due to Justice Crennan, Chief Justice Warren, Justice Mortimer, Justice Hollingworth and the Women Barristers Association for their support of this Project.

The Building Dispute Practitioners' Society offers an annual essay prize of \$3,000 for the best original contribution to the BDPS News. This year, Adam Rollnik was awarded the prize for his article *Security of Payment in Victoria: Payment Claims, Adjudication & Court Intervention*. Adam is a member of the Committee of the Construction Law Section of CommBar and a regular contributor to CommBar News and the activities of CommBar. On behalf of the Executive Committee I congratulate Adam on this award.

On Tuesday 19 August 2014 the Chairman of the Bar Will Alstergren QC and the Bar Council, hosted partners of major law firms to a dinner at the Essoign Club. The Hon. Senator George Brandis QC and Justice Jonathan Beach made speeches. This was a very successful event and continues the huge amount of work by the Chairman and the Bar Council, being done in the area of engagement with law firms and other briefing entities.

The Chairman of the Bar has established a Steering Committee, headed by Martin Scott QC, aimed at examining how the Bar might best position itself for advancing its involvement in international arbitration. Other members of the Committee are the Chairman, Albert Monichino QC, Caroline Kenny QC, Caroline Kirton QC, Josh Wilson QC, me, and Ian Percy.

A reminder to members that invitations are now out to our annual CommBar cocktail party to be held in the Supreme Court library on Thursday 11 September 2014. RSVP's are essential and places are limited.

Philip Crutchfield QC | President



Commercial Bar Association of Victoria
www.commbar.com.au

Room 0412, Joan Rosanove Chambers | 550 Lonsdale Street | Melbourne 3000, Australia
T +61 3 9225 7242 F +61 3 9225 7623 E pdcrutchfield@vicbar.com.au

Quotes of Note

Inquiry is fatal to certainty
Will Durant

Growth in wisdom can be measured precisely by decline in bile.
Friedrich Wilhelm Nietzsche

Pretty much all the honest truth-telling there is in the world, is done by children.
Oliver Wendell Holmes

Give me six hours to chop down a tree and I will spend the first four sharpening the axe.
Abraham Lincoln

Beware how you take away hope from another human being.
Oliver Wendell Holmes

When you are old and grey and full of sleep, and nodding by the fire, take down this book and slowly read, and dream of the soft look your eyes had once, and of their shadows deep.
William Butler Yeats

The Curate's Egg

Publius much enjoyed Edward St Aubyn's latest novel *Lost for Words* (Picador).

Notwithstanding his reputation as a Luddite, Publius read the work on his iPad while snuggled up against Melbourne's winter chills; the novel was doona-loaded, so to speak.

The story is about a fictional literary prize, closely modelled on the Man Booker prize. The judges and competing novelists are shrewd caricatures of familiar literary, political and journalistic types. The prize is won by a supposed post-modern anti-novel, in fact a mistakenly entered compendium of Indian family recipes.

Admittedly critical reaction has verged on the hostile – perhaps some of the characters were a bit close to the bone. Among the critics was Peter Craven writing in the *Sunday Age*.

Craven's review describes the work as "a mistake", "shameful" and "unworthy". But he includes the following:

To describe *Lost Words* as a curate's egg would run the risk of wildly overvaluing it, though it's true. Page by page and phrase by phrase, there are stylish felicities of expression and even some potentially "hilarious" comical developments. They just don't hang together.

Craven appears to be referring to the aphorism about the curate's egg, which is said to be "good in parts". This commonly used distortion of the source is conveying the meaning that the thing in question has some good parts and some bad parts but that the good parts are nevertheless useful and desirable.

The original conveys exactly the opposite meaning. Its source is a cartoon in an 1895 issue of the London *Punch* titled "True Humility".

A young curate (a junior clergyman, assistant to the vicar of a parish) is having tea in the bishop's palace. The curate has just opened a boiled egg. The following exchange takes place:

Bishop: "I'm afraid you've got a bad egg, Mr Jones"

Curate: "Oh, no, my Lord, I assure you that parts of it are excellent."

The curate's timorous sycophancy has led him to an embarrassingly obvious solecism, ignoring the painfully obvious (to the bishop and others present) fact that a rotten egg cannot be partly good.

It's hard to think such an eminent critic had misread his source.

Perhaps Craven thought *Lost for Words* was wholly bad and constructed a subtext which would convey to those astute readers such as Publius, who were aware of the true meaning, that the whole thing was just scrambled, an omelette not worth breaking eggs for.

ADR

Court of Appeal decides that VCAT is a "court" for the purposes of s8 of the Commercial Arbitration Act 2011

Monday, 14 July 2014, by Ian Percy

A majority of the Victorian Court of Appeal has found that VCAT is a "court" for the purposes of s8 of the Commercial Arbitration Act 2011 (the CAA) with the result that if a party to the arbitration agreement so requests, the Tribunal is precluded from hearing the proceeding and the dispute must be referred to arbitration.

[Read more...](#)

Federal Court rejects backdoor attempt to attack arbitral findings of fact on Public Policy/Natural Justice ground

Wednesday, 27 August 2014, by Albert Monichino QC & Eugenia Levine

The Full Court of the Federal Court has refused to set aside or resist enforcement of an international arbitral award on the basis of an allegation that there was a breach of natural justice in making certain findings of fact and that the award was therefore against Australian public policy.

[Read more...](#)

Banking and Finance

Non compliance of terms of settlement by a borrower in relation to repossession proceedings commenced by a lender

Wednesday, 27 August 2014, by Kieran Hickie & Andrew Kirby

Co-authored by Kieran Hickie and Andrew Kirby. The decision of the Victorian Court of Appeal in favour of the NAB highlights some difficulties that might arise between lenders and recalcitrant borrowers in relation to terms of settlement for the compromise of repossession proceedings. The Court of Appeal's decision demonstrates that borrowers who enter terms of settlement must comply with the conditions of the terms of settlement.

[Read more...](#)

Competition and Consumer Law

A lesson in discretion: 'BO' and AeroCare Pty Ltd

Tuesday, 10 June 2014, by Georgia Douglas

The Privacy Commissioner has recently determined that AeroCare Pty Ltd (Aerocare) breached the privacy of a blind airline passenger when asking a range of questions to the passenger regarding his medical condition, in front of the complainant's sighted guide and various passengers in the departure lounge at the Sunshine Coast airport.

[Read more...](#)

Construction Law

10 years means 10 years - s. 134 of the Building Act clarified

Monday, 1 September 2014, by Ken Oliver

The Victorian Court of Appeal has held that the 10 year limitation for commencing a building action in s. 134 of the Building Act 1993 ("Building Act") is not confined to negligence claims, but also applies to actions founded in contract. The Court of Appeal also held that, on the facts of the case, no duty of care was owed by the building surveyor to the owner to prevent the type of loss suffered by the owner.

[Read more...](#)

Corporations and Securities Law

Is redemption of certain interests in a managed investment scheme "withdrawal" from the scheme for the purposes of Part 5C.6 of the Corporations Act 2001?

Tuesday, 26 August 2014, by Roslyn Kaye

The High Court has held that redemption of units in a managed investment scheme did not constitute "withdrawal" within the meaning of Part 5C.6 of the Corporations Act 2001.

[Read more...](#)

Shareholder Protection in Complex Capital Markets

Wednesday, 27 August 2014, by Dominique Hogan-Doran

Shareholder protection in increasingly complex capital markets proved a timely focus for the ninth Supreme Court of New South Wales Annual Corporate Law Conference, held in Sydney on 29 July 2014.

[Read more...](#)

Equity

Is there a statutory limitation period for knowing assistance and knowing receipt claims?

Monday, 23 June 2014, by Tom Clarke

The UK Supreme Court has held that a 6-year limitation period applies to knowing receipt and knowing assistance claims. Will Australian courts apply the equivalent limitation provisions in the same way?

[Read more...](#)

Unsuccessful invocation of equitable principles to deflect a tax liability

Wednesday, 25 June 2014, by Professor John Glover

The HCA disallowed a joint venturer's claim to have derived a lump sum as constructive trustee. Alleged fiduciary duties owed to a non-venturer were not accepted. Alternatively, the venturer's purported equitable assignment of his rights to the lump sum was not tax-effective.

[Read more...](#)

Insolvency Law

Can shares acquired with income below threshold amount to after-acquired property vesting in trustee under the Bankruptcy Act?

Monday, 1 September 2014, by Andrea L Mapp

Examination of whether shares purchased from a bankrupt's income below the threshold amount in respect of which he was required to make contributions to his trustee under Division 4B of Part 6 of the Bankruptcy Act 1966 (Cth) is within the meaning of "after acquired property" in s 58(1).

[Read more...](#)

IP and Trade Practices

Costly claim to have 'halal' certification

Monday, 23 June 2014, by Warwick A Rothnie

The Halal Certification Authority has \$10 in nominal damages for trade mark infringement against each of Scadilone, White Heaven and Quality Kebabs, but \$91,015 additional damages against Quality Kebabs.

[Read more...](#)

Copyright, ISPs and authorisation

Thursday, 14 August 2014, by Warwick A Rothnie

The Commonwealth Government released an Online Copyright Infringement discussion paper (pdf) on 30 July 2014. Responses are required by 1 September 2014. The problem the discussion paper identifies is the high level of usage of the Internet by Australians to infringe copyright by downloading illegally movies, recorded music and the like and a perceived need, following the High Court's decision in Village Roadshow v iiNet, to compel ISPs to negotiate with copyright owners about the introduction of systems such as 'Notice and Takedown (and Put back)' procedures.

[Read more...](#)

Case Note Updates

Wednesday, 20 August 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

In this edition we report on the outcome of the latest (unsuccessful) push by Telstra to assert rights in respect of the colour yellow for phone directories. We also report on two cases in which the Federal Court has considered the appropriate penalties to be imposed for conduct in contempt of court in an intellectual property rights context. Finally we have included a case that demonstrates the merits of obtaining proper advice before seeking to patent an invention – at least when your invention relates to an ascultative method that expounds upon the natural harmonics series in music.

[Read more...](#)

Repeat IP infringer successfully obtains reduced sentence for contempt

Wednesday, 20 August 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

This was an appeal from the ultimate disposition at first instance of Deckers' successful copyright and trade mark infringement claims against various respondents in respect of their use of various UGG marks and the manufacture and sale of counterfeit UGG boots.

[Read more...](#)

When is an exclusive patent licence not so exclusive?

Monday, 25 August 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

The first applicant, Damorgold, successfully established that JAI Products had infringed the patent in suit. A residual issue left for later determination was whether the second applicant, Vertilux, was an exclusive licensee of the patent and therefore also entitled to have initiated proceedings pursuant to section 120 of the Patents Act 1990. A written licence was in place between Damorgold and Vertilux that imparted on Vertilux an exclusive licence to exploit the patent, and also purported to record the terms of an oral licence between the parties said to have been in place at least since the start of 2006. Under the licence, Vertilux was entitled to grant sublicences, with Damorgold's written consent (although Damorgold could waive that requirement).

[Read more...](#)

Failures to change corporate names and deliver up infringing material leads to fines for contempt

Tuesday, 26 August 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

Late last year, the Federal Court ordered that the fourth respondent, Bob Jane, and the companies he controlled, be restrained from trading as a business under any name that is or includes the word JANE. The corporate respondents were also ordered to forthwith change their names, transfer certain domain names and deliver up promotional material to Bob Jane Corporation. Early this year, Bob Jane Corporation brought charges of contempt of court against each of Bob Jane and various of the corporate respondents he controlled for failure to comply with those orders. Bob Jane Corporation sought a declaration of guilt and imposition of a fine in relation to each alleged contempt.

[Read more...](#)

Telstra continues to see red over competitors' use of yellow for phone directories

Tuesday, 26 August 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

Telstra and, more recently, Sensis have published the well known Yellow Pages phone directories since 1975, and also used the "Walking Fingers" logo since shortly after that date. The applicants' more recent online directories and mobile applications similarly have featured a yellow theme. Yellow has been a strong theme in the applicants' marketing from an early date. Telstra and Sensis brought claims of misleading and deceptive conduct and passing off against three publishers of print and online phone directories (the PDC respondents). The relevant publications had yellow covers and yellow pages in the case of the print publications, and yellow icons, background and other visual elements in the case of online directories and mobile applications.

[Read more...](#)

Do you hear what I hear – musical patent less than clear as a bell

Wednesday, 27 August 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

Lisica v Commissioner of Patents [2014] FCA 433 7 May 2014 - On appeal to the Court, the applicant did not seek to lead any expert evidence, which might have explained the area of the useful arts to which his invention would make a contribution or at least assist in understanding the language of the specification and the claims. Justice Jessup concluded that in those circumstances, the claim was neither clear nor succinct as required by s 40(3) of the Act: "As a statement marking out the area of the public monopoly which the applicant seeks, the claim falls well short of the standard of clarity required." His Honour echoed the view expressed by the delegate that the applicant's attempt to draft the specification and claims without professional assistance, had not helped him.

[Read more...](#)

A costly exercise – s 19(2) of the Patents Act

Wednesday, 27 August 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

Alphapharm submitted that, although AstraZeneca had succeeded, it had no need to litigate at all because Alphapharm had made it clear that it would desist from conduct of the kind that was alleged to be infringement of patents, until such time as the result of the appeal in Ranbaxy was known. Nevertheless AstraZeneca commenced proceedings against Alphapharm. AstraZeneca submitted that not only was it entitled to its costs in the normal course, but also that those costs should be taxed on the special basis for which section 19(2) of the Patents Act provides.

[Read more...](#)

Civil Procedure

Recent (2014) discovery amendments to the Civil Procedure Act 2010 (Vic)

Monday, 4 August 2014, by Andrew P. Downie

The Justice Legislation Amendment (Discovery, Disclosure and Other Matters) Act 2014 (Vic) was given Royal Assent on 8 April 2014, and amends the Civil Procedure Act 2010 (Vic) (the "CPA"). The amendments mainly concern document management in the discovery process.

[Read more...](#)

Recent Victorian Offer of Compromise reform: costs inclusiveness, claim failure, pre-litigation offers and other changes

Monday, 18 August 2014, by Andrew P. Downie

The Magistrates' Court General Civil Procedure (Offers of Compromise Amendments) Rules 2014 bring the rules on offers of compromise in the Magistrates' Court of Victoria ("MCV") largely into alignment with the Supreme Court of Victoria ("VSC") and County Court of Victoria ("CCV") rules on offers of compromise. This amendment commenced on 1 August 2014. The VSC and CCV rules were amended on 1 September 2013 and 7 October 2013 respectively.

[Read more...](#)

You are receiving this because you are a member of the Commercial Bar Association.

[Subscribe](#) or [Unsubscribe](#) from this newsletter

Please send contributions for the Commercial Bar newsletter to the editor: [Cornelia FourfourisMack](#).

Strategic
Advice
Effective
Advocacy



Commercial
Bar Association
of Victoria
www.commbar.com.au