



President's Report



On 27-30 June 2016, CommBar held a conference in London, in conjunction with the Commercial Bar Association of England and Wales. The conference was a terrific success with over 180 people in attendance. Particular thanks are due to the organising committee for this conference, headed by Paul Hayes. Without Paul's extraordinary efforts in particular, this conference would not have taken place. The other members of the organising committee were Andrew Bailey, Benjamin Jellis, Caryn van Proctor, Dr Josh Wilson QC*, Ian Percy, Rodney Garratt QC and Sarah Fregon.

CommBar is also very grateful that many judges of the Federal Court and the Supreme Court of Victoria, including Chief Justice Warren, participated in or attended the conference. CommBar is also extremely grateful for all the work

Sally Bodman, Courtney Bow and others in the Bar Office put in to the organisation of the conference. Thanks are due to successive Bar Councils and Presidents of the Bar for supporting the conference. Special thanks also go to those members who devoted significant time and effort in providing detailed papers or who acted as a moderator or panellist at the conference. Without their contribution, the conference would not have been the success that it was.

CommBar continues to publish a blog known as "CommBar Matters" to provide commentary on topical issues in commercial law. The blog is intended to be available not only to CommBar members but also to members of the legal profession more broadly. CommBar has an agreement with Lexology to enable the contributions to the blog to reach subscribers to that database. Contributions from members are encouraged.

CommBar thanks the Editor of CommBar Matters, Cornelia Fourfouris-Mack, for her dedicated service in assisting CommBar members to publish CommBar Matters. Unfortunately, Cornelia has had to resign from her position and we thank her for her tireless efforts as Editor over the years, for all her assistance with our annual cocktail party, and promoting the interests of CommBar generally. Daniel Lorbeer has agreed to take on the role. We thank Daniel for his willingness to do so.

A reminder that our annual cocktail party will be held on 19 October 2016 at the Essoign Club.



* Until his appointment as a judge of the Federal Circuit Court in October 2015

Quotes of Note

Most people measure their happiness in terms of physical pleasure and material possession... If happiness is to be so measured, I who cannot hear or see have every reason to sit in a corner with folded hands and weep. If I am happy in spite of my deprivations, if my happiness is so deep that it is faith, so thoughtful that it becomes a philosophy of life,— if, in short, I am an optimist, my testimony to the creed of optimism is worth hearing.
Helen Keller

When any person does ill by you, or speaks ill of you, remember that he acts or speaks from an impression that is right for him to do so ... Therefore, if he judges from false appearances, he is the person hurt; since he too is the person deceived ... Setting out then, from these principles, you will meekly bear with a person who reviles you; for you will say upon every occasion, "It seemed so to him." Epictetus

It was in the Klondike that I found myself. There, nobody talks. Everybody thinks. You get your perspective. I got mine. Jack London

No man has yet become great by imitation. Samuel Johnson

This morning, again, I am blamed for changing my mind. But is there better proof of my constancy than remaining faithful to my inconstancy? Talleyrand

Forthcoming Events and Updates

CONSTRUCTION LAW

6th Society of Construction Law International Biennial Conference - 13-15 September 2016

Being held in Brazil on 13 - 15 September 2016, the conference will include speakers from five continents. Further information about the conference is available on the website: <http://www.scl2016.com/the-scl-brazil>

The Society of Construction Law Australia (**SoCLA**) is sponsoring the Academic Forum and members, in particular, Matthew Bell, are leading the Forum. SoCLA's Patron, the Honourable Justice Vickery, will be a speaker and a panellist.

BDPS Young Members Social Night - 31 August 2016

The Building Dispute Practitioners Society is launching the Young Members Section by holding a Social Night on 31 August 2016 (**tonight**) at Ombra Salumi Bar, 76 Bourke Street, Melbourne.

The Young Members Section is aimed at Building and Construction solicitors, barristers and consultants under 40 who may be starting out in building disputes or who have relatively little experience in the area. The Young Members Section will provide a network for younger members to help them in the early stages of their building dispute careers by building strong professional and personal relationships with like-minded practitioners.

Tickets are \$40 and include drinks and canapes throughout the evening. Register at <http://www.bdps.com.au/event-2306206>

ADR

Arbitration: Reasonable opportunity to present case

June 22, 2016 · by Albert Monichino QC

This recent decision of the Arbitration List judge of the Supreme Court of Victoria suggests that the requirement that parties will be given a “reasonable opportunity” to present their case will be viewed robustly by a supervising court and not through the prism of [...] [Read More](#) »

Arbitral jurisdiction: what has Kompetenz-Kompetenz got to do with it?

August 2, 2016 · by Albert Monichino QC

The negative effect of the Kompetenz-Kompetenz principle (enshrined in the Model Law on International Commercial Arbitration) requires that courts not make pre-emptive declarations as to arbitral jurisdiction, and adopt a prima facie review when entertaining [...] [Read More](#) »

Arbitration: Chief Justice leaves door open on indemnity costs

August 11, 2016 · by Albert Monichino QC

In a recent decision of the Federal Court of Australia, Allsop CJ (sitting at first instance) has left the door open as to whether the Federal Court of Australia will depart from the (obiter) views of the Victorian Court of Appeal and instead adopt a default indemnity costs rule in [...] [Read More](#) »

Banking and Finance

The High Court on penalties: bank fees and beyond

August 17, 2016 · by Jeremy Whelen

For the second time in four years the High Court has considered penalties, but the law remains somewhat fragmented and challenges remain for practitioners seeking to apply [...] [Read More](#) »

Building and Construction Law

Security of Payment: What constitutes a “method of resolving disputes” and the adjudicator’s role in assessing value

August 17, 2016 · by Michael Whitten QC, Andrew P. Downie and Daniel J Briggs

In this recent decision, the Court of Appeal held that a mediation-based dispute resolution clause in a construction contract did not oust the jurisdiction of an adjudicator under Victorian security of payment legislation, and that an adjudicator is not bound by a valuation [...] [Read More](#) »

Rummaging through the trash: the use of deleted words in contractual interpretation

August 24, 2016 · by Daniel J Briggs

In this recent decision, the Court of Appeal held that deleted words appearing on the face of an executed contract may not be used to interpret a clause unless the clause in question (excluding the deleted words) is ambiguous. If it is, the deleted words may be used, only [...] [Read More](#) »

Energy

Singapore International Commercial Court rules on Australia-Indonesian JV dispute

May 29, 2016 · by Tom Clarke

In its first decision, the SICC has determined a series of preliminary questions in a Singapore law-governed contract dispute, including questions of illegality under Indonesian law [...] [Read More](#) »

Electric flux: contentious issues in the National Electricity Market

August 25, 2016 · by Tom Clarke

An overview of current contentious issues in the National Electricity Market: Basslink outage and energy rationing in Tasmania, wholesale price spikes in South Australia, and the blocked acquisition of Ausgrid [...] [Read More](#) »

Equity

Statements made during negotiations: rectification or estoppel where the written agreement differs from the terms of an antecedent bargain?

August 11, 2016 · by Chris Fenwick

The New South Wales Court of Appeal has confirmed that rectification of a contract is generally only available to redress a common mistake, and that estoppel is available in respect of pre-contractual representations, even in the face of an entire agreement clause [...] [Read More](#) »

Equitable estoppel – what must be shown to establish the equity?

August 17, 2016 · by Daniel Lorbeer

In Crown Melbourne Ltd, the High Court held that a statement that lessees “would be looked after at renewal time” did not give rise to an estoppel in favour of the lessees. The judgments of the majority members of the Court should not distract attention from, or suggest [...] [Read More](#) »

When can defaulting trustees plead their own default against fellow malefactors?

August 25, 2016 · by Lionel Wirth

The Victorian Court of Appeal recently allowed an appeal against an order staying a proceeding brought by companies in liquidation against their former directors for knowingly assisting breaches of trust allegedly committed by the companies. The Court [...] [Read More](#) »

Insolvency

Setting aside a Statutory Demand? Look out, you could be struck out if serving interstate

August 11, 2016 · by Raini Zambelli

When serving an application to set aside a statutory demand interstate, the strict modes prescribed by SEPA trump service under the Corporations Act (or any mode of informal effective service which might otherwise suffice). Practitioners forgetting this may face a rather [...] [Read More](#) »

The company will repay the loan when it can afford to! How certain is that?

August 26, 2016 · by Ralph Greenberger

The Supreme Court of Victoria has dismissed an application by a company to set aside a statutory demand which sought repayment of a loan which was to be repaid “as soon as practicable”. The Court held that the term as to repayment was void for uncertainty, and that [...] [Read More](#) »

Court approval of settlements in liquidations

August 27, 2016 · by Daniel Diaz

The Supreme Court has confirmed that declarations can be made approving settlement payments and the mere fact that a liquidator has acted on incorrect advice will not preclude a settlement payment being regarded as an expense “properly incurred” for the [...] [Read More](#) »

IP and Trade Practices

Tobacco repackaging appeal runs out of puff

August 25, 2016 · by The Hon Peter C Heerey AM QC, Tom Cordiner and Alan Nash

Trade marks – parallel importation – removal of original packaging and repackaging to comply with local regulation – whether use as a trade mark by reseller – whether section 123 [...] [Read More](#) »

No room in the playground for foreign manufactured goods

August 25, 2016 · by The Hon Peter C Heerey AM QC, Tom Cordiner and Alan Nash

Trade marks – infringement – use as a trade mark in Australia – goods manufactured and sold overseas for resale in Australia – whether foreign vendor used marks in [...] [Read More](#) »

Court says “nyet” to infringement of Australian company’s rights in Russian language broadcasts

August 25, 2016 · by The Hon Peter C Heerey AM QC, Tom Cordiner and Alan Nash

Copyright – television broadcasts – communication to the public – Russian language programmes – whether channel streaming a “television broadcast” – “relevant broadcaster” [...] [Read More](#) »

Public Law

“Procedural” decisions and procedural fairness

August 25, 2016 · by James Forsaith

The High Court has confirmed that the making of a “procedural” decision to consider exercising a non-compellable discretion to either grant a visa or to permit a further application for a protection visa (which decision has the effect of prolonging the mandatory detention of [...] [Read More](#) »

Unreasonableness and illogicality: a tale of two grounds

August 26, 2016 · by James Forsaith

In recent decisions of the Federal Court (Wigney J) and the NSW Court of Appeal (Bathurst CJ), unreasonableness jurisprudence has been relied on to reject the argument that the “illogicality” ground of judicial review is solely concerned with the end result, as [...] [Read More](#) »

Sports Law

“When Ambush Marketers smile at me, I go to Rio”: Protected uses of Olympic Insignia

August 24, 2016 · by Elle Nikou and Paul Czarnota

Association with the Olympic brand is a marketer’s dream. Through national and international law, the Olympic Movement is afforded considerable protection against the practice of “ambush marketing” and unauthorised uses of Olympic Insignia. Recently, the [...] [Read More](#) »

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