



## President's Report



CommBar held its annual cocktail party in the Supreme Court library on 11 September 2014. Speeches were made by Chief Justice Warren and the Attorney-General, the Honourable Robert Clark MP. The function was attended by many judges, barristers, solicitors and corporate counsel and was a great success. Thanks are due to Ian Percy, CommBar's Treasurer and Cornelia Fourfouris-Mack as well as Courtney Bow and Sally Bodman in the Bar Office, for all their hard work in the organisation of our important annual event.

Our upgraded [website](#) is up and running. It is now user-friendly for all mobile devices. Enhancements will continue. Members will be advised soon as to how they can log in to amend their own profile. Arrangements are also being made for those who want to have their photograph taken for use on the website. Photographs from the function can viewed on the CommBar website.

On Friday 7 November 2014, CommBar hosted a private workshop at the Federal Court on the subject of increasing the representation of women barristers in commercial litigation. The following judges participated in the workshop: Justice Crennan of the High Court of Australia, Chief Justice Warren, President Maxwell, Justice Ferguson, Justice Hollingworth, Justice Almond and Justice Elliott of the Supreme Court of Victoria, Justice Gordon, Justice Murphy and Justice Mortimer of the Federal Court of Australia and Judge Kennedy of the County Court of Victoria. Thirty five senior partners and/or corporate counsel attended from a range of private firms and from the government sector. The workshop was facilitated by Kate Jenkins, the Victorian Equal Opportunity and Human Rights Commissioner.

Consistently with the private nature of the workshop, no barristers attended and the workshop was held under the Chatham House Rule. Those members of the planning group who attended the workshop (Justice Mortimer, Justice Hollingworth and Kate Jenkins) have reported however, that the workshop was an absolute success. The format worked very well (in broad form, this involved small groups consisting of one member of the judiciary and four partners/corporate counsel discussing a series of talking points, and report-back to the wider group). Moreover, there was unanimous praise of the initiative and uniform support for the need for changes.

An important part of the workshop was the devising of strategies to effect a change in the underrepresentation of women at the Bar table in commercial matters. The group came up with a range of ideas and has committed (as a group) to continue to work on developing these strategies going forward. The confidentiality of the discussions was integral to the success of the initiative and will be continued for the time being. However, we anticipate that there will be a public announcement, down the track, of strategies agreed upon by the group.

CommBar, and the Bar generally, owe a debt of gratitude to Kathleen Foley who took an embryonic idea and turned it into an event which has the potential to effect permanent change. I also particularly thank Mortimer and Hollingworth JJ and Anna Robertson for their involvement in the planning of the workshop with Kathleen Foley. Thanks are due also to the Women Barristers' Association, and in particular Diana Price and Emma Pepler, for their support of this initiative.

I also record my thanks to those people who were prepared to get behind this initiative from the outset and make it happen. They include Crennan J, Warren CJ, Allsop CJ, Mortimer J and Hollingworth J, Gordon J, Middleton J and Deputy Registrar Lagos. I thank them all for embracing the project so enthusiastically. Sincere thanks are also due to Kate Jenkins. Kate's expert facilitation skills and involvement with Kathleen Foley, Hollingworth J and Mortimer J in the detailed planning, was integral to its success.

On 19 November 2014 CommBar held its annual general meeting and election.

Following the election, the membership of the Executive is as follows:

#### Office Holders

Philip Crutchfield QC – President  
Stuart Anderson QC - Senior Vice President  
Wendy Harris QC – Junior Vice President/Convenor  
Ian Percy – Treasurer

#### Committee members

Josh Wilson QC  
Caroline Kenny QC  
Albert Monichino QC  
Kathleen Foley  
Caryn Van Proctor  
Anna Robertson  
Dr Elizabeth Boros

We thank all those who nominated for positions and those who have previously served on the Executive, for their valuable contribution. In that regard, particular thanks are due to Caroline Kirton QC and David Turner for their contributions to CommBar.

The electronic voting system worked well with approximately two thirds of the membership casting a vote. This is a significant increase in numbers voting in previous years. CommBar is pleased to have trialled the system for the Bar which is likely to adopt the system for next year's Bar Council elections.

Thanks to Jacinta Silva of the Bar Office and David Levin QC for overseeing the voting process. Our thanks also go to Sally Bodman, Courtney Bow and Byron Moore of the Bar Office for assisting with all our administrative and web related tasks.

The new Executive will meet soon to roadmap the agenda for the next 12 months.

On Thursday 13 November 2014, the new members of the Bar Council were elected. Congratulations to Jim Peters QC on his appointment as the new Chairman of the Bar. CommBar looks forward to working closely with the Chairman and the Bar Council in the year ahead.

Finally, on behalf for CommBar, I record my deep appreciation for the work that Will Alstergren QC did during his term as Chairman. Will put an extraordinary amount of energy and effort into the role. To touch on just a few highlights of his term, Will worked hard and successfully in re-engaging with the law firms and corporate counsel, supported CommBar in its CPD program, and organised the joint VicBar Law Institute of Victoria conference: "High Stakes Law in Practice and the Courts".

This conference was a first time event for the legal profession and thanks go to Will for arranging a remarkable set of speakers and sessions.

Finally, I wish everyone a happy and restful holiday season with friends and family.

**Philip Crutchfield QC | President**



## Quotes of Note

*It is no use saying "we are doing our best", you have to succeed in doing what is necessary.* Winston Churchill

*Speeches that are measured by the hour will die with the hour.* Thomas Jefferson

*The things most people want to know about are usually none of their business.* George Bernard Shaw

*The only thing worse than being blind is having sight but no vision.* Helen Keller

*Music in the soul can be heard by the universe.* Lao Tzu

## Publius

### *In Catalonia*

Publius recently spent some time in Spain, including Barcelona, the capital of Catalonia.

A referendum on Catalan separation had been scheduled for 7 November. Unlike the Scottish referendum, it did not have the acceptance of the central government. The Spanish Constitutional Court declared that the vote would have no legal effect. Separation proponents appear to have accepted this ruling, although planning to go ahead anyway.

Throughout Barcelona buildings were draped with the Catalan flag – red and yellow stripes with blue triangle and white star. Occasionally one saw the red, yellow and purple horizontal tricolour of the pre-Franco Spanish Republic.

The locals are very keen on the Catalan language, a Romance language like Spanish, Italian, French etc etc (Publius can't help feeling it would make life a lot easier if everyone had just stuck with Latin). In some museums and galleries the accompanying descriptions appear in Catalan, Spanish and English. They are in descending order, which is fair enough, except that they are in progressively paler text so that the English version requires undignified stooping to read.

At least Catalan is easier to cope with than another regional language, Basque. In the San Sebastian railway station the sign for Ticket Sales says "Venta de Billettes" in Spanish and "Txartelak" in Basque.

Returning to Barcelona, a major attraction is the architectural heritage of Antoni Gaudi. His masterpiece is the Holy Family (Sagrada Familia) Cathedral. Gaudi commenced work in 1883. It is due to be completed in 2026, the centenary of Gaudi's death, when he was hit by a tram.

Construction Law Section members of the Commercial Bar Association might speculate whether some of this delay might be attributable to protracted building disputes. Anyway, it is said that the Cathedral is the most visited tourist site in Europe.

Strolling down Barcelona's famous Ramblas one day Publius noticed an English language bookshop. He struck up a conversation with the manager, Jock, a red-headed, lanky Scot.

"Do you by any chance have Peter Heerey's Excursions in the Law"?

“Sorry” said Jock, “We’re completely out of stock. As the Spanish say, they are selling like tartas calientes. People are particularly keen on that chap Publius.”

Aware that Peter is a bit sensitive about being upstaged, Publius contented himself with an enigmatic smile and simply purchased a Lonely Planet Spanish phrase book and a copy of George Orwell’s *Homage to Catalonia*.

One of the great masters of modern English prose, Orwell should, in the humble opinion of Publius, be compulsory reading for journalists, Parliamentary drafts people and even the odd judge.

Viewing him through the prism of the Cold War and his better known works *Nineteen Eighty Four* and *Animal Farm*, we tend to forget that Orwell attacked Communism very much from the Left and was a strong supporter of Republican anti-clericalism. As to Gaudí’s famous cathedral, he writes that it was:

... one of the most hideous buildings in the world ... spires exactly the shape of hock bottles. Unlike most of the churches in Barcelona it was not damaged during the revolution – it was spared because of its ‘artistic value’, people said. I think the Anarchists showed bad taste in not blowing it up when they had the chance, though they did hang a red and black banner between its spires.

Publius does not feel qualified to speak on the spiritual and philosophical issues involved. However, he observes that over the years the cathedral must have provided a great deal of employment for working class builders labourers, tour guides, souvenir sellers etc.

## ADR

### High Stakes Litigation: Highlights of the Victorian Bar and Law Institute of Victoria Joint Conference

Monday, 20 October 2014, by Dominique Hogan-Doran

The first ever Victorian Bar and Law Institute of Victoria Joint Conference, held on Friday 17 October 2014, was an opportunity for the profession and the judiciary to confront the complexities and challenges of modern high stakes litigation and dispute resolution.

[Read more...](#)

### Enforcement of a foreign arbitral award in Australia – the requirement for “proper notice”

Friday, 14 November 2014, by Adam Rollnik

On an application to enforce a foreign arbitral award in the Federal Court, the respondent unsuccessfully sought to resist enforcement on the grounds that he had not received “proper notice” of the original arbitration proceeding.

[Read more...](#)

## Asia Practice

### What happened to the Asian Century?

Wednesday, 29 October 2014, by Dr Josh Wilson QC

After great introductory fanfare, the Asian century was meant to be all things to those who traded in Asia. But have events turned out that way? This article says yes and that opportunities continue.

[Read more...](#)

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## Young Asian barristers series

Wednesday, 26 November 2014, by Dr Josh Wilson QC

Interview with Angela Lee. This is the first of a four part series of interviews between CommBar and some of the Asia Practice Section's up-and-coming members who explain something about their backgrounds and how life at the Bar for a person of Asian heritage throws up challenges.

[Read more...](#)

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## Banking and Finance

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### Attempted challenge by a financial services provider to a determination by the Financial Ombudsman Service under its terms of reference

Monday, 8 September 2014, by Kieran Hickie

The decision of the Victorian Court of Appeal in favour of the Financial Ombudsman Service Ltd (FOS) highlights the difficulties for financial services providers in trying to challenge decisions of FOS and the dispute resolution process under the terms of reference (TOR). The TOR operate as a binding contract with a finality clause in favour of FOS' decisions and determinations.

[Read more...](#)

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## Civil Procedure

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### Where's the evidence? Duties of counsel when making allegations of misconduct

Tuesday, 14 October 2014, by Timothy Goodwin

The Victorian Court of Appeal recently confirmed the importance of counsel's duty to ensure serious allegations of misconduct are only made if reasonably justified by available material.

[Read more...](#)

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### County Court scales up on costs - Order 63A.

Monday, 20 October 2014, by Paul Duggan

Are you a County Court litigator charging scale? If so, congratulations, you just got a pay rise. Commiserations on the other hand if you a County Court litigant already rueful about rejecting a shrewd offer of compromise. Your burden just got heavier. The County Court of Victoria has amended its cost rule, Order 63A. For beneficiaries of scale costs (lawyers and successful litigants especially) this is good news.

[Read more...](#)

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### Lawyers and expert at risk for costs

Monday, 24 November 2014, by Ian Percy

A case study in the importance of compliance with overarching obligations, O44 and the Expert Code of Conduct by lawyers and experts and the serious consequences that can flow from any non compliance.

[Read more...](#)

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2014 Victorian Civil Appeal Reforms: requirement for leave to appeal, new time limits,

## and no entitlement to an oral hearing

Wednesday, 26 November 2014, by Andrew P. Downie

The Courts Legislation (Miscellaneous Amendments) Act 2014 implemented changes to the Supreme Court Act 1986 (Vic) that include a requirement for leave to appeal for all civil appeals, with limited exceptions, and there is no entitlement to an oral hearing for leave to appeal. The changes commenced on 10 November 2014, and the Supreme Court (General Civil Procedure) Rules 2005 were amended also.

[Read more...](#)

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## Competition and Consumer Law

### Informed Cooperation Fuels Consumer Harm?

Monday, 20 October 2014, by Richard Scheelings

ACCC v Informed Sources (Australia) Pty Ltd & Ors VID450/2014 - In August this year the ACCC launched Federal Court proceedings against retail petrol suppliers. The case is an important test of the application of Australia's competition laws to 'tacit collusion'. The ACCC has to date had minimal success in this area.

[Read more...](#)

### More Effective Anti-Monopolization?

Thursday, 13 November 2014, by Richard Scheelings

The Commonwealth government's 'root and branch' review of Australia's competition laws has reached the half-way mark. Proposed reform of section 46 of the Competition and Consumer Act 2010 is especially controversial.

[Read more...](#)

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## Construction Law

### No duty of care owed by builder to avoid causing pure economic loss to owners corporation

Wednesday, 26 November 2014, by Caroline Kirton QC

The High Court unanimously held that the builder of strata-titled apartments did not owe an owners corporation a duty of care to avoid pure economic loss caused by latent defects in common property.

[Read more...](#)

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## Corporations and Securities Law

### Appeal against leave to amend statement of claim in group proceeding

Wednesday, 5 November 2014, by Roslyn Kaye

The Victorian Court of Appeal has refused an application for leave to appeal against a decision of a trial judge to allow a plaintiff to amend his statement of claim in a group proceeding. The amended pleading relates to the interpretation of section 729 of the Corporations Act 2001 (claim for loss and damage arising from misleading or deceptive statements in a disclosure document).

[Read more...](#)

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## Environment and Planning

## The 2014 New South Wales Planning provisions – a precursor to national change?

Monday, 1 December 2014, by Cornelia Fourfouris-Mack

NSW planning laws reforms set to restore public confidence in the planning system and the introduction of ePlanning that inter alia increases transparency and access to information.

[Read more...](#)

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## Insolvency Law

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### Consideration of 'special federal matter' within the meaning of s 6(1) of the Jurisdiction of Courts (Cross Vesting Act) 1987 (Cth)

Monday, 24 November 2014, by Andrea L Mapp

Whether application seeking a declaration for or against the title of the trustee to a trustee in bankruptcy under s 58(1)(a) of the Bankruptcy Act 1966 (Cth) is a 'special federal matter' within the meaning of s 6(1) of the Jurisdiction of Courts (Cross Vesting Act) 1987 (Cth).

[Read more...](#)

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## IP and Trade Practices

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### You get what you pay for – patent application lapses for non-payment of continuation fee

Monday, 17 November 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

Bennett, Greenwood and Middleton JJ unanimously upheld the primary judge's decision in *Miles v Commissioner of Patents* [2013] FCA 1017, a case involving a lapsing patent application.

[Read more...](#)

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### Persuading the ATO that foreign software licence fees are royalties proves to be a taxing task

Monday, 24 November 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

Australian entities that pay royalties to foreign-based licensors are required to withhold and remit to the Australian Tax Office a portion of that royalty, except to the extent an international tax agreement between Australia and the relevant country provides otherwise.

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### Discloser of confidential business plan almost misses out on the fruits of its labour

Tuesday, 25 November 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

Where confidential information about a plan for corporate recapitalisation was disclosed and there was a subsequent development by the recipient and completion of the transaction without further recourse to discloser, the issue at trial was whether elements of confidentiality made out and whether equitable compensation is payable.

[Read more...](#)

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## This will hurt you more than me – validity of IV catheter patent upheld

Tuesday, 25 November 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

In the proceeding *B. Braun Melsungen AG v Multigate Medical Devices Pty Ltd* [2014] FCA 1110, Pagone J held certain claims of two of B Braun's patents for safety IV catheters valid and infringed by the conduct of Multigate. Both patents are for a safety needle protecting device for an intravenous catheter. Both claim the priority date of 12 June 1998 through the same chain of intermediate patents.

[Read more...](#)

## ZIMA tomato trade mark far from rotten

Tuesday, 25 November 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

In *Mastronardi Produce Ltd v Registrar of Trade Marks* [2014] FCA 1021 (19 September 2014) Justice Gordon has overturned a decision of the Registrar to reject the mark ZIMA in respect of tomatoes.

[Read more...](#)

## Trade mark owner successfully runs a claim for additional damages up the pole

Tuesday, 25 November 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

In *Vertical Leisure Limited & Anor v Skyrunner Pty Ltd & Anor* [2014] FCCA 2033 (5 September 2014), the Federal Circuit Court has extended the record by awarding \$300k in additional damages for infringement of Vertical Leisure's X-POLE mark registered for pole-dancing poles. Vertical Leisure is the Australian and international market leader in respect of such products.

[Read more...](#)

## Co-patentees jump the gun in appealing to the AAT

Wednesday, 19 November 2014, by Peter Heerey AM QC, Tom Cordiner & Alan Nash

*Stylis and Commissioner of Patents* [2014] AATA 796 28 October 2014 The Administrative Appeals Tribunal has refused an application to review a particular decision of the Commissioner of Patents on the basis that the AAT lacks jurisdiction to review it.

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