



## President's Report



The Commercial Bar Association of England and Wales ('Combar'), in conjunction with CommBar and the Victorian Bar, are pleased to confirm that the London 2016 International Commercial Litigation Conference ('ICLC') will proceed next year at the Inner Temple on Wednesday 29 and Thursday 30 June 2016. This is an exciting event in CommBar's history and is the first time Victorian barristers have ever staged an international conference.

The conference is expected to attract delegates (barristers, judges, solicitors and corporate counsel) from Australia, England and Asia.

An impressive array of speakers have confirmed their availability to speak at the conference and so far include: Lord Neuberger (President of the Supreme Court of the United Kingdom); Lord Justice Jackson (Court of Appeal); Dame Geraldine Andrews (High Court of Justice, Queens Bench Division); Justices Sifris, Croft and Digby (Supreme Court of Victoria); Justice Jonathan Beach (Federal Court of Australia) and others. Of course many of our CommBar members will be participating in the conference, as will our Combar colleagues.

To accompany the eight business sessions covering a wide range of commercial litigation and arbitration topics, an attractive social program has been put together. This includes a black tie dinner at the Middle Temple Hall and end-of-conference drinks to be held in the Temple Gardens.

The ICLC conference will be officially launched in November 2015, which is when registration will open. The conference registration fee has been set at a competitive and reasonable subscription. The fee will also offer an accompanying person supplement for the social component. To date over 150 Victorian barristers, judges, solicitors and corporate counsel have expressed interest in attending the conference and places will be limited.

More information regarding the ICLC conference launch and the conference program will be released later in the year.

In conjunction with LexisNexis, CommBar held the book launch of *Insolvent Investments* on 25 August 2015 in the Neil McPhee Room. The book was launched by the Honourable Julie Dodds-Streeeton, and the editor of the book, Stewart Maiden made a responding speech. The foreword was kindly contributed by the Honourable Chief Justice Warren. The book has 25 contributing authors, most of whom are drawn from the ranks of our Bar.

Thanks are due to Stewart Maiden for his tireless efforts in making this book possible and to Julie for kindly agreeing to speak. It was fitting that Julie launched this book given her deep involvement in the education of many members of our commercial Bar, and the contributors to the book in particular. As many will know Julie, together with Whelan JA, were the founding teachers of the Corporate Insolvency subject in the Melbourne University Masters course.

Finally, a reminder about the annual CommBar cocktail function. This will be held on Thursday 8 October 2015 at the Federal Court of Australia. Invitations have been sent. Please respond promptly, as places are limited.



## Quotes of Note

*Let's make our mistakes slowly.* General Dwight D. Eisenhower, to his advisors.

*Education is the progressive discovery of our own ignorance.* Will Durant

*We cling to our own point of view, as though everything depended on it. Yet our opinions have no permanence; like autumn and winter, they gradually pass away.* Chuang Tzu

## Publius

### BALLOT PAPERS

Publius has been working on the foundation of a political party. A possible title is the *Publius Prosperity Party*, which would fit well with a slogan like *Prosper with Publius*.

In the course of his researches, Publius has become aware of the importance of the order of names on the ballot paper. Some people, for whatever reason, just vote down the paper so that the candidate on top gets a benefit quite unrelated to his or her merits.

Since the Australian political scene is not dominated by people called Aaronson, Abel etc (albeit there is the occasional Abbott, Abetz) Publius deduced that the order is not determined alphabetically. There must be some other system. Perhaps by lot.

In that event, Publius thought, the legislation probably contains some provision along the lines of:

The order of names on a ballot paper shall be determined by lot, to be conducted in public.

This would be a self-enforcing law. Candidates or their agents present would ensure the procedure was conducted fairly. Eighteen words would cover it.

But Publius recalled the words of a wise judge: "Never think that, just because something seems to make sense, it is therefore the law."

So Publius turned to the *Commonwealth Electoral Act 1918* and discovered section 213 which, to put it mildly, goes into quite some detail.

The section commences by providing that the person who is required to determine the order of names shall:

"prepare a list of the names ... in such order as the person considers appropriate" and then "read out the list."

Then the person is to:

"place a number of balls equal to the number of candidates ... being balls of equal size and weight and each of which is marked with a different number, in a spherical container large enough to allow all the balls in it to move about freely when it is rotated."

Now that you have the balls in the container, the person in charge must:

"rotate the container".

Not only that, he or she must:

"permit any other person present who wishes to do so to rotate the container."

So how are the balls to be removed from the container after rotation? The section requires that the person in charge shall:

“cause a person who is blindfolded and has been blindfolded since before the rotation of the container ... to take the balls, or cause the balls to come, out of the container one by one and, as each ball is taken or comes out, to pass it to another person who shall call out the number on the ball.”

Then:

“as each number is called out ... “ the person in charge is to “write the number opposite to a name ... in the list ... so that the number called out first is opposite to the first name ... in the list and the subsequent order of the numbers in the list is the order in which they are called out.”

Phew! So at last it's all done?

Oh no. What we have now is a list with numbers against the names, eg:

Sally Jones, Greens 2  
Bill Smith, Labor 3  
Tom Black, Liberal 1

The section now requires the person in charge to:

“place all the balls back in the container.” Then once more there is to be rotation of the container, taking out the balls by a blindfolded person, reading out the number on the ball etc etc.

So the new sequence of balls might be those numbered 3, 1 and 2, with the result that the order of names on the ballot paper will be Smith on top, then Black and then Jones.

There are various other provisions including dispensing with the need for a blindfolded person, if an “approved container” is used,

i.e.:

“a container in respect of which the Electoral Commissioner has certified in writing that the container is so constructed that when it is rotated no control can be exercised over the order in which the balls come out of the container.”

Total words: 720

Publius trembles to think of the number of cups of tea consumed in the Parliamentary Drafting Office while this edifice was constructed.

Publius

## Arbitration & ADR

### [Ad hoc admission in Singapore - the saga continues](#)

Dr Josh Wilson QC and William Lye · August 6, 2015

This is the second in our review about the feasibility of ad hoc admission in Singapore. The recent unsuccessful application by high profile UK defamation silk Heather Rogers QC has made the process all the more difficult [...] [Read More](#) »

## Banking & Finance

### [The requirement of leave to appeal in respect of civil appeals](#)

Kieran Hickie · August 25, 2015

The Victorian Court of Appeal has considered the test applicable to applications for leave to appeal in respect of civil appeals. Leave to appeal will be granted if an appeal has a 'real' as opposed to a 'fanciful' prospect of success [...] [Read More](#) »

## [Supreme Court confirms wide scope of FOS discretion to exclude disputes from its dispute resolution](#)

Brian Kennedy · August 23, 2015

The revelations in the case around FOS staffing, expertise and decision-making make for interesting reading for those involved in banking enforcement litigation and the reasons in the case provide helpful guidance on construing the TOR [...] [Read More](#) »

## [Final decisions of the Financial Ombudsman Service are difficult to review in the courts](#)

Michael Wise · August 31, 2015

Final decisions of the Financial Ombudsman Service (FOS) made on the basis of its opinion as to what is fair in all the circumstances are rarely reviewable by the courts, even if it makes errors in the decision-making process [...] [Read More](#) »

## **Building & Construction Law**

### **FORTHCOMING EVENTS**

#### **Building Dispute Practitioners' Society Discussion Night**

*Sydney 9 September 2015*

Topic: The inaugural BDPS discussion night in Sydney.

Speaker: Hammerschlag J, Head of Commercial, Technology & Constructions and Commercial Arbitration Lists, Equity Division, Supreme Court of New South Wales.

Details: [www.bdps.com.au](http://www.bdps.com.au)

#### **Building Dispute Practitioners' Society Discussion Night**

*Melbourne 16 September 2015*

Topic: Domestic Demolition<sup>7</sup> – factual and legal reasons in slab heave cases post *Softley v Metricon Homes Pty Ltd* [2014] VCAT 1502 and *Hooper v Metricon Homes Pty Ltd* [2014] VCAT 277

Speaker: Tim Margetts QC

Details: [www.bdps.com.au](http://www.bdps.com.au)

#### **Building Dispute Practitioners' Society Discussion Breakfast**

*Melbourne 14 October 2015 Breakfast*

Topic: Risk Shifting in Building Contracts: Does it really Work?

Speaker: Alastair Oxbrough, MolinoCahill Lawyers

Details: [www.bdps.com.au](http://www.bdps.com.au)

#### **The Society of Construction Law's National Conference in Melbourne**

*22 - 24 October 2015*

Details: <http://www.scl.org.au/pages/conference-2015.html>

## [Can you be liable for misrepresentations when selling your home?](#)

Suzanne Kirton · August 26, 2015

The NSW Court of Appeal looked at whether the vendor of a private home, who had admitted misrepresenting the quality of the home, could be liable for a breach of the misleading and deceptive

conduct provisions of the Australian Consumer Law. The Court also looked at the proportionate liability regime in Part VIA [...] [Read More](#) »

## **Jurisdictional error as ground for review under the Security of Payment Act in Victoria**

Suzanne Kirton · August 27, 2015

Vickery J looked at applications to set aside judgments under s.28R(5)(a)(iii) of the Building and Construction Industry Security of Payment Act 2002 (Vic) (SOP Act) and the availability in this context of challenges based on jurisdictional error (available) and error on the face of the record (not available) [...] [Read More](#) »

## **Update to Domestic Building Warranty Insurance in Victoria**

Suzanne Kirton · August 28, 2015

The proposed reforms to the domestic building industry (discussed in the CommBarNews of 28 May 2014) have been put on hold by the change of government in Victoria. Despite this, VMIA has taken the pro-active step of improving the services it offers to consumers [...] [Read More](#) »

## **Civil Procedure**

### **The Civil Procedure Act 2010 affects every aspect of the conduct of litigation and simply can't be ignored**

Michael Wise · August 17, 2015

The Victorian Court of Appeal has held that the inherent jurisdiction of the Court is now statutorily modified by the provisions of the Civil Procedure Act 2010 [...] [Read More](#) »

## **Class Actions**

### **Federal Court considers 'Great Southern' issues - lead applicants' authority to bind group members**

Tim Chalke · August 31, 2015

Consideration of the arguments in relation to the extent to which parties in a group proceeding can, in settling the proceeding, bind group members to their compromise and preclude them from agitating rights against the defendants not pleaded by the applicants or addressed by the common questions [...] [Read More](#) »

## **Competition & Consumer Law**

### **Producers and their distributors – When are they in competition?**

Daniel Clough · August 25, 2015

In two similar cases, the Full Court of the Federal Court has clarified the analysis of competition between a producer who retails its own product and brokers or agents who retail that product and the products of the firm's competitors [...] [Read More](#) »

## **Insolvency Law**

### **It's all a matter of interpretation, the costs of 'convening'.**

Andrea Mapp · August 26, 2015

The costs of 'convening'. Whether the person requesting a meeting of creditors, pursuant to 5.6.15(1)(b) of the Corporations Regulations 2001 (Cth) be called is only liable for the costs of calling the meeting [...] [Read More](#) »

## Insurance & Professional Negligence Law

### [The Advocate's Immunity – how broad is its scope?](#)

Clive Madder · August 26, 2015

The Full Court of the Federal Court held unanimously that the advocate's immunity does not apply to an interlocutory decision to strike out a cause of action [...] [Read More](#) »

## Public Law

### [Characteristics, not labels, determine whether an entity is a constitutional corporation](#)

Mark Hosking · August 25, 2015

The High Court held that a statutory authority with separate legal personality was a trading corporation within the meaning of s 51(xx) of the Constitution, even though the Act that established the authority expressly provided that the authority "is not a body corporate" [...] [Read More](#) »

### [High Court on apprehension of bias: A person who brings charges has a conflict of interest in deciding matters consequential to those charges](#)

Simona Gory · August 30, 2015

A person who brings charges, whether as a prosecutor or other accuser, has a conflict of interest in participating in a decision on matters consequential to those charges that may give rise to a reasonable apprehension of bias [...] [Read More](#) »

## Sports Law

### [Helping the media: Should barristers have a role and if so, how?](#)

Natalie Hickey · August 30, 2015

With the promise of a rare CPD ethics point for fortunate attendees, the Sports Section of the Commercial Bar recently hosted a lively session entitled 'Sports Law Ethics and Journalists'. Leading the discussion were [...] [Read More](#) »



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