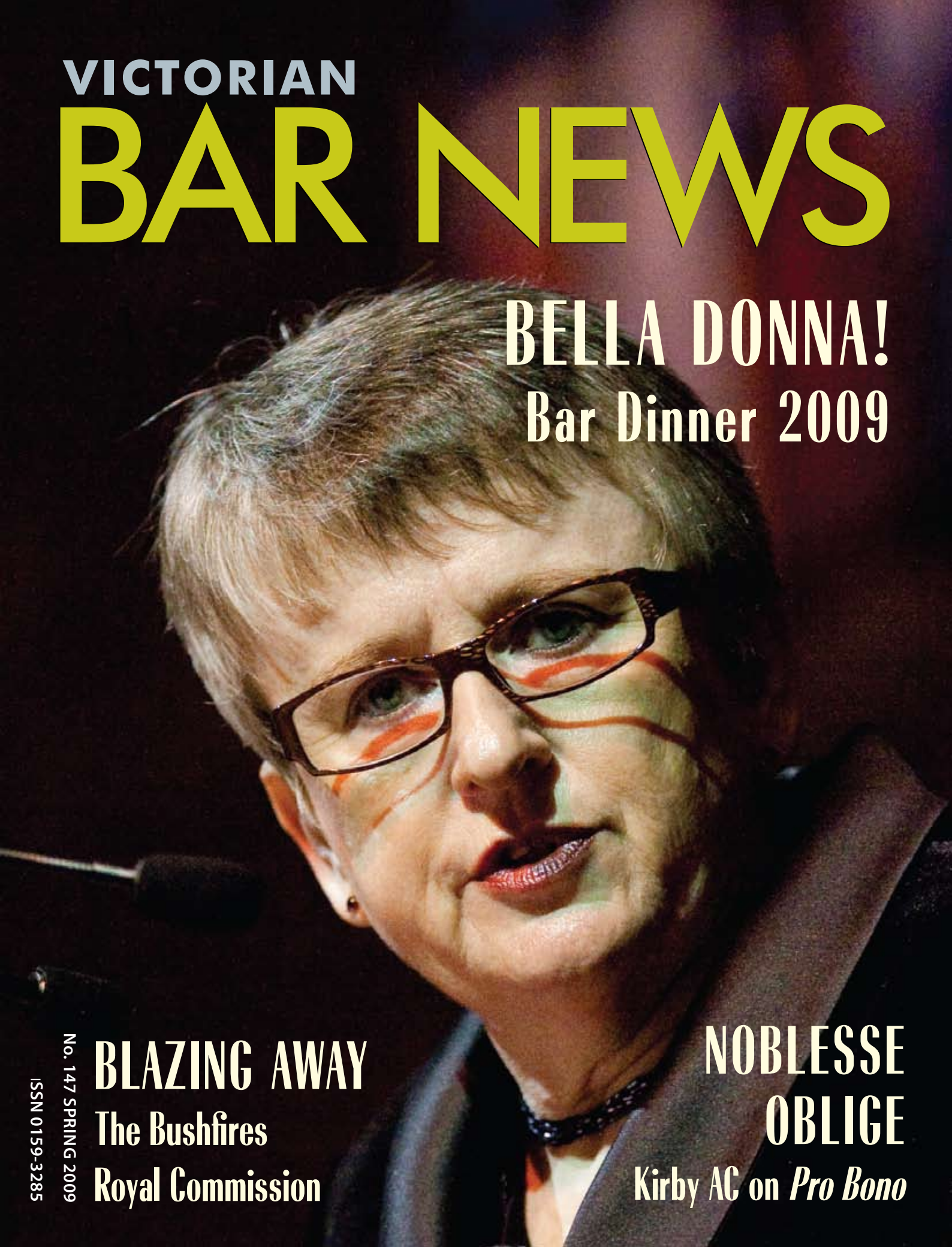
VICTORIAN

# BAR NEWS



## BELLA DONNA!
### Bar Dinner 2009

## BLAZING AWAY
### The Bushfires Royal Commission

## NOBLESSE OBLIGE
### Kirby AC on *Pro Bono*

No. 147 SPRING 2009
ISSN 0159-3285

**VICTORIAN BAR NEWS**

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The Summer 2008/2009 edition of the *Victorian Bar News* (No. 146) reproduced on its cover a photograph of the portrait by Sir William Dargie of the late Honourable Sir John Young that hangs in the Library of the Supreme Court of Victoria. The photograph was made available for publication in *Victorian Bar News* with the kind permission of the Chief Justice of Victoria. *Victorian Bar News* regrets that it overlooked properly acknowledging the reproduction of the portrait in the previous edition and offers the court its sincere apology.

*Cover*: The Honourable Justice Bell speaking at the 2009 Bar Dinner

## EDITORIAL

**4** Welcome to the new *Victorian Bar News*

## CHAIRMAN'S OUTLOOK

**5** 2009, a year of considerable progress

## NEWS AND VIEWS

**7** Reception in honour of the *pro bono* commitments of members of the Victorian Bar
**11** The Technology, Engineering and Construction List
**15** Blazing away: the Bushfires Royal Commission
**17** Seating plans, labels and performance anxiety
**22** 2009 Bar Dinner
**23** Speech delivered by the Honourable Justice Bell

## VBN BOILERPLATE

**27** Quarterly Counsel
**28** Silence all stand!
**29** Adjourned Sine Die
**31** Decree Absolute

## AROUND TOWN

**32** New Silks, Indigenous Lawyers, David Derham book launch, Skiing, Legal Year Opening, Football
**34** Readers' Course photograph
**35** London Calling
**36** Dear Themis
**36** Wine Report
**37** A bit about words
**38** Habitat

## LAWYER'S BOOKSHELF

**39** *Music from a Jade Flute*

EDITORIAL

# Welcome to the new *Victorian Bar News*, the first for 2009

The first thing you will notice is that *Victorian Bar News* looks different and has undergone some significant changes since the previous edition (No. 146 Summer 2008/2009).

Earlier this year, as a consequence of a Bar Council review of the Victorian Bar's overall communications and publications policy, which included the *Victorian Bar News*, it was decided that the Victorian Bar would henceforth publish two periodicals to replace the single publication that was the *Victorian Bar News* in its earlier format.

Our brief is to publish a quarterly magazine reporting on the social and professional life of the Victorian Bar. We understand that the other soon-to-be released publication will be edited by Dr Ian Freckleton SC and will be a more academically orientated journal focussing on recent and important developments in the law and legal practice of interest to counsel practising at the Victorian Bar.

Work commenced on the new *Victorian Bar News* in June. We were allocated 32 pages per edition, (not including the cover), to perform our retainer. No doubt our publishers were initially influenced by the Court of Appeal's Practice Direction No. 1 of 2008, which limits the length of written outlines of submissions to six pages! However, such is the impressive range of activity among the members of the Victorian Bar, it has subsequently been acknowledged that *Victorian Bar News* may need to be composed of a greater number of pages in future editions.

And so, to edition number 147, the first of the new-look *Victorian Bar News*.

The big story at the Victorian Bar in 2009 has been the Victorian Bushfires Royal Commission. The 2009 Black Saturday bushfires were a tragedy of immense proportions: 173 people perished in the fires and over 500 more were injured. Over 2,000 homes were destroyed. Numerous counsel have been retained to appear in the Royal Commission and the record of appearances reads like a who's who of our Bar.

Members of our Bar were also personally affected by the fires and we rallied around our own to help. We also swung into action to help the community. Approximately 500 barristers have volunteered to assist bushfire victims on a *pro bono* basis through the Victorian Bar Legal Assistance Scheme ('VBLAS'), be it in pursuing insurance claims, seeking compensation for personal injury or taking other necessary legal action. For us though, one of the most touching moments of the bushfires was the email from Mission Australia forwarded to members of the Victorian Bar on 13 February which urgently requested people to donate suits for families who had lost everything, and needed suits to attend the memorial services and funerals of those who had perished. Truly heartbreaking. Needless to say, the Victorian Bar immediately responded to the call.

The response of the Victorian Bar in representing the multitude of 'interests' which have been granted leave to appear at the hearings of the Victorian Bushfires Royal Commission highlights the importance of our independent role in the Victorian legal system, together with the depth of talent and skill of our members and the valuable role our Bar plays in serving the Victorian community. When the final report is ultimately delivered, the Victorian Bar will have played a critical and indispensable role in the shaping of the recommendations which will be made for the benefit of their fellow Victorians.

In keeping with the community service theme, we are fortunate to be able to publish a contribution from the Honourable Michael Kirby AC QC. Justice Kirby has selflessly devoted a lifetime of service to the nation and it is his example and that of others like him, which inspires many of our members to contribute to the greater good of our community as they do. Justice Kirby's address at the VBLAS reception in February was one the highlights of the year so far and we wish him well in his 'retirement'.

The High Court continued to illuminate the Victorian Bar when in May its most recently appointed member, Justice Bell, addressed the guests in attendance at the 2009 Victorian Bar Dinner, in what seemed to be the early hours of the morning. Those present were privileged to hear what was one of the great after-dinner speeches delivered anywhere, anytime. It is easy to see why her Honour spoke last. She would have been a mighty hard act to follow. For those who missed it, or those who wish to re-live it once more, Justice Bell's speech is republished in this edition.

Apart from covering news and events of topical interest to Victorian barristers, *Victorian Bar News* will also be introducing new regular sections, which include 'Dear Themis' and 'Habitat'.

Readers will also notice a more succinct approach in the appointments and obituaries columns and the previously popular food and wine contributions have returned. Also to appear in the new *Victorian Bar News* will be 'Quarterly Counsel', a feature which celebrates some of the diverse and engaging personalities of our Bar. Simon Wilson QC is our first 'Quarterly Counsel'.

As there has not been an edition of *Victorian Bar News* published for almost eight months now, we have not been able to publish many of the items we might have otherwise published in the usual course, particularly given the limited space available in our first edition of the new format. We are grateful for all contributions we receive and we hope to publish those articles we haven't been able to include in this edition in future editions. Also, the next edition of *Victorian Bar News* (Summer 2009), will include a tribute to the late Chief Justice, the Honourable John Phillips AC QC.

Finally, it would be remiss of us not to acknowledge the endeavours of our predecessors, Paul Elliott QC, Gerry Nash QC and Judy Benson. Their tireless efforts for over a decade produced a quarterly magazine of exceptional quality which faithfully recorded the life and times of the Victorian Bar. Under their stewardship, *Victorian Bar News* was always eagerly awaited and when it arrived with the daily mail, it was usually the first thing read, no matter how pressing the rest of the mail might have been.

As the new editors of *Victorian Bar News* we appreciate the considerable responsibility that comes with the role now that the editorial baton or 'carrot of justice' has been handed to us. If we produce a publication as compelling as the one overseen by our predecessors then we will have achieved our goal with the new version of *Victorian Bar News*.

We hope you enjoy reading the new *Victorian Bar News* as much as we have enjoyed producing it!

THE EDITORS

## CHAIRMAN'S OUTLOOK

# 2009, a year of considerable progress

Much has recently occurred and is currently underway at the Victorian Bar.

I want to take this opportunity to mention some of the matters of significance in the life of our Bar over the last year and to highlight to members some of the important projects which are currently being progressed.

I have had the honour of working within an excellent Bar Council in 2008/2009, and I acknowledge and thank them for their help and support. I also thank Denise Bennett, the Bar's Executive Officer, and the Honorary Secretaries Simon Pitt and Stewart Maiden for the enormous support they provide me in undertaking the role of Chairman.

The Council in turn enjoys the back-up of Stephen Hare, the Bar's General Manager, and his team in the Bar Office, who labour to make our Bar work as well as it does, and for which we, as members, should all be very grateful.

The Bar Council has been very active over the last 12 months.

The Council undertook an extensive strategic and operational review of the governance and administrative structures of the Victorian Bar and Barristers Chambers Limited.

In relation to BCL I would also like to acknowledge that it has been well served for many years by its recently retired CEO, Daryl Collins, and that BCL (and the Bar) has been lucky enough to engage the services of Edwin Gill as its new Managing Director.

Over January and February of this year, the Bar Council has extensively reviewed the structure and roles of its standing committees and implemented a number of reforms including doing away with some standing committees, amalgamating others and in most cases formally refining the role and purpose of such committees.

Scores of barristers devote very large amounts of time to these voluntary activities. This work is 'the life blood of the Bar,' enabling it to operate effectively and to do as much as it does.

At the end of last year the Bar Council also established the Independent Chambers Committee to ensure that the perspectives and views of barristers who have chosen to share chambers outside the BCL system are fully appreciated and appropriately acted upon. There are 14 sets of chambers that are independent from BCL and which accommodate approximately 350 barristers. The Independent Chambers Committee is currently considering the IT and communications synergies which may be feasible between BCL chambers and independent chambers.

The Bar Council has also worked hard to develop an overarching Strategic Plan led by Mark Moshinsky SC, which is being continually reviewed and implemented as best the Bar can, including strategies to help and protect the Bar in exceptionally challenging and changing environment for the practice of law in Victoria.

The Bar Council is determined to get the message across to those who can best benefit from our services, that counsel bring to every task the highly developed legal skills and experience of a specialist independent advocate, and do so in a way which is usually very cost effective and competitive.

In September 2009, as part of the program to ensure those attributes of the Victorian Bar are appreciated, the Com-mercial Bar Association, under Peter Bick QC's leadership, is launching a series of seminars for solicitors and corporate counsel.

The Bar needs to keep making itself more efficient and sophisticate its operation. To help effect this objective the Bar has engaged a policy officer, Ms Jacqueline Stone, to enhance the Bar's capacity to develop its position on important matters related to the

administration of justice and the community, and more effectively communicate with governments and government instrumentalities.

The Bar has also engaged the services of a specialist media consultant, Ms Alicia Patterson of House Communications who has been of great assistance in getting the Bar's message across to the media in recent months.

The Bar has also been very active in endeavouring to have our governments, both State and Federal, provide appro-priate levels of legal aid funding. Mr David Neal SC and John Champion SC, the Chair of the Criminal Bar Association, have worked hard with the help of others, to solve what the Bar believes is a paucity of legal aid funding, particularly from the Commonwealth, which is contributing to inadequate access to justice, particularly for the most disadvantaged in our community.

The Bar acknowledges that the Victorian Government has, in its most recent budget, stepped up to the task with funding improvements for which the Victorian Bar applauds Rob Hulls and his administration. However, the struggle to secure appropriate levels of legal aid funding from the Federal Government has a long way to go.

The Bar has on the recommendations of the Readers Course Committee, chaired by Matt Connock SC and the Readers Course Review Committee chaired by Peter Riordan SC appointed two independent consultants to conduct a holistic and in-depth review of its Readers Course It is expected that the reviewers' reports will be with the Bar Council by about the end of 2009.

The Bar is constantly assessing the adequacy of and adding components to its continuing Professional Development Program under Jeremy Ruskin QC's chairmanship.

Under the chairmanship of Phillip Priest QC, and with the assistance of Dr Michelle Sharpe and Phil's Health and Wellbeing Committee, the Bar has upgraded its Health and Wellbeing facilities, including engaging new counselling and support services, and offering a number of free consulting sessions to members in need, after-hours support, and education about these matters in the CPD program.

The Bar has this year enjoyed some very good public relations activities such as the Anglo Australasian Lawyers Society Dinner, organised by Rodney Garrett QC and Paul Hayes, at which the Master of the Rolls Lord Neuberger spoke.

There is not space here to recognise all who deserve recognition in relation to Bar work and activities. However, I do want to mark the special efforts and contribution the Victorian Bar has made in relation to the devastating bushfires which occurred in Victoria early this year.

The Victorian Bar, in conjunction with Victoria Legal Aid, the Federation of Community Legal Centres, the Victorian Law Foundation, the Public Interest Law Clearing House and the Law Institute of Victoria moved very quickly to co-ordinate and provide legal assistance to the Victorian community in the wake of this year's terrible bushfires, and created Bushfire Legal Help.

I want to recognise, in particular, the extensive work done by Alexandra Richards QC, Phil Kennon QC, Jane Dixon SC and Victorian Bar's Pro Bono Committee generally which co-ordinated the voluntary services of 247 barristers responding as needed to many of the 1200 calls for assistance received by Bushfire Legal Help.

More than 400 people were assisted in this way with legal advice and referrals. The Bar is also assisting the members of the community interested in the Bushfire Royal Commission; including the Bar's offer of free legal help to people affected by the bushfires who wanted to appear before the Commission. I note that Bar Council member Tim Tobin QC has also made a major contribution, and has worked tirelessly in an effort to see that the community is appropriately represented before the Bushfire Royal Commission.

At an historic Special General Meeting of the Victorian Bar on 5 August 2009, it was decided that it would be in the best interest of our Bar to modify the Chambers Allocation Policy in relation to the application of the seniority rule.

It will now be possible for barristers to register as 'Groups and when chambers occupied by the group become vacant those chambers will be advertised as usual, however in the event that the group expresses a preference for one of the applicants for the vacant chamber or chambers, that applicant would be allocated the chamber, and if no preference is expressed the chamber would be allocated to the most senior candidate in the usual way.'

A protocol is being developed to refine the implementation mechanisms needed to effect the new modified Chambers Allocation Policy.

The basic rationale for the change to the Chambers Allocation Policy is to facilitate, to a greater degree than was available, the development and maintenance of 'floor communities'. By allowing groups of barristers to have a say in who fills vacant rooms within the area occupied by the group, there is likely to be a greater degree of collegiality, and a greater opportunity to develop groups of like-minded barristers or barristers working in a similar practice area.

The Bar has this year reformed the method of levying Bar subscriptions. Subscriptions, the main source of revenue for the Bar, are now more equitably levied by reference to a barrister's income and not on the basis of seniority. This change provides what the Bar Council believes is a more equitable and logical basis for the level of subscription paid by members of the Bar.

Finally, on a social note I want to acknowledge Will Alstergren and those many others who worked hard and effectively to arrange for what I think was an absolutely outstanding 2009 Bar Dinner, replete with entertaining speeches including those from the keynote speaker, High Court Justice Virginia Bell, Paul Elliott QC, and Mr Junior Chris Townsend SC.

Notwithstanding the difficult environment which is being created for most professions including the law as a result of the global financial crisis, our Bar remains strong and resilient and is as I have outlined above, working hard to serve the interest of its members and the community and to ensure that it is well placed to deal with the challenges ahead.

JOHN DIGBY

# RECEPTION *in* HONOUR *of the PRO BONO* COMMITMENTS *of* MEMBERS *of the* VICTORIAN BAR

## Honouring *pro bono* lawyering

On 2 April 2009, the Victorian Bar's *Pro Bono* Committee held a function to thank all those barristers who have assisted many people, often from marginalised and disadvantaged backgrounds, on a *pro bono* basis. This is an edited version of the warm and inspiring address delivered by the **Honourable Michael Kirby AC CMG.***

ONE OF THE WORST misfortunes that can befall a person in judicial office is to be an instrument of the miscarriage of justice. I know, because it happened to me. It is something I have to live with.

In 2006, a bundle of appeal books landed on the desk of my chambers in Canberra. They concerned an appeal by Andrew Mallard. Special leave having been granted, Mr Mallard was challenging orders of the Court of Appeal of Western Australia. Those orders had rejected his petition for the exercise of the royal prerogative of mercy, in respect of his conviction of murder more than a decade earlier.

Very thorough submissions were filed on Mr Mallard's behalf by *pro bono* Counsel, Mr Malcolm McCusker AO QC and Dr James Edelman, members of the Western Australian Bar. As I read the papers, aspects of the case seemed familiar. And then my attention was drawn to the fact that a decade earlier, Mr Mallard had sought, and failed to obtain, special leave to appeal from an earlier panel in the High Court.

Discretely, the record and the submissions did not disclose the names of the Justices who had participated in the earlier refusal of special leave. However, one can look this up in the occasional schedule of special leave dispositions, attached to the *Commonwealth Law Reports*. I hastened to do this. It revealed that the Bench, constituted for the earlier hearing, had comprised Justices Toohey, McHugh and myself.

Justice Toohey was a very fine jurist and by no means formalistic in criminal appeals to the High Court. Justice McHugh, from his years in legal practice, was well experienced in the mistakes that can sometimes occur in criminal trials. I myself, as President of the New South Wales Court of Appeal, had participated for a decade in the Court of Criminal Appeal of that State. As a Bench, the three Justices were by no means hostile to criminal applications. I had the Registrar draw to the notice of both parties in the later appeal, my earlier involvement, lest they would prefer that I did not participate. Neither side raised any objection.

As I read the thorough submissions prepared on behalf of Mr Mallard, I felt a growing concern that the result of his original trial had evidenced a serious wrong to him and that, not only was a miscarriage of justice demonstrated but that, quite possibly, he was actually innocent of the murder of which he had been convicted. I then called for the earlier special leave books and the transcript of the argument in 1997. These disclosed that the principal ground of objection to the conviction was quite different from that advanced a decade later. Originally, the principal point argued had been that the Full Court had erred in confirming the decision of the trial judge to exclude evidence that Mr Mallard had submitted to a polygraph (lie detector) test which had suggested that his protestations of innocence were truthful. This was always a difficult argument to advance, given much authority in Australia and evidence indicating the defective character of the technology of polygraphs.

The second application, and the appeal then pending leave to the High Court, the arguments advanced for Mr Mallard were quite different. In part they addressed the alleged failure of the prosecution to disclose to the then representatives of Mr

*Justice of the High Court of Australia (1996-2009)

Mallard, evidence that might tend to show his innocence. But most importantly, by a painstaking scrutiny of the evidence at the trial, *pro bono* counsel indicated the high unlikelihood (bordering on impossibility) that the participation of Mr Mallard in the homicide could be reconciled with objective evidence concerning his whereabouts on the day of the homicide. That evidence related to proof of his presence in a police watchhouse earlier in the afternoon and in a taxi, later in the afternoon, in a part of Perth distant from the scene of the killing. Putting the factual ingredients of the evidence together, an extremely strong case of miscarriage of justice was built up.

In the end, the Justices of the High Court unanimously allowed Mr Mallard's appeal and set aside his conviction.[1] Later other evidence suggested that the homicide might have been linked to a different prisoner who had since died. An enquiry by the Honourable John Dunford QC found Mr Mallard to have been wrongly convicted. In the result, he had been imprisoned for more than a decade for a crime he had not committed. Although monetary compensation is being paid, nothing could restore the prolonged loss of liberty which Mr Mallard had undergone.

Judges and lawyers have to accommodate themselves to the high responsibilities they carry in contested litigation. Human

ABOVE Gabi Crafti, Doug Laidlaw and Michael Borsky.
LEFT Susan Buchanan and Gerard Holmes.
BELOW Ross Macaw QC the Honourable Michael Kirby, AC CMG. Paul Santamaria SC, Julian Burnside QC, and Andrew Woods.

ABOVE Belinda Johnson,VBLAS and Liz Morgan, PILCH.
RIGHT Peter Condliffe and Justice Dodds-Streeton.
FAR RIGHT Alexandra Richards SC, Chair of the *Pro Bono* Committee, and the Honourable Michael Kirby AC CMG.

justice is necessarily imperfect. Mistakes occur. By hard work and serious-mindedness, we endeavour to reduce the incidence of error. The mistakes of lawyers are serious enough. But the ultimate responsibility for error rests on the shoulders of the judges whose orders determine the outcomes and, as in Mr Mallard's case, affect individual liberty.

But for the outstanding work of Mr McCusker and Dr Edelman, and the excellent brief prepared for them by Clayton Utz, solicitors, in Perth, Mr Mallard would still be serving his sentence for a murder he did not commit. I leave it to you to imagine my feelings about the disposition of the appeal. Could I, by more careful reading of the first application, have prevented Mr Mallard's loss of liberty for more than ten years? If I had enjoyed more assistance earlier, could the wrong done to Mr Mallard have been prevented? Most troublingly, what of the other cases where such *pro bono* assistance was not forthcoming, where wrongs have been done, by mistake, in civil and criminal litigation and never discovered? How can we improve our system of justice to prevent such wrongs in the first place, rather than relying on later, exceptional, proceedings to undo error?

I will always be grateful to the advocates and lawyers who gave relief against the mistake of the first determination of Mr Mallard's case before me. But the error of that determination proves not only the importance of vigilance and good legal representation. It demonstrates the need for systemic improvement to the system to which judges and lawyers must ever be alert.

Often, in the High Court, one would not know, as a judge, whether parties were represented by *pro bono* lawyers or by advocates on a paying brief. The names of the lawyers on the face of the appeal book will not necessarily disclose this. Sometimes, however, the circumstances of the case, and apparent impecuniosity of parties will suggest that lawyers are appearing without fee, or for a lesser fee, on the basis that, doing so, will enhance the prospects of ensuring the attainment of justice.

In *Roach v Electoral Commissioner*,[2] it seemed pretty plain that Ms Roach had secured legal representation from members of the Victorian Bar, acting *pro bono*. The solicitors on the record were Allens, Arthur Robinson of Melbourne. Counsel for Ms Roach were Mr Ron Merkel QC, Ms Fiona Forsyth and Dr Kris Walker. Ms Roach was an Aboriginal prisoner in a Victorian prison, who challenged provisions of federal law that purported to disqualify her from voting in the then pending federal election of November 2007. She brought her challenge as a test case, not only on her own behalf, but for other prisoners who were deprived of the civic privilege (and duty) to vote. Her contention was that she was imprisoned as punishment for the crime of which she had been convicted, but that it was no part of the law's purpose to add to her punishment by depriving her of basic civil rights, such as the right to vote.

In the end, a majority of the High Court (Chief Justice Gleeson, Justices Gummow, Crennan and myself; Justices Hayne and Heydon dissenting) upheld Mr Roach's challenge in part. The majority concluded that a 2006 federal statute, depriving all federal prisoners of the right to vote, was unconstitutional. In effect, the decision of the Court restored the position that had obtained before the amending Act. Prisoners serving sentences of three years or less were thus entitled to vote. Although this did not assure the right to vote to Ms Roach (whose sentence was for greater than three years) part of the principle for which her *pro bono* lawyers had contended, was upheld.

Without such legal representation, it is next to impossible to believe that this important principle of our Constitution would have been determined. What was required was an act of principle on the part of legal practitioners, on behalf of a stigmatised and unpopular minority, prisoners. It is such minorities that are sometimes disadvantaged in an electoral democracy. This is where courts become important to uphold basic rights and the principle of civic equality. I pay tribute to the *pro bono* lawyers for Ms Roach. When, earlier today, I visited the Public Interest Law Clearing House (PILCH) in Melbourne, I spoke with some of the lawyers who had worked on the *Roach* case. Ms Roach has now been released from prison. She is continuing post-graduate studies. The work of PILCH in big and small cases, helps to make the rule of law a reality for such people such as Ms Roach.

There are many other cases that come before the High Court with the aid of *pro bono* counsel. In 2008, the proceedings in *MZXOT v Minister for Immigration*[3] raised an important constitutional question as to whether, in defence of its constitutional function, the High Court had an implied power to remit proceedings in its original jurisdiction to federal or state courts, beyond the provision for such remittal appearing in federal law.

In the end, the constitutional question did not have to be determined. But its importance was undoubted. I pay tribute to Debbie Mortimer SC, Lisa De Ferrari and Chris Young, *pro bono* counsel in that case. They were instructed by Victorian Legal Aid. Many of the refugee cases that have reached the High Court (probably most) have been litigated with the aid of *pro bono* lawyers. I acknowledge and thank them, in every State and Territory, for their advocacy and hard work.

Supporting a refugee applicant, with a viable legal argument, is a precious professional service. In most cases, the matter would never get near a court without assistance. Otherwise, it would generally have to be dealt with on the papers by a panel of two High Court justices, unaided by expert legal scrutiny and advocacy. The refugee decisions of the last decade have not only been important for the individual justice of the cases involved. They have also been significant for clarifying the refugee and administrative law applicable in Australian courts. I express thanks for the assistance of the many legal practitioners who have accepted briefs in cases of this kind. The Victorian Bar has been foremost in representing indigent refugee applicants. I thank all those who have done so.

## PARTICIPATION AND SYSTEMIC WEAKNESSES

A survey of *pro bono* work amongst Victorian barristers, conducted in 2008, indicates that, of the 150 respondents to the survey (about 9% of the Victorian Bar), 126 had performed *pro bono* duties in the preceding year. This was an increase on past returns. The mean hours devoted to such service has been between 50 and 70 hours, considerably more than the 35 hour target fixed for individual *pro bono* work of Australian barristers. Most of the work has been performed following referrals of cases by PILCH. Of those who have undertaken such briefs, 92% have declared that they have done so to assist marginalised and disadvantaged groups and because of a sense of professional duty. It is this

sense that distinguishes a profession, such as the Bar, from other occupations.

In 2008, an additional service was introduced by the Victorian Bar, being the Duty Barrister Scheme. This has responded to hundreds of applications and a high proportion of them (about 50%) have been accepted as deserving of investigation.

The catastrophic bushfires in Victoria in 2009 led to a spontaneous offer by approximately 250 members of the Victorian Bar, indicating to the Bar and to PILCH, their willingness to provide *pro bono* legal services to the needy. The establishment of thirteen support centres, and a Forum of *pro bono* organisations, has enhanced the efficiency of the delivery of legal services to those in need. I pay tribute to the Victorian Bar Legal Assistance Scheme (VBLAS), supported by PILCH, and the Human Rights Law Resource Centre, which affords *pro bono* legal assistance both to local and national endeavours, and also to international activities affecting scrutiny of Australia's delivery of legal services to the needy.

I know that these outlets do not exhaust the contributions by members of the Victorian Bar. In my capacity as a patron of Reprieve Australia, an organisation supporting repeal of capital punishment laws and assistance to those on death row, I know that Victorian barristers have been foremost in offering services and funds to help prisoners facing the death penalty in countries as far apart as Indonesia and the United States. I pay tribute to the Victorian Bar who have taken up this initiative.

Of course, *pro bono* assistance is no substitute for proper facilities of legal aid. The decision of the High Court in *Deitrich v. The Queen*[4] assures indigent prisoners facing trial in Australia for serious criminal offences of an entitlement to be provided by legal representation, to avoid a stay of the criminal proceedings. However, that principle has not yet been extended to prisoners seeking to appeal against their convictions.

As the case of Andrew Mallard[5] demonstrates, mistakes can be made at trial that need to be corrected on appeal.

When I was a young legal practitioner, indeed before, I was always a joiner. I joined civil society organisations at university. I was elected to head student societies. As a young solicitor, I offered *pro bono* assistance to students in trouble.

After my student days, I joined the New South Wales Council for Civil Liberties. As a solicitor and later at the Bar, I represented Vietnam protestors, applicants for conscientious objection from national service in the Vietnam War and Aboriginal interests. Together with Gordon Samuels QC (later my colleague in the New South Wales Court of Appeal) and Malcolm Hardwick (later a QC), I went to Walgett, in outback New South Wales, to uphold the right of Aboriginals to enter the upstairs section of the local cinema. Astonishing as it may seem today, that right was denied to them in the 1960s. With Jim Staples, I took part in an inquest that challenged the police use of firearMs Verbals and confessions to police came under our withering scrutiny. It was definitely no less energetic because it was *pro bono*. I gathered up and remembered the wrongs done to my clients, such as Mr Corbishley.[6] Later, as President of the Court of Appeal, I was able to establish principles (such as due warning of a risk of increase of sentence to permit application for withdrawal of an appeal) where *pro bono* cases had taught me lessons about injustice.

Many of those who joined with me in those days in *pro bono* work for the Council for Civil Liberties in New South Wales went on to judicial appointment. In fact, it was a dangerous professional risk: *pro bono* civil liberties cases often led to judicial preferment. It was no bad thing to leaven judicial appointments in Australia with counsel who had shown their values by their professional work, not for money but for principle and for justice. Values matter in the law and on the Bench. I would not have been appointed to my various judicial offices, now concluded, if I had not been noticed in my earliest days of *pro bono* legal work for the needy.

IF I HAD ENJOYED MORE ASSISTANCE EARLIER, COULD THE WRONG DONE TO MR MALLARD HAVE BEEN PREVENTED?

There is one further reason that brings me to this occasion in Melbourne. I hope I may mention it? In the past, the tradition on the retirement of a Justice of the High Court (other than Chief Justice) has generally been that he or she simply disappears with a minimum of fuss. I see the merits of that tradition. For those who prefer it, it will always be available.

From my earliest years as a barrister, when I would come to Melbourne (generally in industrial cases) I became acquainted with the special talents and traditions of the Victorian Bar. Here, there was the same wealth of ability as in my home Bar, in New South Wales. But there was a special characteristic. It was focus and unnerving professionalism with courtesy. Courtesy was not always present in the judiciary of my own State. I liked what I saw in Victoria because it accorded with my own inclinations and temperament. I applaud this particular feature of your tradition. I have endeavoured, in my judicial service, to emulate it.

One aspect of courtesy (at least as I conceive it) is to take leave when one departs – generally, when one departs from the company of friends. So I use this occasion, and the presence here of so many members of the Victorian Bar, to take your leave. To thank you most warmly for your assistance to me during my judicial years. To praise you for the strong commitment to indigenous Australians and other vulnerable minorities. To applaud the work done by PILCH and VBLAS. To honour those who have given *pro bono* assistance to persons in need. And to express the hope that judicial retirement will not mean a complete severance of the link I have come to cherish with a Bar I have learned to respect and to appreciate.

**NOTES**

1 *Mallard v The Queen* (2005) 224 CLR 125.
2 *Roach v Electoral Commissioner* (2007) 233 CLR 162.
3 (2008) 233 CLR 601.
4 (1992) 177 CLR 292.
5 *Mallard v The Queen.* (2005) 224 CLR 125.
6 *Ex parte Corbishley: Re Locke* [1967] 2 NSWR 547 (CA).

# The Technology, Engineering and Construction List (TEC List); – *de force et de beauté*

**Hon. Justice Peter Vickery** (Illustrated by Patrick Cook)

THE BUILDING CASES LIST of the Supreme Court of Victoria was established in 1972. It was, in its day, revolutionary. It was the first specialist list introduced into the Court and was the first managed list in Australia. The founding judge was Justice Clifford Menhennitt, who established the principles on which the List has been conducted for the last 37 years.

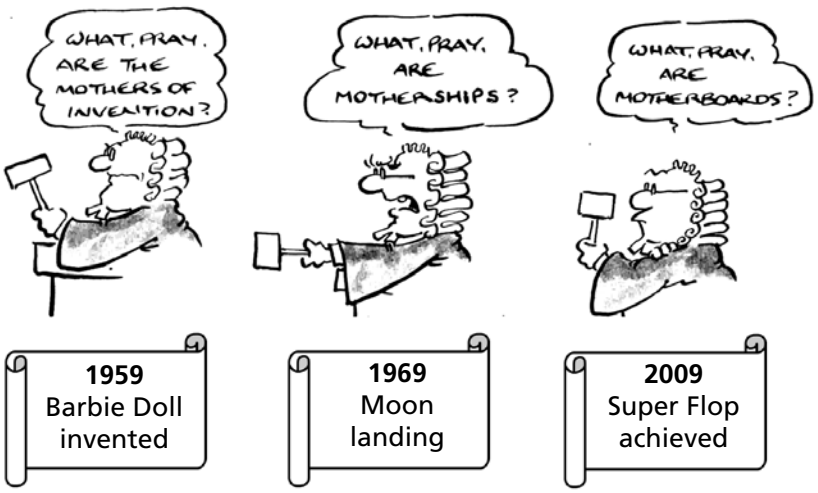
Technological advances in this century have been breathtaking, and will undoubtedly continue in this vein. The amount of new technical information is now doubling every two years. A technical student who commences a course will find that by the time year three is achieved, much of the information learned in year one will be obsolete. On 25 May 2008, an American supercomputer built by IBM, named 'Roadrunner', reached the computing milestone of one petaflop[1] by processing more than 1.026 quadrillion calculations per second. This is a lot of flops. As one commentator has put it:

> To put this into perspective, if each of the 6 billion people on earth had a hand calculator and worked together on a calculation 24 hours per day, 365 days a year, it would take 46 years to do what Roadrunner would do in one day.[2]

Although it is little recognized, leading researchers say that these machines have pushed computing into a new realm that could change science and applied technology more profoundly than at any time since Galileo.[3] Computers replicating the human brain will follow.

In the light of rapid advances in technology, and the nature of disputes on technical matters which are likely to come before the Court with increased frequency, the question arises – is it now time to review afresh the fundamentals which have guided the operation of the List to this day?

In 1931 Norman Birkett KC prosecuted the case of *R v A A Rouse*.[4] His junior was Richard Elwes. Mr Rouse was charged with the murder of a passenger of his car by setting it alight. The defence was that the fire was an accident. On the fifth day of the trial, the defence called an expert witness, Mr Arthur Isaacs. He said that he was an engineer with 'very vast experience as regards fires in motor cars.' He confidently advanced the theory that the junction in the fuel line had become loose, in the course of the fire, and not before. The cross-examination of Mr Isaacs by Birkett proceeded with legendary vigour and style:




**What is the coefficient of the expansion of brass?**
— I beg your pardon.
**Did you not catch the question?**
— I did not hear you.
**What is the coefficient of the expansion of brass?**
— I am afraid I cannot answer that question off hand.
**What is it? If you do not know, say so. What is the coefficient of the expansion of brass? What do I mean by that term?**
— You want to know, what is the expansion of the metal under heat?
**I asked you: What is the coefficient of the expansion of brass? Do you know what it means?**
— Put that way, probably I do not.
**You are an engineer?**
— I dare say I am.
**Let me understand what you are. You are not a doctor?**
— No.
**Not a crime investigator?**
— No.
**Nor an amateur detective?**
— No.
**But an engineer?**
— Yes.
**What is the coefficient of the expansion of brass? You do not know?**
— No; not put that way.

The cross-examination, which was no doubt successful in ridiculing and denigrating the defence expert witness before the jury, is not one which might be expected of a modern prosecutor. Birkett's question contained technical flaws. In the first place, brass, like most other materials, has two coefficients of expansion which are quite different – one for linear expansion, which is generally accepted as having the value 19, the other for volumetric expansion, which is generally accepted as 57. The Birkett question did not differentiate between the two, and in this respect was not capable of the single answer which he pressed for. Secondly, brass is an alloy comprised of copper and zinc, the proportions of which can be varied to create a range of brasses with different properties. Copper has a coefficient of linear expansion of 16.5, whereas that of zinc is 39.7. Consequently, no two types of brass behave in precisely the same way under heat and a range of values is possible, depending on the composition. For example, red brass has a linear coefficient of 18.7, whereas that of naval brass is 21.2.

Birkett probably did not have a sufficient grasp of metallurgical science to understand that his question was founded on these fundamental misconceptions. Defence counsel D.L. Finnemore sat mute. The trial judge, no doubt sharing the ignorance, did not lift a finger to rule the question unfair. The expert in fact provided an accurate answer to the question as it was put.


Richard Elwes and Norman Birkett KC step out to prosecute A.A. Rouse.

Birkett's advocacy secured the conviction of Rouse for murder. The appeal argued by Sir Patrick Hastings KC failed. Rouse was hanged at Bedford gaol on 10 March 1931.

If mistakes of this magnitude could occur in 1931, given the advances in science and technology since that time, how much more vulnerable to error are the court processes of this century in cases involving sophisticated technical evidence?

In response to the challenge, in mid-2008 a review project called the 'TEC Project' was conceived to draw together under one management regime the three strands of related disputes in the areas of technology, engineering and construction.

The TEC Project has built upon what has gone before, and in particular the ground-breaking work of Justice David Byrne in the development of Practice Note No 1 of 2008, 'Building Cases – a New Approach'. This commenced as a pilot project on 1 March 2008. The TEC List has drawn upon the experience gained over the last year in the operation of the 2008 Practice Note and, with some modifications, has incorporated the central features of the 'New Approach' into its own procedures.

The focus of the TEC Project was to produce a state-of-the-art approach to Technical, Engineering and Construction dispute resolution and case management for the first decades of this century, which will achieve both practical and efficient working outcomes within a tolerable budget. The goal has been advanced with the benefit of extensive consultation with the Building Cases List Users Group. The Group includes leading practitioners in the field, industry groups such as the Master Builders Association and the Property Council of Australia, and recent representation from the Construction Law Program at the Melbourne Law School, the University of Melbourne.

The Project drew upon and adapted some of the most successful and innovative practices applied in other jurisdictions, such as the Technology and Construction Court (TCC) of the United Kingdom; the High Court of the United Kingdom; and the Court of Appeal of Rome ('Corte di Appello di Roma'). Other elements are the product of the Project's own work in developing procedures that are uniquely suitable to local conditions and available resources.

The TEC List is now a reality. On 26 March 2009, the Council of Judges of the Supreme Court approved the new rules. The List commenced operation on 19 June 2009.

The objective of the TEC List is to provide for the just and efficient determination of TEC cases, by the early identification of the substantial questions in controversy and the flexible adoption of appropriate and timely procedures for the future conduct of the proceeding which are best suited to the particular case. With the objective firmly in mind, a case conducted in the List will be managed with the co-operation of the parties to ensure its timely and economic disposition.

Matters to be admitted to the TEC List will include cases falling within the former definition of a 'Building Case' as it applied to the Building Cases List. This has now been significantly expanded to include matters where it is alleged, for example, that a telecommunications or computer system, electrical or mechanical component or other technical device has failed, underperformed, or malfunctioned, and which involves an assessment of expert evidence of a technical nature.

TEC matters may therefore extend beyond the traditional building or engineering construction case to include, for example, breaches of warranties of performance of a technical component in a sale or supply contract. Such matters would encompass contraventions of the warranty provisions of a local supply contract or an international supply contract where the UN *Vienna Convention on Contracts for the International Sale of Goods 1980* may apply in relation to goods imported from or exported to a signatory State. However, at least for the present, it is not envisaged that the TEC List would extend to cases in which the ownership or right to intellectual property such as patents, trademarks and registered designs is the central issue. This is in recognition of the fundamentally different specialisation involved in such cases.

It is not proposed that processes in the TEC List will be characterised by curial informalism, which is not appropriate for a court. However, procedures may be appropriately shaped to the dispute at hand, consistently with the requirements of natural

justice and procedural fairness. Within these necessary constraints, the contemporary adage 'let the forum fit the fuss'[5] may be given ample scope to flourish.

A TEC case should be approached like any technical, engineering or construction project, with time and cost budgeting. This will necessarily involve adopting procedures which are proportionate to what is at stake in the dispute by reference to such matters as: the amount of money involved; the importance of the case to the parties and generally; the complexity of the issues; and the financial position of each party.


It will also involve allotting to the dispute an appropriate share of the Court's resources, taking into account the need to allocate resources to other cases.

To this end:

- parties will be expected to have engaged in serious settlement discussions before the commencement of the proceeding;
- at an early stage a Judge will be assigned to assume responsibility for the management of the case;
- Judges will be more active and pro-active in exercising their powers to achieve a just resolution of TEC cases in a speedy and efficient manner;
- Judges will be mindful of the need not to apply the resources of the parties or the Court needlessly or in a manner that is out of proportion to the matters in issue;
- Legal practitioners will be expected to approach their cases co-operatively and with the same goal in mind. They will be encouraged to focus on the central issues in the case.

In order to give teeth to the objective of the List, a number of innovations are included in the practice of the new List. The trial Judge will have access to a 'smorgasboard' of procedures designed to promote a cost-effective mechanism that is tailor made for the management of the individual dispute.

A feature of the new approach will be the early convening of a resources conference after the pleadings are closed. This conference will be convened by the Court and chaired by an Associate Judge. The purpose of the resources conference is to establish a resources budget for the litigation for the use of both the Court and the parties. The outcome will assist the Court in appointing the TEC trial Judge and allocating a trial date. The conference will also identify issues for mediation and the information and investigation required to enable effective settlement discussions to take place at the earliest possible opportunity. It will be relatively informal and the Associate Judge may, in appropriate cases, conduct part of the conference on a without prejudice basis and speak separately with the parties.

Another innovation will be the appointment of assessors in trials conducted in the TEC List, where it is appropriate to do so. The Court in TEC cases will be confronted with very complex and sophisticated technical evidence which is likely to be presented in a range of matters on an unprecedented scale. The current position with such cases is that, virtually overnight, the trial Judge is expected, after a crash course conducted by counsel and the expert witnesses, to become an expert in an arcane field of science or engineering.

It is unrealistic to expect Judges to approach such cases without specialized technical assistance. Failing to adequately equip the trial Judge in these circumstances can cause unnecessary stress for the Judge, give rise to excessive cost expended in court hearings to 'educate' the Judge, bring about delay in the delivery of the judgment, and potentially give rise to a less than adequate, or even a plain wrong, treatment of the technical issue in the judgment. Confidence in the administration of justice in some cases could be eroded.

Section 77 of the *Supreme Court Act 1986* already provides for the Court 'to call in the assistance of one or more specially qualified assessors and hear the proceeding wholly or partly with their assistance.' In Victoria this provision has been rarely been called upon. At least in part this has been due to the lack of clear guidelines as to the appointment of the assessor and the role which the assessor is to play in the trial and the lack of any guidelines directed to preserving transparency, natural justice and procedural fairness. The TEC Practice Note includes a detailed procedure designed to accommodate these critically important interests, while at the same time providing a facility to enable the Court to apply the necessary skill to the technical issues that will inevitably confront it. It is to be emphasised that the Court is to be assisted in its proper function by the expertise of the appointed assessor. The assessor will make no findings. The judgment is that of the trial Judge who will remain responsible for it.

Other interesting innovations in procedure will also apply to cases in the TEC List. These include: a power for the Court to order a limited time trial (or 'chess clock procedure'); a facility to provide electronic rulings on proposed evidence, as employed recently by the Court;[6] directions for the delivery of witness statements, either by way of exchange or in sequence or in stages by reference to issues, and the provision of summaries of evidence in lieu of or in addition to witness statements;[7] directions in the appropriate case for 'e-disclosure'; directions that that some or all of the issues raised in the pleadings be reduced to a Statement of Issues which may be settled by the Judge in consultation with the parties, and directions that the proceeding or part of the proceeding be conducted thereafter in accordance with and by reference to the Statement of Issues; directions that representatives of the parties attend a directions hearing; and directions that the trial or part of the trial be conducted by a trial of a sample or samples of alleged defects or a sample or samples of other appropriate subject matter (for example, a trial of selected samples of multiple welding defects which fall into defined categories).

The practice of the new TEC List is set out in a TEC List Practice Handbook. The Handbook cover has a brick red background to emphasise the building origins of the List, which has provided

its solid foundation to date. It also displays the List's new logo – Pablo Picasso's *Composition in Three Colours* (1947). Thanks are extended to Marina Picasso and the estate of the late Pablo Picasso for its use. The striking Picasso image draws together the three strands of human enterprise represented in the List – technology, engineering and construction, and embodies its hard-edged theme – *'New Perspectives in TEC Case Management'*.


Gustave Eiffel once said in reference to his most celebrated project: 'Ah, bien je prétends que les courbes des quatre areêtes du monument, telles que le calcul les a fournies, donneront une grand impression de force et de beauté. (Well, I think the curves of the four pillars of the monument, as the calculations have provided them, give it a great sense of force and beauty.)

The TEC Rules will not produce a thing of 'beauty'. However, the new perspectives will provide an opportunity to fortify the many creative endeavours that do.

**NOTES**

1 In computing, a FLOP (or FLOPS) is an acronym meaning FLoating point Operations Per Second. The FLOP is a measure of a computer's performance, especially in fields of scientific calculations that make heavy use of floating point calculations (similar to instructions) per second. A petaflop equates to 10^15 flops or 1000 teraflops.

2 Ernst-Jan Pfauth, Editor in Chief, *The Next Web.*

3 Mark Seager of Lawrence Livermore National Laboratory, Livermore, California, USA; Thomas Zacharia, head of computer science, Oak Ridge National Laboratory, Tennessee, USA.

4 See: Julian Burnside QC *R v A A Rouse*, 124 Victorian Bar News, Autumn 2003, at 55–56.

5 See: Rosenberg, M. *Let the Tribunal Fit the Case*, remarks at a meeting of the American Association of Law Schools (28 December 1977), reprinted in 80 F.R.D. 147, 166 (1977). Maurice Rosenberg, a Columbia law professor, coined the phrase 'let the forum fit the fuss' to describe the process of identifying the nature of the dispute, the needs and interests of the parties and the best dispute resolution option in the circumstances, the ultimate goal being to avoid a long, drawn-out process.

6 See: *Nicholson v Knaggs* 27 February 2009 (Sup. Ct. of Victoria) [2009] VSC 64 at [29–34].

7 See: *Downer EDI Mining Ltd v Iluka Resources Ltd*. 5 August 2008 (Sup. Ct. of Victoria) [2008] VSC 622.

The Commission Room.

# BLAZING AWAY

## The Bushfires Royal Commission

On 7 February 2009, the State of Victoria experienced devastating bushfires which resulted in the loss of 173 lives and vast amounts of public and private property.

ON 16 FEBRUARY 2009, the Premier, Mr John Brumby appointed the Honourable Bernard George Teague AO, Ronald Neville McLeod AM and Susan Mary Pascoe AM to conduct a Royal Commission into and to report on the following matters:

1 The causes and circumstances of the bushfires which burned in various parts of Victoria in late January and in February 2009 (**the 2009 Bushfires**).
2 The preparation and planning by governments, emergency services, other entities, the community and households for bushfires in Victoria, including current laws, policies, practices, resources and strategies for the prevention, identification, evaluation, management and communication of bushfire threats and risks.
3 All aspects of the response to the 2009 Bushfires, particularly measures taken to control the spread of the fires and measures taken to protect life and private and public property, including but not limited to:
   (a) immediate management, response and recovery;
   (b) resourcing, overall coordination and deployment; and
   (c) equipment and communication systems.
4 The measures taken to prevent or minimise disruption to the supply of essential services such as power and water during the 2009 Bushfires.
5 Any other matters that they deem appropriate in relation the 2009 Bushfires.

The Commissioners were directed to conduct their enquiry as expeditiously as possible and to furnish an interim report focusing on immediate actions that can be taken prior to the 2009–2010 fire season, by 17 August 2009 and a final report by 31 July 2010.

Since their appointment the Commissioners have embarked upon a punishing schedule of formal and informal hearings. Between 18 March 2009 and 9 April 2009 the Commission held 26 community consultations in 14 fire affected locations attended by 1,256 local people. Those sessions served to identify key issues and themes for the future conduct of the Commission. Following the community consultations, the Commission interviewed a substantial number of people directly affected by the fires who have subsequently given evidence at public hearings. The initial round of public hearings commenced on 20 April 2009 and occupied 35 sitting days during which a total of 87

witnesses, including 29 lay witnesses gave evidence. Following publication of its interim report the Commission has resumed public hearings on 24 August 2009.

Much of the burden of the Commission has fallen upon Jack Rush QC who appears with Rachel Doyle, Melinda Richards and Lisa Nichols as counsel assisting the Commission. Also announcing their appearance at the opening of the Commission were: Allan Myers QC, with Neil Clelland SC, Kerri Judd SC, Garry Livermore, Marita Foley and Catherine Button who appeared on behalf of the State of Victoria; Jonathan Beach QC who appeared with Don Farrands and Chris Archibald on behalf of SP Ausnet Entities; Neil Young QC with Greg Lyon SC and Jonathan Redwood on behalf of the Municipal Associations of Victoria and 77 Victorian councils; Ian Hill QC with Darren Bracken on behalf of the Police Association of Victoria; Chris Winneke on behalf of the Volunteer Fire Brigades of Victoria and Wendy Harris on behalf of the Insurance Council of Australia. Since the opening session, further counsel have announced their appearance on behalf of parties who have been granted leave or limited leave to appear. They are: Michael Garner for Telstra Corporation Limited; Jeremy Ruskin QC with Jamie Gorton and Renee Enbom for the ABC; Terry Murphy SC for the Australasian Fire Emergency Victoria Council and Fiona McLeod SC with Jane Treleaven and Lindy Barrett for the Commonwealth of Australia. Many other members of counsel hold watching briefs in the Commission for parties who have not been granted leave to appear or only limited leave.

On 6 March 2009 the Commission announced the appointment of Corrs Chambers Westgarth as the solicitors instructing counsel assisting.

As seats are numbered at the Commission, proceedings have been streamed live at <www.royalcommission.vic.gov.au> and copies of the transcripts are available on the Commission's website.

Those members of the Bar who have not been blessed with a brief in the biggest show in town can, accordingly, sit and watch proceedings from their chambers.

ABOVE Allan Myers QC.

ABOVE RIGHT Counsel assisting the Commission, Rachel Doyle, Lisa Nichols, Jack Rush QC, and Melinda Richards.

RIGHT Jack Rush QC, Melinda Richards and Kerri Judd SC.

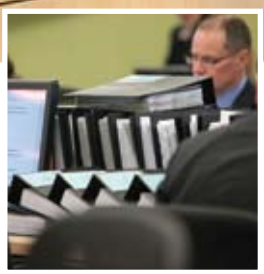
Allan Myers QC and Kerri Judd SC.

Fiona McLeod SC, Jane Treleaven and Lindy Barrett.

The Commissioners.

Melinda Richards addresses the Commission.

Jack Rush QC, Allan Myers QC and Kerri Judd SC.



The brief.

Lisa Nichols and Jack Rush QC.

# SEATING PLANS, LABELS and PERFORMANCE ANXIETY

A Barrister's Diary of the Victorian Bushfires Royal Commission

By **Portia Woods**, Barrister

***20 February 2009***

*Weight 72 kg: good; RACV Gym visits: 5; Illia coffees: none, can't afford it.*

I got the call today. Would I be available to appear at the Victorian Bushfires Royal Commission? I almost fall over at the Chanel counter at David Jones. I compose myself. 'I would need to check my diary', I said, breathlessly, and then hung up. Could my potential instructor hear the conversation next to me about ultra precision moisturiser?

My instructing solicitor is the great Alan Crane. I have been in awe of him since he briefed me to obtain an ex-parte intervention order at Dandenong Magistrates Court last year. For some reason, he came to the hearing. I lost. He thought I did a great job, but I knew I was rubbish. After the hearing I couldn't look at him I was so ashamed of my performance. I went home and straight to bed and lay down with a cold compress on my forehead. I am the worst barrister ever….

Anyway, there is no time to waste. Must race back to Douglas Menzies Chambers to check diary and call Alan back asap.

I arrived in chambers ten minutes later. Gasping for air. My hair was a fright. My DJ's bag was in tatters. I was sweating bullets. It will be high profile. The Bushfire Royal Commission? What do I know about bushfires? What will I wear?

I had to calm down. I went to the loo to try and fix my hair. I paced up and down in my chambers. I called Alan back. Damn, voicemail. 'Er, Hi Alan… It's Portia… Yes, I am available for the Royal Bushfires Commission (oops). Yes, my clerk says that I have a few matters that I'll need to rearrange (lie), but that will all be ok. Can you call me back?' Click.

The backsheet came the next day.

***20 April 2009***

*Weight 78.2 kg: bad. RACV Gym visits: none. Very bad. Free coffees from Illia: 7.*

The last two months have been hell. Box after box of folders. Conferences with silks (I'm the second reserve junior). Lots of talk about liability, witness statements, memoranda of advice and summonses for documents. And emails? All day and night. One good thing is that there are lots of conferences at Alan's offices – they've got a great view of Port Phillip Bay.

Today is the first directions hearing at the Commission. The whole team is going. We are all really excited. What's going to happen? Who's going to speak first? Will the magnificent Myers be there? I hear that Neil might say something controversial. And what will Jack say? My silken leader is concerned about where we will sit.

It took me a while to work out who Myers, Neil and Jack were. I nodded knowingly when they were mentioned in conferences, but after a while I had to ask my clerk who they were talking about: 'Why that would be the one and only Allan Myers AO QC, Neil Young QC and Jack Rush QC! You're in fine company! Don't stuff it up'. 'Oh, right', I replied. 'Thanks'. When I returned to chambers,

I looked up these legal luminaries in the form guide on the Vicbar website. What's RFD mean???

Alan has been complaining that Counsel Assisting the Commission have not been available to talk about what's going to happen today. We decide to go early. What are these Court Network people doing at the door of the hearing room? They asked my leader whether he'd like a glass of water. Just one look from him made them scurry out of his way.

We go in. My leader is annoyed because all the seats in the front row are taken. Jack with his juniors, Myers with more juniors and Neil with his. And they all have loads of instructors. After some huddled discussions, we sit down behind them. Alan tells me that Myers is more senior than Neil and Jack because he's got two junior silks and then three juniors.

I suddenly feel very insignificant.

I don't understand what all the fuss is about. Isn't this just a directions hearing? There are more people here than at Dandenong for the intervention orders list on a Friday morning. Oh, there's the media too. There are cameras everywhere. I think I might be in line of sight of some of them. I adjust my hair quickly. I've been practising my serious Commission face. I put it on.

It's 8.50am. What are we going to do for the next 40 minutes? I realise that Jack's juniors aren't speaking to anyone or looking around. They must be under a lot of pressure. One of them, Rachel Doyle, looks particularly fierce. As it happened, this turned out to be the day she made a submission that some people were lazy and ill-prepared. For a terrible moment I thought she was talking about me.

After what seemed to be an eternity, there was a knock at the door. We all stood, a hush fell over the room and in they came: the Royal Commissioners. One, two, three. The third one was wearing a bow tie. We all bowed and then sat down. The cameras flashed. Myers glinted his customary toothy grin. We were under way.

***11 May 2009***

*Weight: 80.2 kg: awful; RACV gym visits: 1, not bad; Illia free coffees: 12, must cut back.*

The first day of substantive hearings. Have been swamped with documents. In the last week, everything's gone mad. I've hardly slept, I haven't seen anyone.

Again, we're told that it's going to be a crush. Doors to the hearing room open at 9.00am. I imagine it could be like a

doorbuster sale at DJ's on Boxing Day. I'm there at 8.50am. There are more boxes there for the parties! When am I going to read all that? There are also lots and lots of Court Network people. I know they try hard and mean well, but really, the number of times I've had to tell them that I am a barrister and no I don't need a tissue, thank you, is beyond me.

Day one of the actual hearings and my assigned task today is to get to the hearing room early and grab some seats. I have a wheelie case, two big folders, a coat, scarf and handbag that I wave in the face of the Court Network people or anyone else who might get in my way. The Court doors open. I put on my haughtiest voice and we're in. The seats are good. Second row, and in line of the cameras. Everyone's happy. My leader arrives at 9.20am. He nods with approval to me and then starts talking to Jack. He's off to the Federal Court at 11.00am.

A knock at the door sounds. We all stand and in come the Royal Commissioners. The bow tie wearer is the Chairperson, retired Supreme Court judge, the Honourable Bernard Teague AO. Before the hearing starts, he calls for a minute's silence in remembrance of the 173 victims of the bushfires. Good call, Bernie, and quite right too. Sadly, the scale of this tragedy is virtually incomprehensible to all at this stage of the proceedings. Hopefully we'll gain some understanding of this terrible episode in the State's history before the Commission concludes.

My leader announces his appearance soon after Myers. We officially now exist on the record.

***15 May 2009***

*Weight: 81.7 kg very bad; RACV gym visits: 7, can't understand why it's not working; Illia free coffees: 9.*

It's Friday, our day off from the Commission and I'm off to VCAT, trying to preserve what is left of my practice.
My instructor in VCAT is the sole practitioner from hell. I often get a call from Nick late in the afternoon – 'Mate, mate, – I've got a really good one for you tomorrow'. He then goes on to chisel my fee. There's a feeling of dread when the so-called brief arrives by email and it's nothing like the case he described to me. By that stage his mobile is turned off and he's no doubt gone to the Casino with the money he's chiselled out of my fee.

My brief says that I'm acting for a landlord who is seeking to evict his tenants who haven't paid their rent for three months.

As I wander through the glass sliding doors of VCAT, I wonder why there is no security check here. Perhaps it could be that most of the litigants in person would not be admitted. I look around the foyer to see who would not make it through. There are three immediate candidates – a man talking to himself in a corner, someone having a fight with the coffee cart man and a woman wailing to her two friends about something and throwing her papers on the floor. They really do need some Court Network people here.

I look at the list and realise that I'm before the member with the crazy stare. I take the lift up to the hearing room and pass through the zoo of assembled characters on my way to the 'accessible' well of justice.

I meet my client who conveniently speaks English as a second language. I realise that I can't understand a word he is saying. I am sure he understands everything that I am telling him though. The tenants are representing themselves. They actually seem quite sensible. I wish they were instructing me. They have a cheque. I briefly consider joining my instructor at Crown Casino. They also have photos of the subject rental property. I'm appalled. No wonder they haven't paid their rent.

As the hearing commences, the tenants produce the cheque and the photos. They also refer to the Charter. Oh God. The member's crazy stare lengthens. At me. I begin to sweat. Not surprisingly, I lose.

I turn on my mobile to speak to Nick my instructor in what is now known amongst my colleagues in chambers as the VCAT tenancy massacre. He's not available. I check my messages and there are five from Alan's scary 'URGENT URGENT' partner Nadine at the firm instructing me in the Royal Commission. I feel sick. Can't they leave me alone in my misery on my day off?

I spend that evening in a conference room with Nadine and a sleep deprived Gen-Y senior associate who looks angry and shouts a lot into a telephone. Nadine has a lot of points to cover. I sit there daydreaming. I'm awoken by my mobile phone vibrating. Nick, my instructor in the VCAT tenancy massacre, has returned from Crown Casino. I give him the news. Very succinctly.

***21 May 2009***

*Weight 82.4 kg: I'm in crisis; RACV gym visits: none, what's the point?; lllia free coffees: 4, better.*

The seriousness of proceedings at the Commission is taking its toll. Members of the public have been weeping. So too have the volunteer members of the CFA. Every day at 2.00pm the afternoon kicks off with a lay witness telling their story. These stories are, at times, genuinely upsetting.

The evidence is starting to affect everyone. Counsel Assisting the Commission are getting more excited. The VGS appears to be getting more worried. The rest of us are drinking more coffee and hiding behind longer and larger boxes of folders.

I realise that there are a number of cameras in the room. The video feed of proceedings uses the court's fixed cameras. I ensure that I'm in picture. There's also the TV media camera to one side of the court. It took me a few days of manoeuvring to ensure that I was also captured in the sweeping court panoramas that are taken every day. Mum says that she's now seen me on TV about a dozen times!

The media are having a ball. They have taken up residence in a scrum at the back of the court. They are a bunch of about six, armed with laptops and Blackberries studiously waiting for the comment or grab of the morning, afternoon, or day.

You know they've got what they want when suddenly there is a lot of movement from the back of the Court. The choreography goes as follows: journos stand up, balance their open laptops in their hands, try not to trip over the network of power cords covering the floor and then noisily leave the room like a herd of stampeding wildebeest to file their hastily scribbled stories which then appear on their employers' websites about half an hour later.

The ABC's Jane Cowan has all the blokes involved in the Commission hearings following her reports closely. Even Alan. She is by far the most glamorous journalist there. With such uber-chic appeal, I find myself wondering why doesn't she just cash in and earn the big money on commercial television just like Jana did. Sometimes Jane takes the banner of the Royal Commission (in fire red) and records her report just outside the hearing room with the banner behind her. Other times, she records a piece to camera outside the Court building in Lonsdale Street. Either way, my day usually starts with Alan asking me 'Did you see what Jane said on the news last night?' I feign surprise and say no. Perhaps I should start restocking my wardrobe. Sometimes, this is a very stressful brief.

***25 June 2009***

*Weight 82.1 kg: I've turned the corner; RACV gym visits: 16 feeling very pleased with myself; lllia free coffees: 1, excellent.*

Week 7 of the hearings. We've been tortured by one of the Commissioners asking witnesses how they would describe the fire on 7 February. The said Commissioner has been in search of a descriptor. So far we've had killer fire, monster fire, megafire, extreme fire, extremely dangerous fire, amongst other ham-fisted attempts at a definition of the blindingly obvious.

When this line of questioning starts on another witness, Alan starts handing me post-it notes with his own suggestions. I know what he's up to because he starts smiling sarcastically to himself. A big, bad fire. A really big fire. An out-of-control fire that will kill you. These are some of his better efforts.

Why so much attention is being given to a label or moniker to describe hell on earth, Lord only knows. Why don't we all just call it a truly horrific inferno and be done with it. I'm sure Dante wouldn't have minded a bit.

***3 July 2009***

*Weight 81.6 kg: I knew it couldn't last; RACV gym visits: 3 hmmm; lllia free coffees: 12 what am I supposed to do?*

Closing submissions for the Commission's interim report are due today. Alan and I have been working on our client's written submission for weeks – poring over documents, transcripts and emails all day and night. We react with mild horror at Counsel Assisting's early recommendations. Nadine drags me to innumerable phone conferences with our client. She always has lots of notes, even though she's never attended the hearings. Nadine tells me that she spends her days watching the video broadcast of the Commission proceedings streaming on her computer.

As well as writing submissions, I prepare a folder with PR flack-style dot points for my silken leader in case he gets asked something. Given that he's been in the Federal Court for almost all of the Commission hearings to date, he seemed grateful when I gave it to him.

When we arrive, my leader is very pleased with his seat. Before the hearing recommences, he chats with Myers who is also making a brief appearance for the State of Victoria.

In they come and off we go. Myers seduces the Commission. Jack is on the front foot. My leader is up next. He is tentative at first, but seems to be going all right. Then Commissioner Teague asks him a question and it's obvious that he doesn't know the answer. He stammers. I see him gulp. Alan tries not to react. I can almost hear Nadine screaming at her computer screen back at my instructors' offices. The world moves in slow motion. Quick as a flash and as calmly as a common law silk pours his or her first glass of wine for lunch at the Essoign, I open my leader's folder to tab 14 and hand him the answer he needs. Our super-silk rolls off the dot points and Commissioner Teague nods in approval. All is well in the world. My leader pats me on the head afterwards and says well done. Nadine joins us after court and says she has told the client that it all went really well. Alan tells me that I did a great job. Really? I guess I am not such a bad barrister after all.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# 2009 Bar Dinner

This year's Bar Dinner may well rate as the best ever.

It was certainly the best attended and the after-dinner speeches of Justice Bell, Paul Elliott QC and Chris Townshend SC were all first rate and enormously entertaining.

Once again convened underneath the magnificence of Leonard French's stained glass ceiling in the Great Hall of the National Gallery of Victoria ('NGV'), the venue was a fitting stage to celebrate the famed collegiality of the Victorian Bench and Bar.

Rather than stodgily recount our way through the evening's program of events, this year *Victorian Bar News* has decided to focus on fashion and we therefore bring you our coverage of the all-important 'red carpet arrivals'. Small problem though, our red carpet and Vicbar banner which we requested from the Bar office failed to materialise at the entrance of the NGV. Undeterred, however, we pressed on as we know that many of our readers are dedicated followers of fashion and as a result of the marvellous outfits on display at this year's Dinner we look forward to the possibility of the inclusion of a 'legal' category next year at Melbourne Fashion Week.

Leading the charge this year was Rebecca Davern looking resplendent in Givenchy. Rebecca informed our cub-reporter that her stunning gown was a left-over from her days in Hong Kong where they had 'serious' black tie occasions. So there!

Accompanying Davern of Counsel on the front row of the fashion grid was none other than Chief Justice Warren looking splendid as she always does, this year in judicial red.

Rebecca Boyce shone in Carla Zampatti and Zoe Maud looked beyond glamorous in a silk gown by Anna Thomas.

Top marks too to Frances Gordon who glittered in silver sequins and Phoebe Knowles who stylishly offered the Bar Grace in ecclesiastical green.

Also at the head of the fashion stakes this year was the delightfully debonair Jeremy Ruskin QC, superbly kitted out in Zegna. Jeremy for his subtle elegance is one of our favourites at *Victorian Bar News* and is plainly a style icon of the Victorian Bar. In fact Jeremy is the one whom most of the well-heeled members of the common law bar sartorially aspire to, including Ross Gillies QC, who this year decided go with a basic black dinner jacket, having returned to Ricardo Montalban the famous white dinner jacket he borrowed and wore to last year's bar dinner. Ross though continues to be at the forefront of exclusive fashion *pour l'homme*. As keen observers know, Ross drives a very smart black

Mercedes sports, uses a Mont Blanc pen and carries a gold Dolce and Gabbana mobile phone. We can't wait to see Gillies' ensemble next year at the 2010 Bar Dinner.

Gerard Meehan looked positively radiant in a spectacular embroidered waistcoat he purchased off-the-rack from Favourbrook, a well known London retailer. In fact so arresting was Gerard's waistcoat that his great friend and our Quarterly Counsel in this edition, Simon Wilson QC, decided to buy one from Favourbrook too. Simon also revealed that his choice of waistcoat has been the subject of 'serious waistcoat envy' and admired by none other than HRH Prince Edward!

Mark Robins was comfortably 'at home' in his fabulous velvet smoking jacket and Richard McGarvie revealed that he planned to wear a pale blue safari suit, but had been persuaded at the last minute that his black dinner jacket was more appropriate for the evening. Perhaps next year, Richard?

Rodney Hepburn assumed the role of the obligatory man in a kilt and Jim McKenna's confidence in sporting a retro brown velour jacket was impressive as it was courageous.

All in all, as a group we scrubbed up pretty well and the fact that so many make the effort, really adds to the occasion. So with a successful verdict returned for this year's Bench and Bar Dinner, *Victorian Bar News* is eagerly looking forward to next year's red carpet arrivals with great interest. You all have been warned!

# 2009 Bar Dinner

The following speech was delivered by the **Honourable Justice Bell** at the Victorian Bar Dinner, 29 May 2009

Chairman Digby, Mr Elliott, Mr Townshend, Chief Justices, your Honours and members of the Bar – it's a very great delight to be here at the 2009 Victorian Bar Dinner. I am acutely conscious, as the most junior puisne member of the High Court, of the distinct honour of being invited to speak to you on this occasion – an honour made not altogether easy by being, I think it might be, the twelfth speaker tonight.

Another difficulty is that Bench and Bar dinners, although we are a unified profession, are essentially tribal affairs – and I am from a related, but different tribe. I readily accept that it would be a great deal worse if it were the other way around. By this stage at the Bench and Bar Dinner in Sydney, generally the guests from interstate are being fleeced in the toilet. When the Chief Justice of Australia spoke at the Sydney Bench and Bar Dinner two weeks ago – in an unusual but I thought kindly gesture, they moved him up the program so that, surprisingly, he spoke before Mr Senior – whose job it was to introduce him. The reason for that was that President Katzmann was not able to assure the safety of any guest after the main course – whereas here, in the heartland of the civilised Melbourne Bar – in this, the most richly endowed of the State art galleries – I have been treated with nothing but courtesy all night. And, although it's now heading towards 11.00 – as I'm speaking, I'm not actually in fear of you.

I have to say that I'm not oblivious, despite the fact of the honour, to what I would characterise as something of the Realpolitik. Until yesterday, I was on crutches, in addition to the discrete orthopaedic boot that I'm still wearing. I was on crutches when I accepted Chairman Digby's invitation to speak tonight – and it did occur to me, in these days when we, as a profession, are subject to increasing scrutiny – when there's a great deal of pressure on the courts, and on the Bars, to subscribe to the benchmarks of total quality management, to move seamlessly, ever-forward, towards a level of transparency that in my youth would have been viewed as immodest – I thought that in these circumstances, whatever the Victorian Bar Council might think about the Sydney Bar and the suitability of a person who comes from it sitting in judgment on anyone, let alone Victorians, not even an institution as august and venerable as the Victorian Bar Council could quite resist the claims of a disabled, newly appointed woman Judge.

I don't want to dwell on my injury tonight. For those who keep discretely asking me about it, can I say this much? It was occasioned by conduct that did not involve, in any respect, any incident that contravened the voluntary anti-bullying in the workplace code that, in conjunction with the Court's management consultants, the justices have adopted.

As a matter of fact, it's the result of a purchase that I made the last time I was here in Melbourne. It was in a little boutique in Albert Park. We don't have any equivalent to this boutique in Sydney. It's a butcher shop to which you go to buy coffee. People congregate there drinking ristrettos and poring over copies of the *New York Review of Books*. Anyway, unsurprisingly to you no doubt, it was also selling very expensive designer footwear. I was induced to buy a pair of walking shoes that the manufacturer promoted as possessing the quality of built-in instability. They feature wedges of extruded plastic forming a round sole – as opposed to the more conventional flat sole that I'm accustomed to. The DVD that comes with the shoe explains that the purpose of the rocking, round, sole is to force the wearer to adopt the posture of a Maasai tribesman walking across the uneven terrain in East Africa. They're called MBTs, Maasai Barefoot Technology.

You need to spend time with that DVD. You need to make a commitment to the shoe. And if you're not prepared to do that, can I suggest – without being critical of the product – I would not myself recommend it.

I pivoted on my MBT and broke my ankle.

Now I know there are members of the Common Law Bar who are thinking: 'We don't know a lot about her – but she hasn't got a lot of judgment. An impulse purchase in a butcher shop of footwear marketed as featuring in-built instability?'

Can I just say this in my own defence? As a profession, I think we acknowledge we've got our problems. We work very long hours. Generally speaking, we're fairly unfit. Quite often, we drink a bit more than we should. And when we get together, our humour, when we are among ourselves, is a bit schoolboyish, a bit in-club. And then we get hurt because the public thinks we're dull. And, of course, what the public doesn't understand is that so many of us lead vibrant, inner lives.

So, in those weeks between the purchase in Albert Park and the unfortunate fall – when I came home at night – when I took the two toy poodles out on a walk around Redfern in my MBTs – I might have looked to my neighbours like a short, none-too-fit woman in settled middle age – but, in my mind, the manufacturer's suggestion was enough – and it's funny, but I think the poodles sensed it – I had weeks of being a Maasai warrior.

Anyway, I'm not going to share more of my inner life with you because, though I feel relaxed with you, there are limits.

My intention tonight is really to take up a theme that Anna Katzmann touched on earlier. And it is the work being undertaken by the Council of Australian Governments – moving us towards a national system of regulation, in which we will be controlled by officers of the Departments of the Attorneys-General of each State and Territory, working cooperatively in a process that – if I can draw on the language of management consultancy – is known as 'harmonisation'. It's an extremely melodic concept, and none of us can object to it.

We need to put aside the rivalries of the past, and work towards becoming a unified whole. And I know that's going to be difficult because those rivalries depend on very deep-seated prejudices – in your case, the sense that you need to zip up your pockets when you're dealing with the Sydney Bar; and in our case – and I don't know that there's any way I can really put this nicely – but we think that wearing a rose on the back of a silk's gown is effete. And we are kind of tough in Sydney, so I've got to say we think it's effete even when worn by a woman silk. We think you're effete, and a little bit too studious.

Could I now turn to table 20, the Criminal Bar Association? I've looked at their website. I came across it entirely by chance – that's because it never occurred to me that a group of criminal lawyers would have a website. In Sydney, as I understand it, the means of communication amongst the Criminal Bar remains the hotel near the Downing Centre.

Anyway I looked at the Criminal Bar Association's website – and it was really an extremely impressive, professional site, with lots of practice tools, and reference to numerous authorities. The thing that struck me was in the 'useful links', these included: *The Guardian, The Washington Post* and *Le Monde*. In Sydney, I don't think there would be a solicitor who would brief a member of the Criminal Bar who read *Le Monde*.

I suppose it's by these very small differences that we've tended to define ourselves.

Some would say that it's not altogether surprising that the Melbourne Bar produced Sir Owen, and the Sydney Bar, Sir Garfield.

And for some people that niggles – so, quite recently, the Commonwealth Solicitor-General, in the Sir Maurice Byers Address, delivered to the Sydney Bar, took a side swipe at Sir Owen with a none-too-veiled suggestion of plagiarism. He was referring to Sir Owen's judgment in the *Airlines Nationalisation case*, in which Sir Owen spoke of the Constitution as an instrument that is meant to endure, conferring powers that are expressed in general propositions, wide enough to be capable of flexible application to changing circumstances. The Solicitor went on to describe this observation as being 'translated from, but unattributed to, Chief Justice Marshall in *McCulloch v Maryland*'. And some might think, 'Well, that was rather a quick conclusion to draw – two able lawyers looking at the same issue of constitutional interpretation – conceivably might arrive at a similar view'.

I intend no criticism of the Solicitor. He comes from Sydney. We have lived under the weight that the greatest common lawyer of the twentieth century came from Melbourne – and we resent it.

But I don't – and I think the reason for that is that I grew up in Melbourne. I have extremely fond memories of walking hand in hand with my grandfather around the block in Mont Albert after dinner – he in his Onkaparinga dressing gown, and me in mine; he in the precursor of the Hush Puppy – a form of slip-on footwear still much favoured by Justice Gummow – and I in the most sublime footwear that people of a certain age will, I hope remember – little red-and-blue-ribbed, corduroy Noddy slippers, with bells on each toe. I'm speaking of the halcyon, pre-television era of gold-plated suburban security. That's where I come from.

I understand Sir Owen. And there's one thing I know, great internationalist that he was, there is simply no way Sir Owen would have cribbed from an American.

He lived a wonderful life in the law – and I sort of fancy that members of the Melbourne Bar still do – the long trips to Europe on a Pacific and Orient line steamer, heading over to the Privy Council – with nothing but a couple of tea chests filled with the Commonwealth Law Reports to leaf through on the promenade deck.

As to the differences between Sir Owen and Sir Garfield, I'm prepared to accept the judgment of Sir Paul Hasluck – I think we would all acknowledge him to be a straight-shooter; a very fine Australian; and a man with no stake in this debate because he came from Western Australia. He knew them both. And, in a memoir, he said of Sir Garfield that he considered him to be 'far inferior to Sir Owen in loftiness of intellect'. But he did say this about Sir Garfield – describing a quality which, I would have to say, in Sydney we very greatly admire – he said 'he looks like a lawyer… his alertness gives the impression of an eager fox terrier who's come out to just see what's going on.'

Now, of course, that really wasn't Sir Owen. As any of you who have read Philip Ayres' biography of Sir Owen – and I assume that there's not a person in this room who hasn't – may have been struck – as I was – by the account of his letter to his daughter,

Anne, written in 1950, when he found himself marooned in New York for four or five days. It was at the end of his period as the UN Mediator for Kashmir. He had handed in his report to the Security Council. I infer – although Philip Ayres doesn't go into this – that the CLRs must have been stuck in the hold of the Strathaird. He wrote to Anne saying that here he was – his work completed – he was going to be in New York another four or five days – and he couldn't think of a thing to do!

Can I say this about the Sydney Bar in our defence? I would freely acknowledge, on this occasion, that – with the exception of my brothers Gummow and Heydon – we have not achieved the intellectual loftiness that is your birthright. But I would say this for most of us – that if we had the misfortune to find ourselves stranded for five days in Manhattan, members of the Sydney Bench and Bar would probably find something to do.

There is, I think you can see, enormous potential for cross-fertilisation, as we progress the COAG's aims for us all.

The one thing about speaking without reference to one's notes is that it can be, at times, a little ill-disciplined. It had been my intention to address you tonight on the high techniques of Equity. However, John Digby told me that it's bad form to stand between guests at a Victorian Bar Dinner and their dessert for too long when you're the final speaker – so I will have to leave that for another occasion.

It's been a delight to be here.

Thank you.


Alison Umbers and Murray McInness FM .


Justice Crennan, Justice Bell, Henry Jolson QC and Anthony Southall QC.


Jennifer Digby, Caroline Kirton and Judge Lewitan AM.


Simon Wilson QC and Paul Elliott QC.


The Barristers band in full swing. Alistair McNab, Michael Grabowsky, Paul Connor and Mike Turner (other members of the band were Peter Neville on drums and Ken Howden on piano accordian).


Kathleen Foley Lowe and Roslyn Kaye.


John Riordan and Michael Shand QC.


Paul Elliott QC, speaking.


Dr. Karin Emerton SC, Justice Dodds-Streeton and Fran O'Brian SC.

# 2009 Bar Dinner


Justice Elizabeth Curtain, Judge Campbell and Brendan Murphy QC.


Phoebe Knowles, David Morgan, Simon Loftus and Jonathan Kirkwood.


Chief Justice Warren AC.


David and Roger Gillard QC


President Maxwell JA and Justice Cummins


Natalie Vogel.


Former *Bar News* editors, Jerry Nash QC, Paul Elliott QC and Judy Benson.

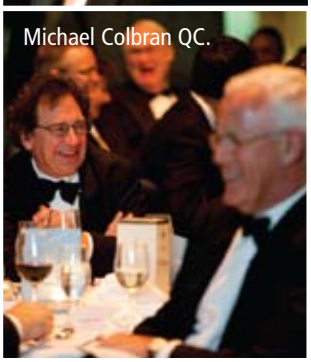

Anna Katzman SC


Toby Cogley, Amy Wood and Andrew Tragardh.


Bar Council Chaiman, John Digby QC.


Chief Justice Black AC and Julian Burnside AO QC.


Colin Lovitt QC, John Digby QC, Paul Elliott QC, Chris Townshend QC and Justice Bell.


Michael Colbran QC.

## QUARTERLY COUNSEL

### Simon Kemp Wilson QC

Simon Kemp Wilson QC studied law at Monash University Law School graduating in1975 with the degrees of BJuris and LLB. He signed the Bar Roll in 1976 and read with Leo Hart. As a member of Hyland's List and with chambers on the 18th Floor of Owen Dixon Chambers West, Simon has a substantial practice in commercial law and non-personal injury common law and is widely reputed as a fearsome cross-examiner and bon vivant. Simon's interests include theatre, food and wine, Carlton Football Club, and his now fully repaired Rolls Royce 'Corniche'. Simon says, 'the Bar is a magnificent working and social environment. I love the men and women who constitute it and provide the camaraderie and skills necessary to maintain this important bulwark of the rule of law.'

## SILENCE ALL STAND!

*High Court of Australia*

# The Honourable Justice Virginia Bell

On 3 February 2009 Virginia Bell was sworn in as a Justice of the High Court of Australia. Justice Bell is the 48th High Court Justice and notably the fourth woman to be appointed to the Court. Justice Bell was elevated to the High Court from the NSW Court of Appeal. A welcome was given to Justice Bell by John Digby QC on behalf of the Victorian Bar on 29 May 2009.

The path to the High Court has been somewhat different for Justice Bell to that of her new colleagues and predecessors. After graduating from the University of Sydney she worked for seven years as a solicitor for the Redfern Legal Centre, one of the first community legal centres in New South Wales, prior to joining the New South Wales Bar in 1984. As a student volunteer at Redfern in the early 1980s I can attest that distance is not the only thing that separates Canberra and Redfern. Justice Bell's path through her legal career is proof positive that the 'Australian Legal Dream' is achievable.

Justice Bell is held in high regard by her judicial colleagues, not only for her social conscience, intellect and balanced approach to the law, but also for her wit and generosity of spirit. This was evidenced by the comments made by Spigelman CJ on the occasion of her farewell from the NSW Supreme Court in December 2008. Spigelman CJ described Justice Bell as someone 'who simply lights up your life'; someone who as a result of her singular attributes had contributed immeasurably to the collegiality of that Court. The Victorian Bar was privileged to experience that wit and humour when Justice Bell gave an after dinner speech at this year's Bar Dinner. Justice Bell spoke of the traditional NSW–Victoria rivalry, and reminded us of Victoria's legal pedigree, noting the role that judicial officers originating from this state had played in the Nation's legal development. More importantly, however, we learned the following essential fact: think twice before buying designer shoes from a butcher!

GFG

*Supreme Court of Victoria*

# The Honourable Justice Jennifer Davies

It was evident to the many who attended her Honour's welcome on 7 April 2009 that Justice Davies has embraced judicial office with infectious enthusiasm and vigour.

Her Honour had not always viewed a legal career so favourably. Born into a legal family and educated at Firbank and later Melbourne Girls Grammar School, her Honour spent much of her childhood fighting destiny. After a short and ultimately unsuccessful dalliance with Japanese linguistics at Monash University, her Honour stopped fighting and transferred to law. Her Honour never regretted the move.

After working for a short period with Paveys (now Corrs Chambers Westgarth) where she had served articles and then with Deacons in Hong Kong, her Honour signed the Bar Roll in March 1983. Her mentor was Kevin Mahony and, after his appointment as Senior Master of the Supreme Court, Philip Mandie, now Justice Mandie.

Her Honour's sons, Rowan and Lachlan, were born in 1984 and 1986. Their care and upbringing for much of their lives have been effectively the single responsibility of her Honour. In 1984 she commenced to work part time and after the birth of Lachlan in 1986 left the Bar.

Her Honour returned to the Bar in February 1990 and quickly developed a strong and expanding practice in the insolvency and, later, tax jurisdictions. She took silk in November 2004 and established herself as one of the leading national advocates in revenue law.

As a junior and later as a silk, her Honour contributed greatly to the Bar as a whole. She served on the Bar Council, the Ethics Committee, the Equal Opportunity Committee and the Federal Court Users Committee, and was a member of the Women Barristers' Association. At the time of her appointment to the bench, she was president of the Tax Bar Association, the success of which has been due much to her Honour's drive and work.

Throughout her career, her Honour has maintained an active and broad life outside the law. Her outdoor pursuits have been impressive: she has bushwalked most of south-west Tasmania, cycled extensively (including the east coast of Tasmania, throughout Japan and the west coast of Malaysia), snow and ice climbed in New Zealand, sea-kayaked, rock climbed (most recently in Yosemite where

her descent was delayed for a number of hours by a chance meeting with a brown bear), and trekked much of New Zealand and parts of the Swiss Alps. Members of the Supreme Court beware, lest her Honour seeks to introduce an annual Supreme Court ski-cycle-run triathlon from Mount Buller to Mansfield.

The enthusiasm and vigour with which her Honour has greeted judicial appointment is well placed. The Bar wishes her well.

GJD

*County Court of Victoria*

## Judge Mark Gamble

His Honour Judge Mark Gamble was admitted to practice in November 1985 and came to the Bar in 1991 where he read with the late Geoff Flatman. He was appointment a Crown Prosecutor in October 2003 and took silk in November 2006, having been at the Bar just over 15 years. In his address on the occasion of the swearing in of his Honour, the chairman of the Victorian Bar Council, John Digby QC noted that as a junior barrister his Honour appeared in complex cases without a leader and as senior counsel appeared in the Court of Appeal in important cases that have produced landmark decisions, such as, for example, *Verdins* (on mental impairment in sentencing) and *MacNeil-Brown* (on a more active role for prosecutors in relation to sentencing at trial).

Quite apart from his legal career, his Honour has had a distinguished sporting career in the Victorian Football Association where he played for the Peninsula Dolphins from 1982 to 1984, returning to captain that team in 1989 and 1990, after three years playing for the St Kilda Football Club in the Victorian Football League.

GLS

*County Court of Victoria*

## Judge Frank Saccardo

Judge Frank Saccardo who has been appointed to the County Court of Victoria is another keen sportsman. His Honour was a fine rower who only narrowly missed out on Olympic selection, a tri-athlete and more recently, a fanatical road cyclist.

His Honour signed the Bar Roll on 18 November 1982 and developed a fine practice, specialising in obstetric medical negligence cases. He took silk in 2004. His Honour's dedication and devotion to hard work will unquestionably provide the Victorian community with great judicial service.

*County Court of Victoria*

## Judge Gerard Mullaly

The new Judge Mullaly leaves an outstanding career as criminal law defence counsel distinguished by an enormous capacity for hard work, judgement, integrity and commitment. His Honour is, of course, not the first Mullaly to sit on the Bench of the County Court. Paul Mullaly QC retired from the Court in 2001 after more than 22 years distinguished service as a Judge.

He was never known to be at a loss for words, that is until the day his son sat him down and told him he was about to follow in his footsteps.

His Honour began his professional career in 1989 serving articles with Maurice Blackburn & Co. A hallmark of His Honour's practice was his depth of social conscience and commitment to the disadvantaged. In 1991, he moved to the Criminal Law Division of the Legal Aid Commission of Victoria. In those earlier days of the evolution of the solicitor/advocate, his Honour was the first Legal Aid Commission lawyer in the Geelong Office to conduct serious criminal trials.

His Honour came to the Bar and read with Roy Punshon (now his Honour Judge Punshon).

It wasn't long before his Honour came to be regularly briefed in serious criminal trials and often in complex sexual offence trials. As trial counsel he understood better than most the developing cultural shift in the handling of sexual offence trials and proved how effective a defence advocate could nevertheless be in that changing climate. He later spent four years on the Department of Justice Sexual Assault Advisory Committee; and two years on the Judicial College Steering Committee on the Sexual Assault Manual. His Honour comes to the bench as eminently qualified to conduct such trials.

In recent years his Honour was briefed in some of the most complex and lengthy criminal trials and inquiries yet conducted, spending the best part of four years in three cases. The Benbrika Terrorist trial (almost two years including pretrial work); the Salt Nightclub murders (7–8 months); and the Cole Inquiry into the Australian Wheat Board (about a year in Sydney). In each case his client was ultimately either acquitted or exonerated.

His Honour appeared pro bono in a number of environmental cases and his contribution was mentioned in Parliament when legislation was finally passed ending logging and creating a National Park in his beloved Otway Ranges.

His Honour served some eight years on the Criminal Bar Association Committee and made a substantial contribution to Advocacy teaching and training, serving on the Bar CPD Committee and Accreditation and Dispensation Subcommittee; teaching in the Bar Readers Course; and teaching in Australian Advocacy Institute courses in Victoria, Tasmania and Indonesia. He had one reader, Amy Wood.

The Victorian Bar, and particularly his former colleagues at the CriminaI Bar, wish his Honour a long, satisfying and distinguished career as a Judge of the County Court of Victoria.

*MGO'C*

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# ADJOURNED SINE DIE

## Justice Murray Kellam

Justice Murray Kellam AO retired from the Court of Appeal in May 2009, after an illustrious career in the law and a parallel career of public contribution.

He was educated at Carey Grammar School, attended Royal Military College Duntroon for a year and then graduated in law at Monash University in 1972 before completing an LLM at the University of Melbourne in1976.

After completing his articles at Aitken Walker and Strachan and subsequently becoming a partner of the firm for three

years, he came to the Bar in 1977 where he read with Jack Strahan, with whom he had a close relationship over many years until Jack's untimely death. He quickly developed a very successful, broad and busy common law practice, particularly with respect to plaintiffs who had suffered major trauma, (including brain damage and quadriplegia), and appeared in large and important cases with John Barnard QC, Ron Meldrum QC and David Kendall QC and Cummins QC (as he then was). In addition to his plaintiffs' practice, he was also keenly sought by insurance solicitors. His reputation was for high quality, speedily performed paperwork and a great capacity to fully analyse the strengths and weaknesses of his cases. He featured prominently on circuit, where he always displayed the capacity to be perfectly prepared, hard working and still able to find time for evening conviviality.

Chambers be they in Four Courts, Aicken, or the 11th floor Owen Dixon Chambers West, which during his time at the Bar he shared continuously en bloc with long standing friends, Kaufman QC, Curtain QC and Scanlon QC, were always happy, lively and very busy when he was around.

His Honour was a great contributor to the Bar. He was a director of Barristers Chambers Limited from 1989 to 1993, during a period of great anxiety for the Bar and when only the brave would act as directors. He was a member of the Bar Council from 1981 to 1987 and 1988 to 1993, serving as Honorary Treasurer from 1990 to 1993.

On appointment to the County Court in 1993, he quickly established his reputation as a judge of excellence and was appointed to the Supreme Court and as inaugural President of VCAT on its commencement in 1998. His organisational and well-renowned people skills were critical in the establishment of VCAT and laid the foundation for its future success. He was much loved and admired by the people who worked at VCAT at every level.

His Honour returned to the Supreme Court trial division in 2003 and sat primarily in the common law and criminal divisions. His handling of the long-running *Pong Su* trial demonstrated precisely why he enjoyed the reputation of a conscientious and extremely competent judge, and such skills and experience were acknowledged by his appointment to the Court of Appeal in 2007, where he sat until retirement this year.

Outside work, his interests were his family, sailing and motorcycling. Although sailing suffered due to work, his Honour would often take his motorcycle on circuit leaving his associate, Margot Moylan, and his tipstaff, Peter Lloyd, to travel separately by car.

His Honour's commitment to the law and to public works is reflected in his involvement in the Australian Institute of Judicial Administration, the Council of which he was a member from 1997. He served as Deputy President from 1999 to 2000, President from 2000 to 2002 and was recently honoured with life membership of the Institute. He was also the Chairman of the Adult Parole Board, serving from 2003 to 2007 and an office bearer with the Medico-Legal Society of Victoria, serving as Honorary Secretary from 1991 to 1997, Vice President from 1997 to 1998 and President from 1998 to 1999.

From 2001, his Honour annually travelled to Bangladesh leading ABA teams in conducting advocacy training of barristers and he conducted other similar programs in Cambodia and Nepal. He also engaged in judicial training in Australia, PNG, and Fiji. In retirement he plans to continue such work and to assist UNICEF in juvenile justice reform in the Asia–Pacific region.

His time as a barrister and judge was characterised by a strong sense of justice, social responsibility and a willingness to sacrifice his own needs to discharge a responsibility to serve the community as a whole. The Bar thanks his Honour for his constant and exemplary service, and wishes him well in his retirement.

DEC

## The Honourable Peter Heerey QC

In somewhat of a break from tradition, the editors have asked me to pen this short farewell to Peter Heerey from the view-point of those members of the Bar who appeared before him on a regular basis. It is a credit to the editors that they nominated me for this task despite my unsatisfactory win/loss ratio before him.

Many kind words were spoken about Peter at his farewell from the Court and there is no need or space to repeat them here.

From the practitioner's point of view it was a pleasure to appear before Peter. He had very high expectations of counsel but was generous in his appreciation of their efforts when counsel did what was

required, such as preparing overnight an *agreed* list of questions he would need to answer to decide the case in an area where the law was in a state of flux!

Peter was very much a barrister's judge. To our great relief he discouraged excessive citation of authorities for simple propositions of law. He helpfully referred in judgments to texts by young barristers keen for the publicity. He was forthright in telegraphing his tentative thinking so as to give one a fair chance of turning that thinking around and he brought sound judgement and common sense to the sometimes over-intellectualised process of running a civil trial.

I was especially fond of Peter's judicial equivalent of a beer in the opposition change rooms after a hard game. At the end of a long case he would sometimes invite counsel and solicitors (both sides) up to his chambers for wine and cheese. There is no better way to foster good relations among the profession. The only problem was that one could never quite predict when an invitation would be forthcoming. Thus after one long case which finished mid-way through a Friday morning Peter sent a message mid-afternoon that we should all pop up for a glass of wine at about 4.15pm. Unwary Senior Counsel from New South Wales was by that stage happily indulging in ample quantities of the best of everything on offer at the Flower Drum, both solid and liquid. As the invitation could not be refused, he boldly made an appearance. The judge was gracious as always.

Peter's sense of humour on the Bench and his appreciation of the same from the Bar is well known. I had put together a series of vignettes from the trial in *Eli Lily v Pfizer Overseas Pharmaceuticals* (2005) 64 IPR 506, a case concerning a compound called sildenafil monocitrate, better known by its trade name 'Viagra'. Alas the word limit and the editors do not permit publication of my collection.

We all know that Peter is a man of many interests, both sporting and intellectual, and we hope that he now finds more time on his hands to pursue them, although we hope not too much since he has returned to the Bar.

We farewell the judge and welcome Peter back to the Bar.

*AJR*

## DECREE ABSOLUTE

# Thomas Bernard Shillito

The following is an edited version of the eulogy delivered by retired **Judge Glenn Waldron AO QC** at the funeral service

Thomas Bernard Shillito graduated in 1949, his law course having earlier been interrupted by his distinguished war service.

He signed the Bar Roll in 1950. Thereafter he quickly established a thriving general practice, particularly at the Common Law Bar, but also in crime. So good was he that Frank Galbally not infrequently privately sought his forensic advice in the criminal trial sphere. A measure of his success at the Bar was that he was offered and accepted appointment as a County Court Judge at the young age of not quite 45.

With many increasingly successful years in prospect, it would not have been an easy decision for him to make when the appointment was offered to him.

How fortunate it was that he opted for judicial office. If ever there was a man who by his performance proved what a superb Judge he was, it was him.

So what is required to make a good Judge? I would suggest the following: integrity; industry; wisdom; rationality; calmness; tolerance; a highly developed sense of fairness and impartiality; good common sense; a reasonable measure of compassion for the less-fortunate; and the courage to make the right decision, even though it may not be a generally popular one. Bernie Shillito possessed all of those attributes – and in more than full measure.

Additionally, he was, in the best sense of the word 'worldly-wise' and further-more was the possessor of a marvellously whimsical sense of humour which virtually never deserted him, save when during the Geelong football team's many years in the wilderness he would often rail about the team's excessive use of handball.

He was a pertinacious man – few would show such unalloyed loyalty to their football team as he did, journeying down to Geelong along with his good friend Edward Ryan, week in week out, year in year out, despite the team's so frequent lack of success.

He was a realistically responsible man. When, some years ago, he had a bad experience whilst driving his car, he gave up driving on the spot.

He was a humble man – much too much so, remembering his outstanding capacity. After all, as a Judge, he was, I believe, never overturned on appeal.

He was a methodical and forward-thinking man. Few would have done as he is reputed to have done when in order to enhance his chances of passing the stringent medical test, in order to qualify as aircrew in the Air Force, he simply memorised the ophthalmic reading chart.

Finally, he, like some others, who had been so sorely tested in the crucible of active, highly dangerous war service, had a splendidly well balanced, well oriented approach to life, thus being able to so clearly differentiate between the important and the unimportant.

Bernie Shillito lived a long and most meritorious life. He served his country bravely and well in time of war. He was a most successful barrister. He was an adornment to the County Court Bench, serving as he did for 29 years in the most exemplary manner. As a man and as a Judge he was an exemplar.

Vale, dear Bernard.

# The F.X. Costigan QC

## The Advocate

(for the late F.X.Costigan QC)

A born story-teller
Jesuits schooled you
School of hard knocks your Ph.D.
Cured of politics by the Party
The Inquiry your Calvary
Spurned judicial apotheosis
Unbeatable in debate
You wrote like Erasmus
Healer of disputes
Morning coffee with the Crennans,
Meagher, Lacava
Gave barristers a good name, you did
One less lion among us.

NIGEL LEICHARDT

**New Silks 2008** ABOVE Middleton SC looking at home in the Federal Court at the Court's sitting to welcome the New Silks.
LEFT TO RIGHT FROM BACK Craig Harrison SC, Sam Horgan SC, Douglas Trapnell SC, Philip Jewell SC, Adrian Ryan SC, John Dickinson SC, Ross Middleton SC, Michael O'Connell SC, Michael Tinney SC, Sturt Glacken SC, Josh Wilson SC, Maryanne Loughnan SC, Christopher Townshend SC and Caroline Kenny SC.

**Indigenous lawyers drinks at Owen Dixon Chambers** LEFT TO RIGHT Karly Warner, Monash Law student, John Digby QC, Chairman of the Bar Council, the Hon. Justice Kaye and Helen Christensen, Deacon Law student.

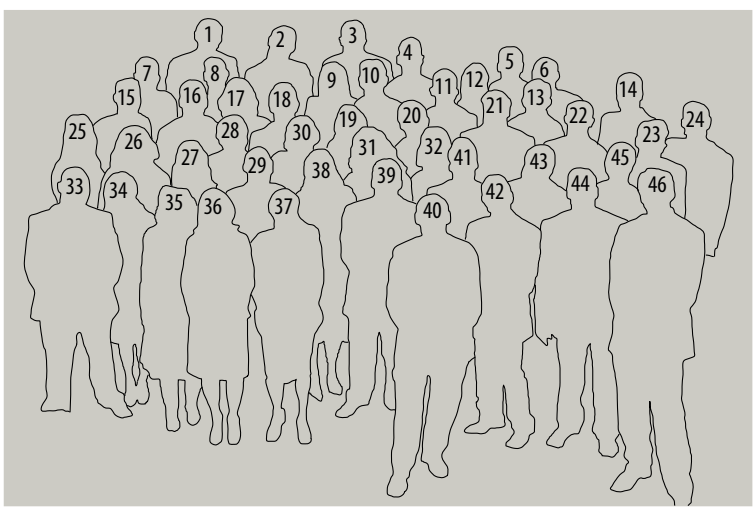
**Opening of the Legal Year** Judge Wood and Judge Pullen. BELOW The Hon. Justice Dodds-Streeton, the Hon. Justice Wheelan and the Hon. Justice Williams.

**David Derham book launch, 17 June 2009** The Rt. Hon. Sir Ninian Stephen KG AK GCMG GCVO KBE KStJ QC speaking at the launch of *Talks on Universities, History and the Law* by David Derham at the Alexandra Club, Melbourne.

**The Frank Galbally Reclink Football Cup, 12 July 2009** Solicitors 75 points def. barristers, 21 points. Collage compiled by Michael Dever.

**The 2009 Age Corporate Ski Race – Falls Creek**
Sara Hinchey going downhill rapidly.


# March 2009 Readers' Course




1 WRIGHT Bradley
2 WARNER Thomas
3 BROWN Christopher
4 KIRKWOOD Jonathan
5 COGLEY Toby
6 WALKER Andrew
7 SMITH Craig
8 RAMSAY Erin
9 VARSAVSKY Jacquelyn
10 BROWN Shawn
11 MORGAN David
12 BENNETT Elizabeth
13 NEKVAPIL Emrys
14 BENDER Philip
15 ATKINSON Peter
16 SUTTON John
17 KAYE Roslyn
18 GIBSON David
19 BROUGHTON Zoe
20 McWILLIAMS Jeremy
21 COLE Daniel
22 PODGER David
23 PARKINSON Charles
24 LLOYD Ian
25 BOLTON Tania
26 PORTELLI Susannah
27 GOLDING Alexandra
28 RATCLIFFE-JONES Caroline
29 TRUMBLE Olivia
30 DIXON Samantha
31 PARKES Catherine
32 CANNON Ashlee
33 REYNOLDS Grant
34 DONMEZ Hulya
35 HESPE Lisa
36 FOLEY LOWE Kathleen
37 KNOWLES Phoebe
38 O'TOOLE Teri
39 LOFTUS Simon
40 PENTONY Richard
41 ROBERTSON Duncan
42 PAGE Matthew
43 WOOD Amy
44 HEPBURN Rodney
45 UMBERS Alison
46 RATTRAY Jonathan

# LONDON CALLING

Colder than a mother-in-law's kiss and bleaker than the prospect of undergoing root canal treatment to a decaying molar, there is little to commend about Melbourne during the depths of mid-winter.

Thank heavens then for the Australian Bar Association ('ABA') Conference held in Strasbourg and London from 26 June to 1 July – the perfect excuse to pack up and leave town for warmer climes to be informed and educated by some of Europe's leading legal luminaries.

Human rights and the European Court of Human Rights ('ECHR') were the central topics of discussion at the Strasbourg leg of the conference. Delegates were privileged to be addressed by ECHR members Judges Nicholas Bratzas and Egbert Myjer on recent developments in human rights law and the operation of the ECHR, which is located in Strasbourg. Given the relatively recent introduction in Victoria of the *Charter of Human Rights and Responsibilities 2006*, the Strasbourg leg of the ABA Conference proved to be particularly beneficial to the Victorian counsel in attendance.

And so, on to London. Impressively, the London leg of the conference was opened on a Sunday evening by Lord Phillips, the senior Law Lord and, as of 1 October 2009, the first Chief Justice of the new Supreme Court of the United Kingdom. Given the foundational role English law has played in the development of Australian jurisprudence, it remains important to maintain the strong links that exist between the Australian and English benches and bars. The staging of the ABA Conference in London this year provided the perfect forum for the exchange of ideas among judges and counsel and the opportunity to comparatively assess current developments in Australian law against those developments taking place in England.

Highlights of the London conference program included the session on 'Appellate Advocacy', chaired by leading London silk, Edwin Glasgow QC. With a heavyweight panel comprising the new Master of the Rolls, Lord Neuberger, Lady Justice Hallett of the Court of Appeal, Mr Justice Irwin of the Queen's Bench Division of the High Court of Justice, Justice Keane of the Queensland Court of Appeal and our very own Justice Middleton of the Federal Court, here in Melbourne, it is hard to conceive a better 'dream team' of English and Australian jurists to deal with such a widely important topic.

The other stand-out session was the one entitled 'Barristers and Judges – A Question of Ethics'. Justice Cummins of our Supreme Court delivered an exceptionally compelling address on the importance of judicial independence and impartiality. It should be compulsory reading for all those who aspire to judicial office. Supporting Justice Cummins was the entertaining and engaging David Etherington QC, a leader of the London criminal bar and legal consultant to the enormously popular television series, 'Judge John Deed' and 'Kavanagh QC'.

Of course the media-flavoured session titled 'Problems with Privacy' and which featured celebrated defamation specialist Desmond Browne QC (the London equivalent of the 'glittering ornament' of the Melbourne Bar, Jeremy Ruskin QC), Joshua Rozenberg (comparably, a more agreeable and urbane version of Chris Merritt) and Max Moseley (for whom no Australian equivalent readily comes to mind), didn't disappoint either, as a robust discussion on this increasingly important topic ensued among the panel and all of the delegates present.

The outstanding conference program was also complemented by an entertaining social program. The conference dinner, which took place in the spectacular hall of the Royal Naval College in Greenwich, will be long remembered by many of those in attendance as one of the Australian Bar's great social events.

However, for some, it was the 'legal ashes' played for on the Sunday lay-day of the conference between the ABA XI and the Western Circuit of the English Bar that was the real social highlight of the conference. With the team kitted out in their ABA baggy-green caps and fielding a solid Victorian contingent which included household sporting names such as Ashley J, Tracey J, Cavanough J, Southall QC, Riordan SC (team captain), Hayes and the dashing and slashing young Jack Tracey, their English opponents approached the match with understandable trepidation. The match was played on a picturesque village green in Winchester of the kind envisaged by Lord Denning in *Miller v Jackson* and was the site for what was ultimately a heroic defeat for the ABA XI. Notwithstanding

TOP The mighty ABA XI in Winchester.
ABOVE The Royal Naval College Hall – ABA Conference Dinner 2009.

the results of the matches, which were played in a wonderful spirit, it will be long remembered for many remarkable performances which included the determined and unstoppable locomotion of Justice Daubney (of the Supreme Court of Queensland), the suave and 007-like performance on and off the field of Thomas Hodgson (of the Sydney Bar), the sledging of Donaldson SC (of the Western Australian Bar), a swashbuckling 5 runs scored by Newlinds SC (of the Sydney

Bar) while playing in official Australian 2009 Ashes kit, the 'ringing-in' of Phillip Tracey and the disturbingly and puzzlingly 'fair' umpiring of Paul Elliott QC. Moreover though the real jewel of the event was the magnificent hospitality extended to the Australian Bar by the Western Circuit, which was generously and enthusiastically arranged by Robin Tolson QC, for which the ABA XI remains profoundly grateful and looks forward to reciprocating in future years.

The biennial ABA conference continues to be a valuable component of the continuing professional development of Australian barristers and judges. By holding the ABA conference abroad, Australian lawyers are afforded the concentrated opportunity to learn from the very best of their peers who practise as advocates and judges elsewhere in the world, who would not otherwise travel to Australia at the same time for such a conference if it were held locally. Barristers and judges, just like solicitors, doctors, scientists, engineers, business people, economists, politicians, policy-makers and even journalists, nowadays operate in an increasingly globalised world. Any suggestion that the Australian Bench and Bar should stay put in Australia and ignore international legal trends, or for barristers, the opportunities to develop their practices abroad (in areas such as commercial arbitration) when other professionals and business people are currently embracing the emerging global economy, is naïve, short-sighted and ultimately detrimental to those the Australian Bench and Bar serves, namely the Australian public. At a time when the various other sectors of the Australian community are actively engaging with the rest of the world, so too should the Australian Bench and Bar. The ABA confer ence admirably achieves this purpose for Australian barristers and judges. Long may it continue.

Finally, the 2009 ABA conference in London could not have occurred without the meticulous planning and exceptional organisation of Justice Glen Martin of the Supreme Court of Queensland and Dan O'Connor of the ABA Secretariat in Brisbane, each of whom are indeed worthy of the countless expressions of gratitude and praise of their colleagues who attended the conference.

# *Dear Themis*

Dear Themis,
I was recently criticised in Court by a judge for using Latin phrases in my submissions such as '*prima facie*' and '*nunc pro tunc*'. The judge told me I should only use English. Then the judge adjourned the hearing 'sine die'. Should I stop using Latin, or not?

Confused

*Dear Confused.*
*Haven't times changed. I recall when judges would spout Virgil's heroic pentameter in court...* 'at regina gravi iamdudum saucia cura...' *Ah, those were the days.*

*But we are told to change: that the law and the courts must embrace the 'modern' world. One thing, however, has remained immutable: the judge is always right, especially when inconsistent. You must appreciate, as did the judge, that one should have the savoir faire never to use a foreign expression when an English expression will do.*
Ave atque vale.

Dear Themis,
I have been receiving more and more of my briefs of late from instructing solicitors in the form of emails and attachments. Some of these run to hundreds of pages. They must be printed, collated, hole-punched, indexed and bundled in folders. The worst of them include lengthy and incomprehensible email chains, which are said to contain my instructions. What should I do with these briefs?

Fed up

*Dear Fed Up,*
*Given the Global Financial Crisis, you sound like an ungrateful wretch. You should be thrilled that you have briefs that run to hundreds of pages. There is no greater joy for me than to charge my hefty hourly fee for printing, collating, hole-punching, indexing and bundling documents into folders: hours of mindless, remunerative fun. But beware: those paper cuts can be seriously painful.*

# *Wine report*

## 2006 Dawson's Patch Chardonnay

Dawson's Patch is a three-acre vineyard nestled in a valley at the southern end of Victoria's Yarra Valley.

In most years, less than 500 cases of wine are produced. Their wines are given extended bottle-ageing, so that by the time of their release, they are just starting to show their potential.

The 2006 vintage chardonnay is a full-bodied wine, highlighting the citrus/lime fruit characters of the site with the subtle, seamless integration of fine-grained French oak. The wine is stored for ten months in new and one-year old barriques, left on lees with regular stirring and partial malo-lactic fermentation have added to the complexity. This year a total of 410 cases were produced.

The wine's bouquet exhibits citrus/lime and pineapple flavors.

The wine colour is a deep golden straw yellow.

The pallet is well rounded with honey/butterscotch fruit and a long finish on the back pallet, and sweetness not found in other more acidic chardonnays. Although able to be drunk now, this wine will last for a number of years. It is available from the Essoign Club at $36 per bottle or $24 takeaway.

I would rate this wine as a talented junior injuries barrister, who knows where she is and knows where she will end up.

ANDREW N BRISTOW

# A BIT ABOUT words –*wistful*

**Julian Burnside AO QC**

*Wistful* is an evocative word which means 'expectantly or yearningly eager; mournfully expectant or longing.' This is the current sense. It originally meant *closely attentive*. It is thought to come from *wistly*, meaning *intently*, but was influenced by *wishful*, which plausibly accounts for its currently accepted meaning.

*Wistful* is one of almost 1400 words which end with the suffix *-ful*. Almost half of the words ending with *-ful* have corresponding words ending with *-less*. Many *-ful* words have corresponding *-less* words, but they do not necessarily have opposite meanings. The following pairs are familiar opposites: *careful, careless*; *fearful, fearless*; *thoughtful, thoughtless*.

On the other hand, the following pairs are recognisable and in common use, but they are by no means opposites: *armful, armless*; *eyeful, eyeless*; *roomful, roomless*; *skinful, skinless*.

Many *-ful* words that survive in regular use have *-less* equivalents that are now obsolete. Why one should survive and the other not is one of the many mysteries of our language. We use *awful* frequently. Its equivalent *awless*, meaning 'without dread, fearless', has not been used since the late 19th century.

*Bashful* has a perfectly useful twin: *bashless* – meaning 'unabashed, shameless, unblushing' – but it has not been used since Elizabethan times.

And *wistful* also has its opposite: *wistless*. In 1795 Southey wrote, in Joan of Arc: 'I held it, and, *wistless* what I did, half from the sheath drew the well-temper'd blade'.

It has a good sound to it, but it has not been seen in print since 1814. It means careless or inattentive. *Wistful* has survived, but *wistless* has not. This is surprising because *wistlessness* is so common. Similarly, *listless* has a vanished counterpart *listful*. It means 'attentive or willing to listen'.

It is not often that barristers would have occasion to use the word *editorless*, but it does exist, and at the time of writing this essay it accurately describes the *Victorian Bar News*. Gerry Nash, Paul Elliot and Judy Benson did a lot of hard work editing the *Bar News* for many years. We are in their debt. They were listful and never wistless.

Between preparing each edition and fending off criticism, they may not have had time to reflect on the way the name of their position illustrates the inventive flexibility of English. *Editor* comes to English directly from Latin. We invented the verb *edit* by backformation. From this we derived *edit* as a noun (an act or spell of *editing*). *Editorial* is an adjective (e.g. '*editorial* comment') and was adopted as a noun describing a statement of *editorial* opinion. Less common, but legitimate, are *editorialist* (one who writes *editorials*) and *editorialize* (the process she engages in); *editorship* and, the now rather quaint, *editress*.

The reborn *Bar News* has an editress. And we are about to get a new, important journal of record, for those who prefer learned pursuits. *In Brief* and *Bar News* are continuing, so the Bar is *editorful* which, unlike *editorless*, is not a real word. This is curious, since editorfulness is much more common than editorlessness.

# Habitat

What is driving the move to private chambers and the move to Queen Street? Is it:

(a) the smell of sewage that unexpectedly wafts through Douglas Menzies Chambers when one is conferring; or

(b) the risk of developing pneumonia in Owen Dixon West.

The *Bar News* does not know if there is any truth to the media reporting about incidents of pneumonia in ODW. But the smell in DMC is certainly very real. Despite the gallant efforts of BCL – which have ranged from engaging contractors to abseil the building to employing young men to walk the floors with spray cans of air freshener – the smell continues to elude BCL. Those in DMC continue to complain. Rent relief was given but there is a push for further rent relief until a solution is found. Is a solution close? No one seems to know.

Whilst visiting DMC can be like travelling through the sub-continent and visiting ODW is like travelling back in time, visiting Aickin Chambers is more like travelling to Dubai. The new and more stylish chambers have attracted a mix of silks and juniors from the commercial, common law and criminal bars. More and more barristers seem to be moving to Aickin Chambers and other private Queen Street chambers – Chancery Chambers, Melbourne Chambers and Dawson Chambers. Some say that the hub of the Bar is now at Queen Street.

So why the move? It's easy to understand the desire to join Aickin Chambers – improved views, fast lifts, large foyer, superior coffee and generally more impressive. The other BCL chambers have passed their use-by date and are in need of a serious face lift.

The move to private chambers around Queen Street and elsewhere is a more difficult issue and continues to be debated around the Bar. The proportion of barristers who rent chambers from BCL has declined from 81.5% in 2000 to 63% in 2008. One of the key reasons why barristers take up private chambers is said to be a desire to share chambers with a selected group. Historically that has been difficult to achieve in BCL chambers. Steps have recently been taken towards resolving this difficulty.

Last month, a special general meeting of members of the Bar was called to consider amendments to the Chambers Allocation Policy for BCL chambers. The amendments were passed. The amendments mean that groups of barristers can now register with BCL and if a room within chambers occupied entirely or in part by the group becomes vacant then the group can express a preference for a particular applicant who will be allocated the room. It remains to be seen whether the recent amendments will help to keep barristers in BCL chambers.

The *Victorian Bar News* will continue to monitor this issue and other issues around chambers.

**Music from a Jade Flute:**
**The Ci Poems of Li Qingzhao**

By Clifford Pannam
Hybrid Publishers, 2009
ISBN 9781876462734

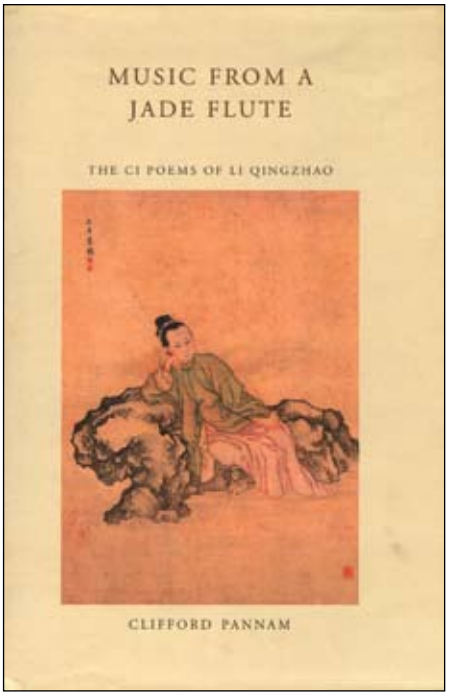
*Thin mist, dense cloud*
*A long dreamy day.*
*In a gold burner*
*Incense smoulders and disappears.*
*The Double Ninth festival returns.*
*A midnight chill penetrates*
*My jade pillow and the bed curtains.*

*After twilight, holding a glass of wine*
*At the eastern fence,*
*A subtle fragrance fills my sleeves.*

*Do not tell me*
*Not to be overwhelmed with sorrow.*
*The curtains are swept up*
*By the west wind.*
*People too are shaken by it*
*Suffering like the chrysanthemums.*

Clifford Pannam's recently published book containing his translations of the poems of Li Qingzhao's, the most famous female poet in Chinese history, is a source of many revelations.

The first is the poems themselves.Read alone, without reference to the accompanying introduction and notes discussing the life of Li Qingzhao and the




historical context in which she was writing, one could think that they were written today. The verses so freshly convey an impression of the emotions that we each feel from time to time that there is really no need for any commentary. The themes and imagery are timeless: the coming seasons; the natural elements: wind, rain and mist; blossoms and flowers, particularly plum, chrysanthemum and lotus; gardens and birds; wine; friendship and occasional drunkenness; and the fine and beautiful artifacts that one associates with Chinese culture: jade flutes, fragments and pillows, golden hairpins and flower engraved mirrors.

To learn that the poems were written in the 12th century by a woman who was considered, even in her times, to be a master of this form of lyric poetry is the second revelation. Whilst some readers might be familiar with China's rich cultural history and know something of the Song dynasty, for those who are not this book will open a window into another time. It is both a history and a biography. It also contains an interesting discussion about the development of Ci poetry and presents arguments for and against various alternative translations into English that have been suggested.

For those of us at the Bar, the final revelation is that a leading Australian silk with such a successful practice as Dr Pannam QC has been able to also dedicate himself to the study of Chinese history, literature and language and to find the time to write this impressive book.

All who read it will, I am sure, be inspired.

Dr Pannam QC is also the author of a number of legal texts including *The Law of the Horse* which is now in its third edition, and other works of history and poetry.

G.L. SCHOFF

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