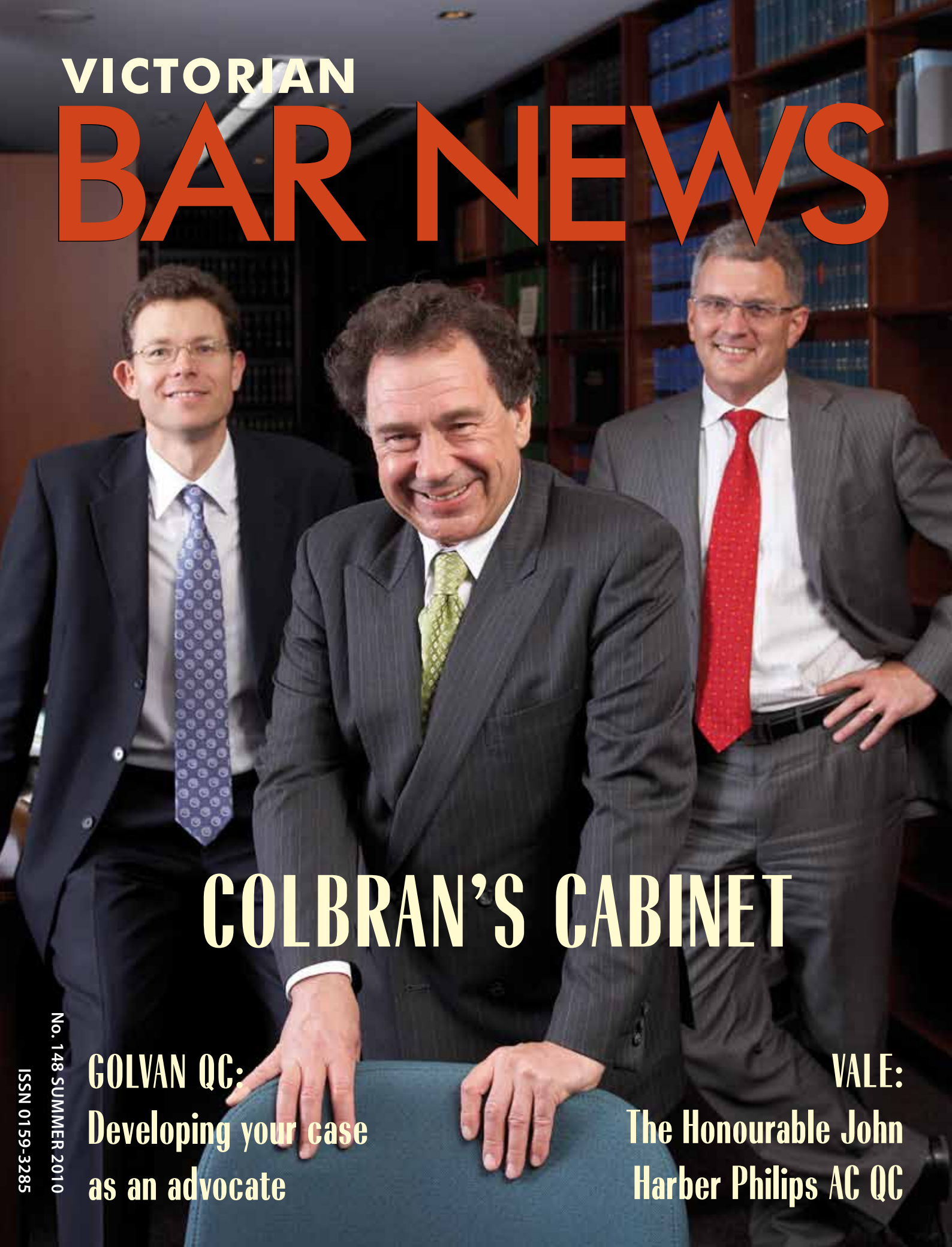
VICTORIAN BAR NEWS



COLBRAN'S CABINET

GOLVAN QC:
Developing your case as an advocate

VALE:
The Honourable John Harber Philips AC QC

No. 148 SUMMER 2010
ISSN 0159-3285

VICTORIAN BAR NEWS

EDITORS
Georgina Schoff, Paul J Hayes

CONTRIBUTORS
The Honourable Alistair Nicholson AO RFD QC, his Honour Judge Tony Howard, Julian Burnside AO QC, George Golvan QC, Ron Meldrum QC, Jeremy Ruskin QC, Jane Dixon SC, Ian Freckelton SC, Mark Robins, Kevin Lyons, Jan Maclean, Michael Gronow, David Gibson, Susan Borg, Samantha Marks, Tom Pikusa, Renee Enbom.

DESIGN/PRODUCTION
Ron Hampton
David Johns (Photography)

CARTOONS
Patrick Cook

ADVERTISING
Miriam Sved
The Victorian Bar Inc.
205 William Street, Melbourne 3000
Telephone: (03) 9225 7943
Fax: (03) 9225 6068

Published by The Victorian Bar Inc.
Owen Dixon Chambers
205 William Street,
Melbourne 3000.

Registration No. A 0034304 S

This publication may be cited as (2009) 147 Vic B.N.

Opinons expressed are not necessarily those of the Bar Council or the Bar or of any person other than the author.

Printed by Impact Printing

69–79 Fallon Street, Brunswick
Vic. 3056

Contributions to VBN Boilerplate should be in Word format and strictly limited to 400 words.

Contributors photographs will be accepted in high resolution JPEG or PDF format.

VICTORIAN
BAR NEWS
ISSN 0159-3285 No. 148 Summer 2010

EDITORIAL

4 The value of independence

CHAIRMAN'S BRIEF

5 The year ahead

NEWS AND VIEWS

6 Ten essential tools and techniques for preparing and developing your case as an advocate
10 The acquisition of ODCW
10 Inaugural Commercial Court conference
11 Still firing: the erratic diary of Portia Woods – barrister
13 Victorian Bar Council 2010
14 New silks 2010
15 New silks: What they said
17 Readers' Course 2010

AROUND TOWN

18 The Honourable Mr John Harber Philips AC QC State Funeral
19 Victorian Bar Council farewell dinner
20 Lord Neuberger visits the Victorian Bar

VBN BOILERPLATE

21 Quarterly counsel
22 Going up
22 Silence, all stand!
24 Adjourned sine die
28 Decree absolute
31 Ethics Committee Bulletin
31 Celebrating female judiciary in Victoria, WBA
32 Soccer: Real Vicbar United Athletico Wanderers FC
32 Masai Barefoot Technology competition
33 Verbatim
35 Habitat
36 A bit about words
38 Dear Themis
38 Wine report

LAWYER'S BOOKSHELF

40 *Bars and Benches*
41 *Maverick Litigants*

Cover: Michael Colbran QC, Cameron Macaulay SC and Mark Moshinsky SC

EDITORIAL

The value of independence

One of the most important attributes of being a member of the judiciary, or for that matter the Bar, is independence. It is one of the hallmarks of the Australian legal system.

This point was powerfully made by Chief Justice Warren AC in a speech delivered to the Judicial Conference of Australia ('JCA') colloquium in Melbourne on 9 October 2009, in response to media reports of a speech made by the Attorney-General for the State of Victoria, Rob Hulls MP, opening the colloquium, but released in advance to the media the previous day.

Addressing the Attorney-General's remarks equating judges to 'especially well-remunerated public servants', the Chief Justice referred to one of the pillars of the Westminster system of government which operates in the state of Victoria, in which they both serve. 'The judiciary is a separate arm of government and not part of the executive of which public servants are. It is a fundamental constitutional principle upon which our democracy is built', the Chief Justice stated.

In ensuring that the state of Victoria continues to thrive as a functioning and robust democracy, it is vital that the Attorney-General fully appreciates this distinction.

The judiciary in Victoria has long been alert to the issue of judicial independence. One need not look any further than the remarks of the Honourable Justice Smith (who features in this edition of *Victorian Bar News* in VBN Boilerplate) who in 2006 warned that the tendency of executive control of the administration of the courts in Victoria has the effect of undermining the independence of our courts. Public confidence in the court system is critical to acceptance of the rule of law. That confidence depends upon the reality and appearance of the independence of the courts.

Independence by its very nature is difficult to quantify. It is often not fully appreciated or understood until it is gone. Regrettably, however, it seems that the importance of judicial independence and the inherent nature of its characteristics are sometimes lost on the spreadsheet-driven executive arm of government.

In Australia, we are fortunate enough to reap the benefits and freedoms which ever so lightly, but critically, permeate our society as a consequence of a vigilant, dutiful, capable and independent judiciary, in all jurisdictions. One does not need to look too far beyond our shores to observe citizens of other states who are not as fortunate. Trite as it is, it is because of our honourable and long-standing tradition of judicial independence (which includes security of tenure for our judges) that we in Australia are not subjected to entrenched judicial corruption and political show trials and that as citizens, if we so choose, we are able to take legal action against our government, confident that such a cause will receive a fair hearing.

The Australian legal system is widely considered to be one of the best in the world. The public's confidence in our judiciary would not exist to the extent that it does, were it not for the independence of Australian courts and judges. A sound and independent legal system and the stable society it promotes figures among the reasons why people choose to live and invest in Australia. The imperatives of 'sustainable population growth' and 'foreign investment' both feature prominently amid the current political challenges which Australia must address if it is to prosper in the years ahead. In meeting these challenges though, our politicians should not overlook the understated but critical role that 'judicial independence' plays in the pursuit of these objectives.

Additionally, the proper functioning of our courts is heavily dependent upon the honesty, candour and capability of counsel and our independence. As barristers we play a crucial role in the administration of justice. Not only do we carry a duty to our client, but significantly, we also carry an overriding duty to the court, the discharge of which as officers of the court requires us, too, to be independent. Ironically, the topic of the Chief Justice's paper delivered at the JCA colloquium, which followed her response to the Attorney-General, was entitled 'The Duty Owed to the Court'.

Independence cannot be controlled or directed. The independence of our legal system in Victoria, and particularly our judiciary, should be zealously guarded and embraced by everyone in our community and especially by those serving within the executive arm of government.

While on the topic of independence, the acquisition of Owen Dixon Chambers West, finalised in December 2009, is a timely, important and impressive development for the Victorian Bar, thereby assuring the future of an independent Bar in this State. The 2008–2009 Victorian Bar Council under John Digby QC's leadership and Barristers Chambers Limited chaired by Mark Derham QC, are to be congratulated for their foresight and resolve in driving this project to its successful outcome.

Finally, we welcome the new Chairman of the Victorian Bar Council, Michael Colbran QC, who publishes his first 'Chairman's Brief' in this edition of *Victorian Bar News*. In leading the Bar over the coming year, Colbran will be ably assisted by Mark Moshinsky SC and Cameron Macaulay SC, as senior and junior Vice-Chairmen respectively, who comprise what we have named on our cover of this edition, 'Colbran's Cabinet'! As can be seen, the continued prosperity and independence of the Victorian Bar remains in good hands.

THE EDITORS

The views expressed in the Editorials of the *Victorian Bar News* are those of the Editors and do not necessarily reflect the views of the Victorian Bar Council and the members of the Victorian Bar.

CHAIRMAN'S BRIEF

The year ahead

Welcome back and Happy New Year! I hope you enjoyed a happy festive season and a refreshing break – however long it was.

The year ahead promises several developments (and possibly some controversy) which hopefully will keep you interested in the Bar Council's efforts on your collective behalf.

The team of officers elected by the Council comprises Mark Moshinsky SC and Cameron Macaulay SC as Senior and Junior Vice-chairman respectively, Will Alstergren and Sara Hinchey as Treasurer and Assistant Treasurer, and Stewart Maiden and Sam Hopper as Secretary and Assistant Secretary.

Areas in which we expect to see significant discussion and development include:

Readers Course

- A review working group chaired by Peter Riordan SC will be delivering its report and recommendations in the next month or so. Reform proposals will be published by the Bar Council for general comment.

Budgeting and financial planning and reporting

- The Treasurer, with a newly established Finance and Audit Committee, will be working with the General Manager to develop a revised approach to budgeting and reporting for management purposes having clearly in mind the consolidation of the Bar and BCL' s accounting obligations and the synergistic opportunities for savings to be achieved.

Equality and diversity

- It has been ten years since the Victorian Bar's ground-breaking study of gender based inequality. It is timely to review progress against the issues identified by the report. Work is also under way on the development of a general diversity and equality policy for the Bar extending beyond gender-based issues.

Communications

- A great deal of work was done last year by the communications committee chaired by Sara Hinchey. This is an area which will continue to be at the forefront of our attention in 2010.
- A marketing officer has been engaged, our new website will be launched very soon and our media relations consultant has already proved invaluable in assisting the Bar in its relationship with print and electronic media.
- As well as better representing what the Bar as an institution does and can offer to the community, the launch of our updated website in February should provide a much more effective means for promoting individual service offerings and linking with the Bar's primary users. It will also improve communication from the Bar Council.

Marketing and Bar Associations

- The job description for the important new position of Marketing Officer can be seen on the website and gives some indication of the areas in which it is hoped this appointment will be of real value to the Bar as a whole and to each of us individually.
- The review undertaken a couple of years ago, together with the work of the Strategic Planning Committee chaired by Mark Moshinsky SC, identified the importance of the Associations to the promotion of the work of members of the Bar. The Bar Council is keen to support the Bar Associations over the coming years and the appointment of the Marketing Officer is a part of this resolve.

Legal aid

- Funding for legal aid is in a parlous state. The Victorian Bar (through the great contribution of David Neal SC) recently initiated and managed a comprehensive analytical review of funding arrangements for legal aid. This initiative led to a combined approach to government by a coalition of the Law Council of Australia, the Australian Bar Association and the LIV. The issue will remain a principal focus of the Bar Council this coming year.

Accommodation at the Bar

- The purchase in December of Owen Dixon Chambers West ensures the continued strength and growth of BCL into the future with greater protection from the often very challenging effects of unpredictable and unwelcome increases in rent payable to external landlords.
- The Council and BCL recognize the need for expansion of the number of chambers available to meet the needs of current and future members of the Bar and are constantly on the look out for suitable opportunities to take more space on a leasehold basis where necessary.
- The technology review now under way will set a path for the Bar's provision of telephony and data services and ensure that the Bar is keeping pace with developments. An essential part of the implementation will be making these services available to all those members of the Bar in independent chambers who wish to avail themselves of the opportunity.

Bar Committees

In the last weeks of 2009, Mark Cameron and I spent considerable time revising and populating the committees of the Bar. It was very impressive to see that almost a third of the Bar expressed interest in one way or another in serving on committees. This generous offer of time and energy in the service of the general good is invaluable to the work of the Bar in its efforts to serve its members and the community as the representatives of a responsible serving profession.

In concluding I would like to thank the many members whose work last year was of such great assistance to the Council. The remarks I made at the traditional dinner held to thank outgoing members of the Bar Council and some of the others who had assisted the Council and the Bar in other important ways can be found on the website.

Again, welcome back to what I hope will be a busy and productive year for you all.

10 essential tools and techniques for preparing and developing your case as an advocate

George Golvan QC

I think that I am uniquely qualified to write on the subject of advocacy skills. Shortly after I came to the Victorian Bar in 1972 I had the opportunity to study law in the United States and enrolled in a subject called 'Techniques of Advocacy'. This was well before George and Felicity Hampel realised that advocacy was a practice in search of a theory, and no law school in Australia taught advocacy skills. In any event, I managed to pass the course and armed with my newly acquired and unique knowledge I returned to the Victorian Bar anxious to try out what I had been taught. One of my first cases was a County Court civil jury trial as counsel for the plaintiff in a personal injury matter, which was a perfect opportunity use my new skills of persuasion. The presiding judge happened to be a fairly conservative judge of the 'old-school'.

One of the American advocacy theories which I had been taught was that you should always try to personalise your client and de-personalise the other party. One suggested means of doing this was to refer to your client by his or her first name and to the other party impersonally as, for instance, the defendant. It seemed like a good idea at the time. So I commenced my opening address before the jury explaining how my client 'Sheila' had suffered due to the personal injuries she had sustained, all as a result of the negligent conduct of 'the defendant', and that it was only fair that Sheila should be fairly compensated for what 'the defendant' had done. I could see the Judge grimacing in my direction, which did not suggest total approval of what I was saying. Eventually, he stopped my opening address, requested the Jury to leave and stated in a rather emphatic tone: 'Mr Golvan I don't care what you call your client, it can be "my client," "the plaintiff" or "Mrs Brown" but I will not have her called "Sheila" in my Court'.

RULE NO. 1: Not all good theory makes for good practice, so don't forget about the personality of your tribunal.

Advocacy is the technique of persuasion. To quote Professor George Hampel, 'Persuasion involves affecting the decision-maker's intellectual and emotional responses towards the desired end'.[1] Which is hopefully in support of your client's case!

RULE NO. 2: Your aim as an advocate is to persuade the tribunal by the use of effective intellectual and communication skills both written and oral.

Good advocacy is 90% preparation and 10% inspiration. Whenever I have worked with great advocates such as Cliff Pannam QC, I never cease to be surprised by the extent of preparation that they undertake outside court. According to Pannam, the key to success is meticulous preparation of the law and a comprehensive understanding of the facts. If that is the approach adopted by a naturally brilliant advocate then it has even more application to the rest of us. On one occasion I was Junior to the late and great Neil McPhee QC, regarded as one of the most naturally gifted and brilliant advocates at the Victorian Bar. The extent of preparation he undertook before the trial was quite striking. He would actually conduct mock cross-examinations with important witnesses before a trial. On one occasion he had me conduct a mock cross-examination of an important witness. In the second or third question I enquired how long he had been working in his current position. I knew we were in trouble when after a lengthy pause he answered, 'That's a curly one!' He did turn out to be a terrible witness, but we won the case anyway on the basis that he was such a bad witness he must have been telling the truth!

RULE NO. 3: Preparation is of critical importance, no matter how eloquent or brilliant you are.

The aim of preparation is the development of a case theory on which to found your case. The ability to select and focus upon the points that have a real chance of success is the hallmark of a good advocate.

A case theory can be described simply as the essential thesis or theme on which your case will be focused. It is a positive explanation of the relevant circumstances and the applicable law which explains why your client should succeed in its case. Your case theory should form the basis of your closing submissions and should have as many of the following features as is possible in the circumstances:[2]

- It must be consistent with your instructions and the evidence.

- It must be comprehensive, in the sense that it establishes the cause of action or defence that you are pursuing.
- It must be simple and focused, in the sense that it focuses on the key contentions that have a real prospect of success. There are some barristers who take the approach that every point should be argued with equal intensity. By the time they have annoyed the Judge with their bad points, the Judge is not paying attention to their good points. It has been suggested that an important military maxim can be called in aid: 'concentrate all available forces at the decisive point.'[3]
- It must be credible and realistic and not fanciful, in that, to use the words of Hampel's – *Advocacy Manual* it 'makes sense in the light of accepted human knowledge and experience.[4]
- It must be balanced, in that it addresses both the strengths and weaknesses of your case.
- It should be empathetic. It should hopefully seek to persuade the court that your client has justice on his side, and if not justice then at least the law.
- It is generally expressed in positive propositional form. Its structure is usually chronological, but it is not simply a narrative of the events.

For example, say that you were briefed in an adverse possession case. The law on what constitutes adverse possession is fairly clear cut, namely, whether for a continuous period of 15 years the claimant has exercised exclusive occupation and control of the disputed land, with the intention to exclude others, including the registered proprietor. It may become apparent in the preparation of the case that no unequivocal single act or acts can be relied upon, such as the construction of a fence around previously unfenced land. Instead, the focus of the case will need to be on a number of acts over the years which collectively amount to evidence of requisite intention. So the case theory will build on the central proposition that continuously over a period of at least 15 years by a series of activities, perhaps equivocal on their own, but unequivocal when viewed together, the claimant in-corporated the disputed land into his or her own land to the extent that there was a demonstrated intention to possess the land to the exclusion of the proper owner. Or to use a colloquialism, the land became effectively 'part of the backyard' of the claimant.

It may be that the initial case theory will need to rebut a defence case that the acts relied upon were merely casual acts of trespass insufficient to establish either factual possession or an intention to exclusively possess. So the development of the case theory will need to include the further proposition that had there been a single owner of the claimant's property and the disputed property, in all the relevant circumstances, the single owner would have made the same use of the land as the claimant, to justify the conclusion that the conduct of the claimant is therefore sufficient to establish an adverse possession claim.

RULE NO. 4: Preparation of your case invariably involves working towards the development of a persuasive and coherent case theory.

Hampel's 'Advocacy Manual'[5] suggests, and I agree, that to develop a case theory you must:

- Thoroughly evaluate the available factual material in your case. This requires, I suggest, conferring with witnesses, examining relevant documents and if appropriate conducting a site view;
- Thoroughly evaluate the available and anticipated material from your opponent's case. This requires reviewing pleadings and discovered documents;
- Thoroughly assess the factual and legal foundations for each side's case. What are the possible case theories and defence theories?
- Consider the likely evidentiary issues that will need to be established.
- Assess the strengths and weaknesses of each side's case.

Having done that you need to ask: What is my plan of action? What is going to be my objective in this case?

RULE NO. 5: The case theory is a developing process which gets continually refined as the factual and legal issues become clearer and new evidence and issues emerge. But it is essential that before you go into court your case theory is clear and well developed.

Professor Hampel suggests that the best case theory is one that provides the easiest and most consistent path through the various factual and legal issues, and is one which conflicts with the probable opposing case theory as little as possible.

That means that your objective is generally not to destroy the entire fabric of the opposing case, although some clients may demand that, but to justify your case theory within the framework of the opposing case. You need to ask yourself: What part or parts of the case do I need to challenge?

RULE NO. 6: The best case theory is one that is most realistic, easiest to justify and fits in as much as possible with the opposing case.

Having reviewed the case and the relevant law and worked out what you need to prove, you will need to identify the potential witnesses to be called and the evidence to be tendered. This is an exercise that should be done at the outset, not halfway through the case, or just before the trial.

RULE NO. 7: You need to start mapping out from an early stage not just the possible case theory but also the possible witnesses and evidence that will need to be called or tendered to justify it.

Again this can be described as a 'work in progress' which takes into account the changing nature of the case, the availability and suitability of witnesses and the admissibility of the evidence.

It is important that full instructions and proofs of evidence in writing are taken at an early stage well before the hearing. Remarkably, it is not unusual for even very complicated cases to be prepared on the basis of the most general instructions, without witnesses being formally proofed until a late stage in the proceeding; sometimes just before the hearing. If an early witness statement is prepared and new documents or issues emerge, witnesses can be seen again and witness statements can be expanded or amended as required, but the obtaining of proofs of evidence at the earliest possible time is invaluable.

As Senior Counsel, I like to proof key witnesses and settle draft witness statements myself. I prefer to form an early impres-

sion of the character and likely demeanor of key witnesses if they are likely to give evidence and to identify for myself what relevant information they are able to provide. I think that that it is a task requiring considerable skill and expertise. For example, I have sometimes formed the opinion after interviewing a witness that a witness who may be in a position to give evidence on a relevant matter would otherwise be dangerous to call because the witness has very poor recollection of the events, or is unpredictable. A judgment call will need to be made whether to cull the potential witnesses from the list of witnesses and how best to substitute the evidence that the witness might have given.

It is also important that the instructions that are obtained are relevant to the development of the case theory and cause of action or defence that will need to be established and are comprehensive. So it is vital to familiarize yourself with the law and have an appreciation of what aspects of the case you will be seeking to establish or corroborate through each witness. It is not a bad idea, as an aid before proofing a witness, to prepare a roadmap of headings as a guide to the various issues that you propose to develop with a witness and also a roadmap of the various components of the cause of action or defence that you propose to prove through the available witnesses, to ensure that they are adequately covered.

A witness needs to come to the conference equipped with the potential documents relevant to the witness's evidence, i.e. correspondence and relevant business records. These will often need to be organized by the solicitor and/or the witness before the conference. I like documents to be organised chronologically in a ring binder. If a witness refers to a document in conference that has not been provided, make sure that you get it.

I also ask witnesses before the conference to prepare and bring a chronology of relevant events as an aid to recollection, particularly in more complex matters.

I think that it is important that witnesses are interviewed separately rather than in the presence of other witnesses, to overcome any inference that their evidence may have been influenced in some way by what they heard another witness say.

It is not appropriate to coach a witness or suggest answers that a witness should give. But of course there is nothing wrong with seeking to clarify the memory of a witness concerning his or her recollection of the events or probing a witness to expand or explain his or her evidence on a particular issue. Nor is it wrong to probe and question assertions that seem unclear, improbable or unlikely having regard to other evidence in the case. In the end the witness statement has to be accurate, relevant and credible.

RULE NO. 8: It is highly desirable to take relevant and comprehensive witness statements from clients and key witnesses at the earliest opportunity.

It is critical that written witness statements, which are now invariably used in civil courts in lieu of examination in chief, are persuasive and interesting. That means they should be well written and easily read, comprehensive but concise, engaging and logically constructed in chronological order, with the use of subheadings to provide a ready guide to what the witness statement seeks to cover. In longer Witness Statements you can even prepare an index of the various issues covered by the witness statement.

I like to include something of the background, experience and qualifications of the witness. I think that it is a good idea to personalise a witness by including some key details of a witness's background, experience and qualifications in the body of the witness statement, even though a witness may have an extensive CV which can be attached as an exhibit. A court perusing a formal CV may tend to overlook important qualifications and experience which can be emphasized in the body of the witness statement.

Do not dictate or write the witness statement as the witness is giving instructions but rather take notes which can later be converted into a witness statement after giving consideration as to what issues the witness statement should deal with, the appropriate order and what admissible evidence the witness is able to give.

What you should endeavor to do is prepare the witness statement, or proof of evidence, in the language of the witness using as far as possible the words and explanations of the witness. After all, a witness statement is intended to be the witness statement of the witness, not the lawyer preparing the witness statement. It is not unusual in a witness statement to see terminology, which is obviously not the language of the witness but can only be the language of the legal adviser. That impacts on the credibility of the whole witness statement.

On occasions in more complex technical cases request a witness to prepare a drawing or diagram or provide photographs to more readily illustrate some point of explanation. If appropriate, the diagram or photographs can be included in the witness statement. Drawings, diagrams and photographs can be very helpful to assist a court to understand technical aspects of the evidence or even to provide some emotional context.

If I think that a particular document is of relevance to the case and can be admitted through a witness, I transfer the document into a folder of relevant exhibits relating to that witness in the order in which the document is referred to in the witness statement and identify the document as an exhibit to the witness statement. So that what is ultimately prepared is a witness statement together with all the documents that are proposed to be tendered through the witness, referred to as attachments, in the order in which the documents are referred to in the witness statement.

When referring to documents or letters it is often desirable to include an explanation as to why certain letters were written or documents prepared, whether particular documents or letters

(and these days more often emails) were received by a witness and what the response was to letters or documents that were received. It may be necessary to make reference to and explain other documents and correspondence referred to in letters.

Obviously it is important to form a judgment when interviewing a witness concerning whether relevant evidence and relevant documents can be given or tendered in admissible form through that witness or whether some other witness will need to be called for the purpose of giving the evidence or of tendering a relevant document. For example, a letter is best tendered through a witness who wrote or received the letter and can confirm its accuracy, or challenge the accuracy of its contents.

After I settle the witness statement I provide a copy of the witness statement to the witness for consideration and review. I also see the witness again in conference for essentially three purposes: first, to go over the witness statement again and confirm its accuracy and credibility; second, to fill in any gaps that may become apparent as a result of other evidence or allegations in a pleading by the opposing party; and third, to give the witness the opportunity to reconcile, if possible, the version of the witness with the version of events of other witnesses or disclosed in documents, if they are inconsistent and can be reconciled.

It is important that witness statements that are provided to a Court or Tribunal are in admissible form and focus on admissible and relevant facts. Too often these days witness statements also contain a range of assertions, conjecture and opinion which the witness is neither permitted or qualified to give and will only result in an application to strike out the offending parts.

RULE NO. 9: Witness statements need to be relevant, admissible and engaging.

I recently came across in an interesting book called *The Technique of Persuasion* by Sir David Napley,[6] an experienced English advocate, which I found in the lending section of the Supreme Court Library (and noted that it had last been borrowed in 2005). The author concludes that the essential function of an advocate is to present to the court what his or her client *should* say if he or she possessed the requisite skill and knowledge.[7] The objective of preparation is to make that possible and is the overwhelmingly important part of advocacy. I conclude by quoting Sir David Napley who, I consider, summarises the essential theme or concept of this article:[8]

> The real basis for presentation of a case – and the gravamen of the technique of persuasion – is not so much the way in which the case is presented at the hearing in terms of style and experience. The decisive factor lies in the initial preparation; the material which is so disclosed; the incontrovertible facts which are marshaled; and the care and patience which go into ensuring that no stone is left unturned. These are by far the most significant factors in the proper presentation of the case for any client.

Your task as an advocate in preparation of the case is from the outset to ascertain the greatest possible amount of information about your own and your opponent's case for the purpose of developing a winning case theory. And in everything you do as an advocate, if there is such a thing as a universal rule of advocacy, you should be guided by the advice of the King to the white rabbit:[9]

RULE NO. 10: Follow the advice of the King to the white rabbit in Lewis Carroll's Alice's Adventures in Wonderland:

> **'Where shall I begin please your Majesty?' asked the White Rabbit. 'Begin at the beginning', the King said gravely, 'and go on till you come to the end: then stop.'**

NOTES

1 Hampel: *Advocacy Manual* (with Brimer & Kune) 2008-*Australian Advocacy Institute*.
2 Hampel: *Advocacy Manual* supra, at p. 24.
3 Napley: *The Technique of Persuasion* 3rd ed 1983 Sweet & Maxwell, p. 86.
4 Hampel: *Advocacy Manual* supra, p. 24.
5 Hampel: *Advocacy Manual* supra, pp. 24–25.
6 Napley: supra.
7 Napley: supra, p.187
8 Napley: supra, pp.15–16.
9 Richard Du Cann: *The Art of the Advocate* 1965 MacGibbon & Kee Ltd, p. 9.

THE ACQUISITION OF ODCW

Great news for the Victorian Bar, now and for the future

After about 23 years, the Victorian Bar, though its accommodation company Barristers Chambers Limited, has acquired Owen Dixon Chambers West (525 Lonsdale Street, Melbourne) for $54M, plus GST. As all barristers will appreciate, ODCW is the Victorian Bar's key accommodation asset, housing approximately 460 barristers and seven barristers' clerks since 1986.

BCL purchased 525 Lonsdale Street in 1979 for $1.85M, with a view to owning ODCW. As part of an arrangement which enabled the desired special purpose barristers accommodation to be built on that site, in 1986 BCL signed a 40-year sublease, with an option to purchase ODCW 2026.

Unfortunately, by about 1995, market conditions created unexpected pressures and forced BCL and the Bar to forfeit the opportunity to complete its planned acquisition.

BCL then became a tenant of ODCW for the next 14 years.

However, in about December 2008 the Bar Council established an Executive Property Group which included the Chairman John Digby QC; Michael Colbran QC; Paul Anastassiou SC; Daryl Collins (former BCL Director and CEO); Stephen Hare, the Bar's General Manager; Will Alstergren and Scott Stuckey, BCL Directors; Mark Derham QC, the Chairman of BCL; and Ed Gill, BCL's Managing Director (after his appointment in early 2009). The Executive Property Group undertook the tasks of evaluating property acquisition opportunities for the accommodation of barristers of the Victorian Bar and advising the Bar Council as to how any such acquisition might be achieved.

Between about the end of 2008 and early 2009 the Executive Property Group developed criteria for the consideration of potential buildings of interest and developed and sophisticated its views as to how the BCL and the Bar might be able to fund and acquire a new building to accommodate barristers, if a suitable property became available.

Bar News understands that the possible acquisition of ODCW emerged in about late July 2009 and that after much further careful consideration by the Bar Council and BCL, in particular on the part of BCL by Mark Derham QC and Ed Gill, in about September 2009, the Bar Council, under John Digby QC's chairmanship, took the decision to attempt to acquire ODCW. Negotiations then ensued and the *Bar News* understands that the ultimately successful Bar offer of $54M was made in about late September 2009 and the contract of sale was signed in the first week of December 2009.

Recognition and congratulations must go to all members of the 2008/2009 Bar Council under the Chairmanship of John Digby QC, the Executive Property Group members and also to Mark Derham QC, Chairman of BCL and Edwin Gill, Managing Director of BCL, and the BCL Board for making the these momentous commercial decisions and pursuing and securing the goal of the acquisition of Owen Dixon Chambers West, the long envisaged jewel in the Victorian Bar's accommodation portfolio.

INAUGURAL COMMERCIAL COURT CONFERENCE

Current Issues in Commercial Law

On Thursday 12 November 2009, over 200 legal practitioners gathered at the Supreme Court for the inaugural Commercial Court conference: Current Issues in Commercial Law.

At 2pm people started to stream into the Banco Court. Judges, silks, juniors, partners of litigation and commercial departments of major and smaller firms, government and corporate lawyers, and academics: there were representatives of a wide cross-section of those practising in or interested in commercial law.

The Honourable Chief Justice Marilyn Warren opened the proceedings. She welcomed everyone devoted to commercial litigation, referring to research which reveals that over $700m per annum is contributed to the Victorian economy by litigation, especially commercial litigation, and to the fact that Melbourne is a centre for commercial excellence.

Next up was Professor Ian Ramsay, the Harold Ford Professor of Commercial Law in the Melbourne Law School at the University of Melbourne. He gave an engaging speech about the differences between the traditional remedy of the minority shareholder (*Foss v Harbottle*) and the new Statutory Derivative Action regime set up in 2000 by the Corporations Act.

Jon Webster, a partner of Allen Arthur Robinson then gave a topical discussion of some issues in Insolvent Managed Investment Schemes that have arisen in the recent *Timbercorp* and *Great Southern* cases.

Later, Allan Myers QC spoke on company directors' and officers' conflicts, noting his view that the recent rise in numbers of non-executive directors in Australia may not be positive for companies.

The Honourable Justice Pagone then talked about the role of the new commercial court, and how the rapid growth of technology in recent years has altered the conduct of litigation. He said that the community 'needs commercial disputes to be resolved quickly, predictably, consistently and economically', and said that our system of dispute resolution 'must be moulded to business needs and exigencies.'

Mark Moschinsky SC spoke on future possibilities for the court.

SLM

Still firing

The erratic diary of **Portia Woods** – barrister

24 August 2009
Weight 80.4 – needs work; RACV gym visits: 1; Illia free coffees 7 (oh dear!)

I was destined for a life in the law. My father, an avid watcher of *Rumpole*, named me after the Portia character in the series. I think he was in love with her. He was very proud of me when I signed the Bar Roll. I remember that he told me: 'Portia, I'm very proud of you – just don't stuff it up'.

Today, I watched *Legally Blonde* which I thought was a very poignant movie. I really liked the main character. How freaky is it that she shares my last name? Was this a sign? Two great fictional careers intertwined with my own. I go to bed feeling confident about my future at the Bar.

30 August 2009
Weight 79.9kg (hoorah!); RACV gym visits 3 (better); Illia free coffees 7 (oh dear!)

I spent the weekend setting up a Facebook account. Some of my friends are on it. I hope that I get lots of friends from the Bar. Apparently it's a great way to stay in touch when I'm at Frankston. I wonder if I can do Facebook status updates from my mobile phone while I'm away?

7 September 2009
Weight 80.5kg (ok); RACV gym visits: nil (v bad); Facebook friends: 0

It is 7.45am. I sit up in bed. I am sweating bullets. I've slept in and I have to be at the Royal Commission by 9.30. It is a shocking time to start. And it is such a long walk up to 222 Exhibition St from chambers. Especially in high heels. My hair is usually in a mess when I arrive. More often than not I've caught my heel or twisted an ankle getting past the bins of rank chicken heads left outside one of the many restaurants in Little Bourke Street.

I arrive just before 9.30am. Damn. Someone's taken my spot. It's some solicitor watching for a government department, no doubt. I confront them and say that their spot is in the third row of the Bar table. They move just before the commissioners arrive.

Today, the commission announced that it is going to take evidence in regional Victoria. A frantic series of emails with Alan, my instructor, eventually confirms that I am to go to Horsham. I am very excited to be going on circuit.

I spend the rest of the day looking at places to stay. V depressed at the calibre of the motor inns on offer. And there are no good food guide restaurants either. I look into staying at the Royal Mail in Dunkeld. Too far away, I'm told. And too expensive. Apparently Myers QC owns the Royal Mail, together with pretty much the rest of Dunkeld. Hmm, this may not be the best thing after all. How can I impress Alan when we have to go to the pub for dinner?

13 September 2009
Weight 79.9kg (hoorah!); RACV gym visits 3 (better); Facebook friends: still 0!

I am packing my 1984 blue Corolla for my drive to Horsham. I am having a lot of trouble getting the four boxes of hearing books into the back seat. I have to practically remove the back seat to get them in. How is a woman supposed to take some clothes to wear? I get a call from Alan. He's left two hours ago and is asking about dinner. I had better get a move on. I throw some clothes together on the bed, bundle them up in my overnight bag, grab some toiletries and I'm off.

When I arrive and check into the Koala Motor Inn, I almost cry when I realise that I have bought mis-matching suits and stockings and the wrong shoes. I make the best of a bad lot, do my hair and head off to see Alan at Moe's Mexican Bar and Grill. This continues to be a very stressful brief.

The chicken chimachunga at Moe's is the specialty of the house and is rated three chillies on the spiciness factor. I snap the menu shut and feeling like Carmen, with a flourish of the hand, I order the chicken chimachunga with Spanish flair. I think Alan is impressed. Either that or he is much more relaxed, or docile, after five margheritas. The chicken chimachunga arrives and hola! It is huge! The plate it arrives on is big enough to also double as a roof to a bus shelter.

I eventually arrive home falling into the exposed brick wall next to my bed at the Koala Motor Inn. Yes, perhaps one margherita too many. It's all Alan's fault. Suddenly I feel the need to go to the loo. One of many painful visits throughout the night…

16 September 2009
Weight 81.2kg (horrid – result of too many tacos at Moe's); RACV gym visits nil (no gym to visit); Illia coffees nil: still no Facebook friends.

Trivia night at the Horsham Sports and Community Club. Alan and I decide to go. There are six other groups there. We lose by a country mile. The captain of the team who wins is wearing a stripey skull T-shirt. I must be missing something. Plainly the winning table have bugger all to do with their miserable local-yokel lives but watch Discovery Channel 24/7.

Last day of the Horsham Commission hearings tomorrow. Can't wait to get back to Melbourne.

17 October 2009

Weight 82 kg (catastrophic due to McDonalds for last few days); RACV gym visits: nil; Illia coffees nil (beyond hope); Rejected one Facebook friend.

I'm depressed because my role in the Royal Commission has dried up. I find myself in the Magistrates' Court at Dandenong appearing for the respondent (an unusual man) on an intervention order. Connex are running true to form and the train ride out is delayed 20 minutes and I run to the Court. I get there only to find I am number 47 in the list. My client wants to contest the orders. We wait for hours. At 12.45, the Magistrate has two more to go before my case. I pop out to the loo. When I get back, the Magistrate is waiting for me. As I walked in, he initially thought I was the defendant in the matter which was due to commence after mine. I must do something about improving my wardrobe. After so long at the Royal Commission I'm starting to look like a public servant. I commence my submission to the bored and disengaged Magistrate while unpacking my briefcase. He allows me to complete my submission and then finds in favour of the unrepresented applicant, without calling on her to address him. It wouldn't have been too bad, but the costs order against my client really tipped me over the edge. I think I may now need to seek an intervention order against said client. He was not happy. Warren was last seen leaving the court loudly saying something about the registration number of my 1984 Toyota Corolla and how I should 'be careful about the brakes' and even more careful when walking back to 'The Mint' carpark at night. Good thing Warren paid my fee up front and my clerk has my brief fee, $330 including GST, safely tucked away in his trust account. On the train back to town I put my head between my knees and say over and over what a bad barrister I am and think about calling Phillip Dunne QC to see if I can persuade him to go out to Dandenong tomorrow, and represent me seeking an intervention order against said former client. I was Phillip's junior once, but haven't heard from him for sometime. I wonder if he'll still remember me.

It has been a difficult few months. Must confess to feeling more like Elle than Portia.

VICTORIAN BAR COUNCIL 2010

BACK ROW: Sam Hay, Justin Hannebery, Stewart Maiden, Matthew Walsh, Will Alstergren, Richard Stanley, Paul Connor, Anthony Strahan, Sara Hinchey, Kim Knights
MIDDLE ROW: Jack Fajgenbaum QC, Brendan Murphy QC, Kate Anderson, Richard McGarvie SC, Kim Southey, Simon Pitt
FRONT ROW: Melanie Sloss SC, Mark Moshinsky SC, Michael Colbran QC, Cameron Macaulay SC, Fiona McLeod SC

New silks 2010

BACK ROW
Andrew John Keogh, Simon Harry Steward, Peter James Morrissey, Philip David Crutchfield
MIDDLE ROW
Andrew James Tinney, Nicholas Papas, Michael Damian Wyles, Michael Damien Wilson, Francis James Tiernan
FRONT ROW
Rachel Marie Doyle, Kirsty Marion Macmillan, David Leslie Brustman, Mary Anne Hartley

what they said

ANDREW JOHN KEOGH

Date signed Bar Roll
19 November 1998.
Who did you read with?
Timothy P. Tobin SC.
Who were your readers?
John Valiotis.
Areas of practice
Common law.
Reason for applying for silk
To progress, run more juries and do more appeal work.
Career highlight to date
Being appointed silk.
Where do you buy your coffee?
Chintaroma.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Yes.
Is there something our readers might be surprised to know about you?
Despite years of shattered dreams, I still follow the (once) mighty Tigers [Richmond Football Club].

PETER JAMES MORRISSEY

Date signed Bar Roll
29 November 1994.
Who did you read with?
Tony Cavanough.
Who were your readers?
Con Mylonas, Clive Patrickson, Terrence Guthridge, Nadia Kaddeche, Fotini Panagiotidis, Peta Murphy, Christine Mellas.
Areas of practice
Crime, human rights law, public international law.
Reason for applying for silk
Desire to assume more responsibility within our justice system.
Career highlight to date
First, being granted the right of audience in Australian courts; secondly, being trusted with briefs in significant cases here and abroad; finally, sharing the career journey with my co-practitioners.
Where do you buy your coffee?
Wheat, Victoria Market, Degani, Tin Pot, Via Verona.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Yes, she is a super speaker and is not to be allowed off the hook.
Is there something our readers might be surprised to know about you?
I was a bit late coming to the law, and I have been a history teacher, welfare worker, lead guitarist, barman and children's playwright. However, it will shock no-one to find another criminal silk who is Catholic, Kew-dwelling and Collingwood-supporting.

MARY ANNE HARTLEY

Date signed Bar Roll
May 1997
Who did you read with?
David Beach (now the Hon. Justice Beach).
Who were your readers?
Munya Andrews and Mary Milsom.
Areas of practice
Common law.
Reason for applying for silk
The challenge of a new direction.
Career highlight to date
Surviving thus far.
Where do you buy your coffee?
Anywhere it is excellent.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Definitely – I would love to hear another speech like the fabulous one she gave in a Bar debate a while ago.
Is there something our readers might be surprised to know about you?
No.

DAVID LESLIE BRUSTMAN

Date signed Bar Roll
13 February 1975.
Who did you read with?
The late Mr (later His Hon. Judge) J.G. (Jim) Howden.
Who were your readers?
Martin Bartfeld QC – 1986, John Arthur – Sept 1989, Daniel Khoury – March 1990, Ann Graham, Graham Berkovitch – March 1991, Mark Howden – Sept 1995, David Bliss – March 1997, Mary McNamee – Sept 1998.
Areas of practice
Crime.
Reason for applying for silk
Wondering what it is like to be the new kid on the block at my age.
Career highlight to date
The murders, the terrorists and getting silk.
Where do you buy your coffee?
Nicks in Queen Street, Dundas and Faussett in Albert Park and the Essoign.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Most definitely yes.
Is there something our readers might be surprised to know about you?
Some say I'm not a bad modern jazz pianist. Others say I'm not a bad glider pilot. Most would think that I cannot shut up when discussing books.

NICHOLAS PAPAS

Date signed Bar Roll
18 November 1982.
Who did you read with?
David Perkins.

Who were your readers?
Peter Triandos, Fraser Cameron and Moya O'Brien.
Areas of practice
Criminal law, occupational health and safety prosecutions.
Reason for applying for silk
To take the next step.
Career highlight to date
Beljajev trial.
Where do you buy your coffee?
Kafae in William Street.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Sure, why not? Especially because I'm not the junior silk.
Is there something our readers might be surprised to know about you?
About 20 kilos and 20 years ago I was an aerobics instructor!

FRANCIS JAMES TIERNAN

Date signed Bar Roll
19 November 1981.
Who did you read with?
Martin Shannon QC.
Who were your readers?
Martin Pirrie, Eric Riegler, Chris Moshidis and Alan Gray.
Areas of practice
Construction law, product liability, professional negligence, arbitration.
Reason for applying for silk
It is something that most of us seek to accomplish in our career as barristers.
Career highlight to date
Taking silk.
Where do you buy your coffee?
I don't drink coffee.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Yes, definitely.
Is there something our readers might be surprised to know about you?
That I am one of 11 children (6 girls and 5 boys) with 37 nephews and nieces and 3 children of our own.

MICHAEL DAMIAN WYLES

Date signed Bar Roll
31 May 1990.
Who did you read with?
Marc Bevan-John.
Who were your readers?
None.
Areas of practice

Supreme Court and Federal Court commercial trials and appeals.
Reason for applying for silk
When I came to the Bar that is what you worked to achieve.
Career highlight to date
Receipt of an encouraging letter from the Chief Justice of the High Court.
Where do you buy your coffee?
Budan.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Yes.
Is there something our readers might be surprised to know about you?
That notwithstanding my shape I am a quite committed cyclist!!

PHILIP DAVID CRUTCHFIELD

Date signed Bar Roll
19 November 2008.
Who did you read with?
Tim North.
Who were your readers?
Sam Rosewarne, Christopher Brown, Luke Merrick.
Areas of practice
Commercial Law.
Reason for applying for silk
The time seemed right.
Career highlight to date
Obtaining articles.
Where do you buy your coffee?
Cafe Pieroni.
Should the Victorian Bar Council invite Ms junior silk to give a speech at next year's bar dinner?
Yes.
Is there something our readers might be surprised to know about you?
Yes.

SIMON HARRY STEWARD

Date signed Bar Roll
18 November 1999.
Who did you read with?
Peter Cawthorn SC.
Who were your readers?
Ms Lisa Hespe.
Areas of practice
Revenue Law.
Where do you buy your coffee?
Spek.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Yes.
Is there something our readers might be surprised to know about you?
Most unlikely.

RACHEL MARIE DOYLE

Date signed Bar Roll
May 1996.
Who did you read with?
Bob Hinkley.
Who were your readers?
James McKenna, Rudi Cohrssen, Adam Bandt.
Areas of practice
Industrial Law, Administrative Law, Equal Opportunity Law, Constitutional Law, Common Law.
Reason for applying for silk
So that I could give the Ms Junior Silk speech at the bar dinner in 2010.
Career highlight to date
A litigant in person inviting the courtroom to applaud my submissions made in support of an application to strike out his discrimination claim against Victoria Police.
Where do you buy your coffee?
Demi Tasse.
Should the Victorian Bar Council invite Ms Junior Silk to give a speech at next year's bar dinner?
Obviously.
Is there something our readers might be surprised to know about you?
Yes, just ask Nick Frenkel.

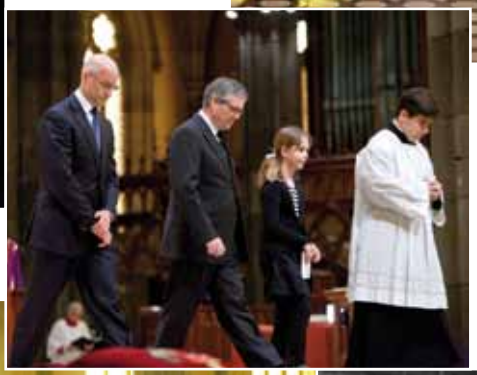
Readers' Course 2010

1 Luke MERRICK
2 Huw ROBERTS
3 Keir DERNELLEY
4 Stephen JURICA
5 David DELLER
6 Bill SWANNIE
7 James McKAY
8 Robin SMITH
9 Carolyn WELSH
10 Andrew CHISLETT
11 Angela MORAN
12 Christopher DUNLOP
13 Mark HOLDEN
14 Michael SEELIG
15 Thomas BEVAN
16 Banjo McLACHLAN
17 Raymond SMITH
18 John VALIOTIS
19 Holly VAN DEN HEUVEL
20 Kate BOWSHELL
21 Robyn HARPER
22 Morgan McLAY
23 Megan CASEY
24 Vanessa NICHOLSON
25 Peter HARRISON
26 Lee RISTIVOJEVIC
27 Priya CAREY
28 Victoria WHITELAW
29 Rodrigo PINTOS-LOPEZ
30 Nigel LESLIE
31 Perry HERZFELD
32 Henzler VIRA
33 Felicity COCKRAM
34 Hayley LUSCOTT
35 Kristie CHURCHILL
36 Miranda BALL
37 Mary MILSOM
38 Rebecca BREZZI
39 David KIM
40 Hugo de KOCK
41 Elizabeth BOROS
42 Anna FORSYTH
43 Kathryn HAMILL
44 Eloise DIAS
45 Charlotte DUCKETT
46 Sharon HAIHAVU
47 Vivianne LAUMAE
48 Jacob KANTOR
49 Roderick TAN

On 18 August 2009 a State Funeral was held at St Pauls Cathedral for the former Chief Justice of the Supreme Court of Victoria, the Honourable Mr John Harber Philips AC QC.

RIGHT Grandchildren
BELOW Kevin Lyons, his Honour Judge Tony Howard and granddaughter.

ABOVE The Honourable Justice Vincent
LEFT Daughter Andrea Philips.



ABOVE The Premier Mr Brumby and Mrs Philips.

LEFT Judge Tony Howard.

ABOVE The Honourable Chief Justice Marilyn Warren.

LEFT Mourners leaving church (including the Honourable Mr Brooking QC and Jim Kennan SC).

Victorian Bar Council farewell dinner

2 December 2009

CLOCKWISE FROM TOP LEFT Dr Michelle Sharpe and William Lye; Samantha Burchell, Martin Scott, Jane Hider and Albert Monichino; Phil Priest QC, Sara Hinchey and Tom Pikusa; Retiring Chairman John Digby QC and his wife Kirsten; Kim Southey and her fiancé Ed Clark.

Lord Neuberger visits the Victorian Bar

On 24 August 2009, the Victorian Bar (Commbar International Law Section) and the Anglo-Australasian Lawyers Society were privileged to host Lord Neuberger of Abbotsbury MR, formerly of the Judicial Committee of the House of Lords and now the new Master of the Rolls.

Lord Neuberger, in a very well attended and well received lecture held in the Neil McPhee Room, addressed those present on the topic, 'The New United Kingdom Supreme Court and Developments in Equitable Estoppel', which highlighted key aspects of the historic commencement of the new United Kingdom Supreme Court and also important recent developments in the field of equity.

ABOVE Lord Neuberger addressing members of the Victorian Bar.
LEFT Justice Hollingworth in attendance at AALS Annual Dinner at the Essoign.
BELOW LEFT Dr Rebecca French and Stephen Moloney.
BELOW Chris Young, Aaron Weinstock and Frances Gordon.

Following the address, Lord and Lady Neuberger attended the Anglo-Australasian Lawyers Society Annual Dinner as guests of the society, which was hosted by Victorian chapter President Rodney Garratt QC and held at the Essoign Club. Also attending and representing the Victorian Bar were the then Chairman John Digby QC, Michael Colbran QC and Mark Moshinsky SC. The evening was one of robust good humour with Justice Elizabeth Hollingworth delivering an enormously witty and entertaining after-dinner speech, which was thoroughly enjoyed by all in attendance and especially by the guests of honour. Of course, the food and wine served 'in hall' continued to uphold the AALS's finest traditions and thanks is extended to Sion Turner and his team at the Essoign Club for ensuring the evening ran so smoothly and so well.

By maintaining links with the English Bar and judiciary, the AALS continues to play an important role in the development and celebration of our shared legal heritage. For more information about the AALS visit <http://www.aals.co.uk/>.

Lord Neuberger, Rodney Garratt QC and John Digby QC.

QUARTERLY COUNSEL

Clarinda Molyneux QC

Clarinda Eleanor Molyneux QC completed her law degree at the University of Melbourne in 1978. She is the most senior female member of the Victorian Bar and was appointed one of Her Majesty's Counsel for the State of Victoria 13 years ago.

Clarinda says 'I cannot imagine a more interesting profession and a better environment to practise in, than the Victorian Bar. Members give each other great support and companionship, and those with whom I practice family law work diligently and responsibly to try and resolve family law disputes'.

'My favourite pastime is spending time with one particularly marvellous member of the Victorian Bar, my husband Hugh Fraser, and working together on making our garden on the Mornington Peninsula part of the Open Garden Scheme of Victoria.'

GOING UP...

Federal Court of Australia

The Honourable Justice Dodds-Streeton of the Supreme Court of Victoria has been appointed a Judge of the Federal Court of Australia.

Supreme Court of Victoria Court of Appeal

The Honourable Justices Mandie, Bongiorno and Harper have all been appointed to the Court of Appeal of the Supreme Court of Victoria.

Supreme Court of Victoria

The Honourable Justice Iain Ross of the County Court of Victoria has been appointed as a Judge of the Supreme Court of Victoria

County Court of Victoria

Associate Justice Kathy Kings of the Supreme Court of Victoria has been appointed a Judge of the County Court of Victoria

SILENCE, ALL STAND!

Supreme Court of Victoria

The Honourable Justice Terry Forrest

A carefully undertaken human genome of Terry Forrest QC who has just taken his judicial seat on the Supreme Court of Victoria, would reveal a fundamental legal structure, despite an outward appearance of chaos. His Honour's father was a County Court Judge, regarded by many as one of the finest judges ever to sit on that court, and his uncle a solicitor. Terry has joined on the Supreme Court of Victoria, his older brother, Jack, a smaller version of Terry but with even less *sitzfleisch*.

Terry commenced his legal career in 1978 articled to Frank Galbally known to many as "Mr Frank", himself an outstanding advocate, described by a modest contemporary of Terry as, in his day, 'the greatest advocate in the western world'. That contemporary described the pivotal moment when articled clerk Terry Forrest greeted Mr Frank upon the acquittal of two members of the Krope family of all charges relating to the shooting death of the father of the then reigning Miss Australia:

> The enthusiastic articled clerk, Terry Forrest (now the famous Terry Forrest QC) raced up to Mr Frank. 'Congratulations', he said. 'Thank you, Tony'. 'Terry, Mr Frank'. 'Of course, Terry. Now Terry, listen carefully. Bill Krope, his mother, Gloria, John Walker QC and I are now going to walk down Lonsdale Street to St Francis Church to pray and to thank God for what he … and I… have achieved. And Terry… for Christ's sake, tell the press!

Unsurprisingly therefore, the experience of working with Mr Frank over the years profoundly influenced and helped to develop Terry's very considerable ability, which as the years progressed from junior barrister to eminent silk was demonstrated in many high-profile cases.

Those cases included:

- The bouncer (*Zdravco Misevic*) charged with and acquitted of the manslaughter of cricket identity David Hooks following an incident outside a night club;
- The Oil for Food Inquiry where he appeared for several AWB employees and had the unique experience of cross-examining Alexander Downer;
- The truck driver (*Christien Scholl*) charged with and acquitted of killing by culpable driving eleven train passengers in the Kerang Rail Crossing incident;
- The show business identity (*Gavan Disney*) creator of 'Hey Hey its Saturday' charged with and acquitted of sexual offences alleged to have occurred in his time at a country TV station in the 1980s.

Terry was a brilliant advocate. He was able very quickly to see the potential winning point in a case and was expert at persuading the trier of fact or law – whether a judge or jury or some other Tribunal – that indeed he had the winning point, whether or not he had it, if you'll excuse the paradox. He was always charming, witty and incisive and a master of infusing submissions with sporting or racing analogies or references, an ability that proved just as helpful before judges and juries.

His Honour will prove to be a judge of great ability and insight, immune from 'judgitis', committed to the rule of law but with a real sympathy for the plight of those who appear before him.

We wish his Honour well.

JR

Supreme Court of Victoria

The Honourable Justice Karin Emerton

On 22 October 2009 the Honourable Justice Karin Emerton was welcomed as a judge of the Supreme Court in a court filled with colleagues, friends and family, including her husband Chris and her sons Jack and Marcus.

Colbran QC spoke of the 'breadth and depth of intellectual scholarship well beyond professional qualifications and more' that her Honour brings to the Court. He outlined key elements of her history: her Honour was born in Geneva, and commenced secondary school in Germany before her family returned to Canberra. She began Arts/Law at the University of Sydney, and after taking a first class Honours Arts degree was awarded a post-graduate scholarship. She then obtained a doctorate at the University of Paris at the Sorbonne. Later, on her return to Australia she completed her law degree and began at Blake Dawson in July 1989. Less than a year later, she was seconded to the policy and research division of the Attorney-General's Department, where she was involved in developing the rescue scheme to compensate those who lost their savings in the collapse of the Pyramid Building Society. Her Honour came to the Bar in 1993, reading with Justice Hargrave. She had three readers, Dr Jennifer Beard, Rachael Ellyard and Dr Vicki Priscitch. In May 2007 she was appointed Crown

Consul advising for a three year term, and in November 2007 she took silk.

Mr Barlow spoke on behalf of the solicitors of the State. He referred in particular to her Honour's 'human passion for justice' and her 'uncanny ability to see through peripheral issues to the heart of any situation.' On a lighter note, he mentioned her family involvement with Australian Rules Football, and her recent 'extraordinarily well informed and robust cross-examination of an expert on the history of the Australian Football League' in a case involving Waverley Park.

Justice Emerton gave a very interesting and personal speech by way of reply. She explained that it was because of her experience studying the history of ideas in France that she finally decided to become a lawyer in Australia. She said that for all the admiration and affection she felt for the French, she did not feel especially responsible for what went on there. In contrast she felt involved in and responsible for what went on in Australia and that the law offered the best opportunities to participate and contribute to the discussion about how we create a fair and just society. Her Honour referred to the special opportunity to be of service to the community that becoming a judge provides. Given her Honour's history there seems no doubt that she will provide such service to the highest level.

SLM

Supreme Court of Victoria

The Honourable Associate Justice Nemeer Mukhtar

His Honour is the first person directly appointed as an Associate Justice of the Supreme Court of Victoria. The previous Associate Justices were all Masters immediately prior to their appointment.

His Honour was born in Iraq in 1958 and came with his parents to live in Australia in 1965 at the age of 6½.

He was educated at Ripponlea State School, Mentone Park Primary School and Mentone Boys' Grammar School. During his childhood, he became a passionate and lifelong supporter of the St Kilda Football Club. His Honour also became a keen and able basketball player and proficient in the clarinet, tenor saxophone and drums.

After school, His Honour studied law and commerce at the University of Melbourne. He was active in the Law Student's Society and was the music critic for the student magazine *Farrago*.

His Honour did his articles at Middletons Oswald Burt & Co (as it was then known). He came to the Bar shortly after his admission, and read with Peter Clark SC.

His Honour developed a strong practice in energy and resources cases, which involved interstate and international travel. This included disputes concerning the Ranger uranium mine, the Jabiluka uranium mine as well as dealing with native title rights, Aboriginal culture and relations between the Commonwealth and the Northern Territory.

His Honour had five readers. The first was Michelle Gordon (now Justice Gordon of the Federal Court), Annette Eastman, Trischa Mann, Michael Gronow and Dr Colin Campbell. His Honour took silk in 1999. His Honour also helped with the teaching in the Bar Readers' Course and has contributed to the Bar in other ways too numerous to mention.

His Honour is regarded by colleagues as being 'straight as a gun barrel'. His Honour is unfailingly polite, courteous and helpful to all. He was and is held in great affection and esteem by everyone who has had the pleasure of being with His Honour on level 14 of Owen Dixon Chambers West.

He also has a dry but impish sense of humour. This was illustrated by a dinner party conversation when others at the table were speaking of their Scottish ancestry. His Honour asked in a thick Scottish accent whether they had not heard of the clan 'McTarr'. His Honour is married to Catherine Mukhtar, herself an Associate to another Associate Justice, and they have two sons named Michael and Matthew.

The Victorian Bar welcomes and applauds his Honour's appointment as an Associate Justice of the Supreme Court.

NOTE: The author expresses his gratitude to Mr Ross Nankivell for permitting him to borrow extensively from the Chairman of the Bar Council's welcome speech.

MGRG

County Court of Victoria

Judge Timothy Ginnane

It was apparent to the many members of the Bar, solicitors and friends and family who attended his Honour Judge Tim Ginnane's welcome on 18 September 2009 that the appointment of his Honour was a popular one and that he is a person widely respected and much admired.

His Honour was admitted to practice in 1977 and was Associate to the Honourable Justice Reginald Smithers of the Federal Court of Australia. After reading with Alex Chernov, his Honour signed the Bar Roll in October 1979.

Over the course of his time at the Bar, his Honour appeared in many leading cases in the commercial, industrial and administrative law fields. His Honour appeared as counsel assisting, with others, the Cole Royal Commission into the building and construction industry.

His Honour was generous with his time. Over the course of his practise at the Bar he had eight readers, and gave to each of them the great benefit of his experience, patience and courtesy.

His Honour is a person with deep roots in the Western suburbs of Melbourne – growing up and beginning school in Footscray – and is, as all who know him are well aware, a passionate Western Bulldogs supporter. His Honour, with others, was instrumental in the campaign to save the Bulldogs when debt and the machinations of the VFL threatened the club's existence – raising close to $2 million with the 'Save the Dogs' campaign in just three short weeks . The Bulldogs lived to fight another day. All that was missing on the morning of his Honour's welcome was the Bulldogs' club song as he came into court.

His Honour has a long standing commitment to the community, particularly those who are vulnerable and in need. His Honour has been a volunteer with the St Vincent de Paul Society for

many years, and for some ten years was Chairman of St Mary's House of Welcome – a day centre for the homeless operated by the Daughters of Charity.

His Honour's family joined with him to celebrate his welcome and his Honour spoke warmly and very movingly of the influence of both his parents on his life, and of the great support and joy that he has found since his marriage to Jo and the arrival of their son John.

As Digby QC said in closing his welcome remarks, 'Your Honour is a good lawyer, and a generous and compassionate man. You have in your work and your life shown the attributes of a good judge.'

All those who know his Honour, and those who will come to know him during his time on the bench, will have no difficulty in agreeing with that description.

JM

ADJOURNED SINE DIE

Supreme Court of Victoria

The Honourable Justice Frank Vincent AO

The Honourable Justice Vincent's reputation in Victoria's criminal jurisdiction is perhaps unparalleled. During his years at the Bar he appeared as counsel in a vast number of murder trials, taking silk in 1980. He went on to preside over many more trials as a judge, and took his career to its logical conclusion when he became a member of the Victorian Court of Appeal. While his contributions in common law can't be disregarded, his Honour literally left his dabs all over the major criminal trials of the recent decades. His retirement marks a generational change for criminal practitioners, especially in the wake of the retirement of Justices Coldrey and Cummins.

Coming from proud but humble beginnings, his Honour never lost the common touch. In the 1980s as a trial judge he had quite a following among the aptly named *alternate jury*. This casual bunch of jury trial spectators vied for seats in the big cases and were said to admire his Honour's unflappable calm, and his penchant for eloquent pauses while peering over the top of his glasses.

His Honour was a 'Port Boy', the son of a wharfie, Frank Vincent Senior. He was taught to tap-dance by his hardworking mother and no doubt garnered skills from both parents for use in later life. He learned a little about oratory through helping his father prepare speeches to be delivered at Trades Hall, and the tap-dancing lessons came in handy in defence of many a client in Supreme Court Four. When studying at Melbourne University, his Honour stole time away from the books to absorb some of the stellar performances of the inimitable Frank Galbally.

After signing the Bar Roll in 1961, his Honour fielded daily inquiries from his proud father demanding tales of forensic triumphs. The pressure to succeed must have had an effect, because his Honour successfully appeared in his first murder trial in 1964. In those death penalty days, beating a charge of murder was no small matter. His Honour combined a rare mix of talents: he was a brilliant cross-examiner, a captivating jury advocate and a fine lawyer, and was equally comfortable addressing the sharpest judge or speaking to clients of few words and modest means.

His Honour's commitment to equal justice drew him to the Northern Territory, where he bunked in with the likes of Coldrey, Hore-Lacy, Dee and Parsons. Pleas of not guilty for Aboriginal clients were almost unheard of in the Territory until then.

His Honour was appointed to the Supreme Court by Attorney-General Jim Kennan in 1985. Sir John Young was Chief Justice and the Full Court included Crockett, Starke and their contemporaries.

His Honour has publicly decried the notion of capital punishment. His stand on the issue gains special credence since no one could accuse his Honour of coming from an ivory tower, nor of lacking an appreciation of the depths of human depravity. After all, his Honour has presided over the trials of some of our most infamous criminals, including Camilleri, Dupas, and Denyer.

His Honour chaired the Adult Parole Board from 1988 until 2001 when he was elevated to the Court of Appeal. He derived considerable mirth from stoushes with disgruntled parole applicants such as Mark 'Chopper' Read, who sent regular tongue-in-cheek Christmas cards. Not content to direct all his energy towards the law, he became Chancellor of Victoria University and patron of Western Chances – an organisation seeking to broaden the reach of educational opportunity in the Western region. He was awarded the Order of Australia in 2007.

In the Court of Appeal, his Honour never undervalued the importance of due process. Their Honours Coldrey and Vincent JJ are sometimes caught reminiscing about early battles for Aboriginal clients in cases such as the Huckitta Station murder trial. From the seeds of that early work one can trace his Honour's contribution in the Court of Appeal to cases such as Jack 'Jihad' Thomas. His Honour had a keen appreciation of the fact that a confession obtained by blandishment or oppression is in truth no confession at all.

We wish his Honour well in his retirement.

JAD

Supreme Court of Victoria

The Honourable Justice Thomas Harrison Smith

On Friday 31 July 2009, in a packed Ceremonial Court, the law bid farewell to the Honourable Justice Thomas Harrison Smith. Tim Smith, as he was fondly known to the Bar, was so called no doubt to differ him from his distinguished father, the Honourable Mr Tom Smith QC who was an equally loved and admired member of the Bar and the Supreme Court Bench.

His Honour came to the Bar in February 1965 and as junior counsel developed a reputation for being an all round lawyer and advocate. He was

understated and penetrating as an advocate and learned as a lawyer.

The quiet understated manner successfully hid from most of his colleagues and instructing solicitors an uncharacteristic love affair with Porche motor cars. It also hid the fact that he was an accomplished field athlete, having been a champion shotputter at school and university intercollegiate level.

Upon the retirement of his father in 1973, his Honour inherited an extensive law library which was the envy of the entire Junior Bar. He had come to the Bar when it was almost compulsory for baby barristers to cut their adversarial teeth in a wide range of Magistrate Court cases for some years. As time passed, the growing reputation of his Honour as a lawyer was in part reflected in the significant commercial and administrative law practice which he developed in all courts.

His Honour's deep interest in the teaching of and the development of the law was nurtured by his appointments to Monash University and the Council of Legal Education Article Clerk's course at RMIT where for over a decade he earned the reputation as a distinguished law lecturer in Evidence.

With this background it is no surprise that his Honour was in strong demand for the role of what was then called 'Master' to five readers. In order they were Ian Henry, the late Ian Sutherland QC, Bruce Millar, Peter Bick QC and Pieter Tomaz. It must have been in his Master's chambers that the quiet and undemonstrative Bick QC caught the bug of driving flashy cars.

While still junior counsel, his Honour resigned from the Bar and took up a full-time position as a Commissioner on the Australian Law Reform Commission. The work of this Commission was far-reaching and his Honour played a pivotal role in the work of dragging the law into the 20th century, a role that in his later judicial career he quietly continued to perform.

As lecturer in the RMIT course in Evidence, his Honour developed what became a life-long interest in this area of the law. When appointed in 1980 as a Commissioner of the Australian Law Reform Commission, his Honour was placed in charge of the reference relating to the law of evidence and the committee led by him drafted the report which became the *Commonwealth Evidence Act 1995,* upon which the uniform Evidence Act of all the Australian States and Territories is now based. His Honour remained on the Commission until 1984 when he returned to the Bar and took silk in 1985.

No doubt it was only the time away with the Law Reform Commission that delayed his Honour's appointment as silk because his standing and reputation at the Bar meant that but for his time away he was expected to have taken silk earlier than 1985.

His busy role as a leader came to an end when on 11 July 1988 his Honour was appointed to the County Court. In this Court he quickly established a reputation of being an industrious Judge.

At the time of his appointment to the County Court his Honour worked on the Legal Systems Committee. Perhaps it was no surprise given his judicial parentage that his Honour was keen to work on a committee of the Bar that was ultimately successful in urging the then government to improve functioning and facilities of the courts, a subject that remained dear to his Honour's heart when he was a member of the County and Supreme Courts and experienced at first hand the cautious approach of successive governments to funding the judicial system. Upon appointment to the Supreme Court his Honour continued his interest in judicial administration and education and was a tireless contributor to court governance.

On 1 May 1990 his Honour was appointed a Justice of the Supreme Court of Victoria. Thereafter, until his retirement in July of 2009, his Honour became a highly regarded and much loved member of the Court. His industry, patience and learning combined to make his Court a pleasure in which to appear. Whilst the adversarial nature of litigation inevitably means that one side is disappointed to lose the case, no litigant whose case was decided by his Honour was ever entitled to complain that all their arguments had not been heard and given a thorough analysis. The courtesy extended by his Honour to all who found themselves in his Court was exemplary.

At the time of his retirement his Honour was the Principal Judge of the Common Law Division and it was an appropriate Division for his Honour, given that he acknowledged that in the first County Court trial over which he had presided for a claim in personal injuries, he had earned the nickname 'Tattslotto Tim'. However, what is usually ignored about this nickname is that

successful appeals against judgments by his Honour were exceedingly rare. This was a tribute to his industry, learning and judgment. In his speech at his farewell his Honour rightly pointed out that the dispute which rages between those who describe themselves as 'black letter lawyers' and those they derisorily define as judicial activists is an illusory dispute as the common law has always grown and developed to meet new needs and new understandings. His Honour played a leading role in this growth and development, hence the enormous regard in which he was held by all who practised before him.

RM

Supreme Court of Victoria

The Honourable Justice Philip Damien Cummins

from the perspective of a former Associate

Philip Damien Cummins was educated at Xavier College and then Melbourne University where he graduated Master of Laws with first class honours followed by a Diploma in Criminology and a double major in psychology. He was articled at Cleary Ross & Doherty, read with Abe Monester and was trial counsel in many notorious cases. He became Queen's Counsel in 1978 at the age of 39 and was appointed as counsel assisting the National Crime Authority. He served on the Bar Council for ten years, was a member of the Readers Practice Course Committee and became Chairman of the Bar in 1986 and then Vice-Chairman of the Australian Bar Association in 1987. But these significant achievements don't capture the impact His Honour had on our profession and on those who had the privilege and pleasure of working with him.

What follows then is my personal tribute to the brilliant and complex man I came to know.

Having finished my degree interstate in 1988 I attended Summer School at Melbourne University as I needed to complete the component called 'Ethics' so that I could practice in Victoria. The lecture was to be given by the Honourable Justice Cummins who I will now refer to as 'HH' (His Honour), of whom I had no previous knowledge at all.

HH took his place at the lectern and began his lecture on ethics. From the moment he uttered the first few words until the lecture ended, I and the other students were silent, perched forward in our seats listening, hanging onto every word. It was clear exactly why he was a successful advocate and had become a successful judge. I remember thinking as I left the lecture theatre, 'I could work for that man'. Little did I know that I would be lucky enough to get that opportunity a year later.

What is clear when I look back on that event, with the knowledge I have now, is why in 1986 he was elected to be chairman of the Young Barristers Committee and why when Four Courts Chambers opened (mainly for the benefit of young barristers), he was the only Queens Counsel to choose to be housed there. It was not a very prestigious building at that time and HH occupied very comfortable chambers on the top floor of the Owen Dixon Chambers, together with Billy Sneddon, James Gobbo, Brian Shaw, Glen Waldron, Norman O'Bryan and others. HH always felt a need to look after, guide and protect young advocates, hence his move to Four Courts Chambers.

A year later when I was at the Leo Cussen Institute, I had occasion to make a phone call on the public phone on the first floor. As I was dialling the numbers I stared straight at an advertisement for the position of Associate to the Honourable Justice Cummins of the Supreme Court of Victoria. Of course I applied. The interview was unlike any I had previously experienced. HH did most of the talking. He asked me some questions that had nothing to do with the law; they were about my migrant background, my western suburbs upbringing, my time at university and my views on matters that would reveal my opinions and how I thought. It was a very relaxed meeting. After the pleasant goodbye a week passed and I heard nothing. Being young and brash I telephone HH. He answered the phone and I could hear that he was surprised at my call but I could also hear him smiling. So I asked as one does at that age, and with the level of impatience the young often carry: 'Your Honour, it's been a week and quite frankly I need you to put me out of my misery. Did I get the job?' I heard him laugh that throaty and slightly high-pitched laugh that he has and he said, 'Yes, my girl, [he always called his associates 'my girl,' or 'my boy'] You have the job, I've just been busy and we haven't sent out the rejection letters yet, so keep it to yourself.' Needless to say, I was ecstatic.

I recall that some time after I was made his associate, HH was hearing a matter in the practice court where a young barrister was struggling. His arguments were not very well formulated and although it was obvious what he was trying to argue, his newness at the Bar robbed him of the eloquence we all hope to achieve one day. His opponent on the other hand was well seasoned but for some reason was making a bit of a mess of his submissions. HH was extremely forgiving of the young barrister, helping him whenever he could. However, towards the more seasoned barrister HH was quite unforgiving yet always polite, questioning every sentence and throwing in a hypothetical or two. After an exhausting hour (and I was only observing), we adjourned to the ante-room. HH plonked himself into a chair and looked at me. It was an invitation to speak, so I did. I asked him why the difference in the way he treated counsel. His response was, 'The more seasoned advocate should know better,' and he smiled. I understood, even as a 24 year

old, that in our experience we should care for and assist young advocates to increase their skill level and not crush them when they try but get it wrong.

There was another poignant moment during my time as his associate where we were called back from Christmas holidays. HH was to preside over an anti-discrimination case at a time where the public transport authorities had introduced bus and railway tickets which required the user to scratch the ticket's silver coating (quite precisely), to reveal the date and month of travel. For people with disabilities like muscular dystrophy this was an impossible task. At the end of the case HH handed down his decision in favour of the disabled plaintiff and retired to the ante-room. There was a vent between the ante-room and the court. We could hear cheers coming from the court room, high 5s being struck and lots of laughter and relief. HH looked at me and said, 'Wasn't that worth coming back from leave for?' Of course it was a rhetorical question.

I asked HH once during a bit of court down time why he gave up such a lucrative practice to become a judge at the young age of 49. He said that as much as he loved the Bar he was being asked to perform a very important public service and felt that he couldn't say no. I felt overwhelmed by that response.

During short lunch breaks and as part of an associate's normal job, I would have to go out and get HH something to eat. I remember going in one day and asking HH what he wanted for lunch. He said, 'My girl, in the words of Lord Tennyson…' to which I interrupted, 'For goodness sakes, your Honour, I only have an hour!' He laughed and put in his order. That's one of the things I liked about working for HH: his ability to treat you as though you could say anything to him without fear of a curt response Whether it was a joke or an opinion, he always listened.

He would often ask my opinion as though I knew as much as he did (which we both knew was not the case). I initially struggled to formulate answers but then it became a challenge and what I didn't realise was that he was pushing me to push myself and I witnessed him doing this to young advocates all the time. Once he introduced me as his reader, having realised his error, he turned to me and said 'it's a bit like that isn't it,' and he was right, you always learned from the things he said and did.

I recall once we were on circuit and the government body responsible for reimbursing us for expenses incurred on circuit overpaid him by $5. He wrote a cheque and asked me to post it back, explaining. I commented that the labour involved in writing the letter, and the postage would cost HH and the government more than the initial overpayment (remember I was only 24). HH said, 'In this job you must be above reproach, remember that.' It was barely a year later that various politicians got into trouble over travel rorts.

In 1989 I threw HH a 50th birthday party. It was in a venue in town below ground. About 100 people were there and

I ordered a large cake. When it came time to blow out the candles, HH who had a bad leg at the time and was having a bit of difficulty walking, raised said leg in a round house kick (that would have made Bruce Lee proud), and travelling centimetres above and across the length of the cake, put all the candles out instantly. The room cheered – HH could always take you by surprise. Ask anyone who learned from or appeared in front of him.

HH often acted like a proud father when one of his protégés achieved a goal or did something he thought would be good for their advocacy skills and so he beamed like a proud father the day I ran into him in the street in 2007 and announced that I was about to take my place amongst the crown prosecutors at Lonsdale Street. I swear I heard him click his heels as he walked back to court.

I have to say that appearing in front of HH for the first time was not daunting. I knew he would challenge me but that he would always be fair and polite. At the end of every appearance he would always say 'I thank you, Ms Borg, for your assistance as always, and you too, Mr…,' and he would give me a fatherly smile. I always felt proud leaving his court room at all I'd learned under his watchful eyes.

The last thing HH said to me when I left his service as an associate and was about to go to the Bar was, 'My girl, you have crossed the Rubicon. You may now call me Philip.' The Rubicon was of course the street between the Supreme Court and the Bar.

So having crossed the Rubicon, Philip, may I say that like many I am finding it hard to come to terms with your retirement. No doubt you will make a splash back on the scene with some plan that will allow you to continue to turn young inexperienced advocates into well seasoned ones. In the meantime, know that all who have had the honour of your knowledge, friendship and assistance are grateful to you, that those you've represented in your time as defence counsel were fortunate to have the benefit of your advocacy and that the community is grateful for your devoted service.

We are often told that the law is not about justice, it's about a legal process, however, I must say that if it was about justice (and I am yet to be convinced that it is not – partly your fault, I guess), your methods, knowledge and kindness to all, would epitomise it.

Farewell and best wishes from us all.

SUSAN BORG
Former associate, Crown Prosecutor
and devoted friend

DECREE ABSOLUTE

The Honourable John Harber Phillips AC QC

John Harber Phillips died on 7 August 2009, aged 75. The passing of the tenth Chief Justice of the Supreme Court of Victoria marked the end of a lifetime of service to the community and conspicuous achievement in and outside the law. John Phillips was a renaissance man of many parts, of deep passions, of concern for others, particularly the fragile and disadvantaged, a charming and elegant person who was devoted to the law and all it might achieve to benefit society.

His Honour came to the law from a humble and modest background. He was lucky enough to win scholarships that took him to the De La Salle Brothers and later to the University of Melbourne. He signed the Bar Roll in 1959 when there were only 200 barristers and everyone knew each other. He practised criminal law for 25 years. He took silk in 1975, the first specialist in criminal law to be so appointed. He served the Bar tirelessly and with distinction and was a member of the Bar Council from 1974 to 1984.

'Criminal Jack', as he came to be known, appeared in many major and notorious cases, including 150 murder trials. It was a different era of criminal practice within which to excel – the death penalty was imposed upon those convicted of murder, although usually commuted; there was no pre-trial prosecutorial disclosure of the kind known today; the defence lost the right of reply if it introduced any evidence at all, including the tender of an exhibit; the police verbal was an entrenched practice; and the judiciary was comprised of men alone, largely from a different era. There were no excuses. Young criminal barristers were compelled to hone their advocacy skills, to prepare thoroughly and present their cases with precision and skill. John Phillips did all this naturally. He was the consummate advocate, one who gave real meaning to the expression 'the iron fist in the velvet glove'. Once described as an 'elegant street fighter', his style was quiet, measured and deadly. It was said that to be cross-examined by Phillips was to *know* cross-examination. In all this, he brought to criminal practice a dignity and respect which was long overdue. Today, much can be learned by the Criminal Bar from his example.

His Honour was appointed the inaugural Chairman of the Criminal Bar Association in 1982 and the Bar witnessed the emergence of its largest practice group. Today, its members comprise almost one quarter of those practising at the Bar, and the CBA vitally and effectively supports criminal practitioners and criminal law reform.

In 1982, with Andrew Kirkham as his junior, his Honour appeared for Michael and Lindy Chamberlain in the most famous criminal trial in modern Australian legal history. While the media savaged Mrs Chamberlain, it dealt kindly with her senior counsel whose '…impressive performance vindicated his reputation as one of the best criminal lawyers in Australia'.

Following the *Chamberlain* case, in 1983, his Honour accepted appointment as the first DPP for Victoria – also a first for Australia. He presided over a truly independent prosecution office and, in his short time as DPP, he successfully addressed the problem of significant delays in bringing matters to trial and was recognised as a skilled administrator and law reformer.

In 1984 his Honour was appointed a Justice of the Supreme Court. Over the next six years he proved to be an incisive, hard-working and courteous trial and appellate judge. It was always a pleasure to appear in his court, particularly for the young advocate. His elegant judgments reflected intellectual rigour, a keen grasp of the law and much common sense, also shown in his work as Chief Justice when presiding in the Court of Appeal.

His Honour had an enduring interest in the forensic sciences. In 1985 he was appointed chair of the Victorian Institute of Forensic Medicine. The *Chamberlain* trial had pointed up the crucial need for such an institution, which has now become one of the outstanding establishments of its kind in the world. Importantly, its services are available to both the prosecution and defence. In 1991, he was appointed chair of the National Institute of Forensic Science and he co-authored the text *Forensic Science and the Expert Witness*.

In 1990 his Honour left the Bench to become chair of the National Crime Authority and a Justice of the Federal Court of Australia. The NCA was in troubled waters and over the next 15 months he steadied the ship. He introduced a major blueprint for the future development of the NCA, which involved a concerted attack on corporate crime and drug trafficking in Australia.

In December 1991 his Honour was appointed Chief Justice of Victoria and served with distinction in that capacity for the next 12 years. Much was achieved by his Honour, including his leadership of the courts and many professional and law reform bodies; his chairing of the Victoria Law Foundation and the Judicial College of Victoria; his special support and recognition of women lawyers in Victoria; and his active involvement in advocacy training and with a number of international legal associations.

In 1998, he was appointed a Companion of the Order of Australia for 'services to the law, law reform, literature and the visual arts'.

On the occasion of his Honour's retirement from the Bench on 17 October 2003, the Bar Chairman noted his stewardship as Chief Justice had seen significant expansion and re-organisation of the Court with the creation of the Court of Appeal and divisions in the trial court, the acquisition of the old High Court building, the substantial refurbishment of the Court buildings and facilities, the introduction of computer technology and the appointment of women to the Court. The Attorney-General referred to his Honour's 'unflagging integrity in an era of unprecedented change for the Court' and to his commitment to open justice and meaningful efforts to bring the law to the people of Victoria. The President of the Law Institute spoke of the Chief Justice throwing open the doors of the Court and engaging with the community '…as *their* Chief Justice – accessible, modest, compassionate, learned in the law – but above all a man of the people.'

John Phillips' work was not only confined to the law. He loved the Collingwood Football Club and the classics. He delighted in a dinner and a glass of wine with his friends. He was an acknowledged author and playwright, with a passionate interest in the Ned Kelly saga. He had a lifelong interest in Italian, French and English opera. He trained as a singer and enchanted many with his rich baritone voice.

Having left the Bench, but not the law, John spent his last six years as Provost at the Sir Zelman Cowen Centre, Victoria University, where he continued his good work until he was struck down by illness.

The Chief Justice delivered the principal eulogy at a State Funeral held on 14 August 2009. In a moving speech on that occasion, Andrea Phillips spoke of her father as wonderful family man, of his deep devotion to his beautiful wife, Helen and of the magical childhood she shared with her brothers, Nick and Tim.

So much achievement. So much to be proud of. Such a life.

Those who knew John Phillips well were indeed fortunate to have his friendship and love and all will miss him terribly. As he said when he farewelled the profession as Chief Justice: *la comedia é finita*: the show is over. Now, it truly is. *Vale* John Harber Phillips.

JUDGE TONY HOWARD

Anthony E Hooper QC

Tony Hooper was born on 13 January 1938. He was educated at Scotch College and matriculated at the age of 16. I shared a study with him in Ormond College in 1955 and we remained friends thereafter.

There are many good stories about Tony in his younger days. Despite living life to the full, Tony passed his exams and graduated aged 20. He had a deep regard for Ormond College, which continued for the rest of his life. He played an active part in college and university life and later took great pride in the fact that his solicitor father Cecil he and his son Edward all represented Ormond in athletics.

After completing articles with Mallesons, he signed the Roll of Counsel on 27 July 1961 as a member of Dever's list. He took silk on 24 November 1981 and practised continuously thereafter until his death on 19 July 2009. He was of 71.

Tony and his first wife, Beverly, were married in 1961. They had four children, one of whom (Andrew) currently practises at the Bar. His second wife was Judy, with whom he had a further child.

He was a complex man who overcame a number of difficulties, including alcohol, which affected his career for a time during the early to mid 70s. To his great credit he overcame this problem, and from that time ceased to consume alcohol. In this regard and many others, I know that he would like me to mention the great support given to him by his clerk, the late Percy Dever, and the subsequent support that he received from John Dever.

He accepted a permanent appointment as a Chair of the Town Planning Appeals Tribunal from 1976–1981 and was regarded by many as the most outstanding Chair that the Tribunal ever had. He had a deep knowledge of the area and an exemplary capacity for objectivity and fairness. He was also highly regarded by

the non-lawyer members of the tribunal, whom he respected in turn.

He returned to the Bar and took silk in 1981. He was a fine barrister, who showed intelligence, competence, a fierce sense of independence and a willingness to fight hard for his clients. He quickly became a leader of the Bar in the areas of Town Planning and Local Government law. The following summarises some of his notable achievements:

- In *City of Nunawading v Harrington and Others* [1985] V.R. 641, Tony persuaded a Full Court that a bakery located on land which had been sold and not used for a number of years still attracted non-conforming use rights. This decision was and still is the leading Victorian case on non-conforming or existing use rights.
- He developed a technique for running interference with shopping centre developments by challenging the legality of the planning scheme amendment or appointment of the panel hearing the matter. This inevitably resulted in the panel deferring to the Supreme Court whilst the proceedings were on foot. The reverse tactic if acting for a proponent was to take proceedings in the Supreme Court compelling the panel to proceed with the hearing. Cases exemplifying one or both tactics include *Karco Nominees Pty Ltd v Diane Morrison & Ors* (1984) 2 PABR 362 and *Murragong Nominees Pty Ltd and Ponte Properties Pty Ltd v MMBW & Ors* (1985) 4 PABR 73.
- Tony loved to act for sporting clubs that he supported. He won a long battle for the development of the Carlton Cricket and Football Social Club, including the introduction of gaming machines – see *RSL v Carlton Cricket & Football Social Club Ltd* [1998] 2 VR 406.
- Tony was instrumental in many cases concerning local government amalgamations or reform. His talents for resisting abuse of natural justice and technical points assisted him in opposing major government initiatives to amalgamate municipalities attempted by the Cain Government.

Tony was a member of the Legal Aid Committee (later the Commission) from 1979 to 1985. He was Acting Judge of the Liquor Control Commission periodically from 1982. He was a member of the Appeal Costs Board from 1978 to 2006 and chaired it from 2000–2006 and was active in a number of other professional committees.

He will be greatly missed by his family and by his many friends on the Bar and Bench and in the wider community.

THE HON. ALASTAIR NICHOLSON AO RFD QC

Michael Rothschild Shatin QC

On 2 November, 2009 Michael Shatin QC died after a long battle with lung cancer.

Shortly after Michael was diagnosed last December, he told me that he was on borrowed time and was retiring from the Bar. Michael took the verdict with his usual grace and dry wit. He said that I was briefed to write his obituary and deliver his eulogy, but on condition that I say nothing about how brilliant a barrister he was.

I responded that this seemed to me like another typical Shatin flick brief – whilst it involved work for a good cause there were no fees up front and there was little prospect of ever being paid. But I added that his condition that I say nothing but lies about his skill as an advocate was otiose. Michael was a superb advocate.

Michael came from a family of lawyers, both his parents being solicitors. After Michael finished his schooling at Geelong Grammar he studied law at Melbourne University. He graduated in 1966 and was admitted to practice on 1 March 1967. On 18 May 1967 Michael signed the Roll of Counsel of the Victorian Bar. Michael became one of Her Majesty's Counsel in November 1993.

Michael had a diverse practice which had many highlights, including appearing as senior counsel for the Commonwealth Bank in the Tricontinental Royal Commission.

In 2000 Michael successfully represented the former Australian Test Cricketer, Mark Waugh, who was the subject of an investigation by the ACB. In Mark Waugh's personal note to his authorised biography, Mark thanked Michael for his 'belief and confidence in me to get me through one of the toughest periods of my life'.

I first worked with Michael in 1995 on what became the longest running civil trial in the history of the Federal Court sitting in Melbourne, *Henderson and Others v Amadio Pty Ltd and Another*. This case involved a failed 'tax effective investment scheme' as a result of which some 23 persons and firms were sued by aggrieved investors. Michael and I acted for the 22nd respondent, a small accounting firm.

This case was a Herculean struggle. Of the 20 counsel involved, five were subsequently appointed to the Court of Appeal, the Supreme Court or the Federal Court. During the six months of that case, Michael and I virtually lived together. Michael's dedication was exhausting. Some nights the only way I could sleep would be to unplug the phone, knowing that if I forgot to do so, at some unholy time Michael would have a brainstorm which he would have to share with me.

Largely thanks to Michael's skill and diligence our client won the case, all of the other respondents lost, and we obtained an order for our client's indemnity costs. We later successfully defeated appeals by several of the respondents. Throughout it all Michael remained the true believer and the courageous and canny barrister he always was.

Over the 13 or 14 years that followed *Henderson v Amadio*, Michael and I worked on many more cases together, always with good ultimate outcomes for our clients. Michael's wisdom and clarity of thought was something he freely shared with me and the many other barristers who had the great good fortune to know him.

I also had the honour of working with Michael on his last case in November 2008, being *BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd*. Once again, largely thanks to Michael, the true believer, we succeeded in persuading the Court of Appeal to reverse what was found to be a mistaken decision below. It was fitting that Michael went out on a winning note.

Michael will be deeply and sorely missed. Michael Shatin QC was a fine barrister and a splendid friend.

MARK ROBINS

ETHICS COMMITTEE BULLETIN

PRACTICE RULES REFERENCE "SOLICITOR"

Counsel will be aware that many of the Practice Rules refer to 'solicitor'.

Counsel will also be aware that this description is not employed in the *Legal Profession Act* 2004.

Counsel are advised that the Ethics Committee have determined that a reference to a 'solicitor' in the Practice Rules should be interpreted as meaning an Australian Legal Practitioner who does not practice exclusively as a barrister.

That interpretation is applied in the exercise of all of its powers, whether it is investigating complaints referred to it by the Legal Services Commissioner, or in giving Rulings and Dispensations.

In consequence, the Ethics Committee interprets 'solicitor' to include, save for barristers, all Australian Legal Practitioners, irrespective of whether they are local or interstate, whether they hold full practising certificates or employee certificates, or are in independent practice or engaged by corporations.

Richard W McGarvie S.C.
Acting Chairman

Celebrating female judiciary in Victoria, WBA

On Wednesday 14 October 2009 over 50 barristers and judges gathered at a cocktail party in the Essoign Club, for an event entitled *Celebrating Female Judiciary in Victoria*. It was organised by the Women Barristers' Association, and was open to all members of the Bar (male and female, members and non-members of the WBA). All members of Victoria's judiciary from State and Federal jurisdictions were invited. Chief Justice Marilyn Warren was the special guest (as Patron of the WBA). The purpose of the event was generally to pay tribute to those many women who have over the years been appointed to the judiciary in Victoria, including current incumbents, and to give female counsel and those judges who attended the chance to get to know each other better. Joy Elleray, the current Convenor of the WBA, spoke warmly welcoming everyone and asking them to 'please mix and mingle.' She also spoke of how hard her committee had worked in organising the event, and referred to her assistant co-convenors Suzanne Kirton and Jan MacLean and the ongoing work the WBA is doing. Over drinks and nibbles the advertised purpose of giving people 'a chance to catch up with each other' was effected.

SAMANTHA MARKS

REAL VICBAR UNITED ATHLETICO WANDERERS FC

A barristerial celebration of camaraderie, sportsmanship and Brazilians…

Victorian Bar team members participating in the 'Homeless Cup' from L to R: James Fitzpatrick, Jim Doherty, Daz (Homeless Person's Legal Clinic), Fiona (Homeless Person's Legal Clinic), Miguel Belmar-Selas and Michael Katz.

What is it about soccer that provokes such fanatical and unwavering devotion among fans and participants alike?

Is it the round ball? Could it be the unbridled manner of celebrations which follow the scoring of a goal? Perhaps it is a fascination with the ongoing soap opera of Posh and Becks, or a love of all things Brazilian, as Kaka, Adriano and Ronaldinho all seem to inspire?

Although soccer until recently has never really caught the imagination of the Australian public en masse, it maintains a steadfast and enthusiastic following at the Victorian Bar.

In continuity of the Victorian Bar's fine sporting tradition, our soccer players have now well and truly secured their place within the Bar's great sporting pantheon. Their commitment, dedication and sportsmanship reflect the Bar's finest ideals and they proudly represent us all when they play. 2009 was no exception. Undeterred by a string of defeats, Vicbar FC regularly turned up in fine fettle and never flinched in giving its best.

In their opening match for the year against the Law Institute's solicitors, notwithstanding a brave effort on the part of counsel, a 5–0 loss was recorded in the annual encounter with their instructors.

Next, it was the annual showdown against traditional rivals, the New South Wales Bar to contest the Suncorp Cup (awarded to the victor of this annual stoush), which was played at Darebin International Sports Centre before a record crowd in chilly and windy conditions. Although the game resulted in a 3–1 loss for the Victorian Bar, Hamish Austen found the back of the net with a scorching shot to record Vicbar's sole goal for the match. Impressive performances were also witnessed from Colin Magee, Andrew Hanak, Tony Klotz and star captain-coach, Agardy.

In its third match for the year, although victories were recorded in two pool matches, overall success continued to be elusive for Vicbar FC in the 'Homeless Cup', a community event that admirably attempts to engage and encourage the disenfranchised and those living at the margins of our society. Our side was captained and managed by Jim Doherty who organised the Bar's team to participate in the 'Homeless Cup' and best on ground was Fiona, transferred to Vicbar FC from the Homeless Persons Legal Clinic for an undisclosed transfer fee.

The team is currently in a rebuilding phase with some of its leading players remaining under an injury cloud and captain-coach Agardy is eagerly scouting for new recruits.

Vicbar FC's 2010 season will be commencing early in the year, which no doubt will be followed with great interest by players and fans alike.

Verbatim

Australian Competition Tribunal
Application by Fortescue Metal Group Ltd

Application by Robe River Mining Co Pty Ltd and Others

Application by Hamersley Iron Pty Ltd and Others

Application by BHP Billiton Iron Ore Pty Ltd and Another

Melbourne, 10.18 am, Wednesday,
30 September 2009
Continued from 29.9.09
Day three

Justice Finkelstein, President
Professor D. Round, Member
Mr G. Latta, Member

Mr Archibald: If the tribunal please, could I deal briefly with some aspects of the Fortescue infrastructure; their facilities … In June of this year, a joint venture was announced between BC Iron and Fortescue. It's not otherwise in the evidence, but I will provide to the tribunal a copy of the June quarterly report, published by BC Iron – June 2009. And on the front page of that, the first item under Highlights.

Ms Zegarac: Excuse me, your Honours, this is my case so I would like to speak as well.

His Honour: Sorry?

Ms Zegarac: This is my case.

His Honour: This particular case?

Ms Zegarac: Yes, this particular case is …

His Honour: Don't think it is.

Ms Zegarac: … my case – my case.

His Honour: Okay. Well, you just sit – you just sit down at the back and have a listen.

Ms Zegarac: No, I would like to speak as well. It's my case.

His Honour: You can speak later on.

Ms Zegarac: No, during the hearing I want to speak and I want all of these documents – discovery of all of these documents. It's my case. My name is Slavica Zegarac. It's my case.

His Honour: I think you might be in the wrong courtroom.

Ms Zegarac: No, I'm not. Are you Finkelstein J?

His Honour: Yes, that's me.

Ms Zegarac: Yes, that's my case.

His Honour: I should have said no.

Ms Zegarac: That's my case.

Mr Archibald: It would have been the correct answer.

Ms Zegarac: I have tried to tell the gentleman but …

His Honour: This one here? [*referring, it seems to Mr Archibald*]

Ms Zegarac: … but he saw me and ignored me, so he didn't want to come to talk to me. I'm sorry, this is my case.

His Honour: Yes. Well, you might think it's your case, but …

Ms Zegarac: No, no, it is my case.

His Honour: … but – but – I know, but it's not really.

Ms Zegarac: I'm sorry, it's my case.

His Honour: Yes.

Ms Zegarac: It's my cases.

His Honour: More than one?

Ms Zegarac: All of the four is my case.

His Honour: Well, can I tell you that these people are paying a lot of money for their barristers to do a lot of talking …

Ms Zegarac: Yes, I know all about it. I know all about it …

His Honour: Do you?

Ms Zegarac: How the money goes and the insurance and all this stuff; I know all about it.

His Honour: Yes, yes.

Ms Zegarac: I'm sorry, this is my case.

His Honour: Okay. Well, how about …

Ms Zegarac: So I need to know what's going on here. Why I wasn't let know to come here as well.

His Honour: Okay. Well, if you sit down and listen …

Ms Zegarac: No, no, I want to speak as well. I need to know what's going on here, so can you please let me know what's going on in here, because I wasn't told to come.

The exchange continues in this fashion for some time …

Ms Zegarac: What it's all about. I'm asking you.

His Honour: Okay. Well, it's about trains. Trains.

Ms Zegarac: Trains. Yes, I know. You keep on changing the company's name every single time you have the hearing. I know. How many times has it been changed?

His Honour: The name? No, no.

Ms Zegarac: Yes.

His Honour: But do you own any trains?

Ms Zegarac: Excuse me, that's your obstruct language – how?

His Honour: Locomotives.

Ms Zegarac: It doesn't matter. I understand what you said; however, it is my case. All these companies, bogus companies that are created in my name, under my name, they don't exist, and this is all designed to get the money from the insurance from the government.

His Honour: Yes, I don't think they're after insurance in this case.

Ms Zegarac: Well, what is it in this case then?

His Honour: This is about trains.

Ms Zegarac: No, no, no, no.

His Honour: Yes, yes.

Ms Zegarac: No, no.

His Honour: I promise.

and continues until …

Security Officer: Sorry, your Honour.

His Honour: Yes.

Security Officer: Mrs Zegarac …

Ms Zegarac: No, no, I'm talking for myself.

Security Officer: Mrs Zegarac …

Ms Zegarac: I have no representative in here.

Security Officer: Mrs Zegarac, please look at me. I have someone outside to talk to you. Please leave the courtroom.

Ms Zegarac: I am talking to the Honourable judge, and …

Security Officer: Can you please come outside with me?

Ms Zegarac: No. No, you have no right to …

Security Officer: You need to come outside with me.

Ms Zegarac: No. You have no right to do this to me. This is my case. So …

Security Officer: It's not your case, Mrs Zegarac. You're mistaken. Please leave …

Ms Zegarac: … can you please tell me …

Security Officer: Mrs Zegarac, …

Ms Zegarac: … why I am not invited to my case.

His Honour: I will tell you why, because it is a different case.

Ms Zegarac: It is not.

His Honour: Yes, it is.

Ms Zegarac: I have the proof, it is not.

His Honour: Show me what proof you have got.

Ms Zegarac: That is what everybody wants to know, how did I know. That part I will let you figure out yourself. Because you know all these things, and you know how you are doing things. It is so impossible to get it.

… *and continues* …

Security Officer: Ms Zegarac, you have to leave the court room.

Ms Zegarac: Why I'm excluded, it is my case and I, as a party, am excluded. That is corruption.

His Honour: At the moment I am going to ask you to leave, because …

Ms Zegarac: You have …

His Honour: You are interrupting other people and I – it is hard for me to concentrate when there is interruptions. I can't do it.

Ms Zegarac: Excuse me, are you saying this is not my case?

His Honour: I am saying it is not your case.

Ms Zegarac: So that is not true. Right now, right now, corruption is happening right now. With all of these three judges, it is all you here, this is corruption.

His Honour: It might be …

Ms Zegarac: This is corruption and I am going to go public, I am going to go public about this, who are these people, what are they doing? They getting money from the government, from the taxpayer's money for what, for the bogus things that don't exist.

Security Officer: Ms Zegarac, you have to leave. You have to leave the court room.

Ms Zegarac: No, no, I am talking to the judge.

His Honour: That man is asking you to go outside …

Ms Zegarac: Yes, it doesn't matter what he asks. Has he got authority to remove me from my case, that's the question.

His Honour: He does.

Ms Zegarac: He has no authority to remove me from my case. I have every right to be heard. I have every right to be heard at my case.

His Honour: That is true. All right.

Ms Zegarac: That's true.

His Honour: What I might do, is that man will talk to you. I am just going to go away for five minutes and just check a few things. But the man over there will explain to you – sorry, he won't explain to you anything. He will escort you out.

Ms Zegarac: No.

His Honour: Because …

Ms Zegarac: Why?

His Honour: Because …

Ms Zegarac: Why, I tried to speak to this gentleman quietly and he saw me and he ignored me. I tried to get his attention quietly and he did not – he saw me, looked at me, he saw I want to speak to him and then he didn't want to look at me any more. So I am not going to sit here and wait till the case is over, till you make a judgment in my presence and not to say anything.

Security Officer: You are making a mistake, Ms Zegarac.

Ms Zegarac: I am not speaking to you, I'm speaking to the judge. Excuse me.

Security Officer: Ms Zegarac …

Ms Zegarac: He has authority to say what he needs to say. You don't have authority.

Security Officer: Please leave the premises.

His Honour: I am just going to stand down for a few minutes.

Adjourned [10.38 am]
Resumed [11.57 am]

Mr Archibald: Before the …

His Honour: We have to work out what we are going to do to make up some lost time. One of us has a meeting at quarter past one. Is it possible to run through 'til quarter past one, have only a 45-minute break, so we get back half an hour …

Mr Archibald: Yes.

His Honour: … and, if necessary, either with or without a break, sit a bit longer into the afternoon, beyond 4.15, if that suits?

Mr Archibald: Yes. Well, we'll see how we're going …

His Honour: Sure, absolutely.

Mr Archibald: … and then we can perhaps catch up a bit more time tomorrow.

His Honour: We could do that.

Mr Archibald: Start a bit early, go a bit later.

His Honour: We could do that.

Mr Archibald: Now, I was referring the tribunal to the BC Iron quarterly activities report for the period to end June 2009…

Habitat

Virtually there… NextG Counsel, E-Chambers, Cyber-Clerks and Online Briefing

Following the last edition of *Victorian Bar News*, we at Habitat have spent some time searching the Melbourne legal precinct for the new Melbourne TEC Chambers. Habitat has now located the new 'chambers' but not where some members of the Bar might have expected.

Habitat commenced its search by looking at the Melbourne TEC Chambers website. The website provided a telephone number and an email address, but no postal or street address. Habitat then moved to the Victorian Bar website.

We visited the part of the Victorian Bar website headed 'chambers' that lists 'the address of each of the chambers at the Bar, both leased by Barristers' Chambers Limited and not'. Habitat found 22 chambers listed. Whilst Habitat was surprised by the existence of Gaudron Chambers and Gorman Chambers, Habitat was more surprised by the absence of Melbourne TEC Chambers. Habitat's search continued.

Habitat had read about threatened legal action by Melbourne Chambers against Melbourne TEC Chambers. It was reported that the former was concerned that the latter would be engaging in misleading and deceptive conduct and/or passing off as a result of the similar name. So, undeterred Habitat continued its search for Melbourne TEC Chambers along Queen Street. The further search failed to produce any results

Habitat was losing hope. The answer was then unexpectedly found in the new sushi shop in Goldsborough Lane. While eating sushi, a young barrister was overheard asking an older barrister if she had heard about Melbourne TEC Chambers. The older and wiser one explained that Melbourne TEC Chambers are virtual chambers. 'There is no building', the barrister explained. 'It is a group of barristers that exist in the electronic world. You cannot locate the group in one physical place in Melbourne. It's like a club without a clubhouse. Actually it's more like a club where every member plays the same game but has their own separate clubhouse', she explained. The young barrister was puzzled. Habitat had eventually found Melbourne TEC Chambers. It was located in the place where Habitat had first looked.

Melbourne TEC Chambers is an interesting and unique concept. It has been established by a group of Melbourne barristers who specialize in the areas of technology, engineering and construction law. Habitat understands that it has been established for the purpose of marketing its members internationally. Melbourne TEC Chambers was launched in Melbourne in October by Justice Vickery. Below is a small part of his Honour's speech:

> …What does stand out from the brochure [a brochure sent to solicitors] is the extraordinary innovation and energy reflected in these chambers. Indeed, they are not chambers at all in the traditional sense. Those familiar with Rumpole's fireside chats with his clerk, cigar and rough red in hand, punctuated by amiable conversations with eccentric like-minded neighbours, will be disappointed. These are in every sense 'virtual chambers'. That does not mean however that its members are mere holograms or figments of a fertile imagination.

Whilst the people at Habitat did not doubt his Honour, they decided to take a look at the membership for themselves. Habitat was initially shocked by what it found:

Geraldine Gray.

Albert Monichino.

Donald Charrett.

It appeared that MTC was representing that its membership comprised the fictional character Elastigirl from the film The Incredibles, the Fonz from Happy Days and movie star, Steve Martin. However, having now made enquiries, Habitat can confirm that there is no cause for concern. The membership includes the respected and successful members of our Bar Geraldine Gray (not Elastigirl), Albert Monichino (not the Fonz) and Donald Charrett (not Steve Martin).

Habitat can also report that Melbourne now has a virtual clerk, Lyus LeGal. Veteran Sydney clerk Belinda Lyus established her online list earlier this year. It is mainly comprised of Sydney counsel but also includes two Melbourne barristers; David Denton SC and Geoffrey Slater. According to *The Australian*, Ms Lyus 'handpicked' the members of her online chambers. Ms Lyus told *The Australian* 'I've clerked for the best and the worst and I can sniff it'.

David Denton SC.

Geoffrey Slater.

Belinda Lyus.

By courageously embarking upon such new initiatives and boldly journeying forth into the outer limits of the parallel legal universe, success for Melbourne TEC Chambers and Lyus LeGal is virtually guaranteed.

A BIT ABOUT **WORDS** *batman*

Julian Burnside AO QC

A recent Quarterly Essay, written by Annabel Crabb, had Malcolm Turnbull as its subject. According to the author, among Turnbull's many interests is an interest in language. Early in the essay, Turnbull is fretting about the etymology of *batman* (in its military sense, not in its modern Bruce Wayne sense). He guesses that 'it must be French'. Not a bad guess, since English recognises *bat* as five different nouns with five different etymological roots. The *bat*, as the name for the winged mammal in the order Cheiroptera, comes from Scandinavian. The *bat*, as the name for the wooden implement used for hitting cricket balls is of uncertain origin, but is thought to be from Gaelic, although it has also been suggested as coming from French. Not well-known in Australia, the *bat*, as American slang for a spree or binge, is of unknown origin. Even less well-known is the *bat*, meaning the colloquial speech of a foreign country, especially in phrase to *sling the bat*, comes from Hindi. Kipling used it several times, for example in Barrack-room Ballads (1892) 'An' ow they would admire for to hear us sling the bat.'

So Turnbull did better than chance to reckon that *batman* (in the sense of a military servant) comes from French. It is unlikely that he would have known more of its obscure origins and development. A *batman* was originally 'a man in charge of a bat-horse and its load; then, a military servant of a cavalry officer; now, an officer's servant.' A *bat-horse* (*cheval de bât*) was one which had a pack saddle, and the French for pack saddle is *bât*. A person skilled in etymology but untutored in current culture would be forgiven for thinking that a batmobile was a truck.

Another name for the bat-horse is a *sumpter*. Originally, a sumpter was the driver of a pack-horse; by the 17th century its primary meaning was 'a beast of burden', but it also signified a pack or saddle bag; and it could also be used in combinations: *sumpter man*, *sumpter beast*, *sumpter ass*, *sumpter camel*, etc. In *King Lear* (1605), Shakespeare has the king say (as he points at Oswald) '…Persuade me rather to be slave and sumpter to this detested groom'; and in *Bold Robin Hood and his Outlaw Band* (1912) Louis Rhead says 'Following some distance behind was the King's war-horse, fully caparisoned, together with some sumpter-horses under the care of his squires'. The adjective *sumptery* means 'of or pertaining to sumpter animals', and in his 1620 translation of *Don Quixote*, Shelton rendered the Spanish reposteria (baggage) as *sumptry*: 'They alighted, and Sancho retired with his Sumptry into a Chamber of which the Oast gave him the Key'.

In the odd ways of English, we have a number of other words apparently connected with *sumpter* but which are quite unrelated: *sumptuous* (also *sumptious*) means 'made or produced at great cost; costly and (hence) magnificent in workmanship, construction, decoration, etc.' *Sumptuosity* means 'lavishness or extravagance of expenditure; magnificence or luxuriousness of living, equipment, decoration, or the like.' *Sumptuousness* and *sumpture* likewise signify magnificence or expense. All of these words are related to the more familiar *consumption* and derive ultimately from the Latin *sumare* – to consume or spend.

Originally, *consume* signified the completed destruction of the thing consumed: we see this sense still when we speak of something being consumed by flames, or consumed by jealousy. Pulmonary tuberculosis was colloquially called *consumption* until quite recently, and had the same connotation of the destructive effects of a wasting disease. Originally, to *consume* in the mercantile sense was 'to spend (goods or money), esp. wastefully; to waste, squander'.

The engines of commerce insist loudly that we consume with extravagance and enthusiasm: we do it on money which is borrowed or invented or hoped for. The global financial crisis, and the increasing signs that global warming is the result of our prodigal ways, bring *consumption* back to its etymological origins, and destruction is the result.

Like *consumption*, *extravagance* and *enthusiasm* are words that have significantly shifted in meaning over their lives. Originally, *extravagance* and *enthusiasm* would scarcely have fitted together in the same sentence.

Extravagance originally signified 'going out of the usual path; an excursion, digression'. In the early 17th century, an *extravagant* officer in the military was 'one who had no fixed place or had a roving function'. Later in the 17th century it meant 'varying widely from what is usual or proper; unusual, abnormal, strange; unbecoming, unsuitable' and *extravagance* meant 'exceeding just or prescribed limits, esp. those of decorum, probability, or truth'. Early in the 18th century *extravagance* settled on its present primary meaning: 'excessive prodigality or wastefulness in expenditure, household management, etc'.

At the time when *extravagant* meant 'spreading or projecting beyond bounds; straggling', *enthusiastic* meant 'pertaining to, or of the nature of, possession by a deity'. In Leviathan (1652) Hobbes wrote:

> 'Neither did the other prophets of the Old Testament pretend *enthusiasm*, or that God spoke in them …
>
> there were some books in reputation in the time of the Roman republic: sometimes in the insignificant speeches of madmen, supposed to be possessed with a divine spirit, which possession they called *enthusiasm*; and these kinds of foretelling events were accounted theomancy, or prophecy…

In the 18th and 19th century, the meaning gradually lost its delusional focus. The OED gives it as:

> Fancied inspiration; 'a vain confidence of divine favour or communication'. In 18th c. often in vaguer sense: Ill-regulated or misdirected religious emotion, extravagance of religious speculation.

It is said that Gladstone (1809–1898) urged his cabinet to avoid enthusiasm. He was Prime Minister of Great Britain four-times: 1868–74, 1880–85, 1886 and 1892–94. By the time of Gladstone's first cabinet, *enthusiasm* meant:

> Rapturous intensity of feeling in favour of a person, principle, cause, etc.; passionate eagerness in any pursuit, proceeding from an intense conviction of the worthiness of the object

It may be that Gladstone was using the word with its earlier connotations of religious zeal, because when he was at Eton the word still signified 'a vain confidence of divine favour or communication', and we tend to think that the language has reached its ultimate, unchangeable form at around the time we end our secondary education. This little vanity, which affects most people (well, most people who are interested in the language at any rate) probably explains why so many elders resent changes in usage, and deplore the linguistic extravagances of succeeding generations. If we account a generation as 25 years, the passing of two generations is a fair approximation of the half-life of the meaning of many English words. While the process is uncertain and idiosyncratic, it is common to see a word shift meaning significantly over a period of 50 to 100 years. When Gladstone was at school, *enthusiasm* had a distinct sense of undesirable religious delusion; 100 years later, Joseph Conrad was using it with its current, much less intense, meaning.

Likewise, the meaning of *fulsome* has shifted progressively from abundant (1250–1583) or cloying, coarse, gross (1410–1735), to offensively smelling, stinking (1583–1725), fat (1320–1628), abundant or rank in growth (1633), overfed (1642–1805), physically disgusting, foul, or loathsome (1579–1720), offensive to normal tastes or sensibilities (1532–1819); gross or excessive flattery (1663–1802). Nowadays, although the 'proper' meaning is still tainted by centuries of undesirable connections, *fulsome* is increasingly used to convey something like its original sense of fullness with no bad connotations.

Choir is another example. It comes from Latin *chorus* – a company of dancers. Originally it is from the Greek *choros* – a company of singers or dancers. It is the root of *choreography*, and also of Huntington's Chorea, so called because the sufferer twitches and jumps. Generally these days it is understood as a body of singers (not dancers), and also of the part of a church in which the singers sit or stand. *Choir* is also spelled *quire* and is so spelled in Shakespeare, Milton and Byron, and also in the Book of Common Prayer. It is distinct from the other word *quire* (an unbound book) which comes from the French *cahier* – exercise book: the kind Malcolm Turnbull wrote in at school, as he formed his views (apparently with enthusiasm) about the ways and meanings of the English language.

Dear Themis

Dear Themis
I seem to be briefed in a number of mediations where the mediator is often a former judge, sometimes a former High Court judge. Some people call the meditator 'Justice X', some 'judge' and others 'Mr X /Ms X'. What is the proper etiquette in referring to a mediator who is a former judge?

Pseudo Sycophant

Dear Pseudo Sycophant
Of course the natural tendency is to flatter such a mediator by referring to him or her by their former title 'Justice' in the hope that it improves the client's prospects of a favourable settlement. Frank Galbally said that it always assisted to 'over qualify' the person you seek to persuade. He found it particularly useful when persuading a police officer to agree with propositions in cross examination! A member of counsel should never descend to such cheap tricks.

In my opinion, the proper etiquette is to refer to the mediator as Mr X or Ms X in the formal sessions. It provides an even playing field for all at the mediation, particularly for clients who may not be accustomed to the niceties of legal address. If one wishes to grovel, one may of course refer to the mediator as 'judge' in private session.

But it is worth remembering two things. First, there is nothing more 'ex' than an 'ex' judge: just ask…Marcus Einfeld. Secondly, in light of the hefty judicial pension, the former judge is only mediating your case for one reason – GREED. And Themis says Amen to that!

Dear Themis,
I have attended many Bar dinners and list dinners over the years. I have sat through a series of interminable and turgid speeches from both the Bar and Bench. Am I duty bound to remain silent and seated throughout such speeches?

Disgruntled Attendee

Dear Disgruntled Attendee
For some reason, lawyers who make speeches, particularly after a few drinks, consider that they should share their 'bon mots' for as long as possible. As we all know, this can lead to disastrous consequences.

But good manners dictate that one should remain silent and seated during a speech. This can be a very onerous obligation in the circumstances identified. But remember: in the uncommon law of etiquette (and unlike the Charter of Human Rights Act), for every obligation, there is corresponding responsibility. Thus while the listener has the ***obligation*** *to remain silent, each speaker has the* ***responsibility*** *to keep his or her speech short, sharp and preferably witty.*

Alas speakers are rarely mindful of this responsibility. As a result, Themis has a practical solution to your problem. Fein the need to go to the lavatory just before any speech commences and then stay near the doorway of the function room for the first few moments of the speech. If the speech sounds dull, you can sneak outside with other disgruntled guests without causing offence. But if the speech sounds funny and entertaining, you can make a great fuss of rushing back to your table. Rather than seeming rude, it will look like you have been waiting excitedly for the speech all night!

There is only one caveat to this practical suggestion: given the number of speeches at the last Bar dinner, there were baseless rumours circulating that Themis had acquired a nasty urinary tract infection!

Wine report

Scotchmans Hill Pinot Noir 2008

Scotchmans Hill is a family-owned vineyard and winery based on the Bellarine Peninsula in Victoria. It was established in 1982 by its current owners, David and Vivienne Browne. It was the second vineyard in the region and the first winery in the region.

Mount Bellarine, on which Scotchmans Hill is located, is an extinct volcano where thick, black, moisture-retentive and fertile volcanic soils of black clay with basalt subsoil lend individual and intense character to the wines. The winemaker is Robin Brockett. James Halliday rates the vineyard with five stars (his highest rating).

The 2007/2008 growing season was excellent, with spring and early summer being moist and warm followed by a warm, dry summer and autumn. Luckily, the pinot noir grapes were picked before an intense heat hit, which gives the wine an excellent quality and flavour.

This wine's bouquet exhibits violet notes, plum and dark fruits. This is complemented by spice and earthy characters with cedar oak in the background.

The wine colour is a deep garnet.

The palate is full, complex and rich with raspberry and dark fruit flavours, beetroot and spice notes. There is a touch of sappiness throughout the mid palate, which is rounded by cedar oak. The wine's structure is defined by firm grained tannins, contributing roundness and length. The tannins are large and somewhat immature. This wine should be given some time and should be cellared for four to six years. It has 14.5% alcohol. It is available from Wheat Restaurant at $52.00 a bottle or $7.50 a glass. It is available from the Scotchmans Hill website for $28.80 <www.scotchmanshill.com.au>.

I would rate this wine as smooth commercial silk, definitely a 'silk's purse, not a sow's ear', but make of it what you will.

ANDREW N. BRISTOW

Bars and Benches

John Dee QC,
John Dee, Melbourne, 2009,
hb 212pp, incl index, $40.

John Dee QC's *Bars and Benches* is a book by one of the Bar's own about one of the Bar's own. It is an autobiography of one of Victoria's best known criminal barristers and judges of the modern era, telling of his early life and of his career in the law.

Perhaps inevitably it is a very personal account of Dee's career, told at times in an irreverent and always in an accessible way. It starts with his early days in Footscray and includes his experience of polio and then his physical abuse by the Christian Brothers at St Augustine's School in Yarraville. It was a school also attended by Judge Ostrowski (as he was later to be) and EJ Whitten but it holds few positive memories for Dee: 'It is difficult to describe the tension and depression that existed… I learnt very quickly that being honest was the worst policy. You learned quickly that, in order to survive, you had to be furtive, cunning and dishonest. … The brutality rubbed off onto the boys. Fights were frequent, and you really had to be able to defend yourself.' (p.11). He describes the time at St Augustine's as having made him anxious and suspicious of the world around him, a fighter when his disposition was not towards violence. He observes that this was a formative part of his psychological background that he brought with him to his career as a barrister. It is clear too that it left lasting scars.

Dee writes of the period of the Second World War in inner-western Melbourne and the poverty of its aftermath: 'It was tough and the times were hard. Working-class people worked hard and for not much money. Throughout though, there was the wonderful togetherness – a feeling of people with a common goal.' (p.23) His escape from the Christian Brothers was to University High School in 1950 where he describes his life turning around, his move from Footscray to Collingwood and his embracing of football and cricket in the local area.

With the end of school came National Service at Watsonia and Puckapunyal and a successful foray into the art of boxing. By 1955 Dee's family had moved to East Preston and he started studies in Medicine at the University of Melbourne. It proved not to his liking and in 1956 he started work as an assistant clerk of courts at Fitzroy, He describes the corruption of the day that he saw at close hand and the knowledge he acquired of the justice system in the form of Courts of Petty Sessions presided over by police magistrates and justices of the peace, many of whom tended to drink with the police, too often even during the recess for lunch. However, the role gave Dee an opportunity as well to observe some of the fine advocates of the era – Frank Galbally, Jack Galbally QC, Ray Dunn and Jack Cullity. In that context he also encountered his later master, Barry Beach, John Phillips and Daryl Dawson in the early phases of their careers at the Bar. He tells many tales of cases he encountered involving both the unknown and the notorious. This is one of the strengths of the book. Dee is a fine storyteller. He does it factually and in an understated way which draws the reader into accounts that are absorbing and often involve persons whom many in the criminal law will recall or readily recognise.

Interspersed with his autobiographical material, Dee writes of fellow travellers on his career at the Bar and on the Bench, including Frank Vincent QC, Margaret Rizkalla and John Coldrey QC, all later, of course, appointed to the Bench.

There is a good deal of self-revelation in Dee's accounts, including in relation to his experience of stress and anxiety. He describes his first panic attack in 1962 and his resort thereafter to alcohol: 'From 1965 on, when I became a barrister, the anxiety really became worse. It increased with the level of stress. As the years went by and the level of complexity increased, so did the stress' (p.54). He describes embracing a culture that existed (and still exists) of drinking as stress relief at the Criminal Bar both on the prosecution and defence sides. Among, what are sometimes painful disclosures, Dee tells a variety of fine and humorous anecdotes, incorporating many of the well-known members of the Criminal Bar, including Graham Thomas SC and colleagues in arms in the Northern Territory. He tells of many bars in which he has passed time; some of them he would recommend (in

moderation, no doubt) and others he would not. He takes the reader into a previous era of the Bar in the 1960s and 1970s, relating his early career doing criminal cases and maintenance and paternity matters.

Large parts of the book are dedicated to significant briefs that Dee undertook as counsel, early ones for the defence and later mostly for the prosecution. As with all barristers, certain cases particularly stick in the memory, some of them because they were life-changing. Dee tells of his role in the Faraday kidnapping trials of the early 1970s and then of his period of seven years as a Crown Prosecutor between 1980 and 1987. Well known trials that he prosecuted included 'Mr Stinky' (Raymond Edmunds), Malcolm Clarke and the Russell Street bombing. After that Dee served as the Deputy Director of Prosecutions for the Commonwealth in Canberra, working at times closely with Paul Coghlan QC, now of the Supreme Court, including on matters related to David Eastman, whose legal travails continue. During that period he took silk.

Dee was appointed a judge of the County Court in 1990 at the age of 53. Although this is the contribution to the law for which most of us know him best, he devotes relatively little of *Bars and Benches* to this aspect of his career. He candidly reveals the stress that he experienced in his judicial role and the measures that he took to enable himself to discharge his functions fairly and effectively. Dee has made the decision to reveal parts of himself in considerable detail. It is a courageous decision. However, other parts of Dee the person are self-censored; he says virtually nothing about his personal life and his life away from the law. Perhaps an insight into the role of the law in his life is to be found in the following passage: 'The work of a judge is essentially a very difficult one. It really consumes your whole life. This may sound an exaggeration. The fact of the matter is that there are frequently judgments or rulings waiting to be done. There is an urgency to get onto the next case – an urgency which must be restrained. There always seems to be one case, or the worry of it, over the judge's head' (p.177).

Dee concludes his autobiography with musings on changes he has seen in the law, including the phenomenon of women's involvement at the higher levels of the Bar and on the courts over the past two decades. He welcomes this, amongst other things, as an introduction of 'reality' into the legal system, and bewails a number of forms of prejudice which he encountered in the law – mostly not directed toward himself. He welcomes the amendments to the Crimes Act that have allowed victims of sexual abuse to have their cases heard in the one hearing, the abolition of the unsworn statement, and the replacement of the *Viro* self-defence rule by that in *Zecevic*. He argues for an entitlement to draw adverse inferences from a suspect declining to answer questions at police interview and contends for judicial appointment being via an independent non-political board, overseeing selection by the Attorney-General. He comments that there 'has been the occasional man or woman appointed who did not deserve to be a judge. These latter appointments have been made by both major State political parties. The persons appointed, few in number thank heavens, have not had the requisite background or skills. They have been mainly to the County Court, and the judges and the legal profession know who they are.' (p.191) He ends with reference to his role as Chairman of the Legal Profession Tribunal after his retirement from the County Court in 2000 and happy tales of support for the resurgent Bulldogs of the recent era.

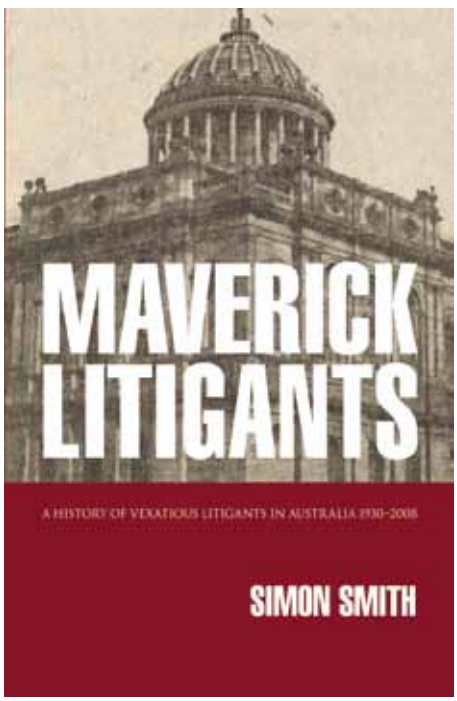
Dee's autobiography, *Bars and Benches*, is a candid and personal account of the career of a well known silk and judge. His preparedness to air openly subjects that are mostly hidden and not referred to, even in whispers, including the stress and anxiety experienced by many at the Bar, and excessive recourse to alcohol, is courageous. It is only when respected practitioners like Dee speak openly of their experiences that bodies such as the Bar's Health and Wellbeing Committee can formulate constructive measures to reduce unnecessary stressors and to provide support to our colleagues so that their journeys through the law are easier, healthier and more effective.

Dee QC is highly respected within the criminal law as a fair, decent and talented advocate and judge. His autobiography does nothing to detract from that reputation but it serves to humanise the man under the wig and in that regard enhances the tapestry of the Bar and our system of justice. Stories of judges' and barristers' travails, triumphs and traumas in the law are not often enough formally recorded. *Bars and Benches* adds another voice to the history of the Victorian Bar. It is the voice of a servant of the law that deserves to be listened to and accorded in retirement the respect that it commanded as an advocate and long-serving judge.

IAN FRECKELTON SC

Maverick Litigants:
A history of vexatious litigants in Australia 1930–2008.

Simon Smith,
Maverick Publications, Melbourne, 2009



I remember as a junior officer in the Department of Justice being handed a thick file full of long meticulously handwritten documents written in legalese, with references to King George, full of capitalisation, underlining and exclamation marks. The file was many years old and the petitioner was threatening legal action for damage to the family hotel – burnt down in the 1850s.

This is the world of the vexatious litigant – the subject of Simon Smith's

book *Maverick Litigants: A history of vexatious litigants in Australia 1930–2008.*

The book began life as a doctoral thesis and the first 60-odd pages include a state by state account of legislation relating vexatious litigation – of interest to the scholar or policy fan (or someone tearing their hair out trying to work out how to deal with one).

There is also a survey the psychiatric literature relating to 'querelents' including some useful guidelines for judicial officers in dealing with vexatious litigants ('maintain rigorous boundaries').

But the book really comes alive in following 200 pages with the stories of six 'maverick' litigants who were ultimately declared vexatious – four of them Victorian.

It begins with Rupert Millane who has the honour of being the first person in Australia to be declared vexatious in 1930. He began his courtroom career in the 1920s challenging the Government bus licensing system, even winning an early (and rare) victory against a young Owen Dixon KC.

An inventor and entrepreneur, Millane then developed and began to build a house out of kerosene and petrol cans in Heidelberg, which was eventually demolished, but not without a vigorous bout of legal challenges.

From then on, he had to seek leave from the Supreme Court before issuing proceedings. But it didn't stop him – he continued to seek leave and would sometimes issue proceedings in the High Court (where the declaration didn't apply) or even in the name of a co-operative brother.

Smith writes well, with a poignant sympathy for his subjects. The gentle and courteous Millane is depicted shuffling the corridors of the Supreme Court in the 1960s, being given a patient hearing by the judges. Appearing before Justice Tom Smith, Millane complained that he needed more time to file a statement of claim because he was going to be busy in the High Court the next day and Heidelberg Magistrates Court in the afternoon. Mr Justice Smith apparently told him with a straight face, 'Mr Millane, the trouble with you is that you have too broad a practice.'

Goldsmith Collins, an ex Fitzoy ruckman, developed his taste for litigation fighting the Northcote City Council in the 1940s over a fence which he had built without a permit. In contrast to the gentle Millane, he was an aggressive character who ended up being banned from the Supreme Court library. He was described by Charles Francis QC as the 'leader of the vexatious bar,' helping other vexatious litigants such as Millane and Constance Bienvenu.

Bienvenu was an animal activist who spent years fighting the establishment RSPCA in the courts which included a notable victory in 1967, when Justice Starke declared that the RSPCA had been without valid by-laws since 1895. But the victory was pyrrhic because it meant that there were no valid officer-bearers or contributors, meaning Bienvenu lost her *locus standi* to bring the action.

Elsa Davies began her career as a teenage musical prodigy ('Australia's champion xylophonist') touring nationally and internationally before becoming a composer and radio performer in the 1930s, with successes that included *King George's Jubilee March*.

With a downturn in her finances, she married the elderly brother of Sir Isaac Isaacs in 1938. The marriage lasted 11 months, but led to nearly ten years duelling in the courts with Sir Isaac (anxious to restore his brother's honour) over issues such as her right to live in the marital home and to get the ring returned, resulting in her being declared vexatious in 1941. But the litigation continued (because the declaration did not prevent her from defending proceedings) only ending with the death of Sir Isaac in 1948.

But she kept on litigating – using her new husband to unsuccessfully sue Myer over a leaking gas heater in the 60s and taking the St Kilda Council to the County court over a dog prosecution in the 1970s. In 1988, she had her swansong when she got leave to sue *The Age* for defamation after it referred to her as an 'ageless eccentric.' She lost after the court viewed footage of her performing on the Mike Walsh Show, singing at the piano with a dog.

This book is full of such gems and it is meticulously researched, down to street names and suburbs. One is ultimately left with a sneaking admiration for these larger than life, never-say-die characters who never knew when they were beat – and thankful never to be caught up in their legal machinations.

DAVID GIBSON

LUDLOWS

LEGAL REGALIA & TAILORS

Ludlows offers a free lifetime alterations service on any garment purchased.

We offer the highest standards in garment care with dry cleaning and wig cleaning services.

Ask us about our legal regalia loan service.

$500 Suit offer (men only) - Super 150s high density wool

Ludlows Mezzanine Level • 530 Lonsdale Street • Melbourne • Victoria • Australia
Tel 03 9670 2000 • Fax 03 9602 2266 • Email info@ludlows.com.au

www.ludlows.com.au

Benjamins Jewellers

COURT DRESS

Cultured pearl
8.5mm – 9mm
necklace and gold clasp.
RRP $3,950.

Longines ladies and gents watches
RRP $1,395 each.

1.24ct diamond
pavé set bangle
RRP $3,400.

Pink sapphire
and diamond
set ladies
dress ring.
RRP $3,500.

Blister pearl stud earrings. RRP $800.

Merchants in fine jewellery,
watches and distinctive gifts since 1880.

360 LITTLE COLLINS STREET MELBOURNE 3000 TELEPHONE +613 9670 9416 FACSIMILE +613 9670 3936