VICTORIAN
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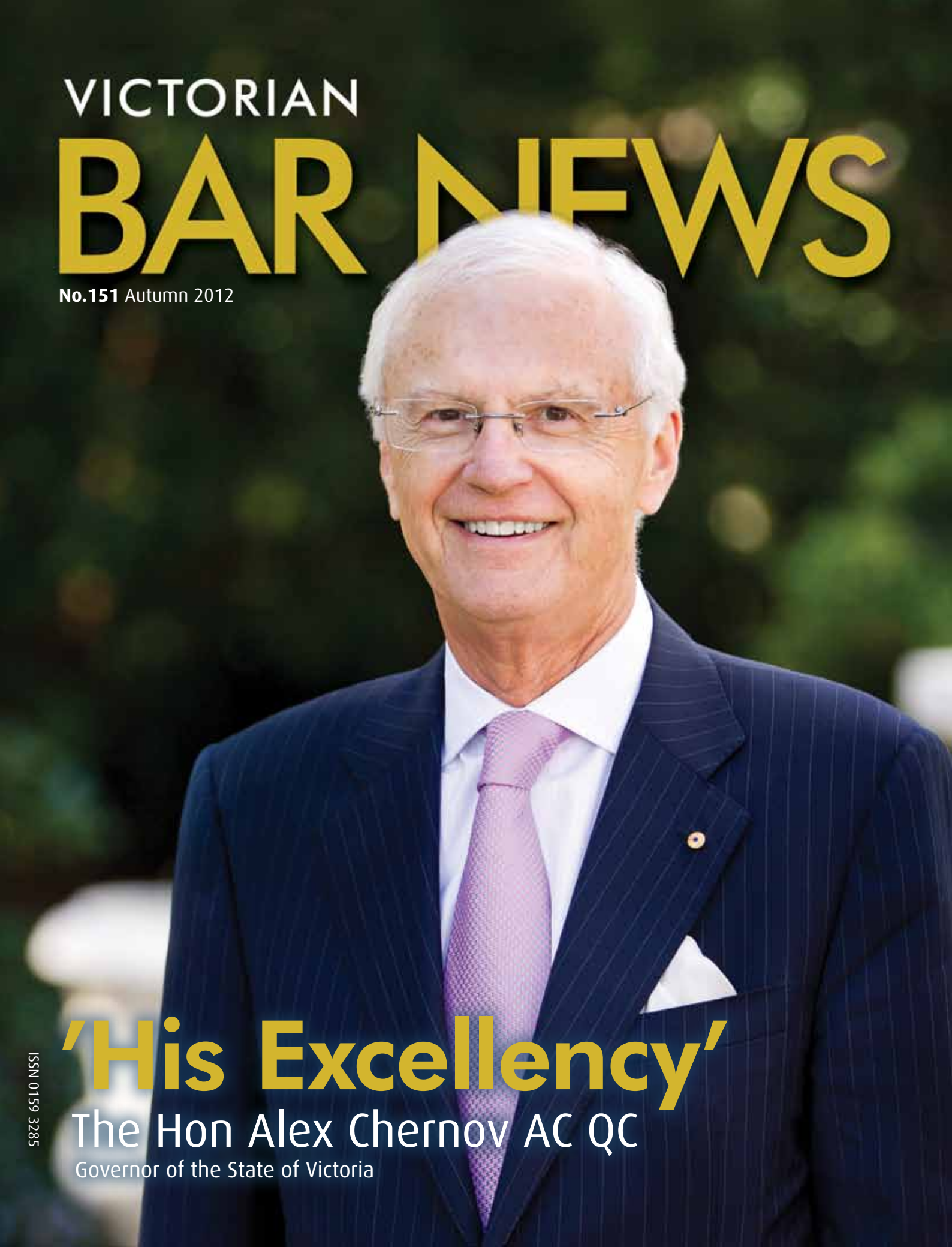
No.151 Autumn 2012



'His Excellency'

The Hon Alex Chernov AC QC

Governor of the State of Victoria

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BAR NEWS

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Cover Photo
The Honourable Alex Chernov AC QC, Governor of the State of Victoria

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Victorian Bar News Continues

The Editors

Welcome to the 151st edition of *Victorian Bar News*.

It has been just over a year since our last edition. Following the release of the bumper 150th edition, the VBN Committee was directed by the Bar Council to cease work on *Victorian Bar News* until further notice, while a Bar Council working group conducted a review into the future of *Victorian Bar News* by addressing three salient questions: Whether to have a print publication at all? If so, what should be its style, content, format and frequency? And, how should it be controlled and produced?

A submission was forwarded to the working group on 28 March 2011 by the Editor which argued for the continuation of *Victorian Bar News* in the style of the 150th edition, but as a half-yearly publication, in order to preserve the new quality standards of this publication. On 25 October 2011, the then Chairman of the Bar Council, Mark Moshinsky SC, appointed us (Paul Hayes, Richard Attiwill and Sharon Moore) as co-editors of *Victorian Bar News*. Our retainer is explained in detail by the current Chairman Melanie Sloss SC in her adjacent column, however, in short, our brief is to deliver the *Victorian Bar News*, twice yearly (Autumn and Spring), in the style and quality of the 150th edition.

A fresh new *Victorian Bar News* editorial committee was convened and it met for the first time on 1 December 2011 to plan the current edition. After the long summer court vacation, momentum picked up during February and March as the laborious process of putting together *Victorian Bar News* culminated in the editing and layout tasks which were undertaken during April and May with a new production team, resulting in the release of this current edition. As our new team has now become more familiar with the compilation and production of *Victorian Bar News*, we expect to have future editions out as planned (March and September each year).

Much has happened at the Victorian Bar since our 150th edition and is covered in this current edition. It is especially pleasing though that *Victorian Bar News* is now able to recognise the appointment of The Hon Alex Chernov AC QC as Governor of the State of Victoria. A former Chairman of the Victorian Bar, the Governor graciously agreed to be interviewed for *Victorian Bar News* and we are honoured to feature His Excellency on our cover of this edition.

And so on to 2012. We wish to thank all of our contributors who have pitched in and helped with preparation of this edition. There is much to report on and smile about in our small universe that is the 'Bench and Bar' and we, together with our new cheerful and enthusiastic committee look forward to more frequently producing future editions of *Victorian Bar News* for the enjoyment of all of our readers.

The Editors VBN

Letter to the Editors

Dear Editors,

As I sat down to idly browse through the latest edition of Bar News, I little thought that I would feel obliged to put pen to paper, or to be strictly accurate, finger to keyboard. But in the interests of historical accuracy I cannot leave your article on Women Lawyers Achievement Awards uncorrected.

I do not know Jane Dixon SC, and I have no reason to believe that she does not deserve her recent award, but I do know that she is not entitled to one of the "achievements" claimed on her behalf in the article by Joye Ellery.

Jane Dixon was not the first female practitioner employed at Galbally and O'Brien where she started articles in 1984. It is probable that I was, although it never occurred to me to claim that as an achievement or even to consider whether the milestone was mine to claim. Jane may have been the first female articled clerk.

I worked at the firm as an employee solicitor in 1966 and 1967. On one occasion I even appeared robed, long before I went to the Bar, as "Mr Frank's" Junior Counsel on the last day of the hearing of the case against Christine Aitkin on a charge of harbouring the escaped prisoners Ronald Ryan (sadly, the last man to hang in Victoria) and Peter Walker. My role was to hold the fort after "Mr Frank" concluded his address to the jury, so he could go and open his next trial.

One reason why I never thought in terms of being the first female practitioner at Galbally and O'Brien, was because of the important role played by the longstanding female unqualified staff, especially Nola Harrison, who knew everything that was happening in the firm and seemed to run partners, staff and clients, and Shirl Pretlove, who was a very experienced and competent criminal law clerk.

Yours sincerely,

Joan Dwyer OAM VBN

Victorian Bar News invited the Women's Barristers Association (WBA) to respond to Ms Dwyer's letter above, however the WBA declined to do so.

At the Coalface: A Busy and Productive 2012

Chairman's Cupboard

The new Editorial team

On behalf of the Bar Council, may I congratulate the new co-editors, Paul Hayes, Richard Attiwill and Sharon Moore, and their fine team of deputy editors, for their work in producing this edition of Bar News. This edition is the product of a process set in train in March 2011 by the (then) Bar Council, under the chairmanship of Mark Moshinsky S.C., when a working group was established to consider the future of Bar News and report back to Bar Council with its recommendations.

The working group, comprised of Richard McGarvie S.C., Will Alstergren, Justin Hannebery, Gabi Crafti and me, consulted informally amongst members of the Victorian Bar with a view to obtaining feedback about Bar News, ascertaining whether members prefer to receive a "hard copy" publication, frequency of publication and content etc, and the desirable number of editors or co-editors etc. The General Manager, Stephen Hare, also assisted the working group and participated in its deliberations as an ex-officio member. The Working Group also sought recommendations and suggestions from previous editors of Bar News and consulted with the NSW Bar Association in relation to their publication.

The key recommendations of the working group were:

- To support the continuation of Bar News as a hard copy publication but on the basis that it be structured to produce a magazine of good quality on a regular basis (e.g., March/Autumn edition and September/Spring edition) drawing from a broad range of contributors and presented in an attractive format/appearance.
- Bar Council should appoint three co-editors (perhaps with one of them taking primary responsibility for alternative issues) and, in consultation with the co-editors, appoint a number of deputy editors. Members of the Editorial team will be appointed or re-appointed annually, with scope for re-appointment and smooth succession in the editorial role.
- Bar Council should provide an outline or brief to the Editorial team setting out the gist of what it is looking for in Bar News.
- The Bar Office will make available a member of its administrative staff to be co-opted as an ex-officio member of the Editorial team to assist with the production of Bar News and to manage enquiries, bookings, copy and payment throughout the year.

Bar Council endorsed the recommendations of the working group, and the new Editorial team in late 2011, and we are delighted to see that they have worked collaboratively to produce a high quality publication for our members, reporting on matters of interest to the Bar. We are hopeful that they will publish an edition twice a year.

Thanks to the 2011 Bar Council

I would like to record my personal thanks to the past Chairman, Mark Moshinsky S.C., and the other members of the 2011 Bar Council who retired at the last election. The 2011 Bar Council was a very strong, egalitarian and cohesive group of people who worked well together, and under Mark's leadership we finalised the review of the Clerking System, introduced the entrance exam for candidates for the Readers' Course and made substantial progress with the preparation of the Discussion Paper for the Silks Selection Process. I would also like to record our thanks to Sam Hay, who worked long hours in his role as Honorary Secretary and greatly assisted both the Bar Council and the Counsel Committee.

Much of the important work of the Bar is undertaken through its committees and I would also like to record our thanks to the retiring Chairs and members of committees who have contributed to the work of the Bar in this way.

The 2012 Bar Council and the year ahead

Once again, the Bar Council has a wonderful mix of talented juniors and experienced silks, from a diverse array of backgrounds and practice areas. We are fortunate indeed to have 14 (out of 21) "continuing" members on the 2012 Bar Council, and this will assist in progressing and consolidating much of the work commenced by the last Bar Council.

In addition to the work we have undertaken towards developing a proposal for the continuation of a Court-based system for the appointment of Senior Counsel in Victoria in 2012, with the Chief Justice being centrally involved as the appointor, matters such as the implementation of the National Profession Reforms and the continued enhancement of the Readers Course and the CPD program provided by the Bar are among the important initiatives that will remain a priority for this Bar Council. We are also reaching out and seeking to develop the Victorian Bar's links with Asia, following the success of our recent 'Engaging the Asian Economies - Law & Practice' conference and visits from a number of delegations from China, Singapore and Hong Kong.

We have also established a productive working relationship with the State and Federal Attorneys-General, the Hon. Robert Clark MP and the Hon. Nicola Roxon MP. Each of them has actively and visibly engaged in consultation with the Victorian Bar and made time to participate in and contribute to Bar activities, including our CPD program.

The Annual Bar Dinner

I am pleased to announce that the annual Bar Dinner will take place on Friday, 25 May 2012 at the splendidly refurbished Art Deco Myer Mural Hall, Bourke Street, Melbourne. (We hope to be able to continue to rotate between Friday and Saturday evenings in coming years) The Hon. Justice Susan Crennan AC and Philip Dunn QC have kindly agreed to be the guest speakers at the dinner. The Junior Vice-Chairman, Will Alstergren, together with the Functions Committee and the marketing team in the Bar office, have arrangements under way for what promises to be a wonderfully enjoyable evening. I am hopeful that members of the Bar will turn out in force to acknowledge our honoured guests, be entertained by our speakers and enjoy the music provided by the Bar Band.

May I take this opportunity to wish everyone success in the year ahead.

Melanie Sloss SC VBN

From Vilnius to Melbourne: The Extraordinary Journey of The Hon Alex Chernov AC QC

"Your Governor mixes the best martini on earth". So it was declared by the head of mission at a recent diplomatic social event held in Melbourne. And said diplomat didn't stop there. "He is a truly engaging and impressive individual and a wonderful host". The diplomat's endorsement of the State of Victoria's twenty-eighth Governor had an all too familiar refrain and save the revelation about our Governor's bar-tending skills, merely echoed the remarks of almost anyone who has had the pleasure of meeting The Honourable Alex Chernov AC QC. Of course those of His Excellency's colleagues at the Victorian Bar who have enjoyed the privilege of knowing the Governor as a Barrister and as a Judge of the Supreme Court of Victoria would not be at all surprised by the universal regard in which he is held, by not only the legal profession, but also by the community at large. Perhaps Alex Chernov was the kind of ideal man Rudyard Kipling envisaged when he wrote:

> *If you can talk with crowds and keep your virtue*
> *Or walk with Kings, nor lose the common touch*

Because anyone who knows the Governor well will say that is precisely who Alex Chernov is, and this is but one of the many qualities which make him an ideal choice as Governor of Victoria.

All up, four of Victoria's twenty-eight Governors have originated from the Victorian Bar. Preceding The Hon Alex Chernov AC QC have been: The Hon Sir James Gobbo AC CVO QC (1997-2000); The Hon The Hon Richard McGarvie AC QC (1992-1997) and Sir Henry Winneke AC KCMG KCVO OBE QC (1974-1982). Further, the Victorian Bar has produced three Commonwealth Governor Generals: The Rt Hon Sir Ninian Stephen KG AK GCMG GCVO KBE PC QC (1982-1989); The Rt Hon Sir Zelman Cowen AK GCMG GCVO QC PC (1977-1982) and The Rt Hon Sir Isaac Alfred Isaacs GCB GCMG (1931-1936).

Chernov's journey to Government House is an inspiring story and underscores the virtues of Australia's envied egalitarian, 'anything is possible with hard work' society. Born to Russian parents in Lithuania in 1938, Chernov attended school in Salzburg, Austria, after fleeing the Stalin's Red Army where he lived with his parents during the Second World War until 1949, when Chernov, his brother and his widowed mother emmigrated to Australia, arriving in Bonegilla in northern Victoria. At eleven years of age, unable to speak English and now living in a strange new county, Chernov set about doing what he would continue to do for the rest of his career – he rolled up his sleeves, got involved and had a go. Eventually, the family arrived in Melbourne and Chernov ultimately secured a place at the prestigious Melbourne High School, where his popularity and leadership qualities were recognised by his appointment as head of the Cadets Corp. So, how did Chernov find his feet in the lucky country so quickly? "Well, kids adapt very quickly", Chernov observes. "I was very fortunate. I had a very intellectually based home, with books, reading, music and so forth which were really the mainstays – maybe too much. So I came from that sort of background. So being a student there was not an odd experience. I had a start in life".

Sport and in particular Australian football and Rugby also provided a means for the young Chernov to integrate and adapt to the Australian way of life. "It's funny, the first school to which I went in Melbourne was Camberwell Central Primary and the first day I walked out on to the oval and instead of producing a round ball, they produced this egg shaped thing which I had never seen before in my life and so that became my passion". Unfortunately for Chernov however he injured his knee playing footy mid-way through his final year at school and so turned to Rugby where he played five-eighth for Melbourne High. While maintaining his interest in Rugby over the years, it is Chernov's passion for the Carlton Football Club which generates the most excitement when it comes to sporting pursuits and as His Excellency was quick to indicate, protocol does not prohibit the Carlton Football Club flag being flown from the tower of Government House should Carlton win an AFL premiership during his tenure.

The University of Melbourne has been a regular and prominent feature in Chernov's life. After Melbourne High, Chernov studied commerce at the University of Melbourne, graduating in 1961, before commencing work as a graduate management trainee at BHP. However after only a relatively short stint at the big Australian, the affable Chernov returned to the university to read law. It was also at Melbourne Law School that Chernov met his wife Elizabeth, whom he married in 1966. After graduating in law with honours, Chernov commenced practice at the Bar in 1968, reading in the chambers of The Hon Sir Daryl Dawson AC KBE CB QC, but continued to maintain his association with the university, where he lectured in equity, before joining the law faculty board and then ultimately rising to the office of Chancellor of the University of Melbourne.

A stellar career at the Victorian Bar spanning twenty-nine years practising primarily in the fields of commercial law, equity and company law (seventeen of these years as a Silk and leading the Bar as Chairman from 1985 to 1986), was the foundation for Chernov's appointment in 1997 as a judge of the Supreme Court of Victoria. Elevation to the Court of Appeal ensued in 1998, where Chernov sat for a decade before reaching the age of statutory retirement in 2008. Chernov was appointed Governor of the State of Victoria on 8 April 2011.

The office of Governor spans three essential roles: Constitutional, Ceremonial and Community Work.

As guardian of the Constitution of the State of Victoria, the Governor in his or her constitutional role plays a critical part in maintaining the checks and balances within Victoria's Westminster system of government encompassing the legislature, the executive and the judiciary. In addition to assenting to legislation and thereby creating Acts of Parliament,[1] chairing the Executive Council and making appointments to public office, issuing proclamations or presiding over the proper implementation of regulations,[2] perhaps the most potent of the Governor's powers is an inherent and exclusive one which can only be exercised in the most exceptional of circumstances, such as where a government refused to resign following an electoral defeat or acted illegally in contravention of the Constitution Act 1975: the reserve power, which in the State's history has never been used.

> I don't think you need to be a lawyer to be a sound Governor but, speaking entirely for myself, I think it helps you to understand more clearly the governance issues that arise in the course of office.

Chernov acknowledges his experience as a Judge and as a Barrister have especially helped him in discharging his constitutional responsibilities. "If you've been experienced in constitutional provisions and how a government works, from a constitutional point of view, it's much easier to understand the requirements of the office", he reflects. "I don't think you need

to be a lawyer to be a sound Governor but, speaking entirely for myself, I think it helps you to understand more clearly the governance issues that arise in the course of office".

Since his appointment, Government Ministers attending Executive Council meetings have now also enjoyed the privilege of witnessing first hand Chernov's renowned drive, rigour and attention to detail, attributes which are well known to the Bench and Bar. "Part of the job is to ensure that the recommendations of the Minister are always based on objective material rather than subjective and there are occasions where one raises queries and I'm happy to say that they all have to be answered" says Chernov. "The whole process of Executive Council is not always understood. The Governor chairs Executive Council meetings and is advised by the Ministers to act in a certain way, such as making a public appointment or approving statutory regulations. The reason these tasks are overseen by the Governor in Council is because Parliament regarded these decisions as so important as not to leave it to the individual Minister. That's the way the democratic process works and I think that's interesting".

As for his reserve powers, Chernov was characteristically to the point. "Democracy is in good shape in Victoria, but you're always on the watch".

To the outsider, the ceremonial role of Governor is exhausting in its own right. The Governor frequently plays host to Heads of State, Ambassadors and High Commissioners and other distinguished visitors who visit Victoria and stay at Government House. The roll call of visitors to Government House during Chernov's term to date has been impressive as it has been extensive and ranges from Her Majesty Queen Elizabeth II to the US Ambassador to Australia and senior Ministers from the Chinese government. "One thing they absolutely agree upon together is the magnificence of Government House", says Chernov who works and lives there. "You've got to live above the shop. I must say that successive governments have been sensible about the need to maintain this house". It is not just dignitaries though who are fortunate to experience the grandeur of Government House, many community organisations and also the people of Victoria have the opportunity to frequently enjoy such a pleasure as Chernov pointed out. "We had Open Day recently and we had over 15,000 people come through in one day. Also, receptions and celebrations for many of Victoria's important events are held here".

At times though a Governor's ceremonial role can be a fine line to walk, especially when the constitutional foundation of the office of Governor is considered. The point was made by Chernov in a recent interview with 'The Age' when he rightly emphasised that while Government House would continue to support important state occasions and events, Government House 'should be free from commercial promotion of products'. The constant and diverse traffic which has passed through Government House over the past 12 months is testament to Chernov's judgment and getting the balance right on this front. As Chernov illustrates, "In recent months we have staged investitures here, hosted innovators and excellence awards and welcomed as visitors, volunteers who have assisted the aged and ethnic communities of our state. Government House is for the business of the State of Victoria, it is not a rent-a-house or function centre".

Community work is perhaps where a Governor is at his or her most visible. It also happens to be one of the features of the role of office of Governor which Chernov clearly enjoys most. "Getting to know large sections of Victoria's rural communities which have suffered from natural disasters and to see their self-help and positive attitude of recovery is really inspiring", Chernov says. "People in Melbourne should not forget the people in the country who are trying to rebuild their lives after the bushfires and the floods". While the Governor acts as Patron for numerous charities, it is the organisation 'Second Bite', a charity which feeds the homeless from St Mary's House in Fitzroy he is most keen to discuss. "They are a truly inspirational organisation to work with", enthuses Chernov. Listening to Chernov so animated when he speaks about 'Second Bite' and the resilience of rural Victorians not only provides a candid insight into a compassionate and passionate character, but it also discreetly reinforces his suitability to serve in the role of Governor.

Family has always been central to Chernov's life, so it is only fitting that he now works closely with his wife Elizabeth in attending to his community responsibilities as Governor. A quick glance at the Governor's website reveals that Mrs Chernov (amongst other appointments) served for many years on the board of the Royal Women's Hospital and was Director and Deputy Chair of the Women's and Children's Healthcare Network. As well as being a mother to three children, a grandmother to seven grandchildren and a qualified solicitor, Mrs Chernov is also Patron to numerous community organisations throughout Victoria and admirably complements the Governor's community service role. At his farewell sitting from the Supreme Court of Victoria in 2008, Chernov sincerely acknowledged the friendship, love and support he received from Mrs Chernov throughout his legal career, however he did remark, "I look forward to being a pensioner with her even though I am told that lunch will not be provided at home during weekdays". Plainly at the time Chernov had no inkling of what might lie ahead, but how he even contemplated the possibility of being served with lunch mid-week from the accomplished and ever-busy Mrs Chernov is as much a mystery as it is amusing.

> A good barrister needs to be diligent, must serve their client and should always remember their paramount duty is to the court.

The Victorian Bar continues to hold a special place in Chernov's affections as is evident by his continuing attendance at the annual Bar Dinner. As a seventeenth floor west stalwart before his appointment to the bench, Chernov was great mates with the Crennans, Barnard, Jack Hedigan and the late and great Frank Costigan and his fond reminiscences of life in and around chambers highlight the treasured collegiality and camaraderie of our Bar. In his farewell speech in 2008, Chernov observed, "At the Victorian Bar I have had good fortune and one that exceeded my expectation. I read with Daryl Dawson. I learnt a lot from him – importantly, that in providing an opinion, reference to finely balanced legal arguments, although interesting to a lawyer, have little value without definitive advice as to what should or should not be done, and why. That is where I truly learnt that you get paid, so to speak, for making the hard decisions". So what makes a good barrister? "To quote Lush J, a good barrister has glue on his or her backside", says Chernov. "A good barrister needs to be diligent, must serve their client and should always remember their paramount duty is to the court".

Following the announcement of his appointment as Governor, the 'Herald Sun' described Chernov as a 'safe pair of hands'. 'The Age' reported the Premier, Ted Baillieu stating that Chernov would be a 'great servant for the people of Victoria'. The then Chairman of the Victorian Bar Mark Moshinsky SC said Chernov 'was well known for his energy and good humour, and his prodigious ability for hard work'.

Such accolades not only indicate Chernov's impeccable credentials for the position of Governor, but also betray the personal characteristics of a good and wise man who has lived an extraordinary life and who can walk as comfortably with Kings as with the everyday man or woman. A conclusion with which Chernov's family, friends, his colleagues at the Bench and Bar, Rudyard Kipling and one very impressed diplomat would all no doubt heartily agree. VBN

1 Constitution Act 1975, Part II.
2 Ibid, Part IV.

How We Lead

The Honourable Justice Marilyn Warren AC, Chief Justice of Victoria

On 31 August 2011 the Hon Justice Marilyn Warren AC, Chief Justice of Victoria delivered the 2011 Leadership Victoria oration at the Plaza Ballroom, Regent Theatre, Melbourne.

When we hear mention of leadership the context in which the leader operates dictates our perception of the qualities of leadership called for in that setting. We admire, or reject, the leader for what they do.

Reflecting on social leaders, the common paradigms are drawn from political government, the business world, institutions and sport. To give examples, former Prime Ministers Sir Robert Menzies and John Curtin are held up as leaders of political government. Successful Chairs or CEO's of major national corporations such as the mining, retail and banking corporations are prominent. Vice-chancellors are recognised and asked to present important addresses, such as the Boyer lectures, and reflect on the role of educational institutions in society. An athlete who rises above drug cheats, faces super-human physical and mental tests, maintains extraordinary self-belief, determination and resilience to win a world renowned race is admired.

These types of individuals inspire our society.
How do they do this?

The revered political leader will be acknowledged for honesty and integrity. Perhaps for vision in shaping the way our society functions – the establishment of government university scholarships schemes to ensure equality of educational opportunity and investment in the social future; or the creation of employment plans. Sometimes political leadership arises in times of national threat: a world war or an international peace crisis. Other times political leadership encourages aspirational goals by reminding society of its historic traditions and culture.

The admired business leader will achieve profit margins through innovation, rigour and confidence. Importantly, the profit will be achieved through ethical conduct, not profit at any cost. This leader will be committed to corporate social responsibility and apprehend that the corporation is beholden to society not just shareholders.

The respected institutional leader, let me take a university or research institute as an example, will cultivate, promote and inspire a yearning for knowledge, excellence and research. They will facilitate the pursuit of the solutions to the problems of the greater world – who we have been, who we are and where we might go as a society.

> Week in week out in the courts the worst and best of humanity are seen and, sometimes, people who have just made mistakes.

The lauded athlete will inspire a society to overcome mental and physical adversity by overcoming physical and mechanical breakdowns, by their level of preparation and sheer determination in racing first to the top of the mountain, the end of the swimming pool or the umpire's words 'game, set and match'. Thus, we ride, swim or sprint a little faster when next on the road, in the pool or on the tennis court. We strive to perform better in our activity with a picture in our mind's eye of the champion athlete we try for a moment to copy.

These leadership paradigms help us as a society to be a good and honest person, to think about how to do things differently, to be strong in hard times, to strive for strong performance in our work, to be a problem solver and to try to give the best performance of which we are capable.

Past Prime Ministers, mega CEO's, vice-chancellors and champion athletes resonate with most of us in what they say and do. To what extent do they truly impact on the daily lives of a parent raising a family, a secondary student going to school, a young person going out on the weekend to socialise, the people catching trains and trams travelling to work, indeed, everyone engaging in ordinary life? Social leaders ultimately inspire the pursuit of goodness, our fundamental social value. From goodness will stem love, kindness, humanity, courtesy, courage and compassion.

As a judge I see the consequences of failed, or lack of, or even evil leadership.

Week in week out in the courts the worst and best of humanity are seen and, sometimes, people who have just made mistakes. A range of leadership profiles are on display. The brave, grieving parent seeking justice who watches the murder trial about their lost, oftentimes brutalised family member. The courageous, determined asbestos victim who faces death but wills himself to stay alive long enough to win compensation for himself and for his family's benefit after his imminent death. The aggrieved disinherited adult child who looked after and supported an aging and difficult parent only to learn that parent, once dead, is cruel to the child by favouring others in their will. The angry employee who seeks compensation for bullying, victimisation, discrimination or unfair dismissal in the workplace. The young person who, in an alcohol fuelled moment, throws a punch that kills another young person. The business person who claims to have been misled into unwisely buying a business, shares or property from a dishonest trader. The evil drug baron who faces life imprisonment for manufacturing and trafficking drugs surrounded in his criminal activities by people who helped him for significant personal financial gain.

Observing the parade of humankind in the courts and determining the outcome on behalf of society, how do judges fit into the common paradigms of leadership? I do not expect judges would see themselves as leaders in that sense. Rather, they would see themselves as leading the administration of justice but would not hold themselves out as public figures to be admired and emulated. For the most part judges seek no public notoriety. They hear and decide the cases. It is for others to critique the result and the judicial performance. Even then, judges will not speak out to defend themselves, preferring to rely on the things they say and write in court to stand as their only words. This might seem acquiescent and supine, even the abrogation of social responsibility. Yet there is a fundamental reason why it happens that way. A judge must be independent and not have expressed opinions, otherwise that judge will not be impartial. They will be vulnerable to corruption or doing the political will of a corrupt government. We need only think of past events in Pakistan, Fiji and Zimbabwe where judges were imprisoned or sacked or compelled by the government of the day to decide cases how the government directed.

> In applying the law, judges exercise the last application of the power of the State. No individual, government, corporation or group is exempt from the finality of that application of power.

Thus, I find great awkwardness in being asked to speak on leadership. Whilst I am the most senior judge of the State I truly hesitate to speak on the topic beyond my home institution.

Yet, having taken the task on I thought I had better say something on the topic that might be relevant to the judiciary.

My first step was to write down the names of people who I regard as leaders and who have influenced my life at some time. I broke the list into two groups, men and women, in case there was a gender difference. Next, I wrote beside each name the qualities displayed by those individuals that impressed me. Top of the female list was my mother. Top of the male list was my father. There followed a mix of personal, historical, national and international figures and, as you might expect, a strong presence of judicial names. There were 12 qualities. Before explaining them I have to admit they are possibly judge-centric but I will apply and explain them as they relate to judges.

First, *humanity*. It arises in the panorama of life viewed by judges through the eyes of victims of harm and suffering rendered by one human being towards another. It necessarily involves understanding pain and suffering but with the capacity to be objective and unemotional. It means a judge recognises difference in people and cares for them as individuals.

Secondly, *loyalty*. Judges are vigilant in protecting the independence of the court. They will not be swayed or influenced by pressure from politicians, public servants, the media or disappointed litigants. Judges decide cases in accordance with the law not how some people would like them to be decided. Judges do not decide cases to be popular. To use the vernacular a judge is prepared to 'lie down in front of a Bourke Street tram' to protect the institution of the court and its independence.

Thirdly, *resilience*. Judges have to cope with criticism from politicians. We need only think of the attack on the High Court of Australia after the *Mabo* decision. Judges also cope with criticism from the public. This week a survey has been released suggesting community confidence in the judiciary is not high. As judges we carefully scrutinise the survey, identify its flaws, note its findings but do not change the way we hear and decide our cases. Yet resilience is much more than toughing it out. Judges must hear the worst of cases: the Bega schoolgirl killings, cases of mothers or fathers killing small children, long terrorist cases with months of surveillance tapes in a foreign language subjected to tedious translation, the killing of police in the line of their duty protecting society such as the *Silk and Miller* deaths, dramatic bushfire cases and complex commercial cases about shareholding, contracts and general business activities. In the face of these cases the judge must be resilient. From that flows poise, dignity and objectivity when confronted by the harrowing, the confronting and the mundane.

The average Supreme Court judge works on the bench for about 15 years. Many stay for over 20 years. Their resilience is powerful. It means judges focus on the objective of justice and are not deterred, distracted or disheartened about achieving it.

Fourthly, *determination*. A judge must have a deep commitment to their goal – the pursuit of justice.

Fifthly, *a high personal ethic both in work and privately*. Judicial work is constant. Court cases are like waves on the shore – they keep coming. An occupational health and safety survey of Supreme Court judges found we work much too long

hours and at an unsustainable level. We do not complain. We see it as our duty to do the ever-pending court work.

We also regard being a judge as an honour and a privilege. Hence, in our personal lives we are acutely conscious of our public behaviour. We must be law-abiding citizens too. For most judges this means becoming quietly removed from public notoriety and not developing a public profile as a 'personality' judge. A judge works hard to achieve a vision of justice, sets an example to others in the workplace and shares the work burden.

Sixthly, *being just*. Judges deliver and administer justice. We aspire to be a just judge. Sometimes that will involve choosing who is telling the truth, with harsh consequences. A judge ensures the people in the court feel they are treated justly.

To pause for a moment, I have identified six qualities I suggest judges demonstrate in their work. To recapitulate, they are humanity, loyalty, resilience, determination, a high personal ethic and being just.

Now to continue with the list of the twelve qualities.

Seventh, *courage*. Judges must apply the law impartially. This combines with their necessary resilience. It also means a judge speaks up, when and where appropriate, or remains silent in the face of negative commentary so as to protect the institution of the court and the people served by it.

Eighth, *fervour*. Judges work for a very long time on the same job. Yet even when they retire they have a strong sense of duty towards and commitment for the greater good of society. So we see inquiries and investigations requested by government of retired judges on areas from bushfires to child protection, from forensic science error to public sector impropriety, from corruption to law reform. Ultimately, the judge conveys commitment, interest and enthusiasm for people's work and ideas. In other words passion for the delivery of justice.

Ninth, *creativeness*. Whilst it varies from court to court, generally all members of the judiciary aim to do things as well and efficiently as they might. Thus they necessarily create new ways to do things. I give the specialist Commercial Court within the Supreme Court as an example. It offers the Victorian business community a fast, flexible and expert way to determine commercial disputes. Despite the old fashioned images some might visualise, judges are flexible and modern in their outlook. Hence, judges undergo 360 degree peer reviews and court craft coaching. Overall, to decide a case, a judge thinks laterally to solve the problems before them.

Tenth, *dignity*. There is much pomp and circumstance with courts. Our practices are very ritualistic. Generally this contributes to the gravity of the circumstance before the court and, importantly, the majesty of the law. The key is the dignity of the central judicial figure. Contrary to what some may believe, we do not and cannot conduct ourselves as sometimes portrayed on television. A judge exudes poise and presence and reflects the culture of the institution. The judge behaves appropriately for the occasion.

Eleventh, *intellectual confidence*. A judge needs self confidence in their own individual intellectual capacity to embrace the work and the demands of the role. They assume a heavy, high-pressured and constant workload. It usually demands not just the hard grind but the application of intellectual rigour.

Lastly, *toughness*. A judge needs to have a strong edge. If an individual needs to or tries to challenge a judge, they should perceive quickly that a judge will test them, not tolerate time-wasting and require directness. A judge represents the gravitas of the judicial office. They have the power to sentence a person to prison for life and to injunct a government or the largest corporations in the land. In applying the law, judges exercise the last application of the power of the State. No individual, government, corporation or group is exempt from the finality of that application of power. It is the key to our democracy – the application of the rule of law.

That is the list. It is by no means exclusive. They are the qualities that struck me.

The normal human value of goodness and the qualities flowing from that fundamental value inform what we do as judges.

In modern writing on leadership there is emphasis on leadership and organisational culture. I have read about awareness of 'perceived situation', 'vision and mission', 'follower attribution', 'charisma', 'leader-follower relationship' and other business and analytical concepts.

I do not approach my role that way. I do not expect my colleagues would either. The normal human value of goodness and the qualities flowing from that fundamental value inform what we do as judges. The twelve qualities I listed are demonstrative of the pursuit of the fundamental value of goodness. Whilst judge-centric I suspect those twelve characteristics - humanity, loyalty, resilience, determination, ethical pursuit, justice, courage, fervour, creativeness, dignity, intellectual confidence and toughness - are universal qualities that resonate in professional life.

But I also suspect that these qualities are fundamental to the exercise of leadership in all aspects of life.

Leadership is not just a human behaviour that occurs in government, business, academia or the sporting arena. It is called for in almost every human situation and aspiration. We are all, alternatively looking for or providing leadership in the myriad of human interactions that make up the totality of our lives.

As a judge, I have attempted to identify leadership qualities that seem critical to the work of the judge. Yet, I expect they are defining qualities across our social spectrum. VBN

Clerking System Review

Sharon Moore

During the preparation of the Victorian Bar's strategic plan in 2008 the clerking system was identified as an area worthy of review. In the next two years, two new clerking operations were established using different business models to the existing clerks. It was, in part, these two matters that were the impetus for the Bar Council deciding in 2010 to establish the Clerking Review Working Group to undertake a review of the clerking system. In particular, the working group was to consider the way the system operated in practice, any changes to the model and other possible improvements.

As part of its review, the working group consulted extensively including meeting with each of the clerks and Chairs of the List Committee as well as two barristers who did not have clerks. In February 2011, it published a discussion paper containing its provisional views and recommendations and called for submissions. Six submissions in response were received and taken into account in the preparation of the working group's final report to Bar Council published on 10 August 2011.

The report made numerous recommendations to Bar Council as well as expressed numerous views on aspects of the clerking system. The Bar Council considered the report and resolved to adopt all of its recommendations.

This article summarises the recommendations made in the report. A copy of the final report can be obtained from the members section of the Bar's website or from the Bar office.

The working group made the following recommendations:

- that the Bar Office liaise with the Clerks to arrange or conduct periodic training exercises for approved clerks to ensure that they are familiar with the requirements imposed upon them by the Legal Profession Act 2004 and the Clerks (Audit and Trust Money) Practice Rules;
- the Clerking Regulations be amended to require the List Committee to undertake a review at least every two years of the operation of the clerk and the clerk's remuneration – the purpose being to ensure that the clerking operation remains viable and that the interests of the members are being served;
- the Clerking Committee be re-established (perhaps initially comprising the members of the working group and List Chairs) and that the Bar Council or Bar Office provide more regular opportunities for the clerks to meet with each other and Bar Council to discuss issues concerning clerking;
- the Bar Council monitor compliance by Lists of the requirements under the Clerking Regulations, in particular the requirement to hold annual elections for List Committees and that they be constituted as required, and the requirement that the List Committee report to Bar Council whether in the preceding year it had reviewed the operation of the clerk and the clerk's remuneration;
- the current licensing system should be retained. However, if retained and intended to perform (in part) an accreditation function, the Bar needed to give greater attention to what the minimum standards are and how they are to be monitored. The working group was of the view that there should be some flexibility to extend the licensing system to clerks who do not necessarily provide a "full service" provided they meet the requirements of the Clerking Regulations;
- the provision by the clerks to the Bar upon request of financial data (eg aggregate billings) is important for planning and policy purposes and, subject to confidentiality obligations and without identification of individual barristers, the licence agreement should address this;
- the Lists operating on the Barristers' Business Model should adopt a set of Rules dealing with matters governing the relations between barristers and the clerk and the barrister and each other, for example, applications for membership, committee of management and annual subscriptions;
- the Bar should encourage the Lists to develop and adopt (if they have not done so already), List Rules dealing with matters such as termination, access to information, complaints and whether more than one clerk may be retained;
- the Bar should ensure that all List Committees comply with the Clerking Regulations, including that the List Committee manage the affairs of the List and be elected annually;
- specialisation (ie whether or not to specialise in a particular area of law and the degree of any specialisation) is a matter for each List to determine;
- the Bar encourage each of the clerks and Lists to make available to all barristers and persons proposing to come to the Bar information about:
  - the make-up of the List;
  - the services the List/clerk offers;
  - the criteria (if any) by which the List selects candidates;
  - the means by which applications should be submitted;
  - the contents expected in applications;
  - their business structure;
  - rates of commission;
  - size of the list; and
  - speciality practice areas
- the Bar Council suggest a timeline for processing all applications to clerks – rather than each clerk operating their own disparate timetables;
- the Bar encourage the clerks to carry out and (where necessary) improve the quality of their marketing activities and that the Bar work with licensed clerks to ensure that the clerks are aware of the marketing activities conducted by the Bar and by the Bar Associations so that the activities are complementary;
- the Bar organise and conduct from time to time training courses for licensed clerks and, where appropriate, their employees;
- the Bar Council seek to have the rules of the Essoign Club changed so that the principal clerk of each List is permitted to become a member; and
- the Bar Office facilitate an exchange of information about IT matters between licensed clerks. VBN

Bendigo Law Association Address

The Honourable Justice David Ashley

Speech delivered on 11 November 2011 by the Honourable Justice David Ashley at a dinner hosted by the Bendigo Law Association to acknowledge the sitting of the Victorian Court of Appeal in Bendigo

Bendigo has a special place in my heart. As a junior barrister, in the mid 1970s and 1980s, I did a lot of work here. As a QC, also, I did some work here. For a time, our family lived at Sutton Grange, and our daughters came to school in Bendigo.

It is this connection which explains why my first and last circuits as a judge – in 1991 and in September this year – were in Bendigo. I was keen that it be so.

The main Bendigo courthouse is an extraordinary building. It has witnessed some extraordinary litigation.

I was very distressed, when I was here in September, to see that it had been let go to an extent. The upstairs area was not what it should be. I know that the Chief Justice shares my view, and has made representations to the Department about the matter.

I think also that it is bizarre that the main entrance to the Court should be closed. It is the antithesis of open justice. I suppose that it is for occupational and safety reasons. But if that is so, why are the stairs to the upper floor not closed off?

I understand also that there is said to be a safety issue respecting criminal trials in the upstairs court. For well over a century, the alleged problem went unremarked. Over that long period, many notorious criminals were tried in that court. The sooner that it is used again–despite its terrible acoustics–the better.

I said that the Bendigo courthouse has witnessed some extraordinary litigation. In my time, four cases stand out. I had some involvement in three of them.

Two of the cases were murder trials. Leith Ratten shot and killed his wife in mid 1970. He said that it was accidental. His trial, in Bendigo, was presided over by Sir Henry Winneke, then Chief Justice. His Honour summed up favourably for the accused. But the jury convicted. An appeal to the Full Court failed, and Ratten was refused leave to appeal to the High Court.

Ratten had a band of supporters. They included Professor Peter Brett of the University of Melbourne Law School. Years later, the Attorney-General was persuaded to refer a petition of mercy for consideration by the Full Court. A major issue was the angle of entry of the shot gun blast which killed the victim. Her body was exhumed for further examination. Ballistics tests were carried out on the carcasses of pigs, whose muscle and fat structure resembles that of humans. Evidence was given for and against Ratten by eminent pathologists.

The hearing, in Melbourne, took 13 days. It was standing room only. I was one of the young observers. The appeal constituted by the reference was dismissed. This decision was upheld in the High Court. The presiding judge was Tom Smith, a great jurist, and father of my now retired colleague, Tim Smith.

The second murder trial was that of Heather Osland and her son for murdering Frank Osland in July 1991. The trial was heard in Bendigo in September and October 1996. My good friend Jack Hedigan presided.

It was not in dispute that Mrs Osland had drugged her husband, been present when her son clubbed him to death, and that she and her son had buried him in a hole which had been dug in advance. It was submitted on behalf of Mrs Osland that she had killed her husband when suffering from battered wife syndrome, and thus in self-defence; or that she had acted under provocation. She was convicted of murder. The jury did not agree upon a verdict in respect of her son. Later, he was acquitted of murder, and convicted of manslaughter.

Mrs Osland's appeal to the Court of Appeal failed. The Court was presided over by John Winneke, whose father had been the trial judge in Ratten.

Mrs Osland's appeal to the High Court also failed.

Over a period of time, Mrs Osland progressively became a symbol of what was claimed to be the criminal law's wrongful treatment of women whose acts of violence were a response to years of mistreatment.

After all her conventional appeals were refused, she petitioned for a pardon, on grounds which were expressed in emotive language. The Attorney-General took advice from the Victorian Government Solicitor, then from Robert Redlich (now my colleague in the Court of Appeal), then from a panel consisting of Sue Crennan (now a High Court judge), Jack Rush and Paul Holdenson.

In the upshot, the Attorney-General refused the petition. Unwisely, as it turned out, he publicly stated that he had relied upon the panel's advice.

That was not the end of it. Mrs Osland sought access to all advices given to the Attorney-General. She claimed, in substance, that privilege attaching to the advices had been waived by the Attorney's reference to one of them. The Attorney resisted giving her access. Her application succeeded before VCAT, failed in the Court of Appeal (where I sat), went to the High Court where it was remitted for consideration to the Court of Appeal, failed again in the Court of Appeal (where again I sat) and ultimately succeeded in the High Court. So Mrs Osland got her wish to see all the advices. I read them. I am unaware that Mrs Osland has published any part of those advices to the world at large. But perhaps she has done so.

The third case I would mention arose out of a bush fire in northern Victoria in the late-1970s. It began near Boort on a day of total fire ban, and fanned out over a large area, driven by strong winds. There was a repeater station, part of the telecommunications system run by Telstra's government-owned predecessor, on a hill. As luck would have it, the fire, which finished up having a front of many kilometres, narrowed to a point just outside the repeater station. On the day in question, a crew comprising Telstra employees and German employees of Siemens Industries had worked at the repeater station. One of the Siemens men was a keen photographer. He snapped a colleague, outside the station, with a lighted cigarette in his hand. The photograph was eventually produced on discovery.

Ken Marks QC and I appeared for the plaintiff. Norman O'Bryan QC and Alistair Nicholson appeared for the Commonwealth. Jack Hedigan QC and Leo Hart appeared for Siemens. All of us, Leo Hart apart, became judges of the Supreme Court. Alistair Nicholson went on to be Chief Justice of the Family Court. Leo Hart became a County Court judge. He could well have been a Supreme Court judge. Had a disaster occurred in the Bendigo Court House during the trial, Victoria's recent judicial history would have been significantly different.

You might have thought, from what I have told you, that the case would have settled. But it did not. Counsel for the Commonwealth developed and pursued a theory that a fire had been smouldering for some time in a hollow log which was a considerable distance down hill from the repeater station; that it blazed on the particular day and then burned uphill, against the wind, to coincidentally stop just outside the facility.

After a long trial, a Bendigo jury speedily found for the plaintiff; and then Alistair Nicholson and I quantified and settled all the other plaintiffs' claims.

I had more to do with the fourth of the Bendigo cases which I want to mention. On a night in December 1978, Dianne Hackshaw drove with her boyfriend to a farm at Korong Vale. It was owned by George Shaw. He lived off the farm. On the farm was a 250 gallon petrol tank and pump. It had been the subject of repeated thefts. Mr Shaw was sick of it, and on this night he lay in wait, not far from the tank. He was armed with a rifle and a shotgun. The boyfriend knew where he was going, and why. Miss Hackshaw, on the evidence, did not.

In any event, soon after the boyfriend had begun to steal petrol, Mr Shaw "opened up", firing at the vehicle. When one weapon jammed, he used the other. The vehicle finished up looking like the one from the last scene in the Bonnie and Clyde movie. Miss Hackshaw, sheltering in the car, was struck and injured. On the evidence, Mr Shaw had not seen her in the darkness.

The boyfriend and Miss Hackshaw attempted to escape, and to get her medical attention. But the damaged car soon stopped. Then the boyfriend commandeered a truck. He used it to take Miss Hackshaw to the nearest hospital.

The escape did not go unnoticed. There was a grain bin on the truck. The truck had a tipping function. In attempting to make a getaway, the boyfriend accidentally elevated the bin to an extent. A trail of grain was left from the farm to the doors of the hospital.

Miss Hackshaw sued Mr Shaw for damages for her injuries.

The case raised the issue of an occupier's liability to a trespasser. The law then was that a very confined duty only was owed to such a person.

A Bendigo jury gave answers to questions which led to a verdict for the plaintiff, reduced for her contributory negligence. By majority, the Full Court allowed Mr Shaw's appeal. In the High Court, Ms Hackshaw's verdict was, by a four to one majority, restored.

I appeared as junior counsel for Ms Hackshaw at the trial and on the Full Court appeal. I appeared as senior counsel, with Neil Young as my junior, in the High Court.

The High Court's decision was the first and substantial step to dismantling the old law of occupier's liability, by which different duties were owed to the various classes of entrants. The task was completed in 1987 in Australian Safeway Stores Pty Ltd v Zaluzna, where I also appeared for the plaintiff. Now the changes are embodied in statute.

The next matter which I will say something about does not concern Bendigo.

Every day, we are responsible for the lives of others. Much of your work, but by no means all, is non-litigious, whilst I resolve the civil disputes of individuals and their collisions with the criminal law. Whether in litigation or otherwise, we deal with individuals, and every one of them is important. Behind them are their families, whose interest in what we do is often profound.

But beyond the problems of the individuals, some of us, just occasionally, have an opportunity to affect the lives of many. In the law, from a barrister's perspective, it is exemplified by involvement in a so-called 'test case'.

When I was a barrister, I had such an involvement.

Wittenoom is a very small town in the Hamersley Range, 1100 kms north of Perth and 250 kms inland from Point Samson.

In the 1930s, the late Lang Hancock discovered deposits of blue asbestos near Wittenoom. He established a small mine and a crushing plant, beginning operations in 1938.

In 1943, when war-time demand for asbestos was very high – because of its strength and heat resistance–Colonial Sugar Refining Co bought Hancock out. It established a subsidiary, Australian Blue Asbestos Pty Ltd, to run operations. But it is convenient to speak of CSR as the operator and employer.

Mining and milling increased. A new mine and a new mill were opened.

There was need for much more labour. In the immediate post-war period, a particular source was found: European immigrants getting off boats at Fremantle.

The mining was done underground. The rock which contained the asbestos was in seams. Some were very narrow. It is the fact that, often enough, miners worked in tunnels less than 20 inches in height.

The milling involved crushing the asbestos-containing rock into smaller and smaller pieces, so that eventually most of the asbestos was separated, and could be bagged off. What remained were the so-called tailings, which contained residual asbestos.

The jute bags containing the asbestos were then trucked to Point Sampson, and mostly shipped to Fremantle. So they were handled a good deal.

After unloading, the asbestos was taken to various places – often there was further shipping – before going into manufacturing processes.

Mining and milling continued until 1966. Then, operations ceased for economic, not health, reasons.

Even in the life of the mill, employees and former employees began to get sick as a result of their exposure to asbestos-containing dust. As the years passed, the number of affected former workers much increased. They suffered not only asbestosis, but the malignancy called mesothelioma, the first case of which was diagnosed in 1962.

Moreover, it was not just miners and millers who became affected. So did administration workers whose employment had not been in the most immediate vicinity of the mine or mill. So did wives who had washed their husbands' dirty overalls. So did men and women who had been children when their fathers worked at Wittenoom, and who had played in the mine tailings which were spread in gardens and in the schoolyard to keep the dust from blowing. So did stevedores who had handled the jute bags containing asbestos. And so did men and women who had worked in manufacturing processes which made use of Wittenoom blue asbestos which was the only Australian source of the mineral.

For some of the injured, there was workers compensation. Not for all. Workers compensation provided, in any event, very small amounts.

Beginning in the late 1970s, a few attempts were made in Western Australia by former employees to establish liability at common law against CSR. This required proof that, judged by the standards at the time of their employment, CSR had failed to take reasonable care for their safety – that is, was negligent. If that could be proved, then adequate damages for pain and suffering, and for lost income, could be obtained.

Those matters were commenced in the Supreme Court of Western Australia. The plaintiffs sought to prove that the work environment had been full of asbestos-containing dust, that dangers of exposure had been known well before mining and milling began at Wittenoom, and that CSR had not provided equipment which was available at different times so as to reduce exposure.

Two of the plaintiffs died before their cases could be heard, and two claims failed. The failures highlighted a want of sufficient historical research.

In 1984, I was a QC. I conducted a case in the Supreme Court of Victoria in which a man exposed to manufactured goods containing asbestos had contracted mesothelioma, and sued his employer for damages. Somehow, negligence was established, and the plaintiff recovered damages. I say 'somehow', because the presentation of the case, in light of what was later discovered, lacked all sophistication. In any event, so far as I know it was the first case in Australia in which an employee had proved that he had been negligently exposed to asbestos.

A group of people banded together in WA as the Asbestos Diseases Society. The Society's president rang me. He had read about the case in the newspapers, and he asked me if I would take on a case for a former Wittenoom worker against CSR.

That's how I came to spend about a year in Western Australia, travelling home as often as I could, and fighting two successive 'test' cases in the Supreme Court of that State.

The first case involved a man suffering from asbestosis. The second involved two men afflicted by mesothelioma.

The first case was heard between July and October 1987. It epitomised a problem that very often arises, in my experience, in test cases. The plaintiff was a very unsatisfactory man for ventilation of the issues. I say immediately that I had not selected him. There was doubt about when, and for how long, he had worked at Wittenoom, and doing what, and with what levels of exposure. The case might easily have failed for want of proof of such matters. But it did not. Judgment was given on the very day that we were due to start the second case. The plaintiff failed, but for an entirely unexpected reason. The judge decided that the plaintiff had failed to prove that he had asbestosis – a decision which was ultimately overturned on appeal. The judge thus had no need to decide the questions which had dominated the trial: what were the levels of exposure? What did CSR know about the risks of exposure from time to time? What should it have known about those risks? What measures were available to alleviate exposure? Did CSR know, or should it have known of those measures? What measures did it take in fact? Answering these questions had involved an enormous amount of historical research, and the work had apparently gone for nothing.

There is an almost humorous side to what happened. Throughout the trial, the judge had to make many rulings. He decided almost all of them adversely to the plaintiff. Knowing what judges do, I said to my juniors that plainly the judge intended to find for the plaintiff, and was making his judgment appeal–proof. My knowledge of what judges do was shown to be seriously deficient.

In any event, there was nothing for it but to get on with the second case. I was one of two senior counsel for the plaintiffs, together with Daryl Williams QC. He was a very fine barrister. He later became Attorney-General for the Commonwealth.

David Malcolm QC was the main barrister for CSR at the beginning of the trial. But he was appointed to be the Chief Justice of WA, and was succeeded by the famous Tom Hughes QC, coincidentally, also a former Commonwealth Attorney-General.

The circumstances in which this change happened were very unusual. The plaintiffs' case began in November of one year, and was completed just before Easter the next year. CSR's case was to begin after lunch on a particular day. As I understand it, David Malcolm, over the lunch break, told his junior and instructing solicitor that he was to become Chief Justice, and that he could no longer appear. His junior was a nice man, who had sat in court for months without taking a witness. He had not the slightest hope of taking over and opening CSR's case at this short notice. After lunch, David Malcolm told the presiding judge that he was to be the next Chief Justice. The judge expressed great surprise, and immense pleasure. He later told me that he knew about the appointment. In any event, the matter was adjourned on the junior's application; and by Easter's end, Tom Hughes was in charge. He was a great barrister, and a great man to deal with.

The case occupied over 130 sitting days in all.

One of our two clients succumbed to his disease before the trial was over.

There were many, many witnesses. Reams of old documents retained by CSR, and old books from libraries telling of the health dangers of asbestos, and of means of alleviating the risks, were placed before the judge.

In the end, the case was won. Both CSR and ABA were held liable. The decision had profound implications for all the kinds of persons whom I mentioned a little earlier. So it was that the case affected many, not just the particular plaintiffs. By and large, asbestos litigation involving CSR ended with that second test case. Thereafter, settlements were negotiated.

Many medical witnesses were called in the case. But of all those witnesses, one stands out: Eric Saint. An Englishman, he was working with the Royal Flying Doctor Service in the late 1940s. In 1948, he wrote to the WA Health Department after a plane trip to Wittenoom. He described in graphic detail the cloud of asbestos-containing dust rising thousands of feet above the mine and mill. He described conditions in the mill. He predicted that Wittenoom would produce the greatest crop of asbestosis the world had seen. He told the mine management about these matters. At a time when, according to CSR, no one knew much about the dangers of asbestos exposure, Dr Saint's contemporaneous letter was a potent response.

What happened at Wittenoom has been described as Australia's greatest industrial disaster. After the second test case, a book, titled Blue Murder, was written about it. Midnight Oil titled an album about the Wittenoom disaster – Blue Sky Mining. Tim Winton wrote about it in his book Dirt Music. All that was a sideshow. I visited Wittenoom before the trials began. It was a ghost town, with only a few remaining inhabitants. You could still see the tailings everywhere. I went to the mill site. It seemed inconsequential, set in a quite beautiful gorge. It was very distressing to think that so much misery had come out of those places.

In 2006, Wittenoom was removed from the State's electricity grid. In 2007, the township was abolished by government gazettal. These events are reminiscent of the photographs from Stalinist Russia in which images of the Old Bolsheviks, who had been purged, were edited out. It is as if Wittenoom never was.

I sincerely wish the Bendigo Law Association, and each practitioner individually, every professional success. VBN

The retirement of Ashley JA from the Court of Appeal in February 2012 marked the end of a long and distinguished career on the Bench and at the Bar. A farewell to Ashley JA will be included in VBN 152.

Opening of the 2012 Legal Year

St Patrick's, St Paul's and Temple Beth Israel

The 2012 legal year was formally commenced on Monday 30 January 2012 with the traditional opening of the legal year services.

The Red Mass was celebrated at St Patrick's Cathedral by His Grace The Most Reverend Denis Hart DD, Archbishop of Melbourne and was attended by the Governor of Victoria, His Excellency The Hon Alex Chernov AC QC and Mrs Chernov.

Presiding over the ecumenical service at St Paul's Cathedral was the Anglican Archbishop of Melbourne The Most Reverend Dr Philip Freier with The Right Reverend Canon Barbara Darling delivering the sermon.

The Jewish congregation gathered at Temple Beth Israel where Rabbi Fred Morgan and Rabbi Kim Ettlinger conducted the service which was attended by Members of Parliament, Judges of the Supreme and County Courts, Members of VCAT, barristers, solicitors and legal academics. At the service Justice Philip Mandie, who is retiring from the Supreme Court later this year, was honoured for his many years' service to the judiciary and for being a long-time supporter of the Jewish service to mark the opening of the legal year.

The popular International Commission of Jurists observance, held in Waldron Hall of the County Court of Victoria for the first time, attracted Professor Carolyn Evans (Melbourne Law School Dean) and Professor Frank Brennan AO SJ as guest speakers.

This year there was no Eastern Orthodox Service due to the opening of the legal year falling on the Feast of the Three Hierarchs, nor was there a Buddhist observance, which in recent years has seen a steady growth in numbers of attendees.

The traditional opening of the legal year services and observances are a timely opportunity for the members of the legal profession to reflect upon the importance of their role in the justice system and their ongoing responsibility to faithfully and fairly serve all members of the community. VBN


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Temple Beth Israel

1. Kingsley Davis, Rabbi Kim Ettlinger and Sam Sharman
2. Rabbi Fred Morgan President Temple Beth Israel, The Hon Justice Mandie, Mrs Marilyn Mandie and The Hon Justice Kaye
3. The Hon Justice Kyrou, The Hon Justice Sifris, The Hon Justice Mandie, The Hon Justice Redlich and The Hon Justice Kaye


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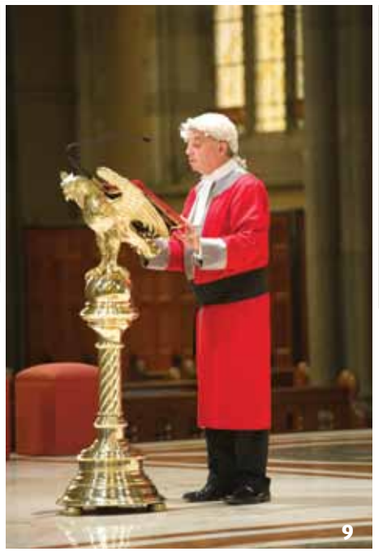
St Paul's Cathedral

1. The Hon Robert Clarke MLA, Attorney General for the State of Victoria
2. The Hon Justice Osborn, The Hon Justice Macmillan
3. Leading the procession: The Hon Justice Nettle, The Hon Justice Jessup
4. Recessional procession
5. Ross Nankivell, Manager Assisting the General Manager The Victorian Bar
6. His Honour Judge Smith SC, His Honour Judge McInerney QC, His Honour Judge Wood QC
7. Fiona McLeod SC, The Right Reverend Philip Huggins, Reverend Dr Dorothy Lee
8. Michael Shand QC, The Hon Justice Ashley
9. Mr Ken Wreidt, Associate to The Hon Justice Nettle



The Red Mass

1. The Cantor, leading the congregation in the singing of hymns
2. Mr Ken Lay APM Chief Commissioner of Victoria Police, Peter O'Callaghan QC and His Grace The Most Reverend Denis Hart DD, Archbishop of Melbourne
3. The Hon Justice Bongiorno AO, The Hon Justice Weinberg
4. His Excellency The Hon Alex Chernov AC QC Governor of Victoria and Mrs Elizabeth Chernov
5. The Hon Andrew McIntosh MLA and The Hon Kevin Andrews MP
6. The Hon Justice Crennan AC
7. Jeff Gleeson SC and Jeremy Gobbo QC
8. The commencement of the Red Mass
9. The Hon Justice J Forrest reading the lesson
10. The Hon Peter Ryan MLA and Mrs Trish Ryan

The New Bar Readers' Course - One Year On

Fiona McLeod SC

Fiona McLeod SC and The Hon Professor George Hampel AM QC

Last year the Readers' Course Committee undertook an ambitious revision of the readers' course. The March 2012 course will be the second course under the new program.

A new curriculum for the course reduces the length of the course to about eight weeks focusing on the core skills of the advocate. The course itself is now much more intensive and there is a midpoint and final assessment of the readers' advocacy skills. The course sessions are more interactive and assume a base knowledge of evidence, procedure and ethics permitting advanced practical instruction to be undertaken. The revised course also has a strong emphasis on practice management and each reader is assisted to produce a business plan. A number of sessions formerly conducted during the course will now form part of the readers compulsory CPD program to be conducted in the seven month reading period after signing the bar roll.

Accredited advocacy instructors now participate in training to ensure consistency of standards and uniformity of method and a number of workshops and training sessions have been already been conducted for potential instructors.

An entrance exam is now a compulsory precondition for entry to the course. The three hour closed book exam covers the topics of ethics, evidence and procedure (civil and criminal). A candidate must achieve a pass mark of 75%. The first exams were conducted in June and November 2011 for all potential readers in the September 2011 and March 2012 course respectively, and will be repeated twice a year. With pass rates of 78% of candidates for the first exam, and 71% for the second, all those who passed received offers to commence the course following these exams.

The exam itself seeks to test the application of general principles, rather than rote learning of sections, rules or authorities and is a mix of multiple choice, short and long answer questions. A typical question might be, in a given fact situation, 'What submissions would you make in support of bail?'

The introduction of the entrance exam represents a significant body of work by the members of the exam working group. Dr Linda Haller of the University of Melbourne was appointed to act as Chief Examiner and oversee the procedural and ethical aspects of the exam. As a result of the introduction of an exam, the previous waiting list, which had extended out to 2016, was effectively abolished. The first two exams last year were reserved for those with seniority on the waiting list. We are expecting a larger cohort to sit the next exam on 16 May, 2011 after a large number attended the Information Session on 28 February.

A website for readers has been developed to provide information about the course, to act as a bulletin board for all readers and to provide electronic access to all course materials. The Bar has also prepared a new publication called "Step up to the Bar" for those contemplating a career at the Bar. This will be supported by an event conducted during law week in May.

Mentors will undertake an additional role with the reading period beyond the course now extending for 7 months. In addition to the usual mentoring responsibilities, mentors will be asked to supervise the post-course component of the readers' compulsory CPD program to ensure readers have practical exposure to a range of topics. The readers' CPD program will complement the bar's current CPD program with sessions aimed at their level of experience and addressing many of the practical issues formerly taught during the course itself. It will also permit readers to focus on jurisdictions of particular interest to them, permitting a degree of specialisation. Many of these sessions were formerly part of the readers' course and we are very grateful for the efforts of those who have previously taught and those who have offered to continue teaching these sessions in the CPD program.

The Bar welcoming the new Readers L to R: Melanie Sloss SC, The Hon Professor George Hampel AM QC, Mark Moshinsky SC, Fiona McLeod SC

The course will continue to welcome and benefit from the company of readers from the South Pacific in each course. Our course is greatly enriched by their participation and our ongoing friendships fostered by the Victorian Bar advocacy training workshops conducted in places such as Papua New Guinea , Nauru and the Solomon Islands.

The Committee is extremely grateful for the contribution of so many members of the judiciary and the bar to the course. We simply could not conduct advocacy training of such a high standard without the extraordinary contribution of so many over many years. I look forward to this support continuing with the new course and thank members for your ongoing interest and offers of assistance as the new course unfolds. VBN

The Bar Exam

Maree Norton

As the next lot of hopeful readers cram for their entrance exam, members of the Bar would do well to ponder how we might fare if also required to crack the spine on the latest innovation to the readers' course.

Consider for example a multiple-choice question requiring examinees to identify their first move on being briefed to act for a blue-chip corporate client in a new and complex Federal Court corporations matter. Who among us would, in good conscience, answer (a) pick up the latest edition of Ford's Principles of Corporations Law to brush up on the law of oppression of the minority, rather than (b) call your significant other with the good news that the Europe trip is back on?

Moreover, how many of our number might think twice when asked to identify whether "Browne and Dunn" is: (a) an English manufacturer of horsehair wigs; (b) a pub near the Melbourne University law school; or (c) a rule of procedural fairness?

Turning to a long answer question involving a barrister in an ethical pickle: what would you do if…? A cakewalk, you might say? But, would we really need to think long and hard before identifying a member (or members) of our Bar who have, say, practised advocacy as though it were a contact sport, or aspired to a second career as a fictional writer when it comes to writing up their fee book.

So let us not be flippant towards our latest would-be members as they agonise over (and in some cases fail) their upcoming exam. For after all, if given the choice wouldn't we, like the Peers in Iolanthe, choose the "fairy land" of boozy Friday lunches at Syracuse over the virtue of competitive examination? VBN

Globe Trotters

Richard Attiwill

During 2011, the Victorian Bar participated in the Global Corporate Challenge.

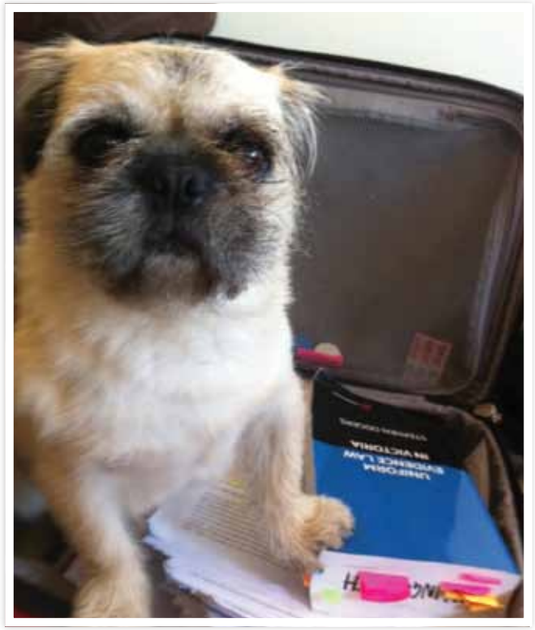
For 16 weeks, from 19 May until 16 September 2011, 7 teams of 7 members of Barristers and VicBar staff walked and walked and walked – and some even ran. The challenge for each team member was to walk on average 10,000 steps per day for the entire 16 weeks. And they succeeded! Each day the number of steps was recorded on the Global Challenge Website and recorded the teams virtual journey around the world.

As a group, the Victorian Bar achieved a staggering average of 11975 steps per day – a significant advance on the number of steps walked by the average office worker in a day which is only 3000 steps. There were many individual success stories, including participants who lost lots of kilograms.

The Victorian Bar has just stepped into the 2012 Global Corporate Challenge, so it is out with the coffee and wine and in with the Eka Pada Bakasanon (a Yoga position) and wheat germ egg white smoothie! VBN

The Courtroom Dog

Lindy Barrett



Picture this–a New York courtroom, filled with flashy looking attorneys in designer suits (who look remarkably like Denny Crane). The camera then pans around and shows a stern looking judge (personally I think of Judge Judy) glowering at all those involved. Cut to a nervous, innocent looking 15 year old girl... and then, a close up of an adorable golden retriever dog, lolling at the feet of the girl. Cue the girl sniffling as she hesitantly tells the judge about how "Daddy" did "bad things". A tear slides down her cheek. The dog (let's call her Lassie), sees the tear and sits up. Lassie places her head in the girl's lap and licks her hand. The girl looks down at Lassie and smiles wanly, softly stroking her ears. Lassie snuffles and opens her brown eyes wider, gazing up adoringly at the girl.

The jurors immediately glare at the dishevelled looking "Daddy". Looks of "how could he?" cross their faces.

Not surprisingly, "Daddy" is promptly convicted and sent away for a very long time.

Sounds like a TV show right?

But it's not. This actually happened (well something like that anyway). And of course it happened in the gold ole US of A.

What the? I hear you ask. Well, apparently, dogs are now helping people to testify in US courts.

Sounds fair right? I mean, I've seen those TV shows–some of those US attorneys are quite smart. They ask tricky questions all the time. They know how to shout "objection!" at the tops of their lungs, as well as how to trap a dirty rotten liar into giving a full blown confession. And they like to trick witnesses during cross-examination, all just to save their scumbag clients. So pity a thought for the poor souls who have to attend court and give evidence before these monsters. I'd be scared too.

So why then shouldn't a witness be allowed to have an "assistance" dog, to help them get through the trauma of facing one of these sharks? It's only fair!

And it's not like there aren't rules about it. According to "Courthouse Dogs" (which I assume is a highly reputable source–after all Google told me it was) assistance dogs have to be quiet, unobtrusive and "emotionally available" for witnesses when the needs arises. They need to be able to sit or lie down for extended periods of time and they should also not engage in any behaviour that would distract the witness or other people in the courtroom. Sounds like an ideal dog right?

Surely such fabulous dogs could only be of benefit to witnesses here? How much easier would it make giving evidence? And imagine the inferences to be drawn! I mean, why would anyone even need an assistance dog unless they were telling the truth about some horrible event?

Now, before all of you defence barristers out there start whining about how unfair this could be, because you can't cross-examine Lassie, (although really, you are probably just not trying hard enough–Lassie's pretty smart after all. I'm sure she could bark once for yes and twice for no if you really wanted to ask her something), don't fret! Courthouse Dogs says that assistance dogs can help defence counsel too!

How you say? Well, I am glad you asked. According to Courthouse Dogs, Lassie can make you appear gentle, and like you are not deliberately trying to stress out a vulnerable witnesses (because apparently, that is where all defence counsel fall down)! They cite an example of a particularly sensitive defence counsel who patted an assistance dog while cross-examining a child witnesses, which made it look like they were just "having a quiet conversation" rather than the reality of a big bad attorney "grilling the child".

Clearly a win-win situation for all then!

But why stop at dogs I say?

Dogs aren't the only animals that might comfort a witness. What about cats? I mean, picture this scenario:

Barrister A: "Now Dr E, just what were you planning on doing with the lasers and the sharks?"

Dr E (absent-mindedly holding a fluffy white cat): "Well, I was going to attach the lasers to the sharks heads, and use them as weapons you freaking idiot!"

Dr E then looks down at the cat he is stroking "I mean really Mr Bigglesworth? What kind of idiot do they think I am? Hmm?"

Think about it. VBN

An Uncomfortable Discovery: Legal Process Outsourcing

Louise Martin

The practice of businesses entering into arrangements with third parties to provide non-core services is not particularly new. Some of the world's largest companies – whether in information technology, finance or manufacturing – have been outsourcing for decades. The longevity of this practice, and success of the global outsourcing providers, suggests that this business model works. But, in the Australian legal industry, legal process outsourcing (commonly shortened to LPO) has only started to take hold relatively recently.

In a widely publicised move, on 27 October last year, Mallesons Stephen Jaques announced the signing of an agreement with Integreon to outsource some of its lower-level work, such as document review, due diligence and discovery. Integreon is one of the largest global LPO providers, having 17 international offices and listing as its clients nine of the top 10 global law firms and the 10 largest investment banks.

As part of the deal, Mallesons will be able to draw upon the services of 200 legally qualified staff based in Mumbai and Delhi. Mallesons managing partner, Tony O'Malley, said the agreement represented a "watershed moment" for the Australian legal services market. "We are making efficiency our business, while responding to cost pressures in the highly competitive legal market," he said in a media release on the announcement day.

A consolidated move by law firms towards LPO is likely to mean that the first couple of years at the Bar will become tougher for many barristers.

Mallesons says the significance of its deal with Integreon is that it is the first large Australian law firm to strike an exclusive agreement with an international LPO provider.

Six months before Mallesons' announcement, a smaller firm, Advent Lawyers, based in Sydney, Melbourne and Singapore, struck a strategic alliance with Pangea 3, a well-known global LPO with offices in Mumbai and New York. Advent Lawyers said it would use Pangrea 3 to provide its clients with what it predicted would be a wide range of lower-cost services such as contract drafting, secretarial support, intellectual property and patent services, and legal research.

Since the Mallesons' deal was announced, other top-tier firms surveyed by the legal press, such as Allens Arthur Robinson and Clayton Utz, have said that they have already been using third-party providers as and when required. In December last year, Blake Dawson Waldron announced that it too had signed a deal with LPO provider Exigent. It was reported the following month that Corrs Chambers Westgarth has a short list of prospective LPO providers.

At first blush, it might seem surprising that local law firms are trumpeting their deals with global LPO providers in the way that they have. LPO is, after all, still relatively new territory for Australian law firms and there is likely to be some resulting nervousness among their clients. This is the case even if, as has been stressed by the firms, it is up to their clients to elect whether they want their work to be sent offshore in this way.

However, given the prevailing economic climate, it seems clear that the deals are being heavily marketed because of the cost savings they are likely to generate. Mallesons predicts that clients who make use of LPO could have their fees cut by between 20 and 50 per cent. "LPO is already common practice elsewhere in the world, and it's time that our clients have access to, and benefit from, this innovative business practice," he said in a radio interview on the announcement day.

As at April 2010, there were over 5200 professionals working in the LPO industry in India and the Philippines, generating an annual revenue of $US300 million, according to a study by Evalueserve, a business research and analytics firm. By December 2015, the firm predicts that there will be 18,000 professionals generating an annual revenue of $US960 million.

Law firms have been claiming that their deals with the LPO providers will not result in any redundancies for junior solicitors, who they say will instead get the chance to focus on better quality work. Although if more Australian firms turn to LPO, it is difficult to see how moving work offshore that has traditionally been done by locally based staff will not have an effect on the job market.

Many barristers have also performed discovery work in their first couple of years at the Bar. They have usually been engaged to work on class action cases, where the resources of the law firms have temporarily been stretched by the volume of the documents required to be discovered in a particular case. Firms, which do not have sufficient permanent staff to handle this work, have benefitted from this smaller and more localised form of outsourcing. So too have clients, as the fees charged by junior barristers, usually experienced former solicitors, are similar to the charge-out rates of major law firm paralegals. For junior barristers, the work has provided a steady income as they have built up their fledgling practices. However, the practical effects of large firms using LPO are even broader. If it becomes widely used, cases will come to court where the first cut of the evidence has been primarily reviewed offshore. Locally based lawyers will need to be satisfied that their level of supervision of this work allows them to swear to the Court that the opposing party has been provided with all the relevant documents. Judges will be hearing cases, and senior and junior counsel appearing in them, where the evidence has been culled in this way. The effects of this might be positive. They also might be negative. They could be neutral. At this point, it is difficult to tell.

In the US, Bar committees have been wrestling with the

ethical effects of this growing trend for several years. Six Bar Association Ethics Committees, the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline and the American Bar Association Standing Committee on Ethics and Professional Responsibility have published opinions discussing the outsourcing of legal work. While all the opinions have concluded that US lawyers are free to outsource work, which includes sending work to lawyers or non-lawyers offshore, they have stressed that those who use these services need to adhere to ethical rules.

In the ABA opinion, which was published in 2008, the Committee looked at what lawyers who outsource legal work (whom the opinion terms "outsourcing lawyers") should do in order to comply with their obligations under the Model Rules of Professional Conduct. It noted that lawyers who supervise other lawyers or non-lawyers in performing legal services are responsible under the Model Rules for ensuring that the individuals they supervise comply with the ethical rules governing lawyers. A key ethical rule, as identified by the Committee in the context of outsourcing, is the obligation of a lawyer to render legal services competently.

The committee notes that outsourcing lawyers may face challenges in assuring competence and overseeing work performed by others, particularly when there is a separation of thousands of miles and substantial time differences. However, it says that, at a minimum, outsourcing lawyers should conduct reference checks and background investigations of lawyer or non-lawyer providers. If the provider is in a foreign country, the outsourcing lawyer should determine whether the legal education is similar to that in the US and whether professional regulatory systems incorporate equivalent ethics principles and disciplinary enforcement systems. The outsourcing lawyers also should ascertain whether the foreign legal system protects client confidentiality and provides effective remedies to the lawyer's client in case disputes arise.

Depending on the level of supervision contemplated, the Committee suggests that it might be necessary to obtain informed client consent before engaging outside assistance. It says that confidentiality agreements are strongly advisable. Regarding fees, the opinion says that outsourcing lawyers may pass along to the client the cost of using the service provider, including a reasonable allocation of associated overhead expenses, "but no mark-up is permitted".

A similar level of scrutiny has not happened in the UK, where the UK Law Society has not released any ethical guidelines dealing specifically with LPO. However, UK lawyers still need to adhere to the Solicitors' Code of Conduct, which has specific rules for the supervision of work that is outsourced.

It will be interesting to see whether, if the practice grows in Australia, it will be left to individual firms to develop their own guidelines, and undertake their own due diligence, in

respect of the outsourcing providers, so that their lawyers can confidently make use of LPO without there being any breaches of their professional and ethical responsibilities under the Legal Profession Act 2004. Or whether, as in the US, the legal industry will formulate its own comprehensive ethical framework that sets out the circumstances in which it is acceptable for an Australian lawyer to make use of LPO.

If the legal industry is to come up with a unified and principled response, it would seem that the time for this to be done is sooner rather than later. Like the rest of the world, the legal industry in Australia has high labour and property costs and has been hit by the global financial downturn. In the light of its promised cost savings to clients, LPO is likely to have an irresistible appeal to both smaller and large firms.

The issues most likely to occupy these firms are probably going to be more about the practical realities of what types of work are most suited to outsourcing and which offshore provider should perform it. In the US, which along with the UK is the recipient of almost all LPO currently undertaken, opinion has been divided as to whether the cost savings outweigh the obvious difficulties. Differing views have been expressed as to its worth given the level of supervision that LPO requires and the quality of work that is produced as a result of it.

Complex work, which is subject to different layers of domestically specific statutory provisions, would, of course, be least suitable. Moreover, it is difficult to see how LPO sits alongside the fact that much of the transactional work of large law firms is based on closely guarded precedents that have been developed over many years by the law firm. As no firm would willingly share this valuable intellectual resource with a non-staff member, it is difficult to see what is left over to give to outsourcers aside from due diligence, discovery work, and the lowest level type of document management.

While the mainstream Australian media gave extensive coverage to Mallesons' LPO arrangements, they did it in an essentially superficial and non-critical manner. More revealing were the legal blogs, where an informative and passionate debate quickly took place in response to the announcement. On one blog, a contributor, who said that he was a Mallesons solicitor, was not at all happy about the announcement. "As a Mallesons junior likely to be affected by this scheme, I can honestly say that while the fact of chasing profit is not altogether new or surprising, the fact of it being sold as an opportunity for 'growth' is truly upsetting."

While these comments were endorsed by others who posted on the blog, some considered that the days of clients paying $200 an hour for graduates or paralegals to "scan, code and sort documents between dates" were numbered. "Anybody can do that. LPOs can do that cheaper and are usually prepared to take some risk/reward on quality outcomes. Firms that realise this and go with the LPO phenomenon will keep their clients – those that don't won't (and therefore there will be further job losses)," said one contributor.

Another, who described herself as young Australian lawyer, said that she had just returned from four years in London to a partnership in Australia. She observed that the trend towards LPO was "fairly common overseas" and the quality of the work produced through it was "just as good if not better".

In an era of globalisation, it would seem naive to think that the brave new global trend of LPO is not going to become a key part of the Australian legal landscape. However, the way in which it operates in a system with a strong and long-held set of ethical obligations is something that can be locally determined. VBN

Supreme Court Library

James Butler - Supreme Court Librarian

The Supreme Court Library is an important centre for legal research for members of the Bar. In this article, I want to provide a brief introductory history and mention some issues that may be of interest.

ESTABLISHMENT

As most readers would know, the Supreme Court Library has existed for over 150 years, as a library for both the Courts and the wider legal profession, as envisaged by Sir Redmond Barry when he first called for a committee to establish such a library in 1853.

Under Barry's guidance, the Library Committee purchased widely in the areas of common law and equity, even later buying a large number of American items giving the Library a valuable nineteenth century American collection. Because of the Irish background of a number of the judges, a large amount of Irish material was also bought, so that the Library has possibly the largest collection of Irish nominate reports in Australia.

The Library has also been given a number of historical items, including our oldest book and only incunabulum, a copy of Statham's abridgement, printed in Rouen around 1490.

Barry was also interested in creating what he considered an "English gentleman's library", with the result that one room on the first floor of the library houses a broad collection of largely nineteenth century non-legal material of a general nature, including sets of the Greek and Latin classics, a set of the Gentleman's magazine, and a complete set of Voltaire in the original French.

When the Supreme Court Library moved to occupy its current location in 1884, it was the major legal research library within the State, with a collection envied throughout the country.

ELECTRONIC RESEARCH

Over the last 20 or so years or so, legal research has changed dramatically. Beginning in Australia with what used to be called Info-One (launched in 1985), a collection of unreported judgments later bought by LexisNexis, and supplemented later by CaseBase (originally Pink Ribbon, but again later acquired by LexisNexis), electronic research has totally changed the way libraries are used. Whereas in the past, the Supreme Court Library was the first port of call for every lawyer in Victoria doing research, the development of electronic material, both on free databases such as Austlii, and their commercial counterparts, has forever altered the way legal research is carried out. These days, lawyers tend to access Austlii for judgments, eschewing law reports themselves, with almost no-one now understanding the difference between authorised reports and others. Much material is available simply by googling, and all legislation is freely available, with increasingly the secondary extrinsic material that relates to it.

JUDGMENTS

The Library has a large collection of what used to be referred to as Unreported Judgments, although with the use of Media Neutral Citation (MNC), the term is beginning to lose its usage, with all judgments now being readily available to all practitioners. Until the development of electronic judgments in the 1990s, these used to be stored in paper form. But, with money provided by the Council of Law Reporting in Victoria, the library's holdings have all been scanned to pdf format, and are all available online, both within the library and also through the externally available library catalogue, and Judgments database. For access, go to the Court's website, and follow the links on the left to judgments. Judgments can be printed in your chambers for court use. Current judgments are all sent to Austlii, and the legal publishers, as soon as they are made available, and all the older material is available as well.

COLLECTION

As many of you will know, the library has an extensive textbook collection. Below is a short list of items recently added.

Cairns, Australian Civil Procedure, 9th ed, 2011.

Clerk and Lindsell on Torts, 20th ed, 2010.

Gans, Criminal Process and Human Rights, 2011.

Evans, Assessing Lawyers' Ethics: A Practitioner's Guide, 2011.

Goode, Principles of Corporate Insolvency Law. 4th ed, 2011.

Hogg, Liability of the Crown, 4th ed, 2011.

Lockhart, The law of misleading or deceptive conduct, 3rd ed, 2011.

Smith and Hogan Criminal law, 13th ed, 2011.

REVIEW

As some of you will probably know, the Library is undergoing a further review, and there are two bar representatives on the Review Steering Committee. After over 150 years, it is no doubt time that the structure and governance of the Library was reviewed. VBN

Ethics Committee Bulletins

Richard McGarvie SC - Chair, Victorian Bar Ethics Committee

Bulletin 1 of 2011

CONFLICT IN RESPECT OF LEGAL PROCEEDINGS CURRENTLY BEFORE A COURT

1. The Ethics Committee has recently received a number of requests for rulings concerning potential conflicts of interest of members of Counsel in proceedings in which they are appearing, including in circumstances where an opposing party has expressly alleged that a member of Counsel has a conflict of interest.

2. The role of the Ethics Committee is to provide rulings on a case by case basis arising out of application of the Practice Rules (such as circumstances in which briefs must be refused or may be returned) . While the Committee does not wish to discourage members of Counsel from availing themselves of this service, the Committee will not provide legal advice as to whether or not a member of Counsel might be found to be in a position of conflict in respect of legal proceedings currently before the Court (and potentially the subject of determination by the Court).

Bulletin 2 of 2011

DIRECT ACCESS BRIEFS – UPDATED

This Bulletin supersedes Bulletin No. 3 of 2004.

The Ethics Committee wishes to remind barristers of the Rules of Conduct relating to direct access briefs.

Rules of Conduct

1. The Direct Access Rules are found at Part VI of the Rules of Conduct – Rules 165 to 177.

2. Subject to the Rules of Conduct, Rule 165 permits a barrister to accept instructions or a brief (without the intervention of a solicitor) from:

   (a) a member of an approved body acting on its own or on behalf of a client;

   (b) a lay client in a matter in which the client is directly concerned; or

   (c) the Victoria Legal Aid in criminal matters.

3. The application of Rule 165 is limited by the Rules, in particular, Rule 171 which prohibits a barrister from accepting any instructions or a brief in a direct access matter (except with the written permission of the Ethics Committee):

   (a) to appear in the High Court of Australia, Federal Court of Australia, Industrial Relations Court of Australia, Family Court of Australia, Supreme Court of Victoria, County Court of Victoria (except in criminal matters where the barrister is instructed by Victoria Legal Aid), or in any civil proceeding in the Magistrates' Courts of Victoria;

   (b) once proceedings are instituted (if acting for a plaintiff) and served (if acting for a defendant) in any of the courts set out in sub-paragraph (a) hereof.

4. Rule 170 allows a barrister to appear in a direct access matter in the Magistrates' Court in a criminal proceeding.

5. The effect of the Direct Access Rules is to permit barristers to appear in the Magistrates' Court in a criminal proceeding and at Tribunals (including VCAT) without the intervention of a solicitor. This permission is, however, subject to Rule 168 which provides that:

A barrister:

   (a) must not accept any brief or instructions in a direct access matter if he or she considers it is in the interests of the client that a solicitor be instructed.

   (b) must decline to act in a direct access matter in which at any stage he or she considers it in the interests of the client that a solicitor be instructed.

6. Furthermore, Rules 173 to 177 place a number of procedural restrictions and record-keeping requirements on barristers when acting in a direct access matter.

VBLAS

7. The Ethics Committee also receives requests from the Victorian Bar Legal Assistance Scheme ("VBLAS") which contacts the Committee seeking dispensation for barristers from the direct access rules in regard to acting, without a solicitor, for migration and refugee matters. These applications are considered on their merits.

Federal Court and the Federal Magistrates' Court

8. The Federal Court and the Federal Magistrates' Court in conjunction with the Victorian Bar also conduct pro bono assistance schemes. The Rules for these schemes are contained in Division 4.2 of the Federal Court Rules 2011 and Part 12 of the Federal Magistrates' Court Rules. The Ethics Committee has granted dispensation from Rule 171 of the Practice Rules to Counsel accepting a pro-bono referral under Division 4.2 of the Federal Court Rules 2011 (previously Order 80 of the Federal Court Rules) and Part 12 of the Federal Magistrates' Court Rules. This dispensation is reviewed on a regular basis.

   The Rules of Practice of the Victorian Bar apply to these pro-bono schemes. Thus, it is the obligation of the barrister to make an assessment of what is in the interests of the client under Rule 168 as well as comply with the other Direct Access Rules. If the barrister considers that it is in the interests of the client that a solicitor be instructed in the matter, the relevant court official must be notified and the court will make the necessary appointment of a solicitor in the circumstances.

Duty Barristers' Schemes

9. In 2007 the Victorian Bar established a Duty Barrister Scheme in the Magistrates' Court. The Ethics Committee has granted dispensation from the operation of rules 171, 172, 174 and 176 of the Practice Rules in order that they may advise and appear in a professional capacity in a civil matter in the Magistrates' Court of Victoria under the auspices of the Scheme provided that the matter satisfies the criteria of the Scheme. Those criteria include a provision that the matter must be that in which, in the Duty Barrister's opinion, the client will not be prejudiced if a solicitor is not acting.

10. In 2008, the Duty Barristers' Scheme was extended to the Supreme Court under strict criteria. The Ethics Committee has granted dispensation from the operation of rules 171, 172, 174 and 176 of the Practice Rules to those members of Counsel who, from time to time, are participating in the Duty Barristers Scheme (the "Scheme") as extended with the approval of Bar Council to the Supreme Court, in order that they may advise and appear in a professional capacity in a matter in the Practice Court of the Supreme Court of Victoria, in mediations led by an Associate Judge or other Officer of the Supreme Court, and in the Court of Appeal, under the auspices of the Scheme provided that the matter satisfies the criteria of the Scheme.

    Both these dispensations are reviewed on a regular basis.

    Again, the Rules of Practice of the Victorian Bar apply to these "Duty Barrister" schemes. Thus, it is the obligation of the barrister to make an assessment of what is in the interests of the client under Rule 168 as well as comply with the other Direct Access Rules.

Bulletin 3 of 2011

DOCUMENTS PRODUCED UNDER SUBPOENA

1. This Bulletin relates to the obligations of counsel in dealing with documents which are subject of a subpoena to produce (a document subpoena). This Bulletin supersedes Bulletin 1 of 1991(issued on 3 September 1991).

2. Where documents are produced pursuant to a document subpoena, the proper course is to follow the three stage procedure set out in National Employers Mutual General Association Limited v Waind [1978] 1 NSWLR 382.

3. A person complies with a document subpoena by producing the documents specified in the subpoena to the Court and not to the party issuing the subpoena or any other party. A party has no right to inspect the documents which a subpoenaed person brings to the Court before they are produced: Burchard v McFarlane [1891] 2 QB 241 at 274 to 278; Hodgson v AMCOR Limited [2011] VSC 269 at [48]-[62].

4. There may be an opportunity, with the consent of the subpoenaed party, for counsel to review documents specified in the document subpoena at Court on the day of the hearing and prior to their production to the Court. Should such an opportunity arise:

   (a) It would be improper for counsel to give the person subpoenaed (or any person representing the person subpoenaed) the impression that the party issuing the subpoena is entitled to inspect the subpoenaed documents before production to the Court or to allow the person to permit inspection under that impression;

   (b) It would also be improper for counsel to inspect the subpoenaed documents where those documents contain or may contain material in respect of which the person subpoenaed or another party might be entitled to claim privilege or has a claim of confidence where inspection may result in the disclosure of the privileged or confidential material.

   (c) Caution must be exercised where the person responding to the subpoena is a relatively junior member of an organization and, therefore, may lack authority to allow inspection.

Bulletin 4 of 2011

CAUTION WHEN CONFERRING WITH WITNESSES

It has been brought to the attention of the Ethics Committee that a practice has arisen in which counsel are conferring out of court with their opponent's witnesses of fact.

Caution must be exercised in doing so where there is a possibility that when later giving evidence the witness will not adhere to what was said in conference to counsel, and, further, may deny having given counsel a the earlier statements of the witness. Where there is a real possibility of this occurring, counsel is obliged to withdraw from the case pursuant to Rule 92(c). The Committee will not give a dispensation to avoid this consequence.

Should the withdrawal occur after it has commenced, the trial is very likely to be aborted. Counsel is, consequently, then open to criticism for allowing the situation to arise.

To avoid these consequences, counsel should arrange for such witnesses to be interviewed by their instructing solicitors, and unless counsel is confident that such a problem will not arise, counsel should not participate in that interview. This exception will often be the case where the witness is a professional person, giving expert opinion evidence, or is a police officer. Even in such cases, it is preferable for the instructing solicitor to be present.

NEED FOR INSTRUCTING SOLICITOR

An associated problem has been drawn to the attention of the Committee. It is the absence of an instructing solicitor where evidence is to be assembled. This has occurred where counsel has accepted a direct access brief in circumstances permitted by the Practice Rules. Attention is drawn to Rule 168 which provides that in such a case counsel must refuse the brief if it is in the interests of the client that a solicitor be instructed. That will always be the case if it is evident that witnesses need to be found and proofed in preparation for the hearing.

The application of Rule 168 is not avoided by directing a lay client to attend to such matters. VBN

The 2011 Bar Dinner

VBN Roving Reporters

Guests arriving at the 2011 Victorian Bar Dinner

Those in the community who regard the Bar as an anachronistic institution populated by legal dinosaurs, would have approved of the venue for the 2011 Bar Dinner, which was held at the Melbourne Museum on 28 May 2011.

The evening was presided over by the 2011 Bar Council Chairman, Mark Moshinsky SC. The Governor of Victoria, the Honourable Alex Chernov AC QC was the Bar's guest of honour.

The keynote speaker at the dinner was the urbane and ever-dry, The Honourable Justice Nettle of the Court of Appeal of the Supreme Court of Victoria, who entertained the elegant and formally attired guests with an amusing and edifying speech which was anything but 'smart casual'. In a venue-appropriate move, His Honour led guests on a stroll through the history books: the first known use of the term "barrister"; the early days of the Victorian Bar; foiled attempts to fuse the legal profession in Victoria; and the political and social landscape of 1993, the year in which His Honour last addressed the Bar Dinner when he carried the poisoned chalice of 'Junior Silk'.

Appropriately in 2011 the chalice was carried by 2009 Junior Silk and occasional Melbourne International Comedy Festival Performer, Rachel Doyle SC, which she enthusiastically accepted despite not receiving top-billing for the evening, while also acknowledging that Nettle JA was not her 'warm up guy'. After thoroughly chronicling her own long-held ambition to speak at the Bar Dinner and the memorable 'Chernov incident' which occurred in 1995 during her term as Associate to The Honourable Sir Daryl Dawson AC KBE CB, Doyle SC then briefly turned to the possible use of social networking sights in the work of barristers and the courts, and the *Civil Procedure (Judgment Writing) Amendment Bill* 2011, which envisages party participation in the judgment writing process.

And so to the future. One can't help but wonder in what capacity His Honour Justice Nettle might for a third time address the Bar Dinner. What's more, who among the Junior Bar might on the very occasion of the 2011 Bar Dinner have committed an indiscretion (akin to assailing a more senior colleague who one day might become Governor with a spring roll), to which that they might one day confess when giving the Junior Silk's speech in 2025 or thereabouts? For now, all that can be said with certainty is that the 2012 Bar Dinner will be held at the Myer Mural Hall on Friday, 25 May 2012 and that spring rolls won't be on the menu. VBN

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1. Melbourne Museum, Venue for the 2011 Victorian Bar Dinner
2. Mark Derham QC, Her Honour Judge Morrish QC
3. Richard Stanley, Michael Wheelahan SC, Mark Moshinsky SC, Fiona McLeod SC, Melanie Sloss SC

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1. Tiphanie Acreman, Daniel Bongiorno, Felicity Cockram, Rae Sharp, Liam Brown and Catherine Boston
2. His Honour Judge Allen, Michael Tovey QC, Nahrain Warda, Michael Croucher SC
3. Michael Ruddle, Gunilla Hedberg
4. Guests seated for dinner
5. Kim Galpin, Rebecca Boyce, Sasha Manova Anthea Tiernan
6. Toasting the Bars of Australia


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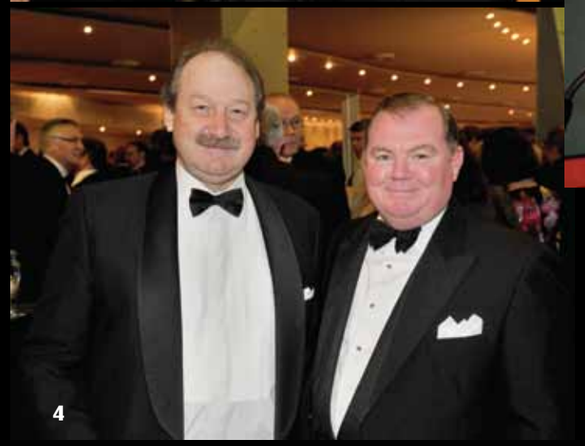
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1. Aaron Weinstock, Catherine Button, Anthony Strahan
2. Mr Jonathan Burke (Aide to the Governor of Victoria), His Honour Judge McInerney QC, His Excellency The Honourable Alex Chernov AC QC, Governor of Victoria, Roger Gillard QC
3. Kingsley Davis, Anna Forsyth, Richard Brear
4. Mr Stephen Hare (General Manager, The Victorian Bar) and Mr Dan O'Connor (Honorary Secretary, Australian Bar Association)
5. Mark Moshinsky SC
6. Michael Wyles SC, John McArdle QC
7. Back row: Billy Pinna, Maria Pilipasidis, Robert Harper, Rohan Hamilton; Front Row: Liz Ruddle, Fiona Forsyth, Fiona Ryan, Francesca Holmes
8. The Honourable Justice Tate, Melanie Sloss SC
9. Mr Ross Nankivell (Manager assisting the General Manager, The Victorian Bar), Michael Gronow, Dr John Emmerson QC
10. Fiona McLeod SC, Bernard Coles QC, Philip Selth OAM

1. Iain Martindale SC, Robert Cameron
2. Rene Sion, Deborah Mandie, Jane Treleaven
3. Andrew Saunders, Dr Paul Halley
4. The Honourable Justice Weinberg, The Honourable Justice King, Patrick Tehan QC

The Lineage and Strength of Our Traditions

The Honourable Justice Geoffrey Nettle

Speech delivered at the 2011 Bar Dinner by the Honourable Justice Geoffrey Nettle.

Your Excellency, your Honours, Ladies and Gentlemen.

As the Chairman has observed, the last time I spoke at a Bar Dinner was 18 years ago. On that occasion, it was because I was the junior silk. On this occasion, the reason is more difficult to identify. I rather suspect, however, that if you scratched the surface, you would find that there are a large number of more suitable speakers otherwise engaged this evening. I may say, too, that I am a little apprehensive about addressing such a discerning audience. I said as much to the Chairman when I was endeavouring to resist his blandishments to come here tonight. He suggested that I should just think back to when we last appeared together in the High Court and managed to put it over. That helped for a while but, upon analysis, there really is no comparison. As you know, the 'Bill and Ken show' is a tough gig but, with all respect to you ladies and gentlemen, at least those boys fly sober.

I notice, too, that there have been a few changes at the Bar Dinner since last I was here. I gather that in the last couple of years you have had no less than their Honours, Chief Justice French and Justice Bell of the High Court of Australia to speak to you. Eighteen years ago, it was very much the era of the High Court of Sydney. So much so that, because Sydney did not appoint any silks that year, the High Court declined to take the bows of those who were appointed from other States and Territories. Back then, with the notable exception of Sir Daryl Dawson, we seldom saw a High Court judge here at the dinner, let alone have one speak to us.

I see as well that you have done away with the High Table at which the Chairman of the Bar Council used to sit with the honoured guests. I gather the idea now is to spread the guests around among the hoi polloi in accordance with what I suppose is a maturing sense of egalitarianism. Mind you, you are not alone in making such improvements. When I joined the Supreme Court nine years ago, judges' dinners used to be elegant black tie affairs, a little like this one, held in the Supreme Court library with occasionally a string quartet for entertainment.

Since then, we have graduated to 'smart casual' at randomly selected inner-suburban trattatoria with occasional karaoke for entertainment. Times change.

One thing I do notice among all these changes for the good, however, is that you no longer drink a toast to the Bench Bar and solicitors of England and Wales. Of course, I appreciate that the toast to the Australian Bars may have more demotic appeal about it, and presumably greater political correctitude. But, if I may say so, compared to the old model it is a little lacking in focus.

According to my rough grasp of legal history, the narratores from which the serjeants and ultimately, by a side step, today's Bar are descended, date back as an elite, separate and apart from the attorneys, at least to the 13th century. So far as is known, the first use of the term 'barrister' was in the Black Books of Lincolns Inn in 1455. The first in statute was in 1531, in the Statute of Sewers of that year. And although the subject matter of that legislation may not sound particularly appealing, especially at meal time, for anyone who thinks of

The Hon Justice Nettle

herself or himself as a barrister, the text of the legislation is uplifting. Because, for the first time in legal history, here was legislation which prescribed the qualification for appointment to office as one 'learned in the laws of the realm, that is to say, admitted [in one of the four Principal Inns of Court] for an utter barrister'. Thenceforth, being a barrister, and being learned in the law, were conceived of as synonymous.

As most of you know, the first barrister arrived in Victoria in 1840, albeit as a judge, and the third, who was Sir Redmond Barry, arrived only three years later. As a result, although both men, and for that matter also the second barrister to come here, were Irish, we have followed the traditions of the Bench and Bar of England and Wales virtually since the inception of the colony. Fortunately, too, there was another Irishman, by the name of Madden, who was up for the task when it became necessary some 50 years later to defend those traditions against the forces of amalgamation. And, as the experience of the last few years tends to show, to some extent the battle remains ongoing.

To come back to the point, however, it strikes me that the singular advantage of the old toast to the Bench Bar and Solicitors of England and Wales was that it served as a sort of annual express affirmation of the separateness and independence of barristers from solicitors and thus, in effect, of the essence of what we are.

Eighteen years ago when I last addressed this dinner, the Bar and the world of which it was part were in some respects very different to now. Back then, few barristers, and even fewer judges, owned a computer, let alone could use one. The Pentium processor had only just been invented and for all intents and purposes the world wide web was still to come on line. Eighteen years ago, the Prime Minister of Australia was Paul Keating, having replaced Bob Hawke by agreement in the third term of the Labor government. In England so called 'New Labour' was still to be conceived of. In the United States, a very plain white bread Bill Clinton had not long been inaugurated as President and, for all one knows, might not even then have met that woman whom he claimed he never knew. Eighteen years ago, John Harber Phillips was Chief Justice of Victoria. The High Court had only recently handed down its seminal decisions in Mabo and Wik. As a result, the late Ron Castan was at his peak as a champion of human rights. The great English judge and humanist, Lord Bingham, had only just been appointed the Master of the Rolls and still had most of his best work in front of him. Closer to home, our own Sir James Gobbo had recently been knighted for his services to the community; his long time friend, SEK Hulme, QC had just been awarded the smart casual equivalent for his services to law and industry; and a young solicitor by the name of Kathy Kings had just left Mallesons in order to take up the position of Listing Master.

Now, by comparison, the web is passé, emails are a pain in the neck and most barristers, and I think the majority of judges, are skilled in the art which not all that long ago the editors of the Victorian Bar News were pleased to describe as 'tip tap'. Today, the Prime Minister of the Commonwealth is the first woman ever to be appointed to that position and, even more remarkably, the first Australian politician ever to depose a prime ministerial leader in the first term of a government's office. Today, in the United Kingdom, New Labour is decidedly non-u and, in the United States, there is an inspirational Afro-Irish-American President who, against all the odds, appears to be happily married.

Sadly, none of J H Phillips, Lord Bingham, Ron Castan and SEK Hulme are any longer with us. Today in this country no one can get a knighthood, even for love nor money let alone for service to the community, and as I look around at some of the more worthy of my retired brethren, it strikes me that, at least in the law, even the numbers of today's smart casual equivalents of a knighthood are still pretty thin on the ground. On a happier note, we have as our Chief Justice the first woman ever to be appointed as such, and she has excelled in the position, and her Honour Judge Kings, as she now is, has advanced from the Listing Court to the County Court.

Despite all these changes, however, things now and things as they were are in some respects remarkably similar. Eighteen years ago, we were still feeling the effects of the 1990 recession which the treasurer Paul Keating said we had to have and, along with a large slice of the Australian population, a substantial part of the Bar on the civil side were doing it fairly hard. Today, we are in the aftermath of the GFC, and struggling with the two speed economy and, one way or another, I expect that there are still a good deal of the Bar on the civil side who are doing it fairly hard. Eighteen years ago, although I confess I was not particularly conscious of it then, the brief fee scales for legally aided criminal work were grossly inadequate. Today, as I am all too aware, it is a case of *a fortiori*.

Eighteen years ago, the Cain/Kirner government had just been swept from office and the late, great, Jim Kennan, may already have been contemplating his return to the inner bar, whereafter he would go on to excel until his untimely death. Today, the Bracks/Brumby government has not long been swept from

1. The Hon Justice Maxwell, President of the Court of Appeal, Supreme Court of Victoria
2. Charles Wheeler
3. Mark Livesey QC

office and, for all one knows, its one time Attorney-General may also be considering his options. Eighteen years ago, I took the opportunity mildly to chide Kennan for the way in which he had, in his capacity as Minister for Transport, turned the state's tramways system into a static transport display. Today, those of us who still chance to travel by public transport know that not much has changed, except of course for that profundity of achievement which graces under the title of 'Myki'.

Eighteen years ago, I chanced to remark upon the questionable constitutionality of Jan Wade's abolition of the Accident Compensation Court. This year, if I were the junior silk, I might be inclined to speculate on the future of the Charter of Human Rights and Responsibilities Act. As it is, however, I am not the junior silk and, in any event, it recently struck me that there is no longer a hell of a lot of the Charter left following the decision of my brethren in Momcilovic. Still, that awaits its denouement in Canberra.

Eighteen years ago, Jan Wade was set to embark upon a process of reorganisation which included the establishment of the Court of Appeal and the creation of the VCAT. More recently, we have lived in the light of 'Justice 1' and 'Justice 2' and the so-called 'legal revolution' which its author proclaimed in the Victorian Bar News would put an end to what he termed the 'parlour game' of adversarial proceedings.

Ladies and Gentlemen, when the Chairman extended your invitation to me to speak here this evening, he imposed two conditions: first, that whatever I said had to be amusing; and, secondly, that it had to be brief. Regrettably, as I fear he probably knew, and you now understand, the former was never a realistic aspiration. I can but seek to console myself and you with John Dryden's thought that: 'Great wits are sure to madness near allied and thin partitions do their bounds divide'. As to the second, I am conscious that, unless that I sit down fairly quickly, I shall be at risk of breach. Nevertheless, in view of the developments of the last eighteen years and some proposals for change at the Bar of which I have read and heard of late, may I take just a little more of your time briefly to mention two anniversaries

First, to return to Madden, this year marks 120 years since the Blockade which he led against the iconoclasts and opportunists, some even from within the Bar, who sought destroy the separate existence of the Victorian Bar and, in effect, turn us all into solicitors. It does not put too fine a point on it to say that, but for Madden, we would not be here in our present form.

Secondly, this year marks 60 years since the Communist Party Case, in which a majority of the High Court–judges all drawn from the ranks of the Bar, and thus imbued with its ethos of separateness and independence–put the rights of individuals (despite them being misguided and unpopular people) before the kind of political and media pressure which is calculated to subjugate judicial independence and so to compromise justice under the rule of law.

I mention these two events now, because it seems to me they demonstrate, as well as any, the criticality of the long traditions of the Bench and Bar of England and Wales which we have inherited as our own. Justice under the rule of law. Of course, I do not suggest that any of the developments of the last eighteen years, or any of the proposals which are now afoot, have challenged us or will challenge us in the ways that the Madden Blockade and the Latham Court were put to the test. Those events were extraordinary. At the same time, however, it may seem to you as it does to me that apparently seriously intended governmental consideration of 'legal revolution' and an end to adversarial proceedings, and perhaps still more so proposals for barristers to amalgamate as if in large firms of solicitors the better to tout for work at the big end of town, are developments which are not exactly to be sneezed at.

At all events, who amongst us doubts that some of the reforms of the last two decades and, the increasing stridency of the popular press over that period, have presented us with challenges which, but for the lineage and strength of our traditions, we might not have weathered so well. Although, therefore, we no longer choose to drink to the Bench, Bar and Solicitors of England and Wales, may I leave you with the hope that these dinners will remain an occasion to celebrate, just as we shall continue to preserve, the inestimable worth of what they have bequeathed to us.

Ladies and Gentlemen of the Victorian Bar, it is indeed an honour to have been invited to join you in tonight's celebration. Thank you very much for your hospitality. VBN

Doyle SC Finally Has Her Say!

Rachel Doyle SC

Speech delivered at the 2011 Bar Dinner by Rachel Doyle SC

Good evening comrades. Well–these are the letters patent that bring home the bacon.

I have been waiting 15 years to speak at the Bar Dinner. But the Bar Council keep changing the selection criteria. The practice, at least since the 1980s, was to have the junior silk speak at the Bar Dinner each year. That tradition was terminated circa 2005 for reasons I won't go into.

Suffice to say, I was on the Bar Council at the time of this rule change. Mark Dreyfus QC and I (who as you no doubt know had ourselves elected to the Bar Council for the sole purpose of constituting ourselves as a left wing voting bloc) presided over a new practice of inviting a member of the Bar to speak who was "really funny".

Publically, I characterised my support for the new requirement that the speaker simply be "really funny" as having been generated by my grave concerns pertaining to the "issue" which arose in 2005.

Privately, I'm sure you have guessed by now, I in fact sponsored the Doyle/ Dreyfus bill for the selfish purpose of ensuring that I would ultimately be invited to speak at the dinner based on merit.

For a couple of years, like an AFL player who marks time in the VFL hoping to catch the eye of the selectors, I demonstrated my deep commitment to the craft of public speaking.

I spoke at innumerable "women and the law" breakfasts; I addressed every gathering of "young" lawyers in the land; I regaled solicitors with my war stories; I flew the flag for the Bar at comedy debates; I even travelled to Adelaide and spoke at their Bar Dinner hoping to impress the selectors with my efforts.

Yes, I criss-crossed this country spruiking my craft.

Like a jilted lover I waited for you little minxes on the Bar Council to contact me. But the phone did not ring.

Then Dreyfus was called to the House of Representatives in our nation's fair bush capital and I found myself distracted by a little thing we call the Royal Commission.

And the Bar Council took advantage of our absence–they reversed the Dreyfus/Doyle amendment and re-instituted the practice of having the junior silk address the Bar in 2009. As a result Chris Townsend SC addressed you that year. Yes, I could see what was happening. A crude attempt to prevent me speaking.

You told me to be more funny – I was. Then you said I had to be more "junior silkish". So I obliged. Yes, I simply ensured that I was the junior silk in 2010, entitling me as of right to speak.

Well time passes, as it is want to do, and I'm sure you recall that those who spoke at the dinner last year did not include me – but rather Chief Justice French and some fellow called David Beach apparently.

Having been bounced from the podium of the 2010 dinner in favour of Justice Beach I was keen to read reports of his remarks. Luckily in the Bar "News" one can always read a lively report of the dinner some 9 months after it is held.

The coverage usually includes a verbatim text of the speeches and some happy snaps with helpful commentary like, "The Hon Ernest Kafoops QC RFD AO RIP and Miss Julliette Hurlstone-Brown chatting with Mr Roger Blasé Senior Deputy (Acting) Vice President of the Storm in a Teacup List of the Fair Go Board Victoria."

I must say, I thought some of the frocks in the photos accompanying the text of the speech delivered by Justice Beach looked a little dated – but I'm still not sure whether that is a result of the passage of 9 months between the dinner and the publication of the article, or whether the frocks suffered from that particular vice at the time they were purchased.

But I digress. We were discussing last year's Bar Dinner. Yes, in a cruel move designed to silence me, in 2010 the Bar Council without warning shifted the goal posts once again, by deciding to hold the dinner in September rather than May– presumably deliberately on the basis that I would be out of the jurisdiction at that time.

Or at least that's what I assumed.

It has since been explained to me that in fact what occurred was that the Bar Council introduced yet another new policy (yes more policy flip flops than the Federal ALP) – this time requiring that the penultimate junior silk speak at each Bar Dinner.

And it is in this capacity – that of penultimate junior silk (or PJS) that I address you this evening.

This new practice involves a very prudent requirement of a settling in or cooling off period for all junior silks to ensure they are sufficiently experienced to deliver a speech which will entertain but not offend.

There is a now a training process for penultimate junior silks, auspiced by the Former Junior Silks Standing Committee. Justice Nettle is a lifetime member of course, having given the Junior Silk's speech in 1992.

I have found the meetings most informative. We spend much of our time engaged in exercises designed to assist us project our voices over the noise made by a drunken crowd not unlike the scenes from the King's Speech: "La la la la la la….".

I have not been advised of the basis for the selection of Justice Nettle to address you this evening, but can only assume that it was tolerably clear to the Bar Council that he ought be the member of the judiciary to make some remarks.

I say this because a quick search of Austlii for the term "Nettle" appearing within 10 words of the phrase "tolerably clear" turned up 13 decisions in which his Honour has used that phrase once; 1 decision in which he used the phrase twice; 3 decisions in which he has quoted another judge using that phrase and 3 judgments of the Court of Appeal in which Justice Nettle has joined in reasons which employ that phrase.

I make note of this because I love the phrase "tolerably clear". Because it suggests at the same time both that something is

Rachel Doyle SC

completely obvious to those of us who are blessed with a fine intellect and that having to listen to counsel who have failed to appreciate a basic point has proven an insufferable bore.

Turning to my substantive remarks.

Most of tonight's Honoured guests need no introduction. So I won't give them one.

I will, however, trouble you with an anecdote about when I first met our Honoured Guest the Governor of Victoria, the Honourable Alex Chernov AO QC.

In 1995, I was 24 years old, a new arrival in Melbourne and associate to Sir Daryl Dawson. His Chambers were at 200 Queen Street.

He said to me one afternoon, "I've got some lovely news, we've both been invited to drinks at Golan Heights."

I had no idea who or what that was, but it sounded very interesting. And the prospect of free booze was certainly alluring.

Sir Daryl mentioned that as I was interested in going to the Bar it may present a good opportunity to meet counsel.

I thought it sounded like a good opportunity to eat enough finger food to avoid having to buy my own dinner. So I went up to the chambers then occupied by luminaries including the judges formerly known as John Middleton and Ray Finkelstein and the former judges formerly known as Alan Goldberg and Ron Merkel.

The surroundings were very plush. There was some very nice finger food. Significantly, there was also some lovely champagne.

The next morning back in chambers, I was idly proofing a High Court judgment as you do when you are a very important High Court associate (AKA putting pedantic little red circles around incorrect punctuation in the draft written by the Judge).

I heard Sir Daryl's phone ring. "Hello….. Alex…. Yes…. Oh I see…. Goodness… I'm sorry about that… yes she does rather…… Yes I'm very sorry…..I'll have a word to her".

His Honour then entered my little dog box of an office: "Did you have a good night last night?"

"Yes" I said brightly, "Lovely night. Very impressive library they've got up there. Great finger food too. Especially those little smoked salmon things".

"Did you meet Alex Chernov?" asked his Honour.

I started to feel a little uneasy.

"I'm not sure" I said.

"He's a silk", said Sir Daryl.

"Ummmmm….You might have to narrow it down a bit–all those old blokes look the same to me…. No offence."

At that moment, I had a flashback. Two things stuck in my mind about the encounter with the Governor formerly known as Alex Chernov QC: he was on crutches – I could remember that, but the details were sketchy, possibly something to do with a cricket match.

Secondly he had revealed that he was briefed to oppose the Fire Fighters' Union (later, a long term client of mine) in a matter involving the State government.

While I could not recall exactly what I had said to him, I did have a vision of him backing away from me (which wasn't easy on crutches let me tell you) and that he appeared to be pressed up rather uncomfortably against a bookcase behind him with an alarmed expression on his face.

Sir Daryl continued: "Well he just called me and he says you menaced him with a spring roll – he said you kept poking it in his face while saying, 'I don't know how you sleep straight in your bed at night representing the Kennett government….'".

I can assure you – I have not attempted to assault the Governor with any finger food this evening, I will almost certainly not attempt to occasion him any bodily harm with my dessert.

Now, I come at last to my substantive remarks. I can't think of anything which will enable a graceful segue to these topics as they have nothing to do with anything that has come before.

They just happen to be two things I want to mention which interest me at the moment:

- Judgment writing
- Social networking sites and the law

If you thought that there was nothing new under the sun in the "judgment writing space" (as a public servant might say)–then you are wrong. I want to tell you about an exciting development in the area.

In all Supreme Court trials now, in place of the usual orders concerning the timing of closing submissions, the trial judge orders that the parties exchange draft judgments. The orders include a requirement that each draft judgment clearly state the determinations of law and the findings of fact which the party invites the Court to make.

The reasons for rejecting the opposing contentions of law or findings of fact advanced by the other party are required to be set out in the draft judgment. There is a mandatory specific order that: "The draft judgment should be written in an appropriately tempered and even handed 'judicial' style. Language which tends to lambaste, deprecate or inflate is to be avoided."

Now whenever this last order is pronounced, I assume the injunction against language which "tends to lambaste, deprecate or inflate" is a rather obvious attempt by the judge in question to force me to recuse myself.

I have since learned that these orders are in fact necessitated by the requirements of the Civil Procedure (Judgment Writing) Amendment Bill 2011.

It is now ordered that at the conclusion of the trial, senior counsel for each party will exchange a draft judgment, the moving party inviting the receiving party to amend the judgment, using the tracked changes function with liberal use of comments in the margin, with the ultimate goal of coming up with an exposure draft which reflects an agreed position as to the appropriate determination of the matter.

Following this process, counsel are required to attend judges' chambers to discuss the draft judgment, On this occasion, the trial judge will talk the parties through any additional changes the judge seeks to make to the draft judgment.

At the conclusion of this process, there will then be a consultation session attended by all interested stakeholders who will be invited to share their reactions to the draft judgment – and their comments will then be fed into the final version of the joint reasons.

Following publication of the reasons, litigants will be given an opportunity to attend a public feedback session, which the trial judge and counsel for both parties are required to attend.

I've found those sessions really helpful – because you know whether you win or lose the trial, in the end it's just an incredible journey, you know what I mean?

You will appreciate that this is all being done as a result of research which indicates that litigants are more likely to accept the result if they feel they can really "own" the end product.

I'm told that the Court anticipates that this exciting development will dramatically reduce the time for which judgments are reserved and contribute to an up swell in community support for the work of the courts.

Significantly, it is also designed to free up judges' time so they can devote more attention to their core work, which is of course participating in team building exercises with litigants in person.

Turning to Social Networking sites and the law.

Last year the unforgettable case of the "St Kilda teenager" or "Dickieleaks" as I like to call it–came before the Federal Court. You may recall that just before Christmas, Justice Marshall made orders restraining the "St Kilda teenager" from further publication of nude photos of footballers.

The St Kilda teenager had not been in court when the orders were made – and was known to be holidaying in Queensland.

The law firm representing the owner of the photos came up with the idea of posting the Court's orders to the teenagers' Facebook page. This was accompanied by a warning that the matter was very serious and that she ought attend the Federal Court in Melbourne with legal representation the following day.

Her reply–posted on her facebook page was: "OMG there is totally like no way I'm coming back from Qld for that ! (: " (SMILEY FACE)

I see great potential for the courts to embrace social networking sites in their work. For example, rather than the parties incurring the cost of coming to court, the reasons for judgment could be posted to the judge's Facebook page. The judge could announce: "Application is dismissed):" (SAD FACE)

Then a comment by victorious defendant could be posted to the judge's wall: "LOL (Laugh out loud)". Followed by a comment from the disappointed applicant: "Whatever. Like I care".

Witty riposte from the court: "You should care – I order costs against you): " (SAD FACE)

With a final comment from the plaintiff: "OMG I h8 u. I am so not paying".

Much like the judgment writing innovations I've already described, this has the potential to save a lot of money. Practitioners will barely have to come to court. We can just use our Ipads to post comments or blogs about issues as they arise in the proceedings. Indeed, the long term plan is to set up court rooms so that there is a live twitter feed running like a Q & A style subtitle below the judge on the bench.

For example, while I'm on my feet, my opponent might tweet: "Good one Doyle – when are you going to make a real point ?"

Or while the judge is giving a ruling, I could use my Ipad to tweet: "Seriously Big J do you really think we won't appeal this – RacyD@Rosanove#com".

Ultimately members of the public (who will be watching the trial via Webcourt) will be able to participate by tweeting in questions for witnesses, helpful comments for the judge and even tips for the barristers. I've had a taste of how this might work in practice during the Bushfires Royal Commission. There were a number of avid fans of the proceedings, which were streamed live every day. Those who were very keen had the mobile number of our instructing solicitor from Corrs. It was not unusual for them to text him really helpful suggestions for counsel while we were on our feet. You can imagine the sort of thing: "Tell Rachel to ask this turkey whether he has even read the CFA booklet on native vegetation".

That kind of crowd participation – it really is incredibly helpful when you're running a trial.

Well, I see my time is up – so I really must go now and update my status on my Facebook page:

Rachel is speaking at the bar dinner (: (SMILEY FACE) VBN

Farewell to Malkanthi Bowatta (DeSilva)

Sharon Moore

Mal Bowatta (DeSilva)

Farewell to Malkanthi Bowatta (DeSilva) after more than 20 years service to the Bar

On Friday 16 September 2011, Malkanthi Bowatta (DeSilva) left the Victorian Bar after just over 20 years of dedicated and professional service.

Mal arrived in Australia in January 1991 as a new migrant from Sri Lanka with her then husband and 5 year old son. After settling her son into school she began looking for a job and went to the equivalent of a 'Centrelink' office. There she attended a 'job club' that helped migrants find work and with the help of a co-ordinator created a C.V. Before she knew it she had her first job in Australia – in the Victorian Bar office. At the time, little did she or the Bar know that it was the beginning of 20 years of service – starting as secretary to Ed Fieldhouse and finishing as Financial Controller.

During those 20 years Mal has seen many changes and shown significant patience and adaptability. She has worked under four Chief Executive Officers – all with very different management styles. Since 1991, the practising list has increased by nearly one half – from about 1,100 to about 1,800 and throughout all that time Mal has been responsible for membership subscriptions. Since 1996 Mal has also been responsible for processing and issuing practicing certificates. Mal was once amused to hear some barristers refer to her as "the polite bully" because in these roles she was always asking them for money – but ever sweetly! This wasn't the only nickname she acquired. Mal claims that one of the funniest highlights of her time at the Bar was when a member, who had been calling her "the bloodsucker", arrived at her office at Christmas time and dropped on her desk a two foot vampire statue. Mal proudly displayed it in her office – testament to her good humour.

Although Mal has moved to the warmer climes of Queensland, Mal is very much missing the warmth of the members of the Bar with whom she worked so closely. One of her favourite aspects of her job was regularly having contact with members of the Bar. She was touched and somewhat overwhelmed by the many barristers who came to see her in her final weeks and took her out for coffee and lunch and expressed their appreciation for her work to her personally or through glowing references.

Mal is excited about the possibilities of a completely new life up north and is beginning to look for a new job. Whilst she might not have another 20 years of working life left in her, her next employer will no doubt be rewarded with efficient, faithful and good natured service. The Bar wishes her well in her new stage in her life. VBN

The Honourable Justice David Byrne Farewell Dinner

Commercial Bar Association

John Digby QC

Speech delivered by John Digby QC on the occasion of the farewell dinner for The Honourable Justice David Byrne, staged by the Commercial Bar Association at the Essoign Club on 10 August 2011

Good evening and welcome to this excellent event.

I repeat and renew Ian Percy's earlier welcome to you all to the Commercial Bar Association of Victoria's Dinner this evening to honour the Honourable David Byrne QC. As the President of the Commercial Bar Association of Victoria, it is my pleasure to say something about David Byrne and in due course to propose a toast in honour of our special guest.

The arrangement of this Dinner, only the fifth such event since the establishment of the Commercial Bar Association in 1995, and our special guest's retirement last year, are no coincidence. The Commercial Bar Association has organised this evening's soiree as an opportunity to acknowledge the very substantial contribution of David Byrne to the Bar of Victoria and to the work of the Victorian Supreme Court over his 19 years as a Judge.

At this point I also want to acknowledge that Ian Percy has generously undertaken the Lion's Share of the work required to make this evening's Dinner a successful reality. Thanks also to the several others who helped Ian.

Back to our Honoured Guest. It is widely appreciated that the attributes which guaranteed David Byrne success at the highest level in his career at the Bar, and then on the Bench of the Victorian Supreme Court, included a notable intellect and an extraordinary capacity for work.

I think it is a fair observation that our Honoured Guest has done more than his share of "*heavy lifting*" as a Judge of the Victorian Supreme Court. Shortly, I will return to some of the matters which appear to exemplify the legal, and judicial attributes of our Honoured Guest.

Before this evening I gave some thought as to how I should structure this after dinner speech and it occurred to me that one of the Judge's fond aphorisms was apposite. As a Junior Barrister (and I can speak with authority on this point) our Honoured Guest would say to his Juniors, of which I was occasionally one, "*... let's look at this in bite size bits*". As a Judge our Honoured Guest would often use the same phrase in an attempt to assist Counsel to convey their case.

Accordingly, I shall try compartmentalise into "*bite size bits*" the topics which need to be touched on this evening.

The first bit is :

Byrne the Younger

Little has been unearthed of our Honoured Guest's youth.

I did not say nothing was unearthed! My research reveals that at your Welcome on Thursday 22 August 1991 (twelve days short of twenty years ago!) David Harper, then Chairman of the Bar, reported that: "*You were born, smooth-cheeked and with cute little eyebrows on 31 May 1940*"; (a tumultuous time indeed).

Reportedly you worked as early as at the age of 13 as a school boy messenger for the then Foley List and in your latter years at school, perhaps also at University (the records are unclear), you also worked as a Law Clerk for Allen Moore; and in those early days as a Law Clerk you were involved in assisting Allen Moore in arbitration proceedings concerned with a construction case.

That may have been the start of nearly half a century of involvement in the area of construction litigation.

You enjoyed something of a privileged upbringing being educated at Xavier College. You matriculated and went on to Melbourne University from which you graduated a Bachelor of Arts and with an Honours Degree in Law.

You were articled in Melbourne and very shortly into your practising career you decamped to France to study Comparative Law at the Sorbonne. To the lasting embarrassment of everybody who has since had to pronounce the fact, you received from the University of Paris the "*Diplome Du Droit Comparatif*".

On your return from France you signed the Bar Roll.

The next bit relates to David Byrne the Barrister.

I will mention the many contributions you have made to the Bar and the Profession in more detail in due course.

However, as an overview:

You came to the Victorian Bar in 1965 and read with A J Gobbo, later Sir James Gobbo, and you took Silk in November 1982, capping off a very developed and busy practice as a Senior Junior in complex commercial and building cases – undoubtedly one of the leaders in the country by that stage and the Victorian Bar's most prominent specialist in the Building & Construction Area.

Notably, (and very unusually at our Bar) our Honoured Guest also took briefs in a number of murder trials.

I have been informed, just today by one of Melbourne's most reliable Solicitors, that he had a conversation with you shortly after you acted as Counsel for a person charged with murder, whose weapon of choice had apparently been a cross-bow. The nameless Solicitor said to you: *"well what had you learned from the case?"* Your reply was: *"Well I have learned what lovely people there are in the Construction Industry"*.

Next the largest topic: Some of David Byrne's many achievements and contributions to the Bar and to the Bench and to the Community.

For our honoured Guest, during his near 50 years in the Law, there have been many achievements and contributions along the way. The catalogue includes:

- A major contribution to the first four editions of Cross on Evidence. His Honour was Associate Editor in the first edition of Cross on Evidence, edited by his former Master James Gobbo, and you remained an Editor of Cross on Evidence throughout its second, third and fourth editions.
- Remarkably, given the loads involved and the heavy demands of your practise, at the same time, between 1974 and about mid 1986 you also took on the Joint Editorship of the Bar News, having joined the Editorial Committee in 1971. That is well known. What is little known is that is that you and David Ross QC personally bore all the costs of the publication, except the printing.
- You also made major contribution to the production of *Halsbury's Laws of Australia* via the Sections which you wrote for that publication.

This catalogue also includes:

- A major contribution to the establishment of the Bar Readers Course and thereafter a continuing and substantial contribution as lecturer and mentor in that Course over decades. You taught in the areas of evidence and E-litigation in particular.
- A major contribution to the establishment of, and one of the driving forces behind, the Building Dispute Practitioners Society since its inception. You were a member of the Inaugural Committee of the BDPS and President in 1983 and 1984.
- You were a founding Director on the Board of ACICA [Australian Centre for International Commercial Arbitration].
- You were involved in and President of the Institute of Arbitrators and Mediators Australia. [IAMA].

From L to R - Albert Monichino SC, Caroline Kirton SC, John Digby QC, The Hon Justice Byrne QC, Melanie Sloss SC, Will Alstergren, Ian Percy

- You served as Chairman of the Council of Law Reporting in Victoria which produces the Victorian Reports . You were also deeply involved in the re-design of the Victorian Reports. You drove the reorganisation of the Victorian Supreme Court Reports after about 2000 and did so in a direction which was more in step with the production of the Commonwealth Law Reports. You were also instrumental in the important initiative to distribute copies of the Victorian Law Reports to Community Legal Centres.
- You made long standing and substantial contributions to the work of the Supreme Court Library.
- In the Supreme Court itself you were instrumental in developing the role of the Principal Judge of the Trial Division of the Supreme Court.
- You were also instrumental in the establishment of the Commercial Court including making a very substantial contribution to successive Commercial Practice Notes.
- You pioneered electronic litigation in the Supreme Court including the production of the "E-litigation Practice Note".
- You also implemented a major revamping and improvement (on more than one occasion) of the Building Cases List.
- You commenced the push for the *"new approach"* to litigation in Building Cases and more generally in relation to other the Supreme Court business.
- You were innovatory in your work in drafting Supreme Court Practice Note 1 of 2008 *"Building Cases, a New Approach"*. This was the origin of the very successful Supreme Court Technology, Engineering & Construction List , which went live in June 2009; (I observe, with respect, that Justice Vickery (who is present tonight) has been very effectively carrying that baton forward in the same List).
- As Junior Counsel David Byrne also made a contribution as a Master to Pupil Barristers – he took on five readers, Ian Turley (now Program Co-Ordinator with the Law Program at Monash College), Margaret Rizkalla who was the first woman appointed as a Victorian Magistrate – now Judge of the County Court; Richard Spicer, John Karkar QC and Mark Bevan John.
- You were on the Bar Council and the Supreme Court Board of Examiners and indeed contributed to many other Bar Committees and volunteered for many Bar appointments.
- I would like to mention in particular, in this regard, that you served with Peter O'Callaghan QC, as something of a Forensic Project Manager in relation to the construction of Owen Dixon Chambers West, reputedly attending over 200 meetings of the Owen Dixon Chambers Development Committee. This was another huge task you selflessly and generously applied yourself to, for the benefit of the Victorian Bar and in doing so made a very substantial contribution to the quality of the project and maintaining the Bar's Budget. However, I pity the poor builder .....!!!
- As an aside I am also very delighted to observe that (after some years of ODCW being in the wilderness) the Bar now owns the Building you worked so hard to bring to fruition.
- In a like, and also lasting contribution, it was you who initiated the Bar's Tapestry Project and as Member of the relevant Committee commissioned the Tapestries which now adorn the Lonsdale Street entry.
- You have written many important Judgments, too many to mention – one only has to refer to any leading Construction Text to note that it is replete with references to Judgments which you have produced on many important aspects of that juris prudence. Similarly, a perusal of important construction texts in the United Kingdom including Keating on Construction Contracts also reveals references to your Judgments.
  Cases like: *Barwon River – Aquatec Maxicon on* – Proportionate Liability and John Holland v. Majorca Projects – Superintendent's Liability.
- As mentioned by the then Solicitor-General at your Farewell you dissented at Appellate level in Central *Bayside Division v Commissioner of State Revenue*, expressing the view that Central Bayside was a charitable organisation and not an agent for the Commonwealth and ultimately , on appeal to the High Court Your Honour's Judgment was upheld without qualification by any of the High Court.
- You also made a very substantial contribution to the academic discussion about various important areas of Building Case jurisprudence including in the prestigious Building and Construction Law Journal about the late 1980s. You have also written more broadly including on the topic of "*Proportionate Liability in Construction Claims*". Your Honour's papers and speeches are very numerous indeed and very well regarded.
- On a more idiosyncratic note: I also recall that the former Solicitor-General's speech at your retirement mentioned that you had an interest in book-binding both modern and ancient.

The Hon Justice Dixon, Peter Nugent

That prompts me to mention this evening my first contact with Your Honour in Chambers as a Junior Barrister in the 1980's. I can distinctly recall in that first conference my Leader, after solemnly reflecting on the matter at hand, mightily impressed his Junior by leaving your desk and moving to the book shelves where you took one of a series of leather bound volumes back to your desk and refreshed your memory as to the legal issue at hand. The series of leather bound Volumes were copies of David Byrne's Advices to that point. (the ones we all have access to are now green and produced by the Government Printer).

Some other personal remembrances of our Honoured Guest at the Victorian Bar

May I also indulge two other personal recollections of our Honoured Guest's earlier professional life.

The first is in the mammoth case in which I was very fortunate to be briefed by John Sharkey at Sly & Weigall (who is here tonight), as Junior to B J Shaw QC and Ron Merkel and Phillip Mandie. David Byrne was opposed, and lead by David Bennett QC and was in turn leading Tim Wood, now of the County Court. You provided an excellent lesson in cross-examination when dealing with the cross-examination of a programming expert in relation to a time extension claim where you successfully deployed, against the black art of critical path programming – what might be said to be the enlightening, meticulously prepared and devastatingly effective cross-examination.

The second experience was a similar one – I was opposed to our Honourable Guest in a case in the Supreme Court of Tasmania at Hobart and found the prospect fairly terrifying. More terrified was my first witness the Senior Manager of my client who called my instructors on the eve of the case saying

he simply wasn't coming to Tasmania to be cross-examined by David Byrne. The matter settled.

May I return again to the main theme for a moment longer: Our Honoured Guest not only, as I have mentioned, took on more than his share of the *"heavy lifting"* in the conduct of trial litigation in commercial cases, it is fair to say that you distinguished yourself as a Judge who was willing to take on particularly long and complex cases: the Aquatec Maxcon Case, and the Spotless Case, to mention only two.

In the numerous conversations which I have had in recent days directed to ensuring that our Honoured Guest was appropriately honoured can I say that, although the precise language changed from time to time the essence of what many senior barristers said to me was

> *".... His Honour was committed to doing the business of the Court and worked tirelessly and effectively to that end and His Honour was also always committed to doing his best to achieve the right outcome".*

I note that on your retirement the Chief Justice made a point of thanking Your Honour for your contribution to the community as a Superior Court Judge and described your contribution as extraordinary in the areas of commercial litigation and innovation in the Supreme Court of Victoria.

Her Honour the Chief Justice did not, however, mention that our Honoured Guest has also been known to mix it with the community which he served so well on the Bench.

I cite the day of the St Kilda - Geelong Grand Final in 2009. The location was the cosy convivial Flinders Hotel where (in mid-afternoon) our Honoured Guest insinuated himself into the bawdy throng of football followers, looking inconspicuous in beanie and old overcoat. While displaying, with unmistakable body language, that he was a St Kilda supporter, our Honoured Guest bumped into one of our Colleagues .... when asked why he was at the Pub watching the spectacle, our Honoured Guest answered: *".....the house is full of Geelong supporters ...!!!"*

Little did the crowd at the Flinders Hotel know they had in their midst one of their hard working Supreme Court Justices.

We wish you all the best in your new life

Finally, I want to quote what you yourself said at your own Farewell, namely:

> *"You see today before you what I think might be a rare beast. I am a contented Judge. I am not contented in the sense that I am pleased to leave this office, for I have spent perhaps the happiest working years of my life here. Nor is it because I am pleased to put down a burdensome judicial load. I have enjoyed the work, ... why then am I content? It is because I accept that the time has come for me to move on. It is time for me to discover and explore a new world, a new life."*

L to R - Paul Santamaria SC, The Hon Justice Osborn, The Hon Justice Dixon, The Hon Justice Emmerton

L to R - Her Honour Judge Kings, The Hon Justice Byrne, The Hon Justice Bongiorno AO, Commendatore dell'Ordine al Merito della Repubblica Italiana, The Hon Sally Brown AM

A Philanthropic Bar

Left to Right: Dr Gerard Vaughan AM, Ian Upjohn CSC, Ian Stewart, Judith Lord, Allan Myers AO QC, Kate McMillan SC, Judith Ryan, Sophia Walsh, Matthew Walsh, Paul Anastassiou SC.

National Gallery of Victoria

In 2011, the Arts and Collections Committee of the Victorian Bar successfully sought donations for the purchase of a significant work of art Kanaputa 2010 created by 22 senior and emerging Pintupi women artists from Walungurru and Kiwirrkura.

The genesis of the gift to the Gallery arose from a discussion between Judith Ryan, Senior Curator of Indigenous Art at the Gallery, and a member of the Victorian Bar, Trevor McLean.

The funds for the purchase were donated by Her Honour Judge Kathy Kings, Julian Burnside AO QC, John Karkar QC, Peter Jopling QC, Peter Hanks QC, Kate McMillan SC, Paul Anastassiou SC, Michelle Quigley SC, James Peters SC, Philip Solomon SC, Judith Lord, Trevor McLean, Neville Bird, Ian Upjohn CSC, Matthew Walsh, Laura Colla, Daniel Crennan and Ian Stewart.

On 2 August 2011, at The Ian Potter Centre: NGV Australia, Kate McMillan SC, as Chair of the Bar's Arts and Collections Committee and on behalf of the donors, presented the painting Kanaputa 2010 to the NGV.

Allan Myers AO QC, the President of the Council of Trustees of the NGV, Dr Gerard Vaughan AM, Director of NGV, Judith Ryan, Senior Curator of Indigenous Art at the Gallery, the Gallery's Supporters of Indigenous Art and some of the donors attended the presentation.

At the presentation, Kate McMillan QC said that the gift had a number of purposes:

(a) first, to continue the Bar's longstanding and important ties with the indigenous community and Victoria's cultural institutions;

(b) secondly, the gift also recognised the Bar's important role in helping to promote the rights and interests of the indigenous members of our Australian community; and

(c) finally, the donors wished to honour Allan Myers AO QC, a senior member of the Victorian Bar and the outgoing President of the National Gallery in this its 150th anniversary year.

The painting will be displayed at The Ian Potter Centre: NGV Australia, Federation Square, in the Qantas Airways Indigenous Galleries, Level G.

Bar Memorabilia Display Cabinets

In 2008, Kate McMillan SC, as Chair of the Bar's Arts and Collections Committee, commissioned Perry McNeilage to design and John Larkins QC to build four display cabinets. Retired barrister, John Larkins QC kindly donated his time, skill and the material used in building the cabinets The cabinets are located in the Essoign.

Kanaputa 2010
Florrie Watson Napangati, Jessica Napurrula, Josephine Nangala, Josephne Napurrula, Kayi Kayi Nampitjinpa, Kim Narpurrula, Lorraine Napurrula, Lisa Napurrula, Mantua Nangala, Mara Jurra Nungurrayi, Marlene Nampitjinpa, Naata Nungurrayi, Nanyuma Nanpangati, Ninguma Napurrula, Payu Napaltjarri, Sylvia Napurrula, Takariya Napaltjarri, Yakari Napaltjarri, Yalti Nanpangati, Yinarupa Nangala, Yukultji Napangati, Yuyuya Nampitjinpa

Pintupi–Synthetic polymer paint on canvas 149.2 x 182.7 cm
National Gallery of Victoria, Melbourne

Purchased through the NGV Foundation with funds donated to the Kanaputa Appeal, 2011 © the artists or their estates 2011 licensed by Aboriginal Artists Agency Limited

AALS-ABCC Lord Judge Breakfast

Anglo-Australasian Lawyers Society (Victorian Chapter)

1. Melanie Sloss SC, Mark Moshinsky SC, The Right Honourable Lord Judge PC, Rodney Garratt QC
2. Mr Fred Tinsley, Chairman of the Australian British Chamber of Commerce
3. The Right Honourable Lord Judge PC
4. Guests at the AALS-ABCC Lord Judge Breakfast

The Victorian Bar was privileged to play host to The Right Honourable Lord Judge PC, Lord Chief Justice of England and Wales, at a breakfast seminar held at the Essoign Club on Monday 5 September 2011, which was jointly convened by the Anglo-Australasian Lawyers Society and the Australian British Chamber of Commerce. Welcoming Lord Judge and the British Consul General, Mr Stuart Gill to Owen Dixon Chambers, was the Chairman of the Victorian Bar Mark Moshinsky SC, along with Melanie Sloss SC and Fiona McLeod SC, and the AALS Victorian Chapter President, Rodney Garratt QC.

In an entertaining and topical address, Lord Judge's speech 'Keeping the Peace' examined the history and often taken for granted principle of the 'King's peace' which originated in 1195 under Richard the Lionheart (Richard I) and was originally upheld by knights commissioned especially to do so. By 1361 under the reign of Plantagenet King Edward III, the Justice of the Peace Act was enacted by the Parliament of Westminster and appointed 'Justices of the Peace' to 'keep the peace' in the communities which they served and which provided:

> I Who shall be Justices of the Peace.Their Jurisdiction over Offenders; Rioters; Barrators; They may take Surety for good Behaviour.E+W.
>
> *First, That in every County of England shall be assigned for the keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to restrain the Offenders, Riters, and all other Barators, and to pursue, arrest, take, and chastise them according their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretions and good Advisement; . . . F1; and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison; and to take of all them that be [X4not] of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People, and the other duly to punish; to the Intent that the People be not by such Rioters or Rebels troubled nor endamaged, nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor [X5put in the Peril which may happen] of such Offenders: . . . F2*

The office of Justice of the Peace and its attendant responsibility for officeholders to ensure the preservation of peace in the community has endured uninterrupted throughout the Commonwealth from 1361 to the present day. Justices of the Peace are still appointed in England and Australia and continue to be responsible for helping maintain peace and good order in the communities in which they serve.

With the support of the courts acknowledging the importance of ensuring our communities remain peaceful places in which to live, work and play, long may the 'King's peace' and those entrusted with its maintenance, continue to exist and thrive in generations ahead. VBN

Vicbar Defeats the Solicitors!

Matt Fisher

Once upon a time, a small group of men planned to win a game of footy. They were folk from different backgrounds, with varying degrees of experience and talent, and generally, limited levels of fitness. There were, however, two things they did not lack. To a man, they were enthusiastic and they were determined. Enthusiastic to participate and determined to win. Sounds a little like the fresh faced Readers we once were. Most of these courageous men would struggle to remember their days as a Reader.

The Frank Galbally Cup is a charity football match played between Barristers and Solicitors. The beneficiary of the match is Reclink – a charitable organisation that assists and supports some of the most vulnerable and disadvantaged members of our community in many ways, particularly through sporting activities. In the modern era, the match has been played on five occasions. On 7 August 2011, the two teams lined up to do battle for the sixth time at Visy Park (it will always be Princes Park to some of us).

The passage of time is a funny thing. Some memories fade while others become more powerful. For those of us involved in the preceding matches, we had experienced the ecstasy of victory on two occasions and the sadness of defeat at the conclusion of three matches. Consequently, the desire to win was intense despite the obvious physical impediments for most of us.

It was impossible not to be moved by the minute of silence everyone observed in honour of the great Allan Jeans who passed away only a few days before the game. Allan coached both the Barristers and the Solicitors in the past with each team experiencing success under his direction. I had the privilege of spending some time with Allan in previous years when he assisted our team. He was a remarkable man and those of us who were fortunate to be associated with him through these matches will remember his contribution for years to come. That minute of silence was the perfect way in which to commence our battle with the Solicitors.

We are grateful that former champion David Rhys-Jones was prepared to embark upon arguably his most challenging football assignment to date (leaving aside the odd tribunal appearance) and coach our team. With a mixture of trepidation, excitement and some attempted optimism, he wished us well as we completed a 25 second warm up (some opted for the light warm up which comprised a 30 metre jog down the race).

I could tell by that trademark smirk that David thought we were about to embark upon some sort of comedy routine. He confirmed my feelings when his parting words before the first bounce were, "Do your best and have a good time"! He instantly reminded me of a Judge who once said to me that my argument was "...interesting, novel and mildly entertaining" before delivering an ex tempore ruling against me.

Alas, we played that first quarter as though it was the last and by the time the siren went at quarter time, we were actually on the scoreboard and in the match. The quarter time address was delivered with an elevated sense of optimism, albeit measured, given that we still had three quarters to play. By half time, the scores were almost level.

We retired to the sheds where most of us collapsed onto the cold concrete floor. Many champions had once walked where we rested our weary bodies. I'm sure I could still smell the aromas of celebratory drinks that had once flowed freely in

that change room. It was a moment of distraction that was cut short as David addressed us again. We started to see the passion in his eyes and hear his words of wisdom with more clarity and volume.

The all important third quarter was again an even fight. Our bodies were starting to succumb to the physical nature of the game and, although we increased our rotations off the bench, it seemed that our opponents were gathering momentum. Still, we were within striking distance by the time we came together for the three quarter time huddle.

It was at that moment that the camaraderie and spirit for which our Bar is famous came to the fore. Looking back, it was there all day, however, during that three minute break and the following 20 minutes of football, that camaraderie and spirit were palpable. As I looked around that group of men and actually tried to focus through my own exhaustion, it was obvious that they were a dedicated and fearless lot.

As we staggered onto the paddock for the last time that day, there was an overwhelming sense that victory could be ours. David's parting words were delivered with such force and commitment that it was impossible not be inspired. I remembered the day he won the Norm Smith Medal and thought to myself, this man has been rewarded as the best player in the biggest match of the football calendar. How could we do anything but fight to the end.

In the blink of an eye and the tweak of a "hammy", we were into the last minute of the game. Unbelievably, the scores were level. The atmosphere was electric. Those final seconds could not have been any better. You could not have scripted the finale that day. The ball was in our forward 50 and it looked like the Solicitors were going to clear it with a long kick. Numbers around the ball were huge. Through heavy traffic, the ball somehow found the safe hands of Seb Reid. A loyal servant of the Bar team over many years, Seb had the presence of mind to know that the siren was imminent. Within seconds, he had dropped the pill onto his boot and sent it goal ward. The rest is history.

Despite the obvious hurdles we faced and the errors we committed that day, that team of Barristers was inspiring. Every now and again, there is a proud and justifiable sense of achievement that comes from a hard fought and unexpected victory. If we are fortunate, we experience it in our professional lives. Like that day, we sometimes feel it with colleagues away from our usual and traditional battleground. In some ways, that makes our victory so much more significant.

These are the men who went into battle that day – Adam Coote, Conor O'Sullivan, Trevor Wallwork, Ken Oldis, Danny Cole, Joe Walker, Matt Rees, Paul Rees, Rob Heath, Sebastian Reid, Dermot Dann, Peter Triandos, Glenn Meldrum (Junior), Richard Harris, Mark Leeton, Zero Partos, Jack Heeley, Alex Johnson, Joseph Hartley, Ash Kennedy and Marcus Allen (voted best on ground for the Bar – not a bad effort for the classy and talented former Brisbane Lion who qualified for the Bar through an broad interpretation of the "Friends and Relatives of Barristers" Rule). Many limped and staggered from the field but they did so as victors. We are grateful to the Solicitors who, with an abundance of players, "loaned" us a few boys so that we had a decent bench from which to draw.

I never thought I'd commit this to writing but both teams had the benefit of some fine umpires on the day. They were led by Mark Gibson of Counsel who was most impressive. Mark's unparalleled fitness, considerable experience and unquestionable fairness were obvious to all and we are grateful for his contribution.

Of course, there are many who deserve our thanks for contributing to our success on the field. David Rhys-Jones was superb as our coach. He warmed beautifully to the task and, by the end, the smirk had become a genuine smile. Tim Bourke is never short of something to say and thank goodness. As team manager, he assisted David commendably and made some rotations and moves that left the opposition (and sometimes even our own team) bewildered. They were essential to our victory as were his occasional motivational outbursts.

As always, Wayne "Moose" Henwood was generous with his time and comments. Moose conducted a joint training run for both teams a week before the game. He imparted some wisdom from his playing days which was interspersed with the odd reality check about how good we actually were. Thanks to Moose, a number of us went into the match only slightly, rather than completely, deluded about how fantastic we were. Miriam Orwin of Counsel graciously gave her time and experience to assist as team trainer for the day.

We appreciate the support of our family and friends who came to watch us play. I'm sure some left the ground still pondering the standard of play. What counts is that they supported us and, in doing so, supported Reclink. A number of Clerks were great at "spreading the word" and generating interest in the game as well as making significant financial donations to Reclink. In relation to the latter, we acknowledge the contributions of Green's list and Dever's list.

Finally, I thank those who played on the day. Without their physical and financial contribution the match would not happen. It is more than a game of footy. It is an opportunity to assist those less fortunate than ourselves and to reflect on some positive aspects of our own lives. I encourage others to get involved in 2012 as we strive to defend our title. Whether you have played for years or never played at all, it is a very rewarding and enjoyable experience (and if you have made it to this point of the article then you obviously have some interest in the proceedings).

For me, the win is something special that we should all be proud of. But of even greater significance is the opportunity to play alongside my friends at the Bar (and the "odd" Solicitor) who played the game with tremendous spirit. Despite all of the variations in skill, ability and physical prowess, as well as a lack of time together as a team, we played as one. Along with the terrific amount of money raised on the day, that is something we should all celebrate. VBN

Bar Hockey

Federal Magistrate Philip Burchardt

Top: Combined Victorian and NSW Teams
Above: His Honour Judge Tinney on the attack

The year 2011 was not a great year for the stalwart warriors of the Victorian Bar None Hockey Team. Things started well when the organiser and captain duties were taken over by Stuart Wood.

Despite Wood's best efforts, we were short of players for our game against the Law Institute of Victoria on 13 October. The solicitors had numbers more akin to a Cecil B De Mille extras casting session and even lent players to us to make up the deficiency. Our team included Sharpley in goal, Chessell at centre half, brilliantly assisted by our LIV ring-ins, with Gordon, Robinson, Tinney, O'Brien, Rome-Sievers, Morgan and Brear as forwards.

This motley group in fact played extremely well. Unfortunately, so did the LIV team. Three of them were current top grade players. Final result 7-0. The umpires awarded the Rupert Balfe Trophy for best on ground to Sharpley, who had well and truly earned it.

Chastened by this debacle we foregathered for the game against the New South Wales Bar on 12 November. Historically, we have had the better of them. Following rumours that both sides might be short, some last minute recruiting from friends and fellow club members meant that both sides had plenty of players.

We started well with Chessell and Andy Denton, son of John, controlling the midfield. Chessell scored from a short corner and we led 1-0 at half time on a baking hot day. NSW regrouped and equalised, and then their secret weapon took over. Mim Pritchard came on. She is 12 years old and the daughter of one of the NSW players. Skilful and confident, she scored two goals. A late reply from Denton was not enough.

The Bar team was Sharpley, Wood, Wraith, Burchardt, Bearman, Brear, Rome-Sievers, Tinney, Robinson, Gordon, Morgan, Riddell, O'Neill and ring ins, including Paul Ross from Old East Malvern who was judged best on ground by the umpires.

The two teams, excluding the kids, attended a very enjoyable dinner at Bamboo House.

Both of these games were played in excellent spirit, as chief umpire Tony Dayton pointed out. VBN

Real Tennis and the Victorian Bar

JB Box Trophy

Speech delivered by John Digby QC at Royal Melbourne Tennis Club: J B Box Trophy (Barristers v Solicitors) 10 December 2010

I am very honoured to have been invited to this auspicious event with my wife Kirsten and asked to present the J B Box Trophy to the Victors in the Solicitors of Victoria–v–the Bar & Bench Tournament today.

Kirsten Digby and I do not play real tennis, however we feel somewhat at home here in the company of so many distinguished colleagues in the law and because of other coincidental connections with your Club, for example we presently live in George Limb's former home in South Yarra.

Not being a real tennis player and wishing to be a little informed about you all and this Club, as one does, I did some research. The results were fascinating.

They were also impressive.

Lord Normanby (the then Governor of Victoria) opened the Royal Melbourne Tennis Club in Exhibition Street Melbourne, in 1882 and the Club's status was enhanced in 1897 when Queen Victoria granted a Royal Charter so as to enable this august body to be known by its present title "the Royal Melbourne Tennis club".

In the early 1970s the Club moved to this venue in Richmond which was officially opened by Lord Aberdare (President of the Tennis and Rackets Association).

My researches also revealed that Club is clearly very exclusive, it being only one of only a handful (Hobart, Romsey, Ballarat & Sydney) of Real tennis Clubs in Australia and amongst about 50 such Clubs in the World , only four others of which also boast more than one Court.

Although exclusive, indeed in the 21st Century, the origins of this game, spawned in a French Monastery Court Yard , precedes lawn tennis by an astounding 600 years.

The pursuit is said, at the top level, to be "…brutal, awesome, savage and intellectually demanding …" , "…a mixture of tennis, squash and chess", and "simply the best racquet game on earth". I mention that the source of these descriptions was one Frank Filippelli. These attributes have also been confirmed to me by a fellow Barrister Julian Snow who, it must be mentioned, is a World Champion Royal Tennis player.

I also noted that the games confirmed environment included a grille, something (or things) called "dedans" and a penthouse? These terms seem exotic and somewhat obscure be reference to any normal game , and almost Masonic …. But there you have it (I guess) this is far from a normal game!

Similarly, John Burnett Box (the person honoured by the trophy, inaugurated by the Honourable Murray Kellam QC, to be presented today) was far from a normal Melbourne Lawyer.

Julian Snow, John Digby QC, Andrew Schnaider

Box was born in England, educated at Cambridge and called to the English Bar at the Inner Temple before coming to the Victorian Bar in 1869.

Box is reputed to have had one of the largest legal practises of his day and is the only Barrister to have occupied the position of Chairman of the Victorian Bar on three occasions and was Chairman from 1900 to October 1905, when he became a Victorian County Court Judge . Significantly , 1900 he established the Victorian Bar Association, as we know it today. Box was indeed the founding father of the Victorian Bar.

Box was also, it appears a colourful and convivial man. In Eric Hewitt's , Judges Through the Years he reports that:

"Judge Box was known to distribute winks rather too freely in Court and sometimes went so far as to address Counsel by Christian name. He was entirely unconventional".

Likewise, in Arthur Dean's Book A Multitude of Counsellors, Box is said to be : "a man of strong personality, one of the most honourable of advocates, rather too jocular, too talkative on the Bench and a "very unconventional old gentleman".

J B Box was a keen Real Tennis player and fisherman (at Metung). In fact J B Box was the first President of the Royal Melbourne Tennis Club for a remarkable 36 years between 1882–1918.

Accordingly, the Honourable J B Box seems a most suitable person to adorn the very important trophy I would now like to present.

I now have the honour and pleasure, on behalf of the Royal Melbourne Tennis Club to present this Trophy to :

Andrew Schnaider, Captain of the Solicitors of Victoria Team.

VBN

Wigs and Gowns Regatta 2011

James Mighell SC

The 25th annual Wigs and Gowns cruise in company was held on the waters of Hobsons Bay on the 19th of December, 2011.

The regatta was held in perfect sailing conditions with a light south-westerly providing a good sailing breeze for the fleet.

The race committee entertained a select coterie of the Bar and Bench aboard the committee vessel, the Tim Phillips built carvel hull motorboat Weeroona Bay.

Given the significant variation in the size of boats competing, it was determined to have a stern chaser start which enabled E.C.S Campbell QC's oughtred designed canoed-stern ketch "Rosa-Jean" to lead the fleet out to the course set to the east of Hobsons Bay.

After rounding the top mark, a close tussle ensured downwind between John Digby QC in his Swanson 42 "Aranui" and Bob Galbally in his salar 40 "Beldisha". Crews of both boats being pushed to the limit!

After close consideration by the handicap subcommittee the eventual winner of the Neil McPhee trophy was Campbell sailing "Rosa-Jean" short handed with Julie Davis. The winner of the Thorsen trophy was Bob Galbally and his very capable crew aboard "Beldisha".

The post race festivities were held at the Royal Yacht Club of Victoria.

We hope to see all on the water next year for the 26th annual Wigs and Gowns cruise in company. VBN

1. John Digby QC and crew aboard "Aranui"
2. "Aranui's" crew rounding the gybe mark

3. Bob Galbally and crew being presented the Thorsen trophy by James Mighell SC and Peter Rattray QC
4. Peter Rattray QC presenting the Neil McPhee trophy to E.C.S. Campbell QC and Julie Davis, the winners of the 2011 Wigs and Gowns Regatta aboard "Rosa-Jean".
5. The fleet rounding the top mark with "Rosa-Jean" leading from "Aranui" and "Beldisha"
6. Bob Galbally's "Beldisha" close hauled making for the finishing line

QUARTERLY COUNSEL

Henry Jolson QC

Henry Jolson QC graduated from Monash University in 1971 with the degrees of Bachelor of Economics and Bachelor of Laws after previously excelling at Melbourne High School. He arrived at the Victorian Bar in 1973 and read with The Honourable Alan Goldberg AO QC and took silk in 1991.

Henry is a true renaissance man in every sense of the word. For while his considerable accomplishments as a Barrister and Mediator are well renowned amongst his colleagues, it is his achievements beyond Owen Dixon Chambers West which hallmark one of the Bar's most fascinating and respected members. For example: Centre Half Forward in the Australian Jewish AFL Team of the Century; Life Member and former Commodore of the Eildon Boat Club; Designer and Patent holder of the 'Ravensdale' Jabot; Australian Ambassador of the Peres Centre for Peace; Life Member and former Board Member of the Western Bulldogs AFC; Occasional Performer with the Australian Percussion Ensemble; Former Chair of the Australian Law Council's ADR Committee; Arbitrator and Member of the Court of Arbitration for Sport; Fellow and Panel Member of the International Council for the Settlement of Investment Disputes (ICSID - Washington); and Former President of the Australian Bobsleigh and Skeleton Association.

A valued mentor to many at the Bar (Henry had 10 readers!), Henry's tip to his fellow counsel is "pray for the return of multiple briefs and Magistrates who enjoy sharing a sherry or two with Counsel during the lunch break and whose clerks announce the adjournment with: 'this Court stands adjourned until about 2.15'".

Silence All Stand

Federal Court of Australia

The Honourable Bernard Murphy

His Honour graduated from Healesville High School as school captain dux of his class in 1973. He undertook his legal studies at Monash University and commenced practice at Slater and Gordon and later moved to Maurice Blackburn where he was a partner. He was elected Chairman of that firm in 2005 and continued in that role until his appointment to the Federal Court.

His Honour's speciality was in commercial class-action litigation, a field in which he was an Australian pioneer.

In 1999, His Honour commenced Australia's first successful shareholder class action: King v. AG Australia Holdings Ltd (formerly GIO Australia Ltd) & Ors. In that case, His Honour represented 22,000 primarily "mum and dad" GIO shareholders. The AMP take-over bid for GIO offered $5.35 a share. The GIO Directors' Part B statement and advice to shareholders, in 2-inch-high bright red font, shouted "Reject this inadequate offer". There were undisclosed liabilities. The professional investors and superfund managers knew the $5.45 offer was fantastic – they all took it. The "mum and dad" investors didn't. The "mum and dad" investors had, in the end, under a scheme of arrangement, to accept AMP income securities worth only $2.75.

The representative applicant, Mr King, had a claim for about $3,000. For the first time in Australia, individual citizens with comparatively small claims had a legal remedy for misleading and deceptive conduct – they had access to justice.

The litigation was protracted and fiercely fought. There were no less than nine groups of well-resourced respondents.There were 7 appeals to the Full Court on procedural matters – His Honour won them all.

The case ran 5 years, settling in 2003 for about $112 million – of that, about $15 million in party/party costs. The respondents' costs have been estimated at approximately $30 million.

Some 22,000 largely "mum and dad" shareholders received an average of about $5,000 each. This was just on 60% of their loss suffered by the unlawful conduct.

Academic and other commentators have heralded the case as a "landmark" result and a "breakthrough" for corporate governance.

His Honour also successfully represented the thousands of businesses and consumers in the Longford Gas Plant explosion class action. That case dealt with many important issues of law, both in Torts (such as, duty of care, causation and different tests for economic loss) and in class actions law (such as, the scope of the initial trial; framing common questions; sub-group representative claims; individual class members claims; and closing the class on settlement).

It took His Honour's immense courage to run, in particular, the early class actions. One Senior Counsel has put it thus: His Honour was a rare lawyer who "had the guts and had a go".

His Honour was also Chair of the pro bono Social Justice Practice at Maurice Blackburn.

Courage, compassion, hard work and intellect; a commitment to justice and access for justice; a relaxed and engaging manner with colleagues and clients alike are the qualities His Honour brings to the Court.

Family Court of Australia

The Honourable Justice Kirsty Macmillan

Bar Roll No 2015

Justice Kirsty Macmillan was welcomed to the Bench of the Family Court on 14 December 2011, following a distinguished career as a family law practitioner, both at the Bar and, previously, as a solicitor.

Her Honour was educated at Morongo Presbyterian Girls College in Geelong, and at Monash University, graduating with a Bachelor of Economics in 1976, and a Bachelor of Laws in 1978.

From a young age Her Honour displayed an interest in people and a desire to help those in need. In a welcome address given on behalf of the Commonwealth Attorney-General, Mark Dreyfus MP recounted that Justice Macmillan's brother-in-law, Neil, accompanied her to attend Monash University's enrolment day. Her Honour intended to enrol in social work, but was persuaded by Neil to nominate law as her course of choice. Although she didn't pursue a career in social work, Her Honour's legal career has afforded many opportunities to help others.

Having completed the Practical Legal Training Course at the Leo Cusson Institute, Justice Macmillan worked as a research assistant at Monash Law School, and as a part-time solicitor at the Springvale Legal Service. In 1981 she was selected from a competitive field for a solicitor's position at Snyder & Fulford, the first Melbourne law firm to be established, owned and operated solely by women and specialising in a single area of law. Her Honour soon established a reputation as a gutsy and diligent solicitor, and became friends with many practitioners in the area.

In 1985 Her Honour signed the Roll of Counsel. She read with Noel Ackman QC, and regularly appeared as his junior. Her Honour developed a formidable family law practice, which included complex children's matters and commercial property matters. She has appeared in significant cases, including those reported under the pseudonyms of *Stephens v Stephens* and *Strachan v Strachan*. She has also appeared in matters that, in addition to being legally demanding, have required Her Honour to challenge pre-conceived ideas in difficult areas.

Her Honour's reputation for diligence followed her to the Bar, where colleagues came to regard her as thorough, forceful and rigorous in her approach to the law, while at the same time gracious and an excellent communicator. Her Honour's one reader, Helen Dellidis, has spoken of her warmth, good humour and continuing support as a mentor, as have others who have worked as juniors to Her Honour since she took silk in 2009.

In addition to running a busy practice, Justice Macmillan has been involved in a range of associations and committees, including the Family Law Bar Association of the Victorian Bar, the Women Barristers' Association and the Family Law Section of the Law Council of Australia. She has also been a member of the organising committee of the combined Law Institute/ Victorian Bar biannual residential conferences and a member of the Victorian Legal Aid Appeal Committee and Victorian Legal Aid Commission.

Her Honour's goodwill towards others has naturally found expression outside her professional life. In 2007 she travelled to Cambodia with the Tabitha Foundation to assist in building houses for the homeless. She is a keen traveller; indeed, when the High Court delivered its decision in the *Stephens* matter, she had to phone in from Zanzibar to learn the result. Closer to home, Her Honour is known to be an excellent cook and generously shares the spoils of her efforts with colleagues. Indeed at Christmas time Her Honour has been known to deliver shortbread to friends and colleagues.

Her Honour will undoubtedly contribute much as a member of the Family Court of Australia (including, if her fellow Justices are lucky, short bread at Christmas time).

Federal Magistrates Court Of Australia

Federal Magistrate Ronald Curtain

Bar Roll No. 1881

Federal Magistrate Ronald Curtin was welcomed to the Melbourne Registry of the Federal Magistrates Court on 9 February 2012, following more than 27 years of practice at the Bar.

His Honour holds a Bachelor of Laws and a Bachelor of Jurisprudence from Monash University. Following completion of his articles of clerkship under Morton Brown at Cornwall Stodart & Co he was admitted in 1977. He remained with the firm as an employee solicitor for the best part of a year, until he and his wife, Carmina, moved to Geelong.

His Honour refused an offer of employment from the long-established Geelong firm Wighton & McDonald, preferring to accept a position with the Australian Legal Aid Office. During his time at the ALAO, his commitment to access to justice, regardless of geography or means, became evident. In addition to undertaking Duty Solicitor and Child Representative duties, His Honour and ALAO colleague, Richard Wallman, established a weekly visiting legal service at the Corio Shopping Centre. He was also a member of the steering committee to establish the South Barwon Legal Service in the Belmont area in 1979.

His Honour later worked as the senior legal officer at the Melbourne headquarters of the ALAO, where he established and solely operated the Office of Duty Solicitor at the Melbourne Registry of the Family Court of Australia. In 1984 His Honour joined the Bar, where he continued to practice in the area of family law. He was a favourite of family law solicitors, particularly on the Ballarat circuit of the Family Court and Federal Magistrates Court, where he frequently appeared. So frequently, it seems, that for the last 13 years he has not missed a single Ballarat circuit sitting.

His Honour has held memberships with the Law Council of Australia, the Family Law Section of the Law Council of Australia and the Family Law Bar Association of Victoria, which he represented on the Legal Professional Committee of the Dandenong Registry of the Family Court from 1995 to 1999. He was a volunteer with the Springvale Legal Service's Domestic Violence Project, and has volunteered at Fitzroy Legal Service since 2001.

As a barrister, His Honour was highly regarded for his empathy and understanding of the frailties of the human condition, as well as for his understated style of advocacy. At His Honour's welcome ceremony, LIV President Michael Holcroft described him as having brought "an aura of calm to the troubled area of family law". These qualities will serve him, and those who appear before him, well in his new role.

Supreme Court of Victoria

The Honourable Justice Kate McMillan

Bar Roll No 1632

Her Honour grew up in Mansfield and came to Melbourne as a boarder at Ruyton Girls' School for the four years leading up to what was then known as matriculation.

In an academically excellent school, and one in which sport was highly valued, Her Honour won the history and geography prizes and the prize for excellence in both academic work and sport. She played in the first hockey XI and was Captain of Athletics. She was also vice-captain of the school.

After Ruyton, Her Honour went into residence at St Hilda's College at the University of Melbourne for the four years of her law course.

Her Honour served articles at Henderson & Ball, a firm whose history dates back to 1885. After admission to practice in April 1976, Her Honour remained briefly as a solicitor with Henderson & Ball before moving to Phillips, Fox & Massel. At Phillips, Fox & Massel, Her Honour was made a senior associate after only a little over two years with the firm, and just two and a half years since her admission to practice.

During her five years at Phillips, Fox & Massel, Her Honour instructed Dr Gavan Griffith QC in a testator's family maintenance Case. He claims that it was his persuasive advocacy that succeeded in attracting Her Honour to the Bar. When she became a member of the fourth bar readers' course in March 1981, Dr Griffith offered to take her on as his reader.

At the Bar, Her Honour had a demanding and remarkably broad practice. She moved with ease from wills and estates, trusts and testators' family maintenance cases, to serious injuries, FOI, and complex commercial matters.

Her Honour was a calm, measured, unflappable and always courteous advocate. One of her juniors has described her using

Ernest Hemingway's description of the courage of a matador as being "grace under pressure".

For many years at the Bar, Her Honour combined her busy practice with her love of farming. Until her marriage, Her Honour had a farm at Kerrie, near Romsey, from which she used to commute daily by train to Melbourne. There, she bred Angus beef cattle, kept chickens and grew eucalyptus trees. Her Honour was an expert in keeping the property and its fencing in good repair and had a Blue Heeler cross who was a constant companion.

While a barrister, Her Honour undertook many years of substantial service to the Bar. This included 11 years on the Bar Council, two of those years as Vice-Chairman and a year as Chairman; eight years on the Ethics Committee, four of those years as Chairman and three years on the Counsel Committee. Her Honour also spent some 11 and a half years as one of the Bar's appointees to the Council of Legal Education and was a member of the Supreme Court Board of Examiners.

Her Honour had 7 Readers: Richard Waddell, Kerri Judd, John Francis, Dominic Lay, Richard Wilson, Dr Colin Campbell and Leonie Bird. These readers, and other juniors who have worked with Her Honour, have spoken highly of her generous support of them, not only in the particular cases in which they appeared with Her Honour but also in assisting to advance their careers at the bar.

Supreme Court of Victoria

The Honourable Justice Anne Ferguson

Her Honour had a distinguished academic record and practised as a solicitor engaged in complex litigation for more than 25 years.

Her Honour was educated at the Brigidine Sisters' Killester College in Springvale where, in the Higher School Certificate year, she was dux of the school. Her Honour went to Monash University and graduated Bachelor of Arts and Bachelor of Laws with first class honours, winning the Chief Justice's Supreme Court Prize and the Flos Greig Memorial Prize. She served your articles at J. M. Smith & Emmerton. You were admitted to practise in 1984, and remained with the firm as an employee solicitor.

In 1985, Her Honour was awarded a Commonwealth Scholarship for study in the United Kingdom where she was awarded her Ph D in Law at the University of Southampton. Her Honour's thesis was on "Unfair Contracts".

In 1989, Her Honour returned to Smith & Emmerton as a partner. That firm became the Melbourne office of the national firm Gadens Lawyers. She was also a part-time Senior Lecturer in Law at Monash, lecturing in the Law of Liquidations in the Master of Laws program.

For 10 years prior to Her Honour's appointment, she was a solicitor with Allens Arthur Robinson – since 2005, a partner in that firm.

Her Honour specialised in insolvency and general commercial litigation, in the Litigation and Intellectual Property Department of the firm.

Her Honour's practice involved her in the litigation which followed the Opes Prime collapse in March 2008; in the Federal Court of Australia and in the High Court of Hong Kong.

Her Honour is a passionate Richmond Football Club supporter. Whilst Her Honour may not have been a barrister-at-law; she was a Tiger-at-law: a member of the supporters group started up by Michael Green – now a mild-mannered barristers' clerk; but, as a 21-year-old law student, a formidable ruckman in the Richmond side that won the 1969 premiership.

Her Honour brings to the Court an outstanding record of achievement in law studies and doctoral work, and in some 25 years practice as a solicitor in the most massive and complex commercial litigation.

Supreme Court of Victoria

The Honourable Associate Justice Rodney Randall

Bar Roll No 1765

His Honour practised law for 32 years prior to taking his appointment as an Associate Judge of the Supreme Court of Victoria. His Honour spent 4 years as a solicitor with J. M. Smith & Emmerton and 28 years at the Victorian Bar.

His Honour was sworn in 28 years to the day from when he signed the Bar Roll on the 19th of May 1983.

His Honour was educated at Carey Grammar School and Monash University. He graduated Bachelor of Science in 1976 and Bachelor of Laws in 1979.

His Honour served articles with David Lee at J. M. Smith & Emmerton (now part of Gadens Lawyers) and remained as a solicitor with Smith & Emmerton for 4 years.

In 1983, His Honour came to the Bar. He read with the Honourable Justice Habersberger.

Predominantly, His Honour did civil matters – less frequently, criminal matters.

By the early 1990s, His Honour's practice became grounded in commercial and Equity matters. The dominant focus of His Honour's practice for the last many years at the Bar was in corporate and personal insolvency litigation and advice.

His Honour had 5 Readers: Timothy Luxton, Stewart Maiden, Simon Pitt, Stephen Waldren and Ozan Girgin. His Readers speak of his extraordinary generosity and support – "perennially kind, wise and accommodating"; "full of practical wisdom and insight".

His Honour was widely acknowledged as one of the leaders of the insolvency Bar. He was rarely briefed with a leader. Indeed, he often appeared against silks, occasionally with juniors of his own. For example, in *Vigliaroni*, His Honour was opposed to Noel Magee QC and Albert Monichino (who themselves had 3 other juniors) for one party; and Michael Sifris SC (now the Honourable Justice Sifris) with a junior for another party. His Honour had 2 juniors of his own.

His Honour served the Bar on the Readers Course Committee and as a member of the Commercial Court Users Group.

His Honour was a formidable advocate – without fear, and unflinching against heavy odds. Underlying the somewhat relaxed and calm manner and delivery, there was a steely determination.

County Court of Victoria

His Honour Judge John Carmody

Bar Roll No. 1784

His Honour practised law for more than 31 years before his appointment to the bench. He spent 28 of those years at the Victorian Bar.

His Honour was one of the great all-rounders at the Bar, equally at home in Crime; Civil Juries; Personal Injuries; Work Cover; Occupational Health & Safety; and in Commercial Matters – in all Courts and before a various assortment of Tribunals.

His Honour is the son of a farmer who worked the land in the Avoca River valley in Northern Victoria–the last of the foothills of the Victorian highlands.

His Honour began schooling at St Joseph's College in Charlton. In Year 9, he became a boarder at Xavier College in Kew.

His Honour's passion for the justice began at a formative stage – in 1971 he became the Xavier boarders' unofficial union shop-steward, and led the 1971 boarders' strike over boarding house food – industrial action that led to out-of-sight improvement in the food.

He studied Law/Commerce at the University of Melbourne, and was in residence at Newman College, where he was elected President of the Student Body.

His Honour, upon graduation, served articles with John Hayes in Pascoe Vale and then worked for 3 years as a solicitor with Behan & Speed in Port Melbourne; and came to the Bar, signing the Roll in May 1983 whereupon he read with Ian Hayden and with Geoffrey Gibson.

His Honour's readers' course contemporaries are an illustrious bunch – the group includes Judges Nicholson, Gucciardo and Dean (of the County Court); and Justice Davies and Associate Justice Randall of the Supreme Court.

His Honour has several readers and other barristers that he worked with who uniformly sing His Honour's praises. He was always thoroughly prepared – across the facts and the law. Perhaps above all, he had (and still has) a highly developed intuitive sense of what, from an experience of human nature, one might expect to have occurred – and what doesn't seem quite right – an intuition based in experience, observation and understanding of the human condition.

His Honour had two Readers – Beata Armatys and David Sanders.

His Honour was recently elected President of the Melbourne University Football Club. However, his modesty is such that it's been said that, asked what his involvement is, he says "I carry the oranges".

County Court of Victoria

His Honour Judge Richard Maidment QC

Bar Roll No 1662

His Honour practised as a barrister for nearly 40 years since his admission to the Bar of England & Wales in November 1971.

The Commonwealth DPP, Christopher Craigie, described His Honour as "the master of complex, controversial trials . . . all you would expect of a great prosecutor . . . ethical, resolute, calm . . . and utterly committed to fairness." These are the qualities which His Honour brings to his place on Court.

His Honour was born in London and went to secondary school at Haileybury College in Hertfordshire. He played cricket and rugby for his school, and made Wisden's Cricketers' Almanack – the bible of English cricket since 1864. Wisden's records His Honour as having taken 3 wickets at Lord's.

His Honour was a London Bobby, serving for 2 ½ years in the Metropolitan Police Force, London. He then attended the Inns of Court School of Law, and read first with Sir Francis Lowe (a common law and criminal law barrister) and then with Dr Frederick Hallis. Dr Hallis was the head of chambers–a small set of civil law chambers on King's Bench Walk, in the Temple.

Upon his acceptance to chambers His Honour appeared regularly in The Old Bailey (London's Central Criminal Court). In 1975, when he'd been in practice less than 5 years, His Honour represented 14 accused in an armed robbery trial which became the longest-running trial in the history of that Court at the time.

His Honour practised in England for nearly 10 years then emigrated to Australia towards the end of September 1981. He was admitted to practise in Victoria and signed the Victorian Bar Roll in October, 1981.

Although, given his extensive experience at the English Bar, reading was not required, His Honour read voluntarily with the late David McLennan (who, while at the Bar, had, as a Colonel in the Army reserves, been a Defence Force Magistrate and was later one of the early appointments of barristers to the Magistrates' Court of Victoria). His Honour also enrolled part-time (largely evenings) in the Master of Laws program at Monash University, graduating in 1986.

His Honour appeared in criminal jury trials from the very outset of his practice in Victoria.

In May 1985, His Honour was engaged on a 6-month exclusive retainer as Counsel Assisting the National Crime Authority. His Honour was engaged to run the NCA investigation of New South Wales night club owner, one Abe Saffron – an investigation conducted wholly independently of the New South Wales police – indeed, with meticulous care that New South Wales police officers who had been seconded to the National Crime Authority and not even know about the investigation. His initial 6-month retainer was twice extended to a total of 18 months.

In no small part due to His Honour's diligence, Mr Saffron was convicted in the New South Wales District Court of conspiracy to engage in multi-million-dollar tax fraud and sentenced to 3

years, with a non-parole period of 2.

His Honour also prosecuted complex terrorism-offence trials for the Commonwealth for the last several years of his practice at the Bar.

His Honour was, as Counsel, painstaking and thorough.

His Honour had 10 Readers:

- Anthony Pitts and Robert Martin in England – Anthony Pitts went on to take silk, and is now a Crown Court Judge in London (The Crown Court is the equivalent of the County Court in its Criminal Jurisdiction);
- In Melbourne: Mary Abriola, Tim de Uray-Ura, Uma Nadarajah, Geoffrey Compton, Martin Grinberg (now a Magistrate), Ruxandra Lazarescue, Sharn-Adelle Coombes, and David Manoka (a Reader from Papua New Guinea – a Principal Legal Officer with the Department of Justice and Attorney-General in Papua New Guinea, and sometime Acting Deputy Secretary (Legal)).

His Honour took silk in November 2001 and practised for more than 9 years as Senior Counsel.

For nearly 3 years, he served as In-House Senior Counsel in the Office of the Commonwealth Director of Public Prosecutions.

His Honour served on the Criminal Bar Association Committee; as Chairman of the Green's List Committee; and on many Bar Committees – most significantly:

- on the Ethics Committee for 5 years;
- on the Continuing Legal Education Committee for 4 years; and
- on the Human Rights Committee for 3 years.

For more than 20 years, he taught both Advocacy and substantive law in courses and seminars conducted by the Victorian Bar.

County Court of Victoria

His Honour Judge Richard Smith SC

Bar Roll No 1939

Prior to his appointment, His Honour practised law for some 34 years – more than 26 of those years at the Victorian Bar – the last nearly 5 years as Senior Counsel.

He practised in a variety of common law and commercial litigation and before the Racing Appeals Tribunal, representing both the Stewards and also numerous jockeys and trainers and before the Pharmacy and Medical Boards. He also practised regularly as a mediator.

His Honour was educated at Scotch College and Monash University, graduating as a Bachelor of Economics and Bachelor of Laws. His Honour then went on to serve articles with Lander & Rogers and was admitted to practice on the 1st of April 1974.

However, once he had the "barrister and solicitor" tag under his belt (and his beloved Richmond Tigers had the 1974 Premiership in the bag) he took off for foreign parts. He worked in ski resorts during the European winters – including as a ski instructor in Austria. In the summers (or what passes for the summer in England) he worked as a travel guide out of London.

His Honour returned to Melbourne in 1976 and went into business, not law. He became an Account Executive in an import/export firm, Tomasetti & Son Pty Ltd – the wholly owned Australian subsidiary of a Dutch company – one of the old Dutch East India trading companies that 'traded in anything they could make money out of'.

In 1977, His Honour could not resist his calling and began work in earnest as a solicitor with Cameron & Lowenstern in Hamilton. He became a partner of the firm in 1979. In September 1984, His Honour came to the Bar, signing the Roll in November and reading with Geoffrey Gibson.

His Honour is also part of an illustrious group of readers who undertook what was one of the first readers' courses. Many of those in the September 1984 intake have gone on to achieve high office – the President of the Court of Appeal, Justice Chris Maxwell, Justice Geoff Giudice AO, the President of the Australian Industrial Relations Commission, Justice David Beach of the Supreme Court, Federal Magistrates Nora Hartnett and Michael Connolly and Victor Perton, a former member of State parliament. Others in that talent pool were Chris Blanden SC, Graeme Clarke SC, John Styring and John Glover.

His Honour served on the Committee of the Common Law Bar Association for several years.

He was most widely known (and feared) as a common law personal injuries jury advocate and for his Racing Appeals Tribunal work. It is said that when it comes to horses, His Honour has an encyclopaedic knowledge of matters concerning the administration of drugs and other prohibited substances to horses and how they were administered. Folklore has it that he coined the expression "administering a milkshake" to describe the conduct of one trainer who was accused of administering a powdery mix down a horse's throat with the use of a tube and a funnel–in a horse float at the gates of the racecourse.

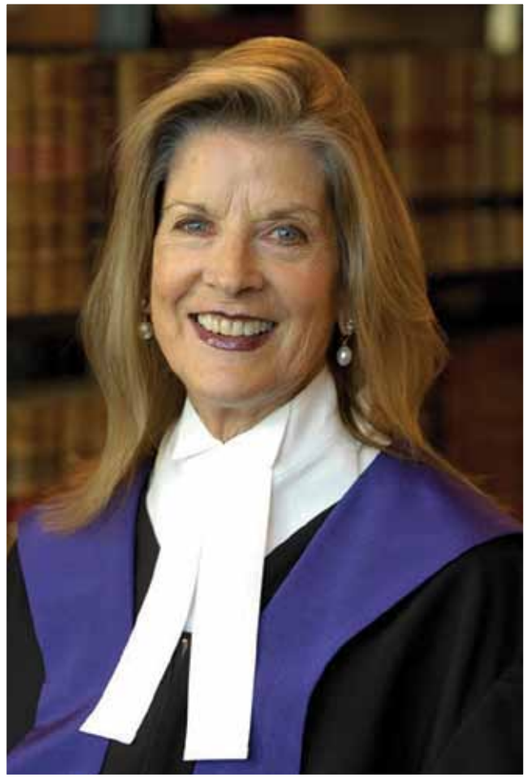
His Honour also developed a fairly formidable reputation in commercial cases at the Bar. In the mid 1990's he honed his skills as the senior-junior for the applicant in the year-long cause celebre in the Federal Court, Henderson v Amadio Pty Ltd. , then the longest-running commercial/trade practices case the Federal Court had seen. The case was won at trial; held on appeal 3-nil; and finally settled in the face of a special leave application to the High Court.

His Honour had four Readers – Bruce McKenzie, David Llewellyn, James Boulton and Mayada Dib. One of his readers recalls His Honour's calm determination, setting off to appear before one of the reputedly more ferocious Judges, whereupon His Honour was heard to utter: "helmet on; visor down; mouthguard in".

His Honour served on the Committee of the Common Law Bar Association, on the Bar Legal Education & Training Committee, and for some years on his List Committee, including as Deputy Chairman and as Chairman.

In his practice, His Honour was always thoroughly prepared, calm and even-tempered, poised, seamless across any jurisdiction, and with an innate sense of fairness. VBN

Her Honour Judge Barbara Cotterell



Appointment of Her Honour Barbara Ann Cotterell as a Judge of the County Court Of Victoria

Tuesday 7 February 2012

Barbara Ann Cotterell, an Acting Judge, was appointed a Judge of the County Court of Victoria on Tuesday 7 February 2012. Members of the Bar were delighted to hear the news, and we warmly congratulate Her Honour on her appointment.

With Chief Judge Rozenes and Judge Hannan, Judge Cotterell has been one of the three Judges in the General Criminal List. She has been sitting full-time in Crime and on Circuit. Her Honour is highly regarded by her judicial colleagues and by the profession.

Barbara Cotterell has described herself as "a child of the 40s and 50s in a family shadowed by the war, as were most in those days, but brightened by hope in the future". She was educated at Toorak College in Mount Eliza and at the University of Melbourne. In 1965, she served articles with Robert Taylor in Frankston.

Shortly after completion of articles, she and her husband moved to London – where they lived for two years, 1966-68. They also travelled widely in Europe and spent substantial time in Greece and Italy.

Following her return to Melbourne, she was admitted to practice on 2 April 1970. She practised briefly as a locum solicitor in the firm where she had served articles.

George Hampel had indicated a willingness to take Barbara Cotterell as a Reader. There was, in those days, no Bar Readers Course.[1] One simply came to the Bar and began reading in the chambers of one's Master; signed the Roll; and began taking briefs.

Barbara Cotterell began reading on 2 April 1973. Her Reading overlapped with that of Hampel's previous Reader, Michael Rozenes.

When she signed the Bar Roll on 5 April 1973, Barbara Cotterell was the 19th woman to do so – by then only the 19th woman of the 1050 barristers who had signed the Roll. She was one of only 7 women[2] amongst the 428 barristers then in active practice at the Victorian Bar[3]. Moreover, by that time the numbers in the junior category of barristers under six years' call had grown enormously – and they constituted just short of 40% of those in active practice.[4] More than a quarter of the Bar was even more junior – of two years' call or less.[5]

Then, as now, competition at that very junior end of the Bar was fierce and, in February 1973, just before Barbara Cotterell came to the Bar, the Bar Council established the Young Barristers Committee to support those under six years' call.[6] A measure of the Bar Council's concern is that it appointed then Bar Council Vice-Chairman Richard McGarvie QC (later Mr Justice McGarvie and later Governor of Victoria) to chair the Young Barristers Committee.[7]

It was in this difficult and challenging environment that Barbara Cotterell, by then the sole parent of two young children, established a general practice, including both crime and family law.

After three years at the Bar, Her Honour decided she needed to spend more time with her young children. She took them on a two-month holiday to Greece. On her way home, she passed by Cortona – an ancient city on a hill in Tuscany, near Florence. It was almost by accident, she says, that they began what became a ten-year stay in Italy.

At the end of 1984, Barbara Cotterell returned to Melbourne and to practice at the Bar. She practised in the Family Court. It was more difficult getting back into Crime, and she began by prosecuting appeals in the County Court.

On 10 July 1990, after a little over 5 ½ years back in practice at the Bar, Barbara Cotterell was appointed to the Magistrates' Court of Victoria. Her Honour was one of the very early women judicial officers in Victoria.[8]

Her Honour served on the Magistrates' Court for nearly eighteen years until her appointment, effective 12 May 2008, as an Acting Judge of the County Court.Chief Magistrate Ian Gray described Her Honour as a highly valued member of the Magistrates' Court; a fine leader in the Court's criminal jurisdiction; and an elegant presence in an often frenetic and boisterous world.

Magistrate Cotterell served on the Court's Criminal Law Committee, its Sexual Offences Committee and on the Executive Committee of the Council of Magistrates. She consulted with Government on proposed changes to the Rules and contributed greatly to submissions by the Court to Government and law reform agencies. With then Magistrate (now Judge) Lisa Hannan, she worked to establish the Committal Mention Court and regularly sat in that Court. She sat mainly in the criminal jurisdiction of the Court, including in the Sexual Assault List. She also served as a Children's Court Magistrate. Barbara Cotterell was a model and mentor to the many women appointed to the Magistrates' Court over those years.

A former Victorian water-skiing slalom champion, Her Honour is an active sportswoman – running, water skiing, scuba diving and horse riding. In 2008, she took part in the "Man from Snowy River" 6-day horse ride in the high country.

At the time of her appointment as a Judge of the County Court, Barbara Cotterell had served the State of Victoria and its people as a judicial officer for nearly 22 years.

On behalf of the Victorian Bar I warmly congratulate Her Honour on her appointment and wish her continuing distinguished service as a Judge of the Court.

Melanie Sloss SC
Chairman VBN

[1] There were occasional lectures on Ethics and other aspects of practice, but these were for the whole Bar, rather than exclusively for new barristers. There were no designated times for Readers to begin and the courses were spread out over the year. There was no "no briefs" period. The Bar Council had, on 8 March 1973, resolved that there should be a two-months "no briefs" period before signing the Bar Roll, in which a Reader would be required to be in daily attendance as a pupil with his or her Master. However, that was not to come into operation until 1 January 1974. Victorian Bar News No. 5 1st Quarter, March 1973 at page 14.

[2] The other six were Molly Kingston, Lynnette Opas, Fay Daly, Patricia Hurst, Mary Baczynski and Beverley Hooper.

[3] Victorian Bar Annual Report 1972-73 at page 8. "Counsel in active practice" is defined in the Annual Report as "Counsel keeping chambers in Victoria, but not including Crown Prosecutors or Parliamentary Counsel".

[4] To be precise, 39.7% – "In 1973, those under six years' call numbered 170 or 39.7% of the 428 counsel in active practice." Victorian Bar News June 1976 at page 26.

[5] Victorian Bar News June 1976 at page 23.

[6] The Young Barristers Committee held its first meeting on 12 February 1973. Victorian Bar News No. 5 (March 1973) at page 5.

[7] Ibid.

[8] The first woman Victorian judicial officer, Francine McNiff, was appointed in August 1983, as a Children's Court Stipendiary Magistrate.

On 9 September 1985, Margaret Rizkalla (now Judge Rizkalla of the County Court) was appointed a Stipendiary Magistrate – the first woman – and, at the age of 32, the youngest person – appointed to the Magistrates' Court of Victoria.

It was more than 10 years later, in 1996, that the first woman Judge was appointed to the Supreme Court. Kathryn Kings (now Judge Kings) was appointed a Master in 1993; but it was not until 1996 that the first woman Judge was appointed – Justice Rosemary Balmford.

Notably, many women who accepted appointed to the Magistrates' Court in those early days, the 1980s, were later elevated to other courts: Justices Sally Brown and Linda Dessau to the Family Court, and Judges Margaret Rizkalla, Wendy Wilmoth and Christine Thornton to the County Court.

Going Up

The Honourable Justice Robert Osborn was elevated from the Trial Division to the Court of Appeal of the Supreme Court of Victoria, and was appointed as a Justice of Appeal on 7 February 2012.

Gonged!

His Excellency the Honourable Alex Chernov AC QC, who was appointed a Companion of the Order of Australia for eminent service to the people of Victoria, to the advancement of higher education, particularly the development of academic and administrative programs at the University of Melbourne, through the establishment of the Australia India Institute, and to the judiciary.

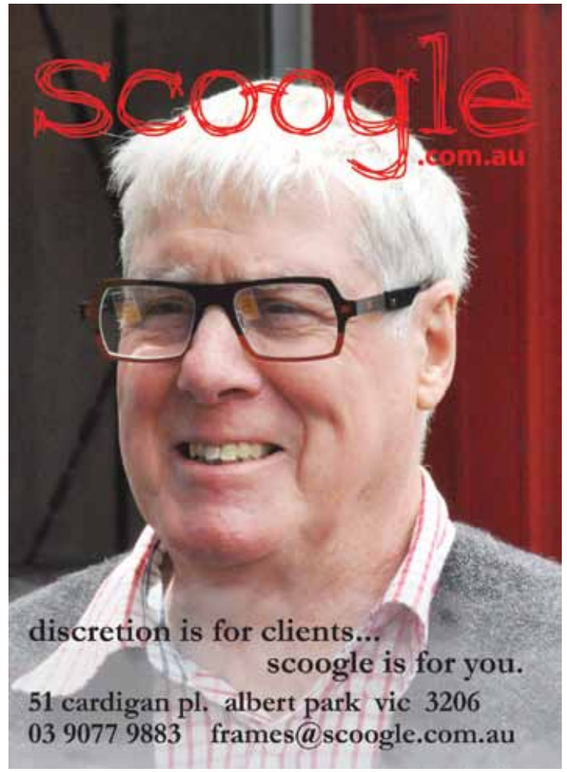
The Honourable Chief Justice Diana Bryant AO QC, who was appointed an Officer of the Order of Australia for distinguished service to the judiciary and to the law, particularly to family law policy reform and practice, through the establishment of the Federal Magistrates Court, and to the advancement of women in the legal profession.

The Honourable Peter Heerey AM QC, who was appointed a Member of the Order of Australia for service to the judiciary through the Federal Court of Australia, to the development of legal principle in the areas of intellectual property, trade practices and military law, and to the community.

The Honourable Gregory James AM QC, who was appointed a Member of the Order of Australia for service to the judiciary and to the law as a contributor to mental health reform, to the administration of criminal justice, and to the international community.

Mr Bryan Keon-Cohen AM QC, who was appointed a Member of the Order of Australia for service to the law, and to the legal profession, through the advancement of social justice and the protection of human rights, particularly in the areas of environmental and Indigenous law reform.

Mr David Russell AM RFD QC, who was appointed a Member of the Order of Australia for service to the National Party of Australia and to politics, to taxation law and legal education, and to the community. VBN



Adjourned Sine Die

Federal Court Of Australia

The Honourable Donnell Ryan

Bar Roll No. 765

Justice Donnell Ryan was farewelled from the Federal Court of Australia on 2 June 2011 after nearly 25 years on the Court and a legal career of more than 46 years of service. His Honour was admitted to practice in April 1965 and came to the Bar four months later. He read with Haddon Storey, who later became a QC and the Attorney-General of Victoria.

His Honour's early practice in the Magistrates' and Country Courts was mostly in commercial matters, real property and building disputes. While he later began to focus on industrial matters, he continued to maintain a general practice.

That practice included his Honour being Senior Counsel assisting Mr Justice Hope in the Royal Commission of Inquiry into the Combe/Ivanov affair and ASIO. In that matter, he was variously described by the media as resembling a butler and an undertaker because of his black woollen coat.

His Honour represented his clients with strength and passion. He honoured the cab-rank rule and, unusually in the highly contested industrial jurisdiction, was briefed by both sides of the industrial divide.

As then Chairman of the Victorian Bar, Mark Moshinsky SC, remarked at his farewell, His Honour, in the very best traditions of an independent Bar, brought to his work "diligence and detachment". The professional advocate, he never permitted himself to be drawn into the surrounding conflict; he never became involved in the politics.

His Honour had 10 Readers, who speak of his Honour's generosity, patience and courtesy, and of the value of all they learned. His Honour took silk in 1980. He was to appear before the High Court in, as the then Commonwealth Solicitor-General, Dr Gavan Griffith QC later recalled, "industrial matters and also constitutional matters of some importance".

His Honour served four years on the Bar and Law Institute Joint Standing Committee on Supreme Court Practice & Procedure and five years on the Bar Law Reform Committee Panel.

He also had a long-term association as a part-time Commissioner of the Australian Law Reform Commission, serving as a part-time Commissioner for some seven years from 1984-90, for two years while at the Bar, and continuing in his early years on the Bench.

In September 1986, His Honour was appointed to the Bench. At his Welcome, His Honour expressed his admiration for his predecessor, the Honourable Sir Reginald Smithers, whom he said had "worried his way to a resolution which was as acceptable as could be achieved in the circumstances".

The same experience of, and sympathy for, the human condition motivated His Honour. It sometimes appeared, from the deep frown of concentration on his face, that His Honour was doing his utmost to work, or worry, through to a just result.

His Honour has delivered numerous notable authoritative judgments in many diverse areas of law, including maritime law. A recent notable case was his Honour's 2009 decision in *Anstis v The Commissioner of Taxation*. A classic David and Goliath struggle, it involved a young woman studying to become a primary school teacher who had claimed $920 as educational expenses by way of a deduction. The Tax Office had denied the deduction and the Administrative Appeals Tribunal had upheld that decision.

She appealed, represented by her father, who had qualified as a solicitor but did not practise as one. His Honour held in favour of the student and against the Commissioner. The Commissioner fought the matter through to the Full Court and the High Court. In these hearings, the Commissioner was represented by the Commonwealth Solicitor-General, and the student still represented by her father.

The principle and logic of his Honour's decision were unassailable. Both the Full Court and the High Court agreed.

Before his retirement from the Bench, his Honour had been the third most senior Judge of the Court, after only Chief Justice Keane and the Honourable Peter Gray.

Family Court Of Australia

The Honourable Justice Nahum Mushin

Bar Roll No. 1549

Justice Nahum Mushin was farewelled from the Family Court of Australia on 29 July 2011 after more than 20 years of service on the Bench, and a legal career that spanned some 39 years. His Honour practised as a solicitor for 8 years, including five years as a partner at the Oakleigh-based firm of Lester, Pearn and Fielden. Leaving the firm to become a barrister, His Honour was a member of the first Bar Readers' Course in March 1980. He read with Mervyn Kimm, who later became Judge Kimm of the County Court.

His Honour initially had a broad practice of commercial, common, industrial, administrative and family law cases. However, he came to develop a particular interest in family law. From 1984, he practised almost exclusively in this area and was renowned for his hard work, sense of balance, and compassion.

In February 1983, having been at the Bar for less than three years, His Honour represented the successful applicant in *The marriage of Miller* against Gavan Griffith QC with Paul Guest, for the respondent, and Michael Black QC and Dr Ross Sundberg, for the Commonwealth intervening.

Having come to the Bench in 1990, His Honour became the third-longest serving of the 31 judges on the Family Court.

Many of the cases His Honour heard contained particularly difficult human dimensions. They included his Honour's restraining the removal of a girl from Australia for the purposes of an arranged marriage; annulling the marriage of young woman who had been tricked into an arranged marriage to which she had not consented; annulling another marriage where the husband had married his girlfriend in China only weeks earlier and had posted photos of that wedding on Facebook; and removing an eight year old from a violent abusive mother whose partner was a child pornographer and placing him with his grandparents.

It was observed at his Honour's farewell by Mark Moshinsky SC, the then Chairman of the Victorian Bar Council, that his Honour never lost his "sense of outrage at gender discrimination and domestic violence". A dead give-away was when he shifted in his seat on the Bench or abruptly stood a matter down to take a few minutes break.

During his 20-year service as a judge of the Court, His Honour also found time to serve on a large number of committees. He served for 10 years as Chair of the Chief Justice's Ethnic Advisory Committee and three years as a member of the Victorian Legal Aid Community Consultative Committee. He was an active member of the National Alternative Dispute Resolution Advisory Council from 1995 to 97.

In 2004, His Honour took over as Chair of the Family Court's National Cultural Diversity Committee after working on the Court's Victorian committee.

Between 2004 to 2008, His Honour was Chair of the National Steering Committee of the Living in Harmony venture, which worked with new and emerging communities to develop and strengthen their relationships with the Family Court. During this same period, his Honour was the Court's Regional Coordinating Judge, Regional Case Management Judge for Victoria and Tasmania and a member of the Chief Justice's Policy Advisory Committee.

From 2005 to 2008, His Honour participated in the Court's consultation with the Religious Courts of Indonesia as part of the Indonesian Australia Legal Development Facility and the University of Melbourne.

In addition to his work on the Court, in 2005, His Honour was appointed as a Presidential Member of the Administrative Appeals Tribunal, a position he held until his retirement. His Honour was also an occasional consultant to the Australian Law Reform Commission on its family violence reference in the 12 months before his retirement.

His Honour found time to be involved with programs offering mentoring and financial support to young people. He was Chair for five years of the Melbourne Chapter of Big Brother, Big Sisters and, since 2002, has been a co-patron of Chances for Children in Mildura.

His Honour has always displayed a strong interest in continuing legal education. He has been an occasional lecturer at Melbourne, Monash and La Trobe universities and a presenter to legal profession associations. For the last few years, he has taught the "Family Law Violence for Barristers" session in the Bar Readers' Course.

Since leaving the Court, his Honour has taken up a three-year appointment as an Adjunct Professor in the Faculty of Law at Monash University, which started 1 December 2011.

This is particularly fitting as his Honour was the first Monash law graduate to become a judge of any jurisdiction, a former Board member of the Faculty of Law and a long-term supporter of Monash legal education.

County Court of Victoria

His Honour Judge Ian Robertson QC

Bar Roll No. 992

Judge Ian Robertson retired from the County Court of Victoria on 29 April 2011.

His Honour was educated in New Zealand and was admitted to the profession in that country in 1968. After working as a solicitor in New Zealand, His Honour was admitted to practice in Victoria in 1970. Following work with Mallesons and Pavey Wilson Cohen and Carter in Melbourne, His Honour signed the Bar Roll in 1972.

His Honour enjoyed a thriving common law practice at the Bar with a speciality in medical negligence. His Honour was noted for a particular politeness and an unassuming manner when a barrister. His Honour was a frequent participant in common law circuits in regional Victoria, and is fondly remembered by many Counsel from that time. In 1996 His Honour took silk.

In 1998 His Honour was appointed to the County Court. At his welcome several aspects of His Honour's character were noted: His Honour was always both well-prepared and easy to deal with; His Honour was good with difficult judges; His Honour was noted as calm, careful, fair and responsible.

During his time on the Court His Honour sat regularly in both the civil and criminal divisions, where he decided many cases in service to the people of Victoria. His Honour has always been noted for his rich and varied interests including: travel, music, theatre, cinema, literature and history. The Bar wishes His Honour a happy retirement and trusts he will enjoy pursuit of some of these interests.

County Court of Victoria

His Honour Judge Tim Holt

Judge Tim Holt was appointed to the County Court on 19 January 1998 and retired on 30 May 2011.

From 1965 to1967 his Honour worked in the office of the Victorian Premier. That work was interrupted by compulsory

military service in 1967, as part of which his Honour served in Australia's military forces in Vietnam. Between 1969 and 1972 his Honour worked in the Prothonotary's Office in the Supreme Court of Victoria. Between 1972 and 1976 his Honour was a legal officer with the crown solicitor. His Honour was admitted to practice in 1975.

In 1982 his Honour was appointed Deputy Commissioner for Corporate Affairs, Legislation and Policy. In 1985 he returned to the Crown Solicitor's office as senior legal adviser. At the same time his Honour acted as the Principal Legal Consultant to the Public Service Board.

In 198 his Honour took leave from the public service and commenced work as a solicitor with the firm Cooke & Cussen where he was involved in general commercial practice.

In 1988 His Honour returned to the public service and commenced serving as Deputy Chairperson or Chairperson on several government authorities, including the Motor Car Traders Licensing Authority, the Motor Car Traders Guarantee Fund Claims Committee, the Travel Agents Licensing Authority, the Credit Licensing Authority, the Estate Agents Disciplinary and Licensing Appeals Tribunal and the Prostitution Control Board.

At his Honour's welcome it was observed that his Honour's significant experience on boards and tribunals, including the emphasis in those fora on administering justice without formality would be deployed by his Honour on the bench. Indeed, it proved so. Frequently his Honour would sit in the Practice Court where his reputation for getting to the heart of matters, and his sense of merit, were put to great use. Many counsel recall well the great courtesy that was shown to practitioners in his Honour's Court, even in difficult cases.

The Bar thanks his Honour for his service and wishes him happy retirement. VBN

Obituaries

The Honourable Associate Justice Ewan Evans

Bar Roll No 1039

The Honourable Associate Justice Ewan Kenneth Evans was born 20 February 1943 and died on 3 February 2011, after a long illness, aged 68.

Associate Justice Evans came to the Bar with seven years experience as a solicitor. He read with John Lyons and rapidly established a significant Supreme and Federal Court practice, mostly in commercial cases.

He co-edited *Williams Supreme Court Practice [Victoria]* with David Bailey for more than 10 years The two also co-authored *Discovery and Interrogatories Australia*, which was published in 1984, 1990 and in loose-leaf form in 1997.

He was appointed a Master of the Supreme Court on 4 August 1983 and an Associate Judge on 19 December 2008, serving in these positions with distinction for more than 27 years.

Damien Francis Cosgriff

Bar Roll No 1547

Damien Cosgriff was born 26 July 1952 and died 25 February 2011, aged 58.

His self-authored Victorian Bar profile described how: "Prior to practising law, he gained general experience as a factory hand, tram conductor (God rest their souls) and tour guide in Europe."

In 1974, he graduated with an LLB from the University of Melbourne and he was admitted to practice on 3 April the following year. He worked as a solicitor with J N Zigouras & Co before signing the Bar Roll on 13 March 1980.

Damien Cosgriff read with George McGrath SC and himself had one reader, Bernard Sheehy.

He practised in criminal law. In his early days at the Bar, he undertook mostly defence work. But, more recently, he had also appeared on behalf of the Crown.

The Honourable Hubert Rofeno Frederico

Bar Roll No 539

The Honourable Hubert Rofeno Frederico was born 1 October 1931 and died 27 April 2011, aged 80.

Justice Frederico was educated at Xavier College and the University of Melbourne. He was admitted to practise on 1 March 1955, signing the Bar Roll on 10 February 1956 and reading with Sydney Frost, who later became the Honourable Sir Sydney Frost, Chief Justice of Papua New Guinea.

He had four Readers: Raymond Perry, Anthony Graham, Con Heliotis and Richard Weil.

He practised in a wide variety of jurisdictions, including commercial and family law. He was appointed to the Family Court of Australia in October 1976, where he served as a Judge and later as the Judge Administrator, responsible for the Melbourne Registry's management. He retired in April 2003.

A keen sportsman, he rowed in the Victorian King's Cup Eight and coached the Xavier College and Australian rowing crews. He was awarded the Australian Sports Medal.

John Bruce Bingeman QC

Bar Roll No 746

John Bruce Bingeman QC was born 28 November 1936 and died 2 July 2011, aged 74.

He attended Melbourne Grammar School. But, at the age of 14, due to the illness of his father, he left to work at the Myer Emporium and then for various stock-broking firms.

He nonetheless completed the Adult Matriculation Certificate and earned a place to study law at the University of Melbourne. While studying full-time, he also worked as the night manager of the stock-broking firm L.G. May. His results at the end of his first year were good enough to earn him a Commonwealth Scholarship.

After graduating with an LLB, he served articles with Bill Carew and was admitted to practice in March 1965. He came straight to the Bar, where he read with Robert Brooking (the now retired Judge of the Court of Appeal).

John Bingeman first practised in crime but then specialised in workers' compensation cases. He co-authored Principles of the Law of Workers' Compensation Particularly in Victoria, which was published in 1981 and was widely used by practitioners in that jurisdiction.

However, at the height of his workers' compensation practice, he took the bold step of informing his clerk, Jack Hyland, that he no longer wished to appear in that area. He swiftly developed a busy commercial, insurance, common law and defamation practice and appeared regularly in appeals to the Full Court and in the High Court.

In his years as a junior, he had four Readers: Alan Middleton, Christine Blanksby, Michael Roche and Robert Squirrell.

He served as a Judge of the Accident Compensation Tribunal from 1988 until the Tribunal was abolished in December 1992. He then returned to practice at the Bar and took silk in 1995.

In April 2004, he was appointed to the Commonwealth Superannuation Complaints Tribunal and served on that Tribunal for about a year, after which he retired.

John Bingeman lived on the Yarra Edge Vineyard in Chirnside Park. For many years, he made, among other wines, a fine Cabernet.

His Honour Judge Gordon Just

Bar Roll No 414

Judge Gordon Just was born 4 August 1924 and died 26 July 2011, aged 86.

He was educated at Trinity Grammar School. In 1942, upon turning 18, he enlisted in the RAAF. After his war service, he completed the articled clerks' course at the University of Melbourne and served long articles with his father, a partner at Arthur Phillips & Just.

Within days of his 1 October 1948 admission, he signed the Bar Roll, reading with Henry Winneke, who was to become Chief Justice and then Governor of Victoria. He had a broad general practice at the Bar for more than 16 years.

His notable appearances included being counsel assisting Sir Esler Barber, the Royal Commissioner inquiring into the Kings Bridge collapse, and counsel assisting Kevin Anderson QC (later Justice Sir Kevin Anderson), who constituted the Board of Inquiry into Scientology.

He had four readers: John Roberts, the late Kevin Whiting, Les Ross (now QC and retired County Court Judge) and John Winneke (now the Honourable John Winneke AC QC, retired President of the Court of Appeal). Just as Gordon Just had read with John Winneke's father so Gordon's son, Don, read with John Winneke.

Judge Just was appointed to the County Court on 10 August 1965, at the age of 41. He sat in all of its jurisdictions, and on the Workers' Compensation Board and the Accident Compensation Tribunal. Returning to the County Court after the Tribunal's abolition, he heard industrial relations cases , almost exclusively.

At his Farewell, the Bar Council's chairman said that His Honour's service to the Court and the people of Victoria had been exceptional.

His Honour was one of Trinity Grammar School's most significant benefactors. He served as a member of the Council for 30 years (1966-99), which included three years (1981-83) as the Council's Chairman.

Professor Colin Howard QC

Bar Roll No 2111

Professor Colin Howard QC was born 23 March 1928 and died 2 September 2011, aged 83.

He was born in Southampton, England and educated at Prince Henry's Grammar School in Worcestershire and the University of London, where he completed an LLB in 1995 and an LLM in 1956.

He came to Australia in 1958 to take up an appointment as a lecturer in law at the University of Queensland. Two years later, he moved to the University of Adelaide to become a senior lecturer in law. He earned a PhD from the University of Adelaide and a Doctor of Laws (LLD) from the University of Melbourne.

He was appointed Hearn Professor of Law at the University of Melbourne in 1965 and held this position until 1990. He also

served as Dean of the University of Melbourne's Facultyof Law from 1978-83, when he was succeeded by the now Honourable Justice Mark Weinberg.

He was admitted to practise in South Australia in 1961 and in Victoria in 1965. He read for the Victorian Bar with Allan Myers. After Allan Myers took silk, he completed his Reading with Neil Young. He signed the Victorian Bar Roll in February 1987 and conducted a practice in constitutional, administrative, commercial and criminal law alongside his academic work.

He was appointed Crown Counsel for Victoria in October 1995 and took silk in November 1996. He also served as General Counsel to the Victorian Government Solicitor. He retired from practice in February 2001.

Kevin John Thompson

Bar Roll No 3366

Kevin John Thompson was born 14 April 1935 and died 12 October 2011, aged 76.

He was educated at Melbourne High School. He played cricket and football, both at school and afterwards, and is said to have been a formidable wicket-keeper. He was awarded first-class honours in British History in the matriculation examinations and graduated in 1957 with an LLB from the University of Melbourne. He served articles with Charles Keith Geer of the firm Herbert, Geer & Rundle and was admitted to practise in April 1958.

Kevin Thompson established his own firm and practised as a solicitor for 23 years. The various positions that he held included being Registrar of the Podiatrists Board, National Director of the Trustee Companies Association of Australia and a Senior Member of the WorkCare Appeals Board.

In May 2000, in the twilight of his legal career, he came to the Bar, where he read with John Bowman (now Judge Bowman of the County Court). His Senior Mentor was Lyn Boyes QC. He practised mostly in the area of WorkCover and also served as a Legal Profession Tribunal Conciliator. He retired in July 2007.

He was sometime Chairman of the Victorian Club and sometime Senior Vice-President of the Bennettswood Bowling Club.

Maurice Gurvich

Bar Roll No 871

Maurice "Maurie" Gurvich was born on 11 June 1943 and died on 18 January 2012.

He was educated at Melbourne High School and served long articles with Thomas Ottaway at McCay & Thwaites, completing the Council of Legal Education course at the Royal Melbourne Institute of Technology.

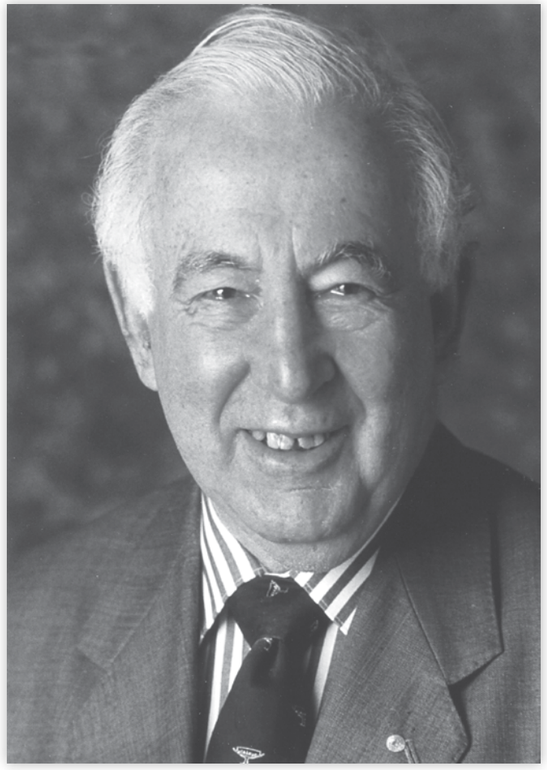
In March 1969, immediately following admission, he came to the Bar. He read with Norman O'Bryan (later a Justice of the Supreme Court) and went on to have five readers of his own.

During his career at the Bar, he developed a general practice, which included family law, crime and commercial work. He served on the Structure of the Bar Council Committee (chaired by J Mcl Young QC) and later on the Court Procedures Reform Committee (chaired by W F Ormiston QC).

He co-authored a guide to the Family Law Act 1975 (1979) with Paul Guest, wrote *An Introduction to Family Law in Australia* (1983) and co-authored *Law for Young Australians* (1981) and *The Scarlet Thread; Australia's Jack the Ripper: A True Crime Story* (1989) with Christopher Wray.

Appointed a Magistrate in May 1990, he served more than 20 years until his retirement at the end of 2010. A compassionate and conscientious judicial officer, a colleague has said of him that there was no better lawyer in the Victorian Magistracy. He was also known for being a supportive colleague. His sons Daniel and Michael are practicing barristers. VBN

The Right Honourable Sir Zelman Cowen



Sir Zelman Cowen AK GCMG GCVO QC PC
Courtesy of the University of Melbourne Archives (UMA/I/1570).

The Right Honourable Sir Zelman Cowen

PC, AK, GCMG, GCVO, KStJ, QC, DCL

7 October 1919 – 8 December 2011.

Sir Zelman Cowen, who died on 8 December last, barely two months after his 92nd birthday, brought great distinction to our Bar whose Roll he signed on 9 November 1951 shortly after he was admitted to practice in Victoria on 1 October 1951.

That bestowed distinction was not simply a reflection of his stellar career in which, as it happened, practice as a barrister was not central. It was the result of the influence, direct and indirect, he had on law students at the University of Melbourne between 1951 and 1966 when he was Professor of Public Law and Dean of the Faculty of Law. Many of those students became leaders of the profession as barristers and judges of all courts, including the High Court.

Sir Zelman presided over a revolution in legal education, creating a teaching community of full-time academics devoted to teaching and scholarship. It was a lively intellectual community. He attracted very distinguished visiting foreign legal scholars, particularly from England and America, who enriched both staff and students.

He was held in the highest regard in both England and America and, thus, he could virtually ensure that the best Melbourne graduates were able to win prestigious and generous scholarships at the best universities in those countries. He was also able to arrange visiting positions for his teaching colleagues at American law schools and so enrich the intellectual capital of the law school.

He travelled constantly. He taught regularly at leading law schools including Harvard and Chicago. He assisted in the creation of new law schools in Hong Kong, Ghana and the West Indies. All this whilst at the University of Melbourne.

He was one of the most gifted and inspiring teachers encountered by his students. He taught with flair, colour and wit. He introduced the American casebook, or Socratic, method of teaching. He engaged his students; he drew them into discussion and debate. He encouraged an understanding and appreciation of principle and the questioning of it when appropriate; and he did not appreciate its parrot like repetition.

His scholarship was significant. It was recognised by Oxford when, in 1968, it conferred on him a Doctorate of Civil Law when the examiners were satisfied that his published work constituted "an original contribution to knowledge of such substance and distinction as to give the candidate authoritative status in some branch of legal learning."

Sir Zelman always rose to the top; be it as dux of Melbourne's Scotch College, as the Supreme Court Prize winner at the University of Melbourne Law School or as Victorian Rhodes Scholar in 1941. He did not arrive at Oxford until after service in the Australian Navy during the Second World War and, at Oxford, he again rose to the top in his BCL course with the award of a Vinerian Scholarship. Even before he had completed his BCL he was appointed to a Fellowship at Oriel College where he taught law until his return home to Melbourne in 1951.

He left Melbourne in 1967 to become Vice-Chancellor of the University of New England. In 1970 he went to the University of Queensland and, whilst there, he was appointed a Queensland silk.

In 1977 he was appointed Governor-General in the wake of the greatest crisis that office had suffered. To that office he brought "a touch of healing" and secured the confidence of all across the political divide, and not simply because he was not challenged by political circumstance as was his predecessor. He retired as Governor-General in 1982, declining an offer to continue, and returned to Oxford as Provost of Oriel College. He retired in 1990 and came home to Melbourne. Shortly after his return he was felled by Parkinson's disease, but he remained socially and intellectually engaged until the end. He suffered his illness with strength and courage.

Jack Fajgenbaum QC VBN

Senior Counsel for 2011

Supreme Court of Victoria

Left to Right. Front Row: Michael O'Bryan SC, William Stuart SC, Stephen Donaghue SC, Lesley Taylor SC, Matthew Collins SC

Middle Row: Michael Croucher SC, Caroline Kirton SC, Martin Scott SC, Stephen O'Meara SC, Peter Kidd SC

Back Row: Thomas Gyorffy SC, Peter Gray SC, Stephen Donaghue SC, James Gorton SC, Danny Masel SC

On 22 November 2011, the Chief Justice of Victoria, the Honourable Justice Warren AC, appointed the following barristers as Senior Counsel in and for the State of Victoria in the following order of seniority:

William Evan STUART SC

Date of Admission: 2 November 1977
Signed Bar Roll: 9 February 1978
Read with: Graeme Uren QC
Readers: Jillian Fischer, Kerry Paull, Nick Button and Jim Stavris
Areas of Practice: Criminal Law

Thomas GYORFFY SC

Date of Admission: 2 November 1977
Signed Bar Roll: 10 April 1979
Read with: The Hon Associate Justice Kevin Mahony
Areas of Practice: Crown Prosecutor

Daniel (Danny) MASEL SC

Date of Admission: 2 March 1981
Signed Bar Roll: 29 November 1990
Read with: His Honour Tom Wodak, retired County Court Judge
Readers: Sandra Macdougall, Michelle Britbart, Tyson Wodak and Stephen Warne
Areas of Practice: Personal Injuries and other torts, Administrative Law, Professional Negligence, Insurance

Michael Hugh O'BRYAN SC

Date of Admission: 2 March 1987
Signed Bar Roll: 23 May 2002
Read with: Stewart Anderson SC
Readers: Nina Moncrief
Areas of Practice: Competition and Consumer Law, Corporations and General Commercial Law and Administrative Law

Martin Rothwell SCOTT SC

Date of Admission: 30 March 1987
Signed Bar Roll: 28 May 1992
Read with: Joseph Santamaria QC
Areas of Practice: Commercial, Arbitration, including International Arbitration

Caroline Eve KIRTON SC

Date of Admission: 7 April 1988
Signed Bar Roll: 29 November 1990
Read with: Peter Murdoch QC and Andrew Panna SC
Readers: Ingrid Braun, Nathinal Asimba (Papua New Guinea)
Areas of Practice: General Commercial, Contract, Trade Practices, Banking and Finance, Equity and Trusts, Property, Retail Leases, Construction, Professional Negligence, Mediation

Peter Barrington KIDD SC

Date of Admission: 2 April 1990
Signed Bar Roll: 30 November 1995
Read with: Damien Maguire
Areas of Practice: Crown Prosecutor

Stephen Andrew O'MEARA SC

Date of Admission: 23 April 1992
Signed Bar Roll: 28 May 1998
Read with: The Hon Mark Dreyfus QC MP
Readers: Jack Tracey, Andrew Meagher, Roslyn Kaye, Simon Martin, Jessica Swanick and Shaun Gladman
Areas of Practice: Common Law & Compensation, especially appeals; Defamation

James Peter GORTON SC

Date of Admission: 7 April1993
Signed Bar Roll: 23 May1996
Read with: Robin Brett QC
Readers: Melanie Baker and Megan Fitzgerald
Areas of Practice: Common Law (including personal injuries) and Commercial

Peter Robert Darling GRAY SC

Date of Admission: 7 April 1993
Signed Bar Roll: 21 November 1996
Read with: The Hon Justice Anthony Cavanough; then the Hon Justice Kevin Bell
Readers: Fiona McKenzie, Stephen Rebikoff, Zoe Maud, Tom Clarke, Phoebe Knowles, Liam Brown and Steven Castan
Areas of Practice: Competition and Trade Practices, Administrative Law, Utility Regulation, Energy Law, Taxation, Customs, Investigative Examinations, Professional Standards/Disciplinary, Electoral and Constitutional, and Commercial

Stuart John WOOD SC

Date of Admission: 7 April 1993
Signed Bar Roll: 25 May 1995
Read with: His Honour Judge Timothy Ginnane SC
Readers: John Snaden and Matthew Follett
Areas of Practice: Employment, Industrial Relations

Matthew John COLLINS SC

Date of Admission: 7 March 1994
Signed Bar Roll: 27 May 1999
Read with: The Hon Justice David Beach
Readers: Kate Burke, Melissa Marcus, Jack Heeley and Nasos Kaskani
Areas of Practice: Commercial, Media, Information and Technology

Lesley Ann TAYLOR SC

Date of Admission: 16 October 1992 (ACT); 14 July 1995 (Victoria)
Signed Bar Roll: 28 May 1998
Read with: Brent Young
Areas of Practice: Criminal and Human Rights Law, including International Criminal Law and International Humanitarian Law

Stephen Paul DONAGHUE SC

Date of Admission: 2 December 1996
Signed Bar Roll: 24 May 2001
Read with: James Elliott SC
Readers: Raelene Sharp, Nick Wood
Areas of Practice: Constitutional and Administrative Law, Appellate, Royal Commissions, Human Rights

Michael James CROUCHER SC

Date of Admission: 7 April 1997
Signed Bar Roll: 27 May 1999
Read with: Simon Gillespie-Jones
Readers: Amy Wood, Catherine Boston and Fiona Todd
Areas of Practice: Criminal Law, Confiscation, Occupational Health & Safety, Inquests, Inquiries and Investigations, Professional Disciplinary Tribunals

2011 Readers

Victorian Bar Readers' Course

March 2011 Readers
Back Row: Tiphanie Acreman, Eitan Makowski, Richard Morrow, Louise Hicks, Naomi Hodgson, Helen Tiplady, Yael Steel, Lionel Wirth, Liam Connolly, Daniel Matta, Simon Young, Angela Lee, Megan Fitzgerald, Temple Saville, Wendy Pollock.
Centre Row: Caroline Mills, Jim Mellas, Victoria Campbell, Daniel Sala, Nicholas Wood, Andrew Saunders, Justin Mereine, Andrew Freadman, Steven Castan, Jack Heeley, Jonathan Wilkinson, Nina Moncrief, David Babovic, Carmen Currie, Kate Langham, Karen LeFaucheur, Lucy Kirwan, Harry Bleas, Mark Halse, Barbara Toohey.
Seated Row: Kylie Evans, Nick Button, Rodney Yahamani, Gregory Takau, Christine Lahua, Kemueli Qoro, Kelly McKay, Elizabeth Tueno, Caroline Paterson.
Front Row: Dean Churilov, Christopher Twidale, Jacqualyn Turfrey, Nicholas Goodenough, Terry Strong, Romesh Kumar, David Seeman, Mark Costello, Viola Nadj.

September 2011 Readers
Back Row: Wendy Pollock, Christopher Trim, Gautam Mukherji, Tom Vasilopoulos, Catherine Pierce, David Downey, Ekbol Taghdir, Jane Warren, Vicki Sweet, Belinda Franjic, Andrew Higgins, Christopher Farrington
Centre Row: Jacqueline Stone, Barbara Toohey, Jim Stavris, Peter Caillard, Andrew Conley, Michael Clarke, Daniel Robinson, Ben Jellis, Shaun Gladman, Sarah Fisken, Harry Forrester, Angus Galbraith, Sam Gifford, Margo Harris
Seated Row: Fiona Todd, Robin Harrison, Sophia Munamua, Ricky Iomea, Rosemary Siriman, Abigail Burchill, Jessie Taylor
Front Row: James McIntyre, Keith Kendall, Nasos Kaskani, Andrew Bailey, Nick Dunstan, Paul Glass

To Carry Or Not To Carry

Red Bag, Blue Bag

RED BAG

I have often wondered about the origin of the rather quaint practice which, at least until some years ago, existed at the Sydney Bar whereby the Silk did not carry anything to Court, this task being undertaken by the Junior or the instructing solicitor.

The sight of a deliberately hands free Silk whose brief is carried by someone else is unknown in egalitarian Melbourne. The rationalisation for the hands free practice is difficult to justify. Perhaps the practice is meant to underscore the fact that the Silk is an orator who uses his hands unencumbered by such irrelevances as paper.

These days – at least in Melbourne – a Silk who refused to carry his or her own brief or bag would be regarded as unusual and probably in need of therapy. The Diagnostic and Statistical Manual of Mental Disorders Version 4 recognises a disorder known as narcissistic personality disorder (NPD). Any Silk in Melbourne who demands a hand free passage from Chambers to Court would be at risk of a visit from the CATT team and a positive score for NPD.

There is a further problem: any Silk who claims to be unable both to walk from Chambers to Court and hold a brief or carry a bag would be at risk of being likened to the American politician Gerald Ford (before he was President). Of Ford, Lyndon Johnson famously said: "Gerry is so dumb he can't fart [later sanitised to "walk"] and chew gum at the same time".

There is enough controversy about the role/appointment of Silk without seeking to retain a concept of the hands free walk to court Silk who could well be accused of either being as dumb as Gerald Ford or as pompous as Mussolini.

BLUE BAG

If its not enough to "carry the load" when it comes to preparation, the prospect of adopting a protocol that requires juniors to carry their leader's materials to and from Court may well be enough to shrink the waiting list for the readers course down to a couple weeks.

It only takes a few months post-signing of the roll to become familiar with the vast tomes of Law Reports and the like which adorn walls of most silk's chambers (that is, all except those walls which frame a sweeping view the city and beyond or an original Whitely or Nolan). These volumes are also the homes of such authorities which turn "ambitious" submissions into persuasive ones. I'll also concede that there's a clear impression of erudition which comes from precisely lining up, along a bar table, rows of several cloth-bound volumes of law reports, both authorised and (dare I say it) unauthorised. That is beside the point though. The books have to get from the lofty chambers to the curial dancefloor somehow. The question is whether we, in this fair and refined State of Victoria, should be heaving the onus of trafficking such materials to our juniors.

The inner bar may find more willing pack-horses in their juniors should they (they silks) paddle out into to the modern (metaphorical) surf and be willing to ride that technological wave which is sweeping the profession … and the rest of the world. The advent of iPad advocacy has meant that a stroll to Court can be made relatively painless and effortless: without an anchor of folders, volumes, trolley bags, a colourful array of pens and an image or charm of St Thomas More (to some, the Patron Saint of Lawyers).

Quick checks on the AUSTLII app accompanied by an email to the judge's associate and opposing instructor, means that even the most fulsome authorities may be disseminated with ease, all the while saving around 1/3 of the Amazon.

Carrying the silks materials, I am all for it as long as it can be contained with a sleek, 64Gb, 8.8 mm thick, recyclable aluminium and glass casing that weighs less than a carton of milk. Until then, may the status quo be maintained.

*Disclaimer, Apple Inc. its associates and subsidiaries had no part to play in the conceptualisation, writing or dissemination – except for the fact that it may have been written to the soundtrack of the ever-so-subtle tapping of a finger on a 9.7", anti glare touch screen. VBN

Gallimaufry

The Honourable John Coldrey QC

What is the point of having a column in the Victoria Bar News (Limited Edition) if you cannot, occasionally utilise it to promote yourself and your friends? (I understand that is also the considered view of my friend Frank Vincent).

The opening of Coldrey Chambers in 20 May 2011 provided an ideal opportunity.

Incidentally the Chambers were launched by The Honourable Frank Hollis Rivers Vincent AO QC.

The Editors have been kind enough to print my response to his perceptive comments:

First, I would like to thank Frank Vincent very much for his kind words tonight. I have always been a great fan of the pre-death eulogy.

As many of you know Frank was my mentor in the law. But not just in the law, he also gave me sartorial advice. When I ventured to wear a bow tie, he opined that this item of apparel was a substitute for a personality. And when I bought a pair of boots with Cuban heels in an effort to enhance my personality (and height), he kept referring to me as "the littlest cowboy."

I was sent a letter by the organiser of this event suggesting that "I might like to speak for about five minutes". Whilst this might not seem long (although there is always the possibility that it will) I was extremely grateful for the opportunity. The tradition on these occasions is for the person after whom the Chambers are being named to say nothing at all. This because they are usually dead. I hope to buck this trend for some time.

People have all sort of things named after them. Some of these you wouldn't wish for–for example the M'Naughten Rules or the Basha Inquiry. Up until now the only public acknowledgement of the Coldrey name is in Castlemaine. It is a short street (which is probably appropriate). It consists principally of back fences and it leads towards the rear of the Old Castlemaine Jail.

Consequently, I am absolutely thrilled and deeply honoured at the selection of my name for these splendid Chambers.

This choice is doubly significant for me. First, because I loved my life at the Bar. I had wanted to be a barrister from the moment I saw Perry Mason on the television. I was impressed by this ability to win every case, and I was filled with adolescent admiration for his blonde personal assistant, Della Street.

Like most, if not all, barristers, my life at the Bar gave rise to a whole spectrum of emotions, from the excitement and adrenaline rush of court appearances, through to gut-churning anxiety and despair. And you can throw in, from time to time, the taste of fear. But it was addictive.

I also loved the camaraderie of the Bar. Two stories illustrate it.

A young Dick McGarvie (later Justice McGarvie) was appearing in a personal injuries case against a prominent silk, Olaf Moodie-Heddle. The judge, the elderly Justice Gavan-Duffy, had become a great exponent of the siesta which he practised without leaving the bench. Dick McGravie objected to one of Moodie-Heddle's questions and counsel and the jury all turned towards the bench to hear the learned judge's ruling. His Honour's response was a gentle snoring sound. After waiting for what seemed an eternity. Moodie-Heddle announced: "Well, I'm the most senior person still awake in this court. I rule that my question was outrageous and I withdraw it."

In slightly more modern times, I was cross-examining the last police witness at the Beach Inquiry into police misconduct. John Phillips (later Chief Justice), who was appearing for Victoria Police, vehemently accused me of "humbug". Later I came to view this as a delightful Dickensian form of criticism. But not at that moment! Chairman Beach came to my rescue by declaring that the only practitioner of humbug in the room was Mr. Phillips. Thereafter proceedings became a tad heated. But when the hearing adjourned, Phillips said: "Well after all that Coldrey, I think I'd better buy you lunch" in retrospect I should have asked him to order a humbugger with the lot.

The second and major reason this occasion is so significant for me is you–the members of these Chambers.

The fact that you each have a component of criminal law in your practice; the fact that, as a group, you have an almost equal gender representation; the fact of the camaraderie which obviously exists within these walls; and the fact that, at this stage your careers, you each have the potential to become future leaders of this Bar.

I wanted to make a gift to these Chambers as a memento of this event. I chose a relatively rare historical print entitled 'The Barunga Statement'. It was produced at the time of Prime Minister Hawke, when Aboriginal people hoped that their prior occupation of this country would be recognised by a treaty. It contains artwork by Galarrwuy Yunupingu and Wenten Rubuntja who were, at that time, the respective chairman of the Northern and Central Land Councils.

In concluding, can I acknowledge the presence here tonight of members of the Bar Council and Barristers Chamber Limited, and thank them for their attendance.

There are four of my former Associates at this function-Gina Schoff SC, Julie Condon of Coldrey Chambers (I like the sound of that) her sister, the talented Leith Condon, and Teresa Porritt of Counsel, who came up in the world from the floor below (Gorman Chambers) to join us. They were either my minders or my carers, depending on the stage my judicial journey had reached.

Three of my closest friends in the law have also come here tonight to honour you and this event.

Frank Vincent, of course, who, as a barrister, appeared in over two hundred murder trials- a record that I doubt will ever be equalled. Margaret Rizkalla, who was Victoria's first female Magistrate before becoming Equal Opportunity Commissioner, and finally, a County Court judge.

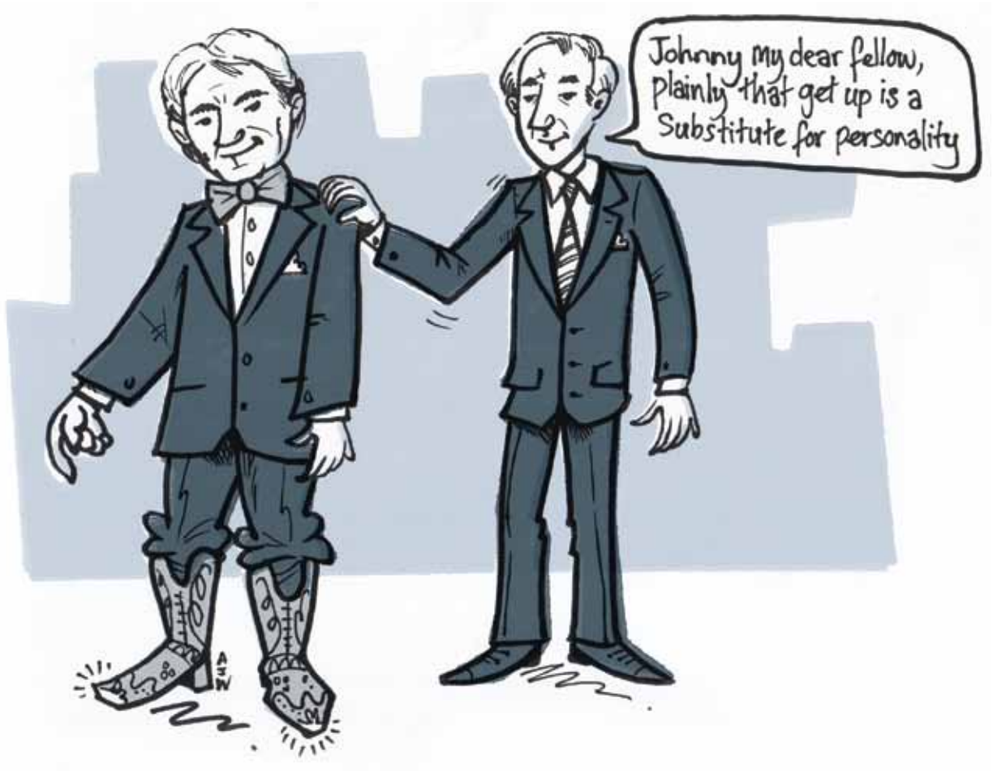
And Geoff Eames who, before he became a Supreme Court judge, was a pioneer of Aboriginal legal aid and land rights in the Northern Territory. Among his other activities as a barrister, Geoff was Counsel Assisting the Royal Commission into Aboriginal Deaths in Custody.

The Victorian Bar is the best bar in Australia if not the common law world. It is a unique institution with its dedication to the pursuit of justice for all; to the preservation of human rights; to the advancement of indigenous Australians; and to supporting legal practitioners in the Pacific islands.

The persons I have just mentioned embody the ethos of that Bar.

I am proud to be a member of The Victorian Bar, and the perpetuation of my association with it, through the naming of these Chambers, is truly a legal highlight of my life.

It is an honour and privilege which, as a boy from Essendon High School, I could never have dreamed of, or foreseen. VBN



Dear Themis

VBN's Guide to Good Form

On the occasion of being caught short, pre-court…

Dear Themis

I was recently on circuit in country Victoria when I had to answer a call of nature at 10:25am before court. I entered the lavatory and then lo and behold, two minutes later as I tried to exit said lavatory, I discovered to my shock and amazement, I was locked in! My client was in the dock, awaiting his sentence hearing. My desperate cries for help shrieked through the fixed louvered windows and relentless banging at the door went unanswered. I only managed to escape from my incarceration in the nick of time before my client was committed to his, when a member of the registry staff arrived to use the loo herself. How can I avoid this happening again?

- Signed Embarrassed.

Dear Embarrassed,

I presume you practise in criminal law and while I understand many of our criminal colleagues are not as tech-savvy as our tip-tappy whispering counterparts, I should have thought that at the very least, you would own a smart-phone. Indeed I am surprised that you weren't carrying it with you (an offence punishable by banishment to Siberia on some lists), or overlooked using it. Rather than seeking to find a solution on 'wiki-how', a simple phone call to your instructing solicitor, or the court registry could have secured your early-release. Of course, should you find yourself in a similar position at some future time, I counsel you against shoulder-charging the door like a marauding buffalo or trying to telepathically request your client to pick the lock to get you out. Rather, I recommend you enrol in evening classes which teach operatic singing and you develop your talents as a soprano. As well as being able to forcefully and yet gracefully attract the attention of the court officers next time you are 'locked in' thereby affecting your escape, you might also be able to land the part of Aida (who with her father Amonasro escaped from the Egyptians), next time Opera Australia stages Verdi's 'Aida'.

- Themis.

On taking tea with the Judge and one's opponent…

Dear Themis

Last month I was appearing in the Supreme Court of New South Wales, when at around 11:30am, the court adjourned for morning tea, whereupon counsel from both sides were invited to share tea with the Judge in his chambers. I dutifully followed my leader and opponents into the chambers of our presiding judge when morning tea (consisting of a pot of tea, five cups and saucers, milk, sugar and a plate of assorted cream biscuits) was brought in on a tray by His Honour's tippy. Upon the tray being placed on the Judge's table, my opponent's junior motioned towards the tray and suggested that I "play mother". I didn't have a clue what he was going on about, but sheepishly poured the tea for everyone just the same. How should I avoid such humiliations in the future?

- Signed Robur.

Dear Robur,

Well done you Robur! No need to be humiliated my friend, but you actually kicked a goal without realising it. It is a legal tradition at the Sydney Bar that when invited to morning tea with the Judge, the most junior person in the room pours the tea. By gesturing towards the tray as he did, your opponent was either being kind (possible), or was setting you up for a potentially embarrassing response on your part (more likely). But all's well which ends well, so we'll give him (and our Sydney colleagues) the benefit of the doubt on that one anyway. You know Robur, it's a bit of a melting pot up there. People there generally have no real idea of what it is like to be truly human. They're all trying to be masters of the universe, hence they hide behind unnecessary formality so the real non-reinvented self is not as easily revealed, unlike their more open, friendly and egalitarian Melbourne cousins. Frustratingly, one of the consequences of this veneer of formality which encapsulates Sydney society (well, whatever passes for it these days) is a dogged adherence to traditions, many of which have long been dispensed with in progressively liberal cities like Melbourne and San Francisco. However, the judicial morning tea tradition is a nice one to keep. Something very civilised I think to have a cuppa mid-morning with the Judge and one's opponent – keeps things pretty sensible in court – or at least that's the theory!

- Themis. VBN

The Milk Bar*

* Warning: This article contains bodily substances

It can be tough juggling being a parent with being a barrister. But for those barristers who take on briefs while breast-feeding, it is good to know there are places available to do so in court buildings and in Owen Dixon Chambers.

One barrister told me that she used to say that she would breast-feed anywhere except three places: in church, on public transport and in court. She has since fed her baby both in church and on the tram. She claims that the embarrassment of a screaming baby was worse than the quiet slurp of contented suckling, especially given that modern breast-feeding clothing makes the matter quite discrete. Court remains, however, a no-go zone for the exposed nipple. So how do you run a trial without weaning your baby, when you need to nurse a baby every few hours?

If you are able to pump your milk out into a bottle and send it home to baby to drink from a bottle, a portable breast-pump in your handbag or briefcase can be utilized in a bathroom during available court breaks. A barrister who did this explained to me that she rang the Judge's Associate before a trial started to ask if there could be a mid-morning break so that she could express milk. The Judge was happy to oblige and the barrister ducked out to a cubicle in the morning, lunch and afternoon recesses. But what to do with the breast-milk once expressed? Some fortunate barristers have a nanny/husband/mother/courier waiting on William Street to whisk the milk home to baby. The rest must slip it in a fridge somewhere, preferably well-marked, as breast milk may not improve the taste of a cup of tea.

Some breast-feeding barristers have had babies who refused to drink from the bottle (no doubt a sign of excellent manners to come) and so they needed to feed their baby straight from the breast three or four times a day. In this case, the lavatory of the Melbourne Magistrates' Court is not the most salubrious environ in which to feed your baby. Fortunately, there are other options. The Victorian Bar parents' room is on the ground floor of Owen Dixon Chambers, a quick dash from the Supreme, County and Magistrates' Courts. You need to ask your clerk for a key to enter it. Whilst further away from the Victorian Bar parents' room, the Federal Court has a parents' room available in the Court building.

Once the baby has been fed, there is the issue that … err… what goes in must come out. The parents' rooms of Owen Dixon Chambers and the Federal Courts have change-tables and nappy bins, which makes changing the baby easier. If, however, you feed and change your baby in your chambers, the usual place to change the baby is on the floor. As for nappy disposal, one barrister recommends a zip-locked bag for the odorous item before binning it in your chambers.

Before the babies are born, the little blighters already cause some challenges for pregnant barristers. One barrister said she was very disappointed that in pregnancy she "was not glowing with a bump". Instead, she was breathless, nauseous and suffered heartburn and fat ankles. But worse that all that, she had moments of completely vacant thoughts at random moments, including once during her own oral submissions. She quickly learned to have detailed speaking notes.

When the pregnancy bump expands, the bar jacket can be too tight. Fortunately, there are barristers around with girths wide enough to accommodate an extra person and who are generous enough to lend their jackets to pregnant barristers. Whilst on the topic of bar robes, it is only when you feed your baby solid food in your chambers having forgotten to bring a bib that you realise that a jabot is a bib. A jabot is a marvelous cradle-to-grave item of clothing, available for an eighteen-monther dribbling rice cereal or a mature barrister producing spittle whilst addressing a jury. One wonders if it could serve to protect clothing from jelly in a nursing home. There is plenty of talk about abandoning wigs, but no call for the end of jabots. Maybe they are just too useful.

But seriously, there are women who need to work in the fleeting and irreplaceable early months of their child's life and who wish to provide their baby with the health benefits of breast-feeding. If senior counsel, opposing counsel and the bench are flexible and considerate in granting a woman the time and space to breast-feed during a court hearing, the kindness will likely be remembered gratefully by that barrister for many years to come. VBN

A Bit About Words *Batman*

Julian Burnside

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 gaue 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 magnifince 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.

Extravagance and enthusiasm are words which (like consumption) 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 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 OED2 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 an desirable 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 (but certainly do not damce). 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. VBN

Verbatim

VBN Court Reporter

Supreme Court Of Victoria

Before The Honourable Justice Croft
28 July 2011

Clarke v Great Southern Finance Pty Limited (Receivers and Managers Appointed) and Others

MR WILLIAMS: Well that becomes the key to it, Your Honour. What we would say once one gets to that point that there is merit in what Mr Bigmore had to say about there being something short of discovery–- -

HIS HONOUR: You've got 150 boxes or something.

MR WILLIAMS: Mr Bigmore referred to a data room. I assume what he meant by that was a darkened room that had a lock on the door that could be let into and not let out of without being searched and so on and where articled clerks and first year solicitors and law students might disappear for hours upon end and emerge only for theoccasional feeding and watering and the like if these things occurred. That is obviously, from the point of view of GSF and its creditors, vastly preferable to GSF being required to conduct a discovery exercise in relation to those documents.

Supreme Court Of Victoria

Before The Honourable Justice Dixon
28 July 2011
Semanov and Semanov v Pirvu

MR DUGGAN: Yes, but in terms of cooperation, my point is it was a two-way street. It can't be characterised as a reasonable party dealing with a bloody-minded party, it's just not that simple.

HIS HONOUR: I'm not suggesting that. I might be thought to be suggesting that your client was bloody-minded but I don't recall suggesting that anyone was behaving reasonably.

Supreme Court Of Victoria

Before The Honourable Justice Almond
27 October 2011

Fulton Hogan Constructions Pty Ltd v Cox Coating Pty Ltd and Others

MR COLE: Yes, it is the same volume, right at the very start of the volume?

WITNESS: Thank you.

MR COLE: Now do you recognise that document?

WITNESS: Yes.

MR COLE: And you've read that previously?

WITNESS: I've read it, yes. Not previously, but I've read it.

Supreme Court of Victoria

Before The Honourable Justice Almond
4 November 2011

Fulton Hogan Constructions Pty Ltd v Cox Coating Pty Ltd and Others

MR HAYES: Now, your mobile telephone number is [mobile phone number], isn't it?

WITNESS: That's correct.

MR HAYES: You recall having a conversation with Mr Lowe on 30 January?

WITNESS: I'm Mr Lowe.

MR HAYES: Sorry, with Mr Cengiz?

HIS HONOUR: Unless you were talking to yourself, Mr Lowe?

WITNESS: That could have been the case. I've never met Adem, I did speak to him a couple of times on the phone, yes.

Restaurant Review

Schweinhaxe

Mister Bianco

The Venue: Mister Bianco
Address: 285 High St, Kew VIC 3101
Telephone: 039853 6929
Website: www.misterbianco.com.au
Email: info@misterbianco.com.au

Well done Mister!

Why is it barristers tend to be so city-centric in their eating out choices?! Yes, the city is awash with dining options but it's now the suburbs where the action is. There is a new Italian restaurant in Kew (hardly "whoop whoop") called Mister Bianco.

There is a city connection here. Mister Bianco is the younger sibling of the well established Mezzo Bar and Grill. Owned by the same blokes - Silvio Sgarioto and Joseph Vargetto, Mister Bianco is bringing a touch of smart, modern charm and southern Italian influence to east of the Yarra.

It's a balmy Tuesday night when we head off to dinner. The restaurant is almost full. Polished but not "über-cool", the Mister Bianco package works – concrete floor, white tablecloths, soft lighting, banquette seating and friendly but efficient waiters who are busy keeping the Tuesday night crowd well satisfied.

"Come almost ravenous", I was warned by a friend. That warning proved correct. The menu is neatly divided into '"stuzzichini" (small plates to share), entrees, pasta and risotto, mains, chargrill, sides. Desserts and cheese too.

We decide to opt for some Sicilian-inspired dishes to share as starters - baccala (salted cod) and potato croquettes, tuna carpaccio "alla zingara" with avocado and cucumber and olive oil braised octopus, with crushed potato salad. We are impressed. Fresh, clean piquant flavours – the cold potato salad is a perfect partner to the saltiness of the octopus, and the dill in the baccala croquettes a foil to the unmistakable flavour of salted cod. The owners are certainly paying due respect to the fine cuisine of their Sicilian backgrounds. Generous serving sizes too. We are almost full after this introduction.

But we can't halt our Mister Bianco experience there. For main, I choose the cavatelli with prawns, mussels, zucchini, lemon and basil (cavatelli are semolina gnocchi, very common in southern Italy). When the dish arrives some peas had crept in (not mentioned on the menu), but I can forgive them for this minor misdemeanor. The prawns are sweet and cooked to perfection, and again the fresh basil gives a real lift. The cavatelli melt in my mouth. My husband plays the conservative lawyer and has crumbed veal cutlet schnitzel with caprese salad and lemon. No ordinary schnitzel he tells me, he is very happy.

We had planned on dessert which look enticing (after all, Sicilians are the only Italians with a real dessert culture – the Arabs introduced sherbet to Sicily which gave way to gelato), but simply cannot manage. So it's "no, grazie" when our friendly waiter enquires.

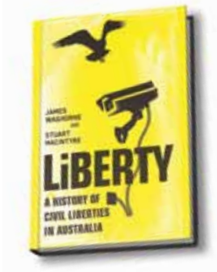
The wine list here is also sure to please. Not a tome, but it gives a choice of Australian and Italian options. We "mixed and matched" with wines by the glass – the star of which was a white Fiano and Greco di Tufo blend from Basilicata (next door to Calabria). This wine had texture and the right balance of fruit and acid. Magnifico! We should have ordered a bottle.

We leave sated and happy with our southern Italy journey. If Mister Bianco is an introduction to the gems of this region's cuisine, then instead of "Roman Holiday", "Sicilian Holiday" for us it will be. In the meantime however, a trip to Mister Bianco will have to satisfy. I am not complaining.

Guten Appetite!

Book Review

Georgia King-Siem



Liberty: A History of Civil Liberties in Australia, by James Waghorne and Stuart McIntyre

The introduction of draconian anti-terrorism legislation in 2005 was not the first time civil liberties have been endangered, nor the first time that ordinary Australians, including members of the Victorian Bar, have campaigned to protect them.

In 1936 the Menzies government introduced the *National Security Bill* which sought to grant the Government broad powers without reference to the Parliament. Growing disquiet with these measures led to the formation of the Australian Council for Civil Liberties (ACCL). One of its first publications, '*the case against the Crimes Act: with objectionable political sections quoted*' was authored by the ACCL's first legal advisor and later President, J.V. Barry KC. Other founding counsel included Sir Eugene Gorman (with whom Barry KC read) and Geoffrey Dethridge. The book traces the ACCL from its inception in the 1930's through to 2005 as the Victorian Council for Civil Liberties (Liberty Victoria).

The ACCL was highly active in the lead up to WWII with its legal members representing numerous defendants prosecuted under the *National Security Act*, including Phillis Johnson (prosecuted under Regulation 42 for being in possession, but not having read, two pamphlets critical of Australia's war involvement). The book describes the *Dalfram* waterfront dispute, the internment of 'aliens' under Regulation 26 and the successful challenge to Regulation 51 by three of the ACCL's Vice Presidents, two of which were members of the Bar (Barry and Dethridge). In addition Maurice Blackburn was heavily involved and was instrumental in the disallowance of Regulation 42A whilst Allan Fraser MHR (also a ACCL Vice-President) oversaw the transition of the National Security Regulations into more appropriate peacetime legislation after the war. Indeed, there are many who even before coming to the Bar had links with the ACCL; Frank Brennan for instance, who came to the Bar in 1978, was already a Vice-President in 1941. As an historical reference, the book canvases not only the civil liberties issues of the day, but the political tensions within the ACCL that almost overwhelmed it.

History is divided into seven distinct periods within the book; Between Depression and war, War under Menzies, Total war and reconstruction, Cold War, Revival and law reform, Rebuilding the Council and Human rights. For each period, it provides an engaging account of the events of the day and the important role the ACCL and its members played (who were often as not either at the Bar or who would be called to the Bar later). Through the ACCL, Dethridge represented 97 illegal immigrants and with another member of the Bar, Geoffrey Sawer, sought fundamental legal reform of the Constitution and Crimes Act. Issues such as Aboriginal rights also emerged although the appointment of Barry and Dethridge to the Bench left the ACCL bereft of its two most senior counsel.

The book tells how the departure of Barry and Dethridge led the ACCL to recruit counsel such as Samuel Cohen and its opposition to many of the Cold War measures resulted in a perception of it as an overly leftist organisation, particularly through the actions of its general secretary, Brian Fitzgerald. This led in 1966 to the creation of the Victorian Council for Civil Liberties (the 'Council' and now known as 'Liberty Victoria') which attracted a new generation of members, many of which were counsel (including its founding member John Bennett, Vice-Presidents Maurice Ashkanasy QC and Edward Lloyd and treasurer Peter Faris). Other members from the Bar included Neil Brown, Alan Missen, Clifford Pannam and Gareth Evans.

The book goes on to describe how Robert McGarvie QC represented the Council in its fight against censorship and how its political neutrality, intrinsically attractive to the Bar, failed to reach the membership levels it had in the 1930s and 40s. Bernard Cooney and Howard Nathan of counsel became active members on issues such as censorship and police powers whilst John Bennett remained the driving force in the Council until a schism developed over the Holocaust.

In a fascinating exchange, the book details how in 1980 the Executive called a general meeting and ousted Bennett who, in response, called his own meeting at which he was elected President and another member of the Bar, David Bell, secretary. Both claimed authority and even the creation of a third, more unified Executive Committee (which included Bar members Kevin O'Connor, Gareth Evans, Graham Fricke QC, Julian Phillips, Bernard Cooney and Ron Castan QC) failed to resolve the dispute. Ultimately Neil Young and much later Alan Goldberg QC were retained to pursue Bennett and Bell in the Supreme Court of Victoria and the book details how the tussle for leadership, although a financial disaster, led to a beneficial restructure of the Council. Other notable Bar members recruited around this time were Chester Keon-Cohen and Tony Pagone.

Under Castan's leadership, the Council's prominence increased and the likes of Robert Richter QC, Ian Freckleton, Ron Merkel QC, Alan Goldberg also joined. As noted in the book, the Council's membership '*demonstrated the distinctive ethos of the Melbourne Bar at that time*'. The book describes how current events resulted in Julian Burnside, Felicity Hampel, Sarah Porritt, Chris Maxwell, Greg Connellan, Brian Walters and Michael Pearce all joining the Council.

It was with this legal backing that the Council, now calling itself Liberty Victoria, took a more active role, even issuing a writ for *habeas corpus* in the Tampa refugee case. The book details how Liberty Victoria opposed the anti-terrorism legislation following 9/11 and the government's hypocrisy on human rights. Importantly it provides a well researched insight into the political and personal motivations that have shaped Australia's protection of civil liberties over the last eight decades. I highly commend this book to anyone who has an interest in civil liberties and its history in Australia.

The Chairmans' Wall

VBN Essay Competition

As observed in Owen Dixon Chambers on 6 March 2012

Victorian Bar News Caption and Essay Competition

Win a $100 Lunch Voucher at the Essoign Club!

Competition Rules:

1. Write a caption for the above photos, AND write an accompanying short essay (150-200 words) which addresses the above photo.
2. Submit your entry to vbneditors@vicbar.com.au before the 12:00pm, Friday 27 July 2012 deadline.
3. The author(s) of best, most humorous and publishable entry (determined solely by the Editors, whose decision is final and no correspondence will be entered into) will be declared the winner of the current competition and will receive a lunch voucher at the Essoign Club to the value of $100.
4. The winning entry will be published in the Spring edition of Victorian Bar News and the author(s) agree for their entry to be so published.

START WRITING!

VICTORIAN BAR REVIEW

No 1 2012

JUSTICE ANTONIN SCALIA: A MAJOR FIGURE IN AMERICAN LAW

The Hon Peter Heerey AM QC

Since his appointment in 1986 – a quarter of a century ago – Justice Antonin Scalia has been a highly visible member of the United States Supreme Court. At first a regular dissentient, more recently, following the appointment of Chief Justice Roberts and Justice Alito in 2005, Justice Scalia has found himself in a majority. With reasonable health, and given his life tenure, this state of affairs may continue for another decade or two.

Justice Scalia is the subject of a recent biography by Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia, Sarah Crichton Books, 2009. Ms Biskupic is a journalist who has covered the Supreme Court since 1989, first for The Washington Post and currently for USA Today. If the titles of some of her articles are any guide (eg In Terms of Moral Indignation, Justice Scalia is in a Majority of One [1]) Ms Biskupic is not of a particularly sympathetic disposition to conservative causes. Nevertheless her Scalia biography is as fair as it is thorough and readable. In her own words

> *Justice Scalia can be a polarizing figure who inspires strong reactions. I have worked hard to be both fair to him and true to the readers of this book.* [2]

In the writer's opinion, this self-imposed standard has been well achieved.

The lingering impression left by the book is that Scalia, as well as being super bright and intellectually combative, is a likeable individual – cheerful, gregarious, witty, thoughtful. He and his wife Maureen have nine children, all launched on successful careers, and at last count thirty grandchildren. Although his judicial opinions not infrequently refer to those of his colleagues with a ferocity and disdain which startle the Australian reader ("cannot be taken seriously", "beyond the absurd", "nothing short of preposterous"[3]), his off-bench relationships seem quite amicable. He is a particular friend of Justice Ruth Bader Ginsberg, a regular member of the liberal bloc on the Court.[4] On a personal level, it must be hard to regard as sinister or threatening someone with the nickname Nino.

Scalia's path to a seat on his nation's highest court manifests his intelligence and drive, but also a certain restlessness, and the mysterious ability to be in the right place at the right time.

Born in 1936 in Trenton, New Jersey, Scalia was the only child of Salvatore Scalia and the former Catherine Panaro. Both parents had emigrated from Italy, his father from Sicily. Salvatore Scalia quickly learned English,[6] gained degrees from Rutgers and Columbia and became a lecturer in Romance languages.

Antonin Scalia won a scholarship to Xavier High School, a Jesuit institution in Manhattan. [7] Here he entrenched his Catholic faith and was conspicuous for his religious devotion, even in a pre-Vatican II Jesuit setting. From Xavier he progressed to college at Georgetown University, another Jesuit school, and thence to Harvard Law School[8] where he became editor of the Law Review – a prestigious post whose later holders included Barack Obama.

While at Harvard Scalia met Maureen McCarthy, a Radcliffe graduate from an Irish background. They married in 1960.

From Harvard Scalia went to the Cleveland law firm of Jones, Day, Cockley and Reavis. In 1967, on the verge of becoming a partner, he left the firm for a position at the University of Virginia.[9] After four years teaching he joined the Nixon administration, first with the Office of Telecommunication Policy and later as Chairman of the Administrative Conference of the United States, a small agency dedicated to improving the management of the bureaucracy. [10]

In the Northern Spring of 1974, as Nixon was succumbing to the Watergate scandal, a vacancy of assistant attorney at the Office of Legal Counsel became vacant. Scalia was appointed, largely due to the influence of the new Deputy Attorney General Laurence Silberman, a friend from Harvard days. [11]

Scalia's next move was back into academia at the University of Chicago. He was not entirely happy there. Amongst other things, the neighbourhood Catholic parish was too liberal for the Scalias. Antonin and Maureen would take the family on a substantial trip into downtown Chicago to a more conservative place of worship.[12] So when the Republicans returned to power at the 1980 elections Scalia was keen to win, as Biskupic puts it, "a high ranking job in Reagan's social counterrevolution".[13]

1 Washington Post 30 June 1996
2 Biskupic,415
3 Biskupic, 276
4 Biskupic, 88,89,256, 304
5 Biskupic, 11
6 Biskupic, 13
7 Biskupic, 21
8 Biskupic, 26
9 Biskupic, 34
10 Biskupic, 34
11 Biskupic, 35-36
12 Biskupic, 73
13 Biskupic, 73

After missing out on the position of Solicitor General of the United States, Scalia was offered a seat on the Chicago-based United States Court of Appeals for the Seventh Circuit. He took a calculated risk in declining, in the hope that a position in the more prestigious Court of Appeals for the District of Columbia Circuit would become available. As it turned out, fortune favoured the brave and in late 1982 President Reagan appointed Scalia, then aged 46, to the DC Circuit.

A highly influential force in the Reagan counterrevolution was a body called The Federalist Society, founded in 1981 by law students Lee Liberman and David McIntosh (University of Chicago) and Steven Calabresi (Yale). The Society promoted conservative debate forums, commencing with a symposium at Yale which attracted 200 students from twenty law schools. Scalia, already something of a hero for Liberman and McIntosh from Chicago days, helped with ideas, energy and fund-raising organization. [14] By 2007 the Society had 40,000 members. It was described by the liberal Washington Monthly as "quite simply the best organized, best-funded and most effective legal network operating in this country"[15]. Biskupic says of the three founders:

> *They kept the emphasis on high-quality debate and first-rate networking. They built connections to prominent academics, federal judges, and Reagan Administration officials and helped members get jobs in the Justice Department and the judiciary. All three eventually moved to the Justice Department and cycled in and out of one another's lives as they climbed the ladder of the law and politics, all the while helping to identify possible candidates for the federal bench. … The student founders would be part of a broadscale transformation of the federal courts, and each of them would rise and remain on the stage of conservative policy and politics for decades.*[16]

In 1986 Chief Justice Warren Burger retired and Associate Justice Rehnquist was appointed to the vacancy. The Reagan Administration had already been active in investigating possible appointees who might be philosophically sympathetic to Republican aims on issues such as abortion, criminal defendants' rights and church-state separation. Prominent in the Justice Department on this task were Federalist Society co-founders Liberman and Calabresi, the former having been a Scalia law student and later law clerk.[17]

Scalia and fellow DC Circuit judge Robert Bork were front runners for the Rehnquist vacancy. Scalia was appointed, even though Bork was senior to him on the DC Circuit and had been United States Solicitor General. Amongst the factors favouring Scalia were his Italian and Catholic heritage[18] and a number of admirers among younger members of the Administration, including future Chief Justice John Roberts, then only two years out of law school (Harvard of course). [19]

Notwithstanding his partisan backing, Scalia sailed through the Senate Judiciary Committee hearing and was confirmed 98-0 by the Senate. In part this was due to a reaction against a bitter hearing on the Rehnquist Chief Justice appointment and the positive effect of Scalia's ethnic background. Scalia's genial style also helped. Senator Heflin from Alabama remarked that every Senator with an Italian American[20] connection had come forward to welcome the candidate. He continued:

> *I would be remiss if I did not mention the fact that my great-great-grandfather married a widow who was first married to an Italian American.*

Quick as a flash Scalia replied:

> *Senator, I have been to Alabama several times too.*

Subsequent Republican nominees did not fare so well. Bork was rejected by the Senate after an acrimonious debate on his conservative philosophy. Justice Clarence Thomas survived, but only narrowly and after sensational allegations of sexual harassment. Scalia had given ample evidence of being at least as conservative as Bork and Thomas, but was blessed with the essential political gifts of good luck and good management.

Biskupic provides a lucid and perceptive discussion of the major Supreme Court cases on which Scalia sat. For present purposes, it is sufficient to note some recurrent themes.

Scalia has become particularly associated with the interpretive philosophy of original intent. First introduced into the mainstream of legal thinking by Bork when teaching at Yale in the1970s, the doctrine, broadly speaking, is that the Constitution must be read in the sense it would have conveyed at the time of its framing in the late eighteenth century. The test is an objective one – it does not enquire into the actual subjective intent of the framers. [21] On this approach, capital punishment could not be unconstitutional, or an infringement of the Eight Amendment's ban on cruel and unusual punishment, since it was an accepted fact of life (and death) in the 1780s and, moreover, is explicitly contemplated in the Constitution.[22] Likewise, sodomy was a criminal offence then and for 200 years thereafter, so could not be protected by any implied right to privacy.

Scalia has been an implacable opponent of affirmative action. He accepts, even supports, the right of the individual to complain of discrimination, but rejects the notion of "a

14 Biskupic, 78
15 Biskupic, 79. That the author of the article was not an enthusiast for the Society's objectives is rather suggested by its title: *The Federalist Society: The Conservative Cabal That's Transforming American Law*
16 Biskupic, 80
17 Biskupic, 103
18 Biskupic, 106
19 Biskupic, 107
20 Biskupic, 110
21 Scalia, *A Matter Of Interpretation,* Princeton University Press, 1977, 38
22 Fifth and Fourteenth Amendments; Scalia, 46

creditor and debtor race", which he regards as fundamentally inconsistent with the Constitution. On this issue Scalia has deployed effectively his own background. In an early speech at Washington University Scalia made the point with characteristic pungency:

> *My father came to this country as a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country relatively late in its history – Italians, Jews, Irish, Poles – who not only took no part in, and derived no profit from, the major historic suppression of the current acknowledged minority groups, but were, in fact, the object of discrimination by the dominant Anglo-Saxon majority. To compare their racial debt … with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill.* [23]

Scalia noted that in the system of "restorative justice" established by white judges such as John Minor Wisdom, Lewis F Powell and Byron R White, it is precisely the Italians, Jews, Irish and Poles that do "most of the restoring". It is they who, to a disproportionate degree, are the competitors with the urban blacks and Hispanics for jobs, housing and education which are the things that "enable one to scramble to the top of the social heap where one can speak eloquently (and quite safely) of restorative justice".

A standard issue weapon in culture wars, legal and otherwise, is the accusation of inconsistency. "Your supposed principles A, B and C should logically compel result X in this case, but your political/religious/ideological objectives have led you to result Y. So there!" Ralph Waldo Emerson's warning that "a foolish consistency is the hobgoblin of little minds" is largely ignored. [24]

Scalia critics point out, for example, that his stated philosophy of deferring to democratically elected legislatures is applied on issues such as the death penalty, abortion and gay rights, but not on gun control and affirmative action. [25]

On the other hand, as Biskupic makes clear, on some criminal defence issues such as the right to confront witnesses and the right to trial on all issues (including those relevant only to sentence) Scalia has joined with liberal Justices Stevens, Souter and Ginsberg in broadly construing Constitutional rights. [26]

The major count on Scalia's inconsistency indictment is the celebrated case of *Bush v Gore*,[27] which effectively decided the 2000 Presidential election. Under the United States Constitution, federal elections are not conducted by a national body but by each State applying its own electoral laws and systems.

Votes in Florida seemed likely to be decisive in favour of Candidate Bush. There being evidence that many votes were arguably invalid, the Florida Supreme Court, on the application of Candidate Gore, had ordered a recount. The Bush team sought leave to appeal and by a 5-4 majority the US Supreme Court granted leave and ordered a stay of the recount. The majority, in an opinion delivered by Scalia, gave as its reason that letting the recount continue would threaten the "legitimacy" of Bush's election – if Bush were ultimately to show the recount was unfair, he would suffer "irreparable harm" if the recount had continued and ended up favouring Gore, albeit invalidly. [28]

The logic is, to say the least, not compelling. Moreover, Scalia and Chief Justice Rehnquist had long favoured deference to the States, and in particular to State courts. [29]

On the substantive merits of the Bush case, a principal argument was based on the claim that Florida officials in different counties were giving different results for the same irregularities, such as ballot papers being incompletely punched in various ways ("hanging chads", "dimpled chads" etc). It was put, and accepted by the majority, that this offended the equal protection guarantee of the Fourteenth Amendment. But Scalia had long been a vigorous opponent of the use of the Fourteenth Amendment to strike down State measures which the Court deemed unfair to racial minorities and the politically disenfranchised. [30]

Another example of Scalia's departure from a previous stance came in later statements defending the majority in Bush v Gore. (There seems to be no convention in the United States against judges publicly debating their decisions; as Biskupic records, Scalia did so frequently and vigorously in relation to *Bush v Gore,* repeatedly advising critics to "get over it".)[31] On one occasion, he said that the delay in producing the result had made the United States "the laughing stock of the world. The world's greatest democracy couldn't conduct an election". [32] But usually Scalia has gone out of his way to deprecate any attention to world opinion. He has rejected the "sanctimonious criticism" of America's death penalty by foreign "finger-waggers". [33]

Scalia, along with many American judges, opposes the citation of the judgments of foreign courts.

[23] *ABC v Lenah Game Meats* (2001) 208 CLR 199
[24] Conduct of Life, ii Self-Reliance
[25] Biskupic, 355
[26] Biskupic, 285,353
[27] 531 US 98 (2000)
[28] Biskupic, 237
[29] Biskupic, 234, 241-242
[30] Biskupic, 241
[31] Biskupic, 248
[32] Biskupic, 248
[33] Biskupic, 404, n 26. This is not to say that Scalia is a xenophobe. He has visited many countries, including Australia.

This reaction to a practice that in other common law countries seems totally unexceptionable, may be simply a manifestation of American Exceptionalism, the concept that the United States is somehow unique among nations, and morally superior to all others. Indeed the link is explicitly made by Federalist Society founder Steven Calabresi, now a Professor of Constitutional Law at Northwestern University, in his article *'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law.* [34]

Calabresi sees many Americans believing, as he clearly does himself, that "Americans are a special people, in a special land, with a special mission … (t)he Constitution is the focal point of American exceptionalism: it is our holiest of holies, the ark of the covenant of the New Israel". He says that American Exceptionalism "is not racist whereas the nationalist exceptionalism of Ancient Greece, Rome, the British Empire and Nazi Germany were all explicitly racist" and later that "America is a good country that is committed to good values in a way that Ancient Greece, Rome, the British Empire, and Nazi Germany were not". Without wishing to descend to the tiresome America-bashing of some in the Australian commentariat, the point can surely be made that the lofty ideals enshrined in the US Constitution and Bill of Rights did not stand in the way of 80 years of slavery and a further century of law-backed racial segregation and discrimination.

The recent rejection by the Australian Government of a Charter of Rights, even in the watered-down "conversation with Parliament" model, was largely founded on a reluctance to entrust the regulation of society to unelected judges interpreting broadly stated aspirational provisions. In some ways American judges have a greater claim to democratic legitimacy. State judges in most States are directly elected and often subject to recall by referendum. Federal judges are appointed by a democratically elected President and confirmed (or not) by a democratically elected Senate. Yet, at federal level an essential element is missing. Democracy requires periodic review by the electors of the elected. We view with disfavour Third World dictators who get themselves elected President for Life.

As Scalia's career demonstrates, United States Supreme Court Justices are long-term super-legislators. They tend to be appointed at a relatively young age, for the very reason that their influence may extend far beyond the maximum eight years of the President appointing them. Not infrequently they serve well into their eighties or even nineties, sometimes postponing retirement until the party of the President who appointed them regains power.

As the makeup of the Court changes, Court-made law can change – but over a very long time frame and removed from any direct democratic involvement. Sometimes those changes remedy what have come to be seen as wrong turnings in earlier decisions: endorsing slavery in *Dred Scott v Sanford*,[35] upholding racial segregation in Plessy v Ferguson,[36] striking down workplace regulation in *Lochner v New York*.[37] The immensely powerful role of a US Supreme Court Justice is exemplified by the career of Justice Scalia, as vividly portrayed in the Biskupic biography. VBR

[34] (2006) Boston University Law Review 1335
[35] 19 Howard 393 (1857)
[36] 163 US 537 (1896)
[37] 198 US 45 (1905)

DOMAIN NAME DISPUTES AND THE UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY

The Hon Neil Brown QC[1]

New forms of commercial activity require new responses from the law and it is therefore appropriate that the internet, having given rise to new forms of disputation, should also have stimulated a unique method of resolving them. The problems of jurisdiction, identifying the parties, service of documents, evidence, the law to be applied and the enforcement of decisions would have caused almost insurmountable obstacles to all parties if the resolution of domain name disputes had been left to litigation in the national courts. However, the international community devised a unique form of compulsory arbitration of domain name disputes– the Uniform Domain Name Dispute Resolution Policy- which, with over 30,000 cases decided since the year 2000, has proved its value and is now by far the preferred method of resolving domain name disputes. In this article, the author, who is a domain name arbitrator and intellectual property lawyer, describes the essential features of the UDRP and the new jurisprudence that has grown from it as well as some issues of evidence and the proof of essential elements of the claim. The author concludes by raising the question whether, as the UDRP has been largely successful, it could be used as a precedent for innovative methods of resolving other types of disputes.

Introduction

The purpose of this article is to provide an outline of the way in which disputes about domain names are resolved by means of the Uniform Domain Name Dispute Resolution Policy.

Most aspects of human life give rise to disputes and domain name are no exception. So disputes about domain names, which are usually disputes about who is entitled to own (or, more precisely, lease) the domain name, have to be resolved.

In fact, the main thesis of this paper is to argue that as the internet itself is new, so, disputes about the ownership of domain names have given rise to a new and unique method of resolving them, a method operating outside the courts and a method that has been widely accepted and very successful. I also raise the question whether this is also a method of resolving disputes that could usefully be considered for application to other forms of dispute.

Because I will be looking at this unique method of resolving disputes, I should say that one of the things that I will not be referring to in any detail in this paper is the resolution of domain name disputes in the law courts and through the normal law. They can of course be resolved in the courts and they are. It was held quite early in the piece, in a case called *British Telecommunications plc v One in a Million Ltd* [1998] 4 All ER 476 that in appropriate cases, the wrongful appropriation of someone else's name and using it in a domain name amounted to passing off and possibly breach of trademark.[2] Such a case could be taken through the normal courts and if proved, would result in the Plaintiff obtaining orders enabling him to take the domain name from the cybersquatter and also obtaining injunctions and damages from the party who had wrongly used the domain name. That is still so and cases can be and are brought in the regular courts claiming, uncompetitive and misleading and deceptive conduct, passing off and breach of trademark.[3]

Cases are also brought in the regular courts for other matters connected with domain names, for example, infringement of copyright by unlawfully extracting data on domain name registrants from the records of a registrar.[4]

But we are not concerned in this paper with the resolution of domain name disputes in the courts. We are interested in the unique method of resolving them that has been developed outside the courts, a method that has all the features that proceedings in the law courts do not have, ie it is novel, modern, quick, economical, online, with no appeal and very final.

This system is known as the Uniform Domain Name Dispute Resolution Policy (UDRP). It has been adopted since 1999 by the registrars who register all of what are called generic Top Level Domains or gTLDs, (.com, .net, .org, .coop, .aero, .biz, .info, .museum, .name, and .pro) and who are registrars accredited by ICANN – the Internet Corporation for Assigned Names and Numbers which administers the internet. It has also been adopted, although with some amendments, to apply to the resolution of domain name disputes about country code Top Level Domains, i.e., those that have a country designation like.com.au for Australia.

ICANN has described its dispute resolution system in the following way:

'Dispute proceedings arising from alleged abusive registrations of domain names (for example, cybersquatting) may be initiated by a holder of trademark rights. The UDRP is a policy between a registrar and its customer and is included in registration agreements for all ICANN-accredited registrars.'

So when you register your domain name with an accredited registrar, you sign a registration agreement and that agreement will incorporate the dispute resolution policy giving jurisdiction to the UDRP and the mechanism under it for resolving disputes.

So what we will be doing in this article is looking at this unique dispute resolution scheme for domain names, a scheme that is designed to resolve disputes about abusive registrations of domain names, one such abuse being cybersquatting.

You would have noticed already that one of the basic principles of the scheme is that complaints under the scheme may only be started by parties who have an interest in a trade or service mark. The scheme therefore essentially deals with complaints by trademark owners that someone else is trespassing on their trademark by registering a domain name.

Outline of the article

Part I gives a description of domain names, the significance of grouping them in various levels, how disputes about them arise and the application of the UDRP. Part II looks in more detail at how the UDRP is used to resolve domain name disputes. Part III examines three typical disputes and how they were resolved by using the UDRP. Part IV proceeds to examine the essential elements that must be proved in a UDRP claim and some evidentiary issues that have arisen, such as the proof of an unregistered trademark and proof of bad faith in the registration and use of the disputed domain name. Part V deals with the accredited providers of dispute resolution services and how they administer claims brought under the UDRP. Part VI looks at some recurring issues that have emerged as parties have become more familiar with the UDRP, namely a claim by a respondent-registrant of the domain name that it was not aware of the complainant's trademark, registering but not using a domain name and negotiating to sell a domain name and what that shows about the real intentions of each side to the dispute. Part VII discusses the lessons that can be learned from just over 10 years of the UDRP. Part VIII looks at how amended versions of the UDRP have come to be applied in the Asia-Pacific region. The conclusion is that the UDRP has largely been a success, raising the question whether similar online dispute resolution processes might be useful for resolving other disputes. But first we should look at what domain names are and how they come to be involved in disputes.

Part I: What is a domain name?

A domain name is an internet address; an address that can find its way through the internet and convey a letter to someone or lead to a website that can be used for conveying information. I have a domain name which is <*neilbrownqc.com*>. The Institute of Arbitrators and Mediators Australia (IAMA) has a domain name which is <*iama.org.au*>. You will notice that it is not *www.neilbrownqc.com* or *www.iama.org.au*. Neither of those descriptions is a domain name. They both use a domain name, of course, but they are website addresses, which invite the computer to go through the world wide web and find the domains which have been given the names <*neilbrownqc.com*> or <*iama.org.au*>. Thus the domain name is <*neilbrownqc.com*>. You will also notice something about IAMA's domain name, which is that it is not <*iama.org*>, but <*iama.org.au*> meaning that it is not a generic domain but an Australian Second Level Domain.

I can use my website to receive emails. So, if someone wants to write me a letter by email delivered to that website, it must be addressed to neilbrown@neilbrownqc.com. If it is addressed as neilbrown@hotmail.com it will go unclaimed and be returned, as there is nobody of that name at Hotmail or, if there is, it is not me. The only people there are those who have been given <*neilbrownqc.com*> as their address. It follows that a domain name need not have a website. But clearly, if you are in business and you want a website to promote your wares, your domain name will lead to your website, for there would not be much point in having a domain name you just allow remaining dormant and do not use. So, domain names often lead to websites. But not always. They may be used as an address with a whole string of email addresses attached to them. They might also be registered just to keep in reserve for the future, the consequences of which can sometimes be an issue in domain name dispute cases.

In any event, let us assume that our domain name is chosen. It is a domain and a name, or more precisely a name and a domain. It technically consists of the Top Level Domain which is the <*.com*> part and the name, which is the <*neilbrownqc*> part. The Top Level Domain may be any one of a number of domains which are designated by suffixes. The most common and the most popular, of course, is 'com'.

The 'com' suffix is known as a global or generic Top level Domain or gTLD, generic because it is generalised or covering a group or class, or global in the sense that it does not make allegiance to any particular country. There are other generic top level domains as well as .com and some of them are: .org, .net, .biz, .info, .name .aero, .coop, .museum, .pro jobs, .travel and the recently approved .xxx.

I will not go through all of the Top Level Domains in detail, but .com is intended for use by commercial businesses, .org by the non-commercial community and .net by internet service providers.[5]

There are also country code (ccTLD) Top-Level Domains, such as .au or .nz. The Australian domain space, designated by the '.au' abbreviation, is divided into several Second Level

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2 See the discussion of this issue by Hill J in *CSR Ltd v Resource Capital Australia Pty Limited* (2003) 128 FCR 408 and the observation by His Honour that 'The case of *One in a Million* was followed by *Architects (Australia) Pty Ltd (trading as Architects Australia) v Witty Consultants Pty Ltd* [2002] QSC 139 and *Australian Stock Exchange Ltd v ASX Investor Services Pty Ltd* (Burchett J, 3 June 1999, unreported).' See also the article by Catherine Ekambi, Domain Names and Trade Marks–Unhappy Bedfellows? in (2005) 8(2) INTLB 30.

3 *Fletcher Challenge Limited v Fletcher Challenge Pty. Limited* [1981] NSWLR 196 , *Glaxo plc v Glaxowellcome Ltd* (1995) 42 IPR 317, *Direct Line Group v Direct Line Estate Agency Ltd* [1997] FSR 374 .

4 *Nominet UK v Diverse Internet Pty Ltd (No 2)* (2005) IPR 131.

5 For a full description of the intended use of each Top Level Domain, see the ICANN website at http://www.icann.org/faq/.

Domains (or 2LDs) as they are called. They are: asn.au, com.au, net.au, id.au, org.au, edu.com, gov.au, csiro.au, info.au and conf.au. There are rules on who and what may register a domain name under each of these Second Level Domains.[6]

It is of course up to the person who registers the domain name to decide whether it is registered as a generic Top Level Domain domain or a country code domain. Parties often want the international cache´ that goes with .com or .net, but they also often want the connection with a country that goes with having a country code. Sometimes, they have no connection with a country but try to get the country code because they believe it is good for business; the obvious one is to have the domain name registered in Tuvalu, because the country code for Tuvalu is .tv and the domain name <*realestate.tv*> is thought to be a valuable commodity.

How do domain name disputes arise?

Disputes, of course, may be about anything, but the particular disputes with which we are concerned are defined for us in the document called the ICANN Uniform Domain Name Dispute Resolution Policy.[7] ICANN is the Internet Corporation for Assigned Names and Numbers which is a company with an international Board of Directors and which supervises the naming process on the internet and ensures that it runs smoothly.[8]

It justifiably prides itself on its wide consultation with all sectors of the internet community, including governments, so that, for example, it says: 'Over eighty governments closely advise the Board of Directors via the Governmental Advisory Committee'.

When you register a domain name, you enter into a registration agreement with the registrar you have used, which is an authorised company that arranges the registration. The registrar is authorised by ICANN. That registration agreement in turn contains an agreement to abide by ICANN's Uniform Domain Name Dispute Resolution Policy or UDRP and its procedural rules. It is that UDRP document that sets up the compulsory dispute resolution process to resolve disputes over domain names. As the Policy itself says, it is 'mandatory'.

As I asked the question, what disputes are we concerned with, the answer is to be found in this binding Policy, which tells us that it covers:

'…a dispute between you and any party other than us (the registrar) over the registration and use of an internet domain name registered by you.'[9]

We are therefore dealing with a new method of resolving disputes between the person who registers a domain name on the one hand and, on the other hand, any other party apart from the company that arranged the registration with ICANN for a fee. Now, '…any other party' is a very wide expression. Clearly, it includes a party that claims you should not have registered that name, that you have no right to the name, that you have stolen the name or misappropriated it and that it should be returned. So most disputes are between such a party and the party who has registered the domain name, called the registrant. Next, that party cannot just complain about it, but must have a real dispute about 'the registration and use' of the domain name. So the dispute resolution process we are concerned with, the UDRP, is for real disputes about both the fact that the domain name has been registered in the first place and also about the way the domain name has been used after it was registered.

There are many factors that will determine if the dispute is a real one. For example, if a trademark owner knew that you had used his trademark or business name by registering it as a domain name and yet he stood by and did nothing about it for five years, you might be excused for thinking that he really did not object to what you were doing, that there was really no problem and therefore no real dispute. Cases brought under the Policy, although they all depend on their own individual facts, sometimes actually end with that conclusion being reached, the case fails and the party who is the registrant of the domain name keeps it.

Part II: The mechanism adopted by the UDRP to resolve the dispute

The Policy then sets up a mechanism under which the following steps take place to resolve the dispute. The aggrieved party makes a Complaint. The Complaint is made on the appropriate documentation to one of the providers of dispute resolution services approved by ICANN.[10] The respondent, the party who registered the domain name and against whom

6 For example, Schedule 6 of the relevant auDA Policy sets out the eligibility for org.au, the source the IAMA registration. It provides:
' SCHEDULE F ELIGIBILITY AND ALLOCATION RULES FOR ORG.AU
The org.au 2LD is for non-commercial organisations.
The following rules are to be read in conjunction with the Eligibility and Allocation Rules for All Open 2LDs, contained in Schedule A of this document.
1. To be eligible in the org.au 2LD, registrants must be:
a) a charity operating in Australia, as defined in the registrant's constitution or other documents of incorporation; or
b) a non-profit organisation operating in Australia, as defined in the registrant's constitution or other documents of incorporation.
2. Domain names in the org.au 2LD must:
a) exactly match the name of the registrant's charity or non-profit organisation;
b) be an acronym or abbreviation of the name of the registrant's charity or non-profit organisation; or
c) be otherwise closely and substantially connected to the registrant, because the domain name refers to:
(i) a service that the registrant provides; or
(ii) a program that the registrant administers; or
(iii) an event that the registrant organises or sponsors; or
(iv) an activity that the registrant facilitates, teaches or trains; or
(v) a venue that the registrant operates; or
(vi) a profession that the registrant's members practise'.

7 See the Policy on ICANN's website at http://www.icann.org/udrp/

8 For more information on ICANN see its website at http://www.icann.org/

9 Paragraph 1 of the ICANN Uniform Domain Name Dispute Resolution Policy (UDRP).

10 The approved providers are listed at www.icann.org/udrp/approved-providers.htm

the complaint is being made, is then given a chance to defend the complaint and justify the registration of the domain name which is done by filing a Reply. After the Complaint and the Reply, parties in contested matters sometimes try to put in additional pleadings, like a response to the Reply and a further response to that pleading. Opinions differ among panelists as to whether these additional pleadings should be allowed and it is very much a matter of the discretion of the panelist in a case whether the additional filings will be allowed and considered.

A panelist or an arbitrator is appointed by the provider to decide the case, but to decide it on the papers filed by both sides and not by having a hearing with witnesses. It is this process of dealing with the case online and on the papers, but without complicated pleadings and without a hearing with witnesses and arguments, that is the great asset of the system. It results directly in keeping the costs down and in keeping the procedural steps to a minimum so that decisions can be given promptly and the whole case disposed of in a short period of time. On the other hand, arbitrators or panelists often say in their decisions that the limitations in this process make it difficult to reach firm conclusions on contested issues of fact. After the arbitrator or the panelist considers the evidence and the submissions put in by both sides, he or she gives a written decision with reasons. If the panel is a three-person panel, the decision is by a majority and dissenting opinions may be delivered. Decisions are made public by delivering them to the parties and posting them on the provider's website.

That is another difference from the usual arbitration, where the outcome of the proceedings is usually known only to the parties and the decision is confidential or private as between them. The issue that the arbitrator will be deciding under the UDRP scheme is in effect whether the registration of the domain name is legitimate or whether the registration has involved some transgression by the registrant such as a breach of the trademark rights that the complainant has over the same name. The decision is final and there is no appeal.[11] The only positive order that the tribunal may make under the UDRP procedure is to cancel the registration of the domain name or transfer it to the complainant. Other than that, the panel will dismiss the Complaint and the registration of the domain name stays where it is. The tribunal cannot award damages or costs or grant any other form of injunction.

Clearly the complaint will almost always ask for a transfer of the domain name away from the respondent to itself. There is not much point in asking for cancellation of the registration of the domain name when another party or even the respondent itself could just go away and register the same contentious name again. So, complainants usually ask for the domain name to be transferred to themselves even if they do not intend to use it. For example, Yahoo has been successful in getting the transfer away from cybersquatters of the deliberate misspelling of many variations of the spelling of the word 'Yahoo!' which have been registered as domain names. There is no value to Yahoo in using<*jahu.com*>. So, after it is transferred to Yahoo!, Yahoo! would just keep it and pay the registration fee to prevent the cybersquatter coming back or a new cybersquatter emerging and taking the same name, when the dispute resolution process would have to be gone through again.

Part III: Three examples of the type of case brought under the UDRP

Let us look at three actual disputes in ascending order of substance and difficulty to show you the sort of disputes that are arbitrated under this scheme. They are also useful in that they illustrate some of the categories into which domain name disputes regularly fall. I will give you some other categories later. I have taken three cases where I have been the arbitrator. I can speak openly about them because, as we have seen and unlike the situation in other arbitrations, the details of the case and the result are public and posted on the providers' website.

The first case is *Go Daddy Software, Inc v. Henry Tsung*[12]. This is what you might call a straightforward dispute, because Mr. Tsung had registered the domain name <*godadday.com*> which was virtually the same as the GO DADDY trademark of the well-known company Go Daddy Inc that operates in domain name registration, web hosting and related fields. It is of course nothing to the point that that was the industry in which it worked. It could just as well have been motor cars or hotel management. What Mr. Tsung had done was take the Go Daddy trademark, the name Go Daddy and turn it into a domain name, but by making one change in the spelling, i.e. spelling it 'godadday'. It was therefore a clear case of typosquatting, misspelling a trademark put into a domain name in the hope that innocent users of the internet who are looking for Go Daddy will type 'godadday' into their computers by mistake. That intention was reinforced by the fact that when you typed the erroneous name, you were directed to a website that was not the official Go Daddy site but a site pushing a collection of rival products by competitors in the same fields as Go Daddy. Not only was that so, but once they got hold of him, the website trapped the user into a bewildering array of all sorts of blandishments from online gambling to dating services and real estate agents. In some such cases, the links lead to pornography sites. It was clear therefore that all of this was being done by Mr. Tsung having deliberately created a domain name that was similar to the Go Daddy trademark, that the name was confusing because of the spelling mistake, that he had no right to use the company's name and that in doing this he had acted in bad faith and for improper motives.

11 However, either party may institute court proceedings over the dispute before or after the mandatory procedure has been followed: see paragraph 4 (k) of the UDRP.

12 References to WIPO Cases are references to cases handled by the World Intellectual Property Organization (WIPO). The decisions are to be found on its website at www.wipo.int; *Go Daddy Software, Inc v. Henry Tsung* is WIPO Case No. D2004-0980, January 4, 2005.

After considering some other cases, *The Toronto Dominion Bank v. Boris Karpachev*[13], where the respondent had registered <*tgwatergouse.com*> and <*dwaterhouse.com*> to confuse everyone with the trademark T D WATERHOUSE and also the decision in *Yahoo! Inc v. Eitan Zviely et al*[14], where the respondent had registered Jahu, Jaghoo and Yahjoo in domain names to create confusion with the name Yahoo!, I ordered the domain name to be transferred to the complainant Go Daddy Inc, which now has a domain name that it does not use, but at least no one else can use it to sow confusion.

The second case to illustrate these points is *Sony Kabushiki Kaisha, also trading as Sony Corporation v. Richard Mandanice*[15]. Here, the respondent had registered as a domain name <*sony-z5.com*> which of course was not a deceptive case of slightly changing the spelling in the hope that some internet users would make a mistake, as in the *Go Daddy Case*. The respondent Mr. Mandanice had spelt 'sony' correctly, but had added on 'z5' which was a special Sony mobile telephone that could be used in connection with the internet and email and which had been launched in 2000. What Mr. Mandanice was clearly trying to do was to attract internet users who were seeking, not the Sony site but a site promoting a particular Sony product. Hits on the site were then diverted not to the Sony site but to another website, *www.free-for-all.com* which supplies sexually explicit material. It is well known that someone is paid a fee each time a hit arrives at such a site, for someone sooner or later will buy a video or another product on the site. It is clear therefore that the domain name was confusingly similar to the SONY trademark, that Mr. Mandanice had no right to use their name and that the whole thing was got up to make money improperly and was therefore done in bad faith by trapping people into thinking that by typing<*sony-z5.com*> into their computers, they would be going to the Sony site whereas in fact they ended up in Aladdin's cave. This case had another feature in that Mr. Mandanice was a serial cybersquatter, having registered over 50 domain names including<*amazondirect.com*> and <*lycosdirect.com*>. He had also been involved in 7 UDRP cases, all of which he had lost and in all of which the domain name had been transferred to the complainant trademark owner.

The third case has another variation: *Sydney Airport Corporation Limited v. John Crilly*[16]. In that case, the respondent had registered the domain name <*sydneyairports.com*>, making it plural, so that it was like Go Daddy in the sense that it was a misspelling. However, the additional factor was that it looked as if an attempt might be made to show that the website to which the domain name diverted visitors was a sort of information site on Sydney airports or at least on airports in general, so as to give it an air of respectability. The complaint however, was not defended and in substance the references to be found were not about airports at all, but were at best about travel agents, cheap air tickets and what I called in the decision 'the usual blandishments ranging from dating services and cosmetic surgery to digital cameras and used cars'. So there was no public interest in what the respondent was doing; he was trying to confuse people with the domain name; it was virtually the same as the official Sydney Airport name and, after luring visitors into his domain, he was trying to sell things to them. So again the domain name was transferred to the complainant.

Another unsuccessful attempt to drum up a sort of public interest element and where at least there was no attempt to make money by diverting visitors to salacious websites is *Chung, Mong Koo and Hyundai Motor Company v. Individual*[17]. In that case, the respondent had registered the domain names <chungmongku.com> and <chungmongku.net>. Mr. Chung, the first complainant was the Chairman, CEO and part-owner of Hyundai, the second complainant. The respondent had built a website to which hits on the domain name were directed. The site carried some derogatory remarks about Mr. Chung and urged viewers not to buy Hyundai, which it described on the site as 'junk'. Again, the case was undefended, but even if it had been defended it would have been hard to show that such abuse could be described as legitimate criticism or the exercise of free speech and as serving some sort of public interest. It was none of those things because it was just abuse. So the case simply became a regular one, where the company and its chief had never consented to their names being used in this way and where some improper exercise was under way, either to damage Hyundai or to build up a visitors list to use later on for some other improper purpose. So Hyundai now have two other domain names in their collection.

All of the cases I have mentioned so far were undefended, but they illustrate the issues that arise in these cases time and time again. Some of the defended ones, however, pose more difficult questions. Moreover, some of them are not merely cases where a company or individual has registered a domain name that is attractive or where there may be confusion with a well-known trademark or name and in the hope that sooner or later someone will buy them out. There are, of course, such cases, but there are also cases where there are real disputes, say between business partners, or a franchisor and a franchisee where both sides say they are entitled to the domain name. Or say, for example, the dispute is between a distributor and its parent company, the distributor has registered the domain name and the parent says it had no right to do so, terminates the distributorship and claims the domain name.

One of these more substantial cases is a case I did in 2006 as Chairman of a panel of three panelists: *Deutsche Post AG v. NJDomains*[18]. There were many issues of fact and law in that

13 WIPO Case No. D2000-1571.
14 WIPO Case No. D2000-0273.
15 WIPO Case No. D2004-1046.
16 WIPO Case No. D2005-0989.

17 WIPO Case No. D2005-1068; the Respondent is 'Individual' as the Respondent had been able to conceal its true identity.
18 WIPO Case No. D2006-0001.

case, which was hotly defended, but in essence, the German Post Office was claiming that it had a trademark over the word 'Post' and that therefore the respondent could not legitimately register the domain name <*post.com*>. The German Post Office certainly had 14 registered trademarks, in Germany, the European Community the US and internationally. But with one exception they were all registered after the domain name was registered. Now that is not fatal, but it is obviously hard to prove that when a respondent registered a domain name, he did it from bad motives or to spite a trademark owner, when the trademark had not even been registered at the time he was registering the domain name. But it had one other trademark that was registered before the domain name. This was not merely of the word 'Post', but was predominantly a hunting horn or perhaps a post horn, which the German Post Office has taken as its logo together with the word 'Post'. So it was able to mount an argument that the domain name had been registered to copy and trade off its trademark 'Post' logo and that the respondent had then used it to sow confusion in the minds of people who saw it, that they were really seeing the domain name of the German Post Office when of course they were not.

We unanimously rejected that argument, because the substance of the trademark was not the word Post used in the domain name but the logo itself together with the word. If you asked an objective bystander if the single word 'Post' was the same as this predominantly pictorial representation of the horn and if he or she was confused between the two, the bystander would say 'No' because the two are just so different. Moreover, the German Post Office was really overstating its case. It was saying that it also had an unregistered trademark in the word 'Post' which really could not be so, for 'Post' is a generic word of universal application and does not bring to mind an association with the German Post Office to the exclusion of everyone else, for example Australia Post, which had already lost a similar domain name case[19]. One of the principles that has clearly emerged through the development of this area of the law is that generic words cannot be the basis for a common law trademark unless they attract another particular meaning that associates them with the party claiming the trademark, as with Apple computers, Orange telephone or Dell Computers. [20] This argument was developed further in the decision.[21]

The complainant could not establish this intimate association between itself and the word 'Post'. Moreover, the respondent, the party who had registered the domain name, had a very persuasive case in defence. It freely admitted that it had registered the domain name and a series of others, but asserted that it had done so to enable people to pay for the use of the domain name as an email address. In fact, this argument had the air of truthfulness about it, as over the years, the respondent had acquired 30,000 clients who were paying to use '@post' as their email addresses.

The respondent therefore succeeded in that case, as the complainant could not show that it had a trademark to support its claim and the respondent itself had a legitimate explanation as to why it had registered the domain name and how it had been using it since then, all of which was quite persuasive.

From reading these comments, you would have seen that a number of principles are starting to emerge. It is now time to try to clarify what a complainant must prove if he is to succeed in prising a domain name out of the hands of another party who has registered it.

Part IV: What has to be proved by a complainant in a UDRP proceeding?

There are essentially three things that the complainant must prove.[22] The first is that it has rights in a trademark or service mark over the name at issue and that the domain name is either the same as that trademark or at least similar to it and confusingly similar. In other words, when Mr. Mandanice registered the domain name <*sony-z5 .com*>, it was not identical to the trademark, because the trademark was 'SONY', not 'SONY-z5'. But it was similar to the trademark and confusingly so, because anyone who saw <*sony-z5.com* > would assume that this was an official domain name of Sony.

Note that I have said that the complainant must show rights in a trademark. It is not enough to show that the complainant

19 *Australian Postal Corporation v. Aly Ramzan*: No.123884 NAF (National Arbitration Forum), December 20, 2002.
20 *Postecom spa v. smartphone sa*: No.110805 (NAF July 22, 2002).
21 Thus: "The word 'POST' in the trademark is clearly a generic name, invoking principally the notion of postal services. The Panel is of course able to reach its own conclusion on this issue, having regard to its own understanding of what the word is taken in the general community to mean. But even if the question were left to a matter of evidence, the Panel finds that the material submitted by the Respondent, namely the dictionary definitions of 'Post' and the fact that the Respondent's Google search yielded 972 million web pages containing the word 'Post' without 'Deutsch or 'DHL' show conclusively as a matter of evidence that 'Post' is a generic word.
The Complainant is therefore relying on trademark rights in a generic word. It has often been said that a generic word will be given little if any protection under the UDRP, whether it is sought to use it as a common law trademark (*Postcom spa v. smartphone sa* (supra)) or even if it has actually been registered as a trademark (*Rollerblade Inc. v. CBNO*, WIPO Case No. D2000-0427).
Moreover, the Respondent has also used the same generic word and registered it as his domain name. Accordingly, he has a very wide protection under the UDRP by virtue if that fact alone. It would be quite contrary to the Policy and entirely inconsistent with practice under it to restrict the use of generic words in domain names, unless they have also taken on the stamp of a particular business name to the extent that they are identified with a particular trademark owner".

22 The proofs referred to here are those under the UDRP Policy. There are, of course, other domain name dispute resolution policies dealing with the less frequent number of cases arising under different domains. One of those policies is the Australian policy for disputes concerning the .au domain. The dispute resolution policy for this domain is to be found at http://www.auda.org.au/policies/auda-2002-22. It has some substantial differences from the UDRP. Thus, a complainant need only establish that the domain name is identical or confusingly similar to its business name and not necessarily to its trademark. The complainant need also establish only that the domain name has been registered **or** used in bad faith, not that the domain name was registered **and** used in bad faith. See the detailed provisions of the .au Policy and also the eligibility criteria for the registration of Australian domain names.

has simply applied for a trademark without it having been registered, for that gives no rights at all for the purposes of these proceedings. However, it is sufficient for the complainant to show a licence to use the trademark even if he does not own it, for a licence does give rights in a trademark.[23] The second element that the complainant must establish is the reverse side of the coin, i.e. that the respondent has no rights or legitimate interests in respect of the domain name. If, for instance, before the dispute arose it was actually using the name as its business name, that would be a legitimate interest. If it were the respondent's own personal name, that also would be a legitimate interest. If it was using the domain name as a genuine public interest site or an information site, that also would be legitimate. But at the end of the examination of the evidence, the complainant who, after all, is asking for a pretty draconian remedy, cancellation or transfer of someone else's domain name, has to show on the balance of probabilities that the respondent, the party who registered the domain name, has no rights in the name or legitimate interest in it.

The third thing that the complainant must show is that the respondent registered the domain name in bad faith and that it has been using it in bad faith. He must show both of these things. So you will see that there is quite a burden of proof put on complainants.[24] They have to show all three of those elements and, as the proceedings are civil proceedings, they must be proved on the balance of probabilities.

Most domain name cases are won by complainants, but that is because most of them are not defended. When they are defended and the respondent puts up a spirited defence based on fact, they often win and are allowed as a result of winning to keep their domain name.

Categories of cases

You will see from the cases I have mentioned that domain name cases cover a great variety of types. Let me see if I can categorise them, although, as each case depends on its own facts and as there are now thousands of decisions, they tend to be what a Judge once referred to as 'a wilderness of single instances.'

First, there is the blatant taking of someone else's name. Secondly, there are the deliberate misspellings of business names to trap the unwary, like the 'Yahoo!' and 'Go Daddy' cases. Thirdly, there are the cases where a trademarked name is used and a product or product line is added on, as in *<sony-z5.com>* or another one *<delltechnologies.com>*[25]. This latter case is noteworthy for the explanation given by the respondent registrant of the domain name as to why he had chosen 'delltechnologies' for his domain name. The explanation was that a dell was a 'secluded valley', leading the arbitrator who decided the case to observe that 'Mr. Mbowe (he was the respondent in that case) may frolic in dells to his heart's content, (but) under the Policy he cannot use Dell's trademark as part of his domain name'.

Fourthly, there are the cases, as in the *Deutsche Post Case* where the complainant is saying that even if it does not have a registered trademark over the name, it has an unregistered or common law trademark and the respondent is arguing that it also has as much right to use a common or generic name like 'post' or 'rollerblade' as anyone else and certainly as much right as the complainant.[26] If the respondent can make out a persuasive case to that effect, it can win such a case. Fifthly, there are the cases where the respondent actually admits that the domain name has been registered to reflect or reproduce the name of the complainant, but where it has been done to create a criticism site or public discussion site. Whether this will satisfy the tribunal depends on the facts and, as you have seen in the weak fact situations like the *Sydney Airports Case* and the *Hyundai Case,* in some cases this defence will not succeed because it is not persuasive on the facts. American litigants and their advisers are keen on this defence and there are cases decided by American arbitrators where greater credence is given to it than might be given in other jurisdictions.[27]

23 *Smart design LLC v. Carolyn Hughes* WIPO Case No. D2000-0993.
24 See the detail of what must be established in paragraph 4 of the UDRP.
25 *Dell Inc. v. Pateh Mbowe Case* No. D2004-0689.
26 *Rollerblade Inc. v. CBNO*, WIPO Case No. D2000-0427.
27 The following discussion is from WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition ("WIPO Overview 2.0") at http://www.wipo.int/amc/en/domains/search/overview2.0/index.html.
"**2.4 Can a criticism site generate rights and legitimate interests?**
See also the relevant section in the WIPO Legal Index.
This section only concerns sites that practice genuine, noncommercial criticism. There are many UDRP decisions where the respondent argues that the domain name is being used for a free speech purpose but the panel finds that it is primarily a pretext for commercial advantage.

See: *Wal-Mart Stores, Inc. v. Walsucks and Walmarket Puerto Rico*, WIPO Case No.D2000-0477, <walmartcanadasucks.com> *inter alia*, Transfer
Rolex Watch U.S.A., Inc. v. Spider Webs, Ltd., WIPO Case No.D2001-0398, <relojesrolex.com> *inter alia*), Transfer
In the event that a domain name identical or confusingly similar to a trademark is being used for a genuine noncommercial free speech website, there are two main views. In cases involving only US parties or the selection of a US mutual jurisdiction, panelists tend to adopt the reasoning in View 2 (though not universally).

See: *Howard Jarvis Taxpayers Association v. Paul McCauley*, WIPO Case No.D2004-0014, <hjta.com> Denial
Sermo, Inc. v. CatalystMD, LLC, WIPO Case No.D2008-0647, <sermosucks.com> Denial.
View 1: The right to criticize does not necessarily extend to registering and using a domain name that is identical or confusingly similar to the complainant's trademark. That is especially the case if the respondent is using the trademark alone as the domain name (i.e, <trademark.tld>) as that may be understood by Internet users as impersonating the trademark owner. Where the domain name comprises the protected trademark plus an additional, typically derogatory term (*e.g.*, <trademarksucks.tld>), some panels have applied View 2 below.
Relevant decisions:
Skattedirektoratet v. Eivind Nag, WIPO Case No.D2000-1314, <skatteetaten.com>, Transfer
Myer Stores Limited v. Mr. David John Singh, WIPO Case No.D2001-0763, <myeronline.com>, Transfer
Triodos Bank NV v. Ashley Dobbs, WIPO Case No.D2002-0776, <triodos-bank.com>, Transfer
The Royal Bank of Scotland Group plc, National Westminster Bank plc A/K/A NatWest Bank v. Personal and Pedro Lopez, WIPO Case No.D2003-0166, <natwestbanksucks.com>, Transfer
Kirkland & Ellis LLP v. DefaultData.com, American Distribution Systems, Inc., WIPO Case No.D2004-0136, <kirklandandellis.com>, Transfer
1066 Housing Association Ltd. v. Mr. D. Morgan, WIPO Case No.D2007-1461, <1066ha.com>, Transfer
Hoteles Turísticos Unidos S.A., HOTUSA v. Jomar Technologies, WIPO Case No.D2008-0136, <eurostarsblue.com>, Transfer
Aspis Liv Försäkrings AB v. Neon Network, LLC, WIPO Case No.D2008-0387, <aspis.com>, Transfer with Dissenting Opinion
The First Baptist Church of Glenarden v. Melvin Jones, WIPO Case No.D2009-0022, <fbcglenarden.com>, Transfer
Anastasia International Inc. v. Domains by Proxy Inc. /rumen kadiev, WIPO Case No.D2009-1416, <anastasia-international.info>, Transfer
View 2: Irrespective of whether the domain name as such connotes criticism, the respondent has a legitimate interest in using the trademark as part of the domain name of a criticism site if such use is fair and noncommercial.
Relevant decisions:
Bridgestone Firestone, Inc., Bridgestone/Firestone Research, Inc., and Bridgestone Corporation v. Jack Myers, WIPO Case No.D2000-0190, <bridgestone-firestone.net>, Denial
TMP Worldwide Inc. v. Jennifer L. Potter, WIPO Case No.D2000-0536, <tmpworldwide.net> *inter alia*, Denial
Howard Jarvis Taxpayers Association v. Paul McCauley, WIPO Case No.D2004-0014, <hjta.com>, Denial
Sermo, Inc. v. CatalystMD, LLC, WIPO Case No.D2008-0647, <sermosucks.com>, Denial
Sutherland Institute v. Continuative LLC, WIPO Case No.D2009-0693, <sutherlandinstitute.com>, Denial
Additional considerations: Some panels have opted to assess questions of whether a respondent may have a legitimate interest in using a trademark as part of the domain name of a criticism site by reference to additional considerations, including whether: (i) the domain name has been registered and is used genuinely for the purpose of criticizing the mark owner; (ii) the registrant believes the criticism to be well-founded and lacks intent for commercial gain; (iii) it is immediately apparent to Internet users visiting the website at the domain name that it is not operated by the owner of the mark; (iv) the respondent has refrained from registering all or most of the obvious domain names reasonably suitable for the owner of the mark; (v) where appropriate, a prominent and appropriate link is provided to the relevant trademark owner's website; and (vi) where there is a likelihood that email intended for the complainant will use the domain name in issue, senders are alerted in an appropriate way that their emails have been misaddressed.
Relevant Decisions:
Covance, Inc. and Covance Laboratories Ltd. v. The Covance Campaign, WIPO Case No.D2004-0206, <covancecampaign.com>, Denial
Fundación Calvin Ayre Foundation v. Erik Deutsch, WIPO Case No.D2007-1947, <calvinayrefoundation.org>, Transfer
Grupo Costamex, SA de C.V. v. Stephen Smith and Oneandone Private Registration / 1&1 Internet Inc., WIPO Case No.D2009-0062, <royalholiday.info>, Transfer
Midland Heart Limited v. Uton Black, WIPO Case No.D2009-0076, <midlandheart.com>, Denial
Coast Hotels Ltd. v. Bill Lewis and UNITE HERE, WIPO Case No.D2009-1295, <coasthotels-badforbc.info>, Denial."

There are other cases where the facts will decide who came first, the domain name registrant or the trademark registrant and the consequence of the domain name not having been registered until after the trademark. Generally it is very hard to prove that someone registered a domain name to cause trouble for the trademark owner or in bad faith when the trademark was not registered until after the domain name.

There are also cases on whether a complainant, who has not been able to establish a registered trademark, can nevertheless establish a common law or unregistered trademark. It is sufficient if the complainant can establish an unregistered trademark. As a practical matter, it should be emphasised that whether an unregistered or common law trademark is established is a matter of fact to be determined on evidence submitted with the Complaint. It is not sufficient just to assert the existence of a common law trademark without evidence; sufficient evidence must be adduced to show that the particular name relied on was in fact associated with specific goods and services and that the name was recognised as their source. This is sometimes done by evidence of company records, advertising and media reports showing that the public identified the name as the source of the goods and services. It is also important that the evidence should relate to all relevant times, so that if it is said that the common law trademark existed at the time the domain name was registered by the respondent, so that the domain name was registered in bad faith, the evidence must relate to facts that occurred at least as far back as the time of registration of the domain name. Under that heading there is an interesting group of cases on whether an entertainer or sportsperson or politician can establish an unregistered or common law trademark in his or her own name and hence stop the irritating practice of admirers or others registering domain names in the names of their heroes or victims.

A case brought by Senator Hillary Clinton seems to confirm the notion that elected representatives can establish a trademark in their own name, not because they are famous but because in addition to that, they earn income from trade or commerce under the name, as Senator Clinton did as the author of several books that had big sales and produced income.[28] There are also very interesting cases establishing these rights brought by Julia Roberts, Jeanette Winterson, Nick Cannon, Nicole Kidman[29], Cedric Kyles[30] and other entertainers; see also *Robert Downey Jr. v. Mercedita Kyamko* WIPO Case No. D2004-0895, *Morgan Freeman v. Mighty LLC* WIPO Case No. D2005-0263 and *Madonna Ciccone, p/k/a Madonna v. Dan Parisi and "Madonna.com"* WIPO Case No. D2000-0847 to the same effect.

Then there is the countervailing argument put by some people that they are entitled to register domain names in their heroes' names because they are entitled to establish fan sites even if the celebrities do have trademarks in their own names. There are cases on this issue that are listed here for you to follow up with further reading.[31]

Then there are cases on whether a domain name registrant can establish a legitimate interest in the domain name because he was formerly an agent or a distributor for the trademark owner.[32] And there is no end of cases on what particular conduct constitutes bad faith, all of which depend on their own facts. Even if all other elements are proven,

28 *Hillary Rodham Clinton v. Michelle Dinoia a/k/a SZK.com*, No.414641 (NAF March 18, 2005).
29 Discussed in *Chung, Mong Koo and Hyundai Motor Company v. Individual* (*supra*).
30 30 *Cedric Kyles v. Domains by Proxy, Inc. / Asia Ventures, Inc*. WIPO Case No. D2006-0046.
31 See the WIPO Overview (*supra*).
32 See *Oki Data Americas, Inc. v. ASD, Inc*. WIPO Case No. D2001-0903 and the other cases collected on the WIPO Overview (*supra*).

the complainant still must show that the respondent, who registered the domain name, did it and then used it in bad faith. There has been some argument about this in internet circles in recent times, but it is fair to say that the prevailing view is that a complainant must prove both that the domain name was registered in bad faith and that it has also been used in bad faith. Often the bad faith argument revolves around the fact that the respondent was deceptive or misleading or that he diverted hits on his website to a competitor of the complainant or to a pornography site, all of which have been held to be bad faith. There is even an issue, immortalised in an Australian case with the delightful name, *Telstra Corp Ltd v. Nuclear Marshmallows,* as to whether registering a domain name, and lying low and doing nothing, can show bad faith by itself, which in an appropriate case it can.

There are many other issues which are analysed on the very useful WIPO Overview (*supra*) and which give an indication of the prevailing views of panelists who decide these cases. Although their decisions are not binding or conclusive they are persuasive and are contributing to a body of jurisprudence on these issues. The Overview is based on a review of 7000 cases and is therefore a practical guide to the likely decision on a particular issue. It is a very valuable resource for parties and lawyers getting involved in this field and it promotes consistency in decisions. This result is enhanced by the fact that the Overview itself is cited and quoted in decisions and is itself becoming something of an authority. I have noticed myself citing it on several occasions and it certainly adds lustre to the decisions.

Part V: Who conducts the UDRP proceedings?

Of the organisations approved by ICANN that provide dispute resolution services under the UDRP, the World Intellectual Property Organisation (WIPO), a United Nations agency in Geneva and the National Arbitration Forum (NAF) in Minneapolis, are the most active providers in the field. WIPO and the NAF have been responsible for stimulating debate on this area of the law of intellectual property and, through the decisions issued by panelists they have appointed, have developed its generally accepted principles. Other approved providers of dispute resolution services under the UDRP and who do valuable work in this field, are:

1. The Asian Domain Name Dispute Resolution Centre [ADNDRC]. It has four offices, which are in Beijing, Hong Kong, Seoul and Kuala Lumpur. ADNDRC is a joint undertaking between the China International Economic and Trade Arbitration Commission (CIETAC) , the Hong Kong International Arbitration Centre (HKIAC), the Korean Internet Address Dispute Resolution Committee (KIDRC) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA)
2. The Czech Arbitration Court.

   The complainant determines which of the four organisation it will go to, to initiate the proceedings. At least so far as WIPO is concerned, 70-80% of cases are disputes about .com domain names and the remaining 20 % account for all other generic Top Level Domains. As well as being the provider of dispute resolution services for the generic Top Level Domains under the UDRP, WIPO also provides those services for 45 of the county code Top Level Domains. The most frequently used of those codes has been Tuvalu.

In almost half of WIPO cases, the complaints have been brought by parties who are domiciled in the United States. Only a slightly lesser number of respondents are also domiciled in the United States.

The outcome

In between 60 and 70 % of cases, the respondent does not defend the complaint. Since 1999, complainants have won 83 % of cases, leading to the transfer of the domain name from the respondent to the complainant and in only 1 % of cases has the registration of the domain name been cancelled. In 16 % of cases, the respondent has won and been allowed to keep the domain.

As has been noted above, a complainant using the UDRP process is only able to obtain transfer of the domain name to itself or cancellation of the domain name, but that may be all that it wants or needs. It may be that it does not want damages or it may be that the prospective defendant is a man of straw and that it is pointless pursuing it for damages. But if the complainant can get the domain name transferred to itself within a couple of months through the UDRP procedure and for US$1500 (for a single panelist to decide the case) with a guarantee that there is no appeal and that the order is self-executing, this makes the UDRP process overwhelmingly attractive. The success rate of 83% that I have just noted makes the UDRP process even more attractive. So there is no wonder that it remains after 10 years the preferred method of resolving domain name disputes.

Selection of panellists–how the providers of dispute resolution services go about their task

All providers of dispute resolution services maintain panels of arbitrators from which they choose the particular panelist who will conduct the arbitration.

The selection of the panelists who will conduct the arbitration is an important task and one that gives rise to some controversy. One question that arises is whether a party should be content with a one person panel, or whether there is some intrinsic value in asking for a three person panel, which both the complainant and respondent may do. Some party advisers take the view that if the issue involved in the case is one of controversy, it might be better to have a three person tribunal to generate robust debate.

The other question that arises from time to time is whether

the provider should select the panelist from a rotating roster, but the prevailing practice still remains that appointments are made in the discretion of the provider. There is, however, an element of choice in the case of three person panels. In those case, each party may nominate a panelist, or at least submit three names from which the provider will select one; when it comes to the case of selecting the presiding panelist or Chair, (although the Rules do not specifically say that the third panelist will be the presiding panelist or the Chair, but only that he or she is the third panelist) the provider must consider the views of the parties expressed by responding to a list of 5 potential appointees as third panelist.

Most panels appointed are one member or single panelists, as the complainant asks only for one panelist and the respondent either does not defend the Complaint or does not ask for a three person panel, but in about 8 % of cases there are three member panels.[33]

The providers of dispute resolution services naturally strive for independence and impartiality and usually the panelist is not allowed to see the papers until signing an undertaking or otherwise indicating that there is no conflict of interest and that the panelist will act impartially. So the provider will consider all sorts of factors before offering the case to a particular panelist. The providers naturally have regard to the requirements of experience and also to factors such as where the panelist resides, so that, for example, they avoid having a panel member who resides in one of two countries involved in a particular case. Factors such as whether the panelist has taken a declared position on the disputed issue will also be considered in deciding whether to appoint the panelist. After the panel is appointed, the provider managers the case through the case managers employed by the provider.

Part VI: Some recurring issues

There are also positions taken by parties in UDRP cases and they deserve consideration for a more rounded appreciation of current issues arising under the UDRP.

One such issue is where the respondent says of the complainant, in effect, that it did not know the complainant had a trademark when it, the respondent, registered the domain name. If it transpires that it was comparatively easy for the respondent to find out, but it did not, or that there are facts showing that it must have known of the trademark if, for instance, it was a really famous trademark, this may well cause real difficulties for the respondent. On the other hand, the view has also been expressed that it is too high a test to impose on a respondent to require it to investigate at length whether the complainant had a trademark in a different country, especially if the trademark office of that country was not online at the time. The fact that the respondent claims it did not know of the complainant's trademark is not a defence by itself, but it may well go to the respondent's *bona fides* and the overall judgment that the panel makes of the respondent's conduct.

When it is said against a respondent that it registered a domain name and retained it without using it, the respondent often replies that the website was 'under construction' and it would have been up and running in time, showing his legitimate use of the domain name, if only the complaint had been made a short time later. These cases, as all cases should be, are resolved on the facts and the panelist will go thoroughly into the question of whether the facts and the respondent's conduct show that it was legitimate or whether it was just engaging in deception and pretending to be preparing for a legitimate use of the domain name which it never intended to pursue.

As a panelist I have been faced with this problem from time to time and I had to consider one such case a few years ago. I resolved it, as other panelists do, by making a judgment as to whether the explanation that was given was probably true or probably not and I decided it was probably not.[34]

The fact that there were negotiations for the sale of the domain name may be, depending on the facts, an indication that the registration was not legitimate but was done only with an eye on its resale value. Here the difficult question is often: who initiated the negotiations? That again is a matter for the panelist to decide on the facts. If the respondent who registered the domain name offered it for sale to the complainant, the panelist may think the registrant was acting in bad faith. But if it was the complainant, the trademark owner, who made the initial offer and the respondent rebuffed the offer or even entered into negotiations, the panelist may conclude that the respondent's conduct was above reproach or at least not worthy of censure.

Part VII: What does ten years of the UDRP show?

1. Online resolution does work. Obviously, online dispute resolution is not appropriate in all cases, especially where the case can only be resolved by seeing the witnesses and making judgments about them. But with that exception, online resolution does work. In any case, there is power under the UDRP Rules to ask the parties for more information and I have often used this power. So it is possible, even in a difficult case, for the panelist to have access to all or virtually all of the evidence that a court would have before it. But of course a panelist does not have the advantage of hearing and seeing cross-examination of witnesses or discovery of documents.
2. The process has its own discipline, for if the public and practitioners see cases being lost because they are not prepared or presented properly, they will make sure that they improve next time and present a better case. This is

33 There are Rules for the Policy which, *inter alia* deal with the process of determining whether the case is decided by a single panelist or a three-member panel; see *www.iama.org/udrp.*

34 *Seagate Technology LLC v. Wang Zhanfeng* , No. 635276 (NAF, March 10, 2006).

helped by judgments being posted on the website of all of the providers, so it is possible to see why one case was successful and conversely why another case was lost.

3. The UDRP process is fast, taking only a couple of months and it is cheap compared with litigation and, although the complainant will not recover damages, it will get what is more useful, the domain name. The UDRP process is free from the complications that unfortunately still bedevil the court process. The case is often decided from a remote and in a necessarily detached way free from the agitation that is so often associated with litigation.

Accordingly, as the UDRP process works well in its own field, there is a very strong case for applying this online method of dispute resolution of domain name disputes to other types of dispute.

Part VIII: Administration of the domain name process in the Asia-Pacific region

In this article, we have been looking at the arbitration of domain name disputes under the UDRP and of course the UDRP applies only to the generic top level domains approved by ICANN. The question therefore immediately arises as to how disputes about country code top level domains are resolved. The answer is that they are resolved by whatever mechanism is determined by the appropriate authority administering the country code top level domain in question and in some cases, this is left to litigation without the advantages possessed by the UDRP, speed and economy among others. But, fortunately, the UDRP is applied, with or without amendments, to disputes arising under some of the country codes as well. In other words, the authorities in charge of a particular code decide that, instead of writing their own specific dispute resolution policy and in the interests of as much uniformity and consistency as possible, they will simply adopt the UDRP or adopt it with some amendments. It might therefore be useful to conclude by looking at a couple of country codes to see what has been done to apply a quick and economical dispute resolution process by using the UDRP as the starting point.

Australia

As ICANN tells us 'registration of domain names within two-letter country-code top-level domains (ccTLDs) such as .cn, .au, .ca, .jp, .uk are administered by country-code managers'.

For Australia, the country code top level domain is .au and the company that administers it is au Domain Administration (auDA). WIPO is one of four approved providers of dispute resolution services for .au domain names, the others being Australian organisations. The four providers in alphabetical order are:

- LEADR–Association of Dispute Resolvers
- The Chartered Institute of Arbitrators–Australian Branch (CIArb)
- The Institute of Arbitrators and Mediators Australia (IAMA)
- World Intellectual Property Organisation.

But here again the number of cases handled by WIPO is notable and significant because what it really means is that this is the number of complainants who choose WIPO and initiate their proceedings there.

It should also be noted that the .au Dispute Resolution Policy, although substantially the same as the general ICANN Uniform Domain Name Dispute Resolution Policy contains some differences. Thus, although under the UDRP, a complainant must prove that the contentious domain name is identical or confusingly similar to the complainant's trade or service mark, under the Australian policy the complainant may rely on a trade or service mark or just a name, meaning a company or business name or a personal name that may not be a trademark. This enables some complainants to use the Australian policy although they do not hold a trademark, registered or unregistered.

Secondly, although under the ICANN Policy, a complainant must prove that the domain name was both registered in bad faith *and* used in bad faith, under the Australian policy the complainant need only prove that that the domain name was registered *or* used in bad faith.

Elsewhere in the region it is a matter of studying the particular country, as they may differ both in the eligibility to register a domain name and the dispute resolution policy that applies. Several examples are as follows.

Canada

The Canadian policy, known as the CIRA Domain Name Dispute Resolution Policy applies to .ca domain names and is a policy based on its own provisions rather than amendments to the UDRP, although there are similarities. The complainant's standing to bring a complaint rests on its rights in a **'mark'**, as defined. The complainant is then required to prove that the disputed domain name is confusingly similar to the mark, that the registrant has no legitimate interest, as defined, in the domain name and that the domain name was *registered* in bad faith, again as defined.

China

The China Internet Network Information Center administers the .cn domain name space for China and disputes are governed by the CNNIC Domain Name Dispute Resolution Policy. This Policy also has echoes of the UDRP. In particular, the complainant's standing requires a "name or mark" and the requirement for proof of bad faith is that the domain name was registered or used in bad faith. There is also a statute

of limitations provision in the local law to the effect that a claim for a domain name must be made within 2 years from registration, thus preventing stale claims from being brought.

Malaysia

In Malaysia, the country code is .my and the Kuala Lumpur Regional Arbitration Centre has been appointed the .my domain name dispute resolution service provider by the Malaysian Network Information Centre (MYNIC), which administers the .my domain. The Policy applied is called MYNIC's (.my) Domain Name Dispute Resolution Policy. It is similar to the UDRP but has some differences. Notable differences are that the complainant has to prove both of two elements to be successful, the first being that the disputed domain name is identical or confusingly similar to a trade or service mark and the second being that the respondent domain name registrant has registered *and/or* used the disputed domain name in bad faith. However, it is possible for the registrant to rebut the allegation of bad faith by showing a right and legitimate interest in the domain name.

Singapore

The Singapore Domain Name Dispute Resolution Service ("SDRP Service") manages the dispute resolution mechanism under the SDRP, and is run by a Secretariat ("SDRP Secretariat") jointly operated by the Singapore Mediation Centre and the Singapore International Arbitration Centre. The policy applied is the Singapore Domain Name Dispute Resolution Policy which is substantially the same as the UDRP. However, it also has some differences. Thus, the complaint may be brought by someone relying on a "name" and not solely on a trademark or service mark under the UDRP and the requirement to prove bad faith is that the domain name has been "registered *or* is being used in bad faith." There is also, under the Singapore Policy an option for mediation of the dispute, provided both parties agree to mediation.

United States of America

As is well known, the most popular domain names in the USA are the traditional generic top level domains, of which .com is leader. However, there is a US country code which is .us and it has its own dispute resolution policy which, again, is similar to the UDRP. On the specific issues mentioned above, where country policies differ from the UDRP, the US policy, named us TLD Dispute Resolution Policy, requires proof that the disputed domain name is identical to a trademark or service mark, as does the UDRP, but requires proof only that the domain name has been registered or is being used in bad faith, in contrast to the UDRP, which requires proof of both.

Conclusion

The UDRP seems to me to have been a success, although there is room for improvement, especially in some procedural matters and certainly sufficient of a success that we should study the Policy and the Rules and see if they can be used as precedents for the online resolution of other types of disputes. I am certain that they can be. VBR

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