VICTORIAN BAR LEVAS

No.152 Spring 2012

ISSN 0159 3285

The Mabo Legacy



THE START OF A REWARDING JOURNEY FOR VICTORIAN BAR MEMBERS.

Behind the wheel of a BMW or MINI, what was once a typical commute can be transformed into a satisfying, rewarding journey. With renowned dynamic handling and refined luxurious interiors, it's little wonder that both BMW and MINI epitomise the ultimate in driving pleasure.

The BMW and MINI Corporate Programmes are not simply about making it easier to own some of the world's safest, most advanced driving machines; they are about enhancing the entire experience of ownership. With a range of special member benefits, they're our way of ensuring that our corporate customers are given the best BMW and MINI experience possible.

BMW Melbourne, in conjunction with BMW Group Australia, is pleased to offer the benefits of the BMW and MINI Corporate Programme to all members of The Victorian Bar, when you purchase a new BMW or MINI. Benefits include:

BMW CORPORATE PROGRAMME.

Complimentary scheduled servicing for 4 years / 60,000km

Reduced dealer delivery charges

Complimentary use of a BMW during scheduled servicing*

Door-to-door pick-up during scheduled servicing

Reduced rate on a BMW Driver Training course

MINI CORPORATE PROGRAMME.

Complimentary scheduled servicing for 4 years / 60,000km

Reduced dealer delivery charges

Complimentary valet service

Corporate finance rates to approved customers

A dedicated Corporate Sales Manager at your local MINI Garage

Your spouse is also entitled to enjoy all the benefits of the BMW and MINI Corporate Programme when they purchase a new BMW or MINI.

For more information, please email VICBAR@bmwmelbourne.com.au, or contact Simon Reid or Chris Mayes on (03) 9268 2222



BMW AND MINI CORPORATE PROGRAMME.

BMW Melbourne

118 City Road, Southbank. Tel (03) 9268 2222. www.bmwmelbourne.com.au LMCT 8155

MINI Garage Kings Way

209 Kings Way, South Melbourne. Tel (03) 9268 2222. www.melbourne.minigarage.com.au LMCT 8155

BAR NEVS

No. 152 Spring 2012







Editors

Paul Hayes and Sharon Moore

VBN Editorial Committee

Paul Hayes and Sharon Moore (Editors), Georgina Costello, Anthony Strahan (Deputy Editors), Justin Tomlinson, Louise Martin, Maree Norton and Benjamin Jellis

Contributor

The Honourable Justice Susan Crennan AC, The Hon Chief Justice Marilyn Warren AC, The Hon Justice Hollingworth, The Hon John Coldrey QC, The Hon Hartley Hansen QC, The Hon Peter Heerey AM QC, The Hon Robert Clark MP, Attorney-General for Victoria, Julian Burnside AO QC, Jack Rush RFD QC, Melanie Sloss SC, Tony Neal SC, Richard McGarvie SC, Mark Moshinsky SC, Georgina Schoff SC, David Bailey, William Lye, Paul Hayes, Steven Anger, Susan Brennan, Matthew Fisher, Jane Treleaven, Sharon Moore, Georgina Costello, Anthony Strahan, Justin Tomlinson, Louise Martin, Maree Norton, Benjamin Jellis, Robin Ann Robinson, Ashley Halphen, Jane King, Nerida Wallace, Sa'ad Hossain, Sally Bodman

Publisher

The Victorian Bar Inc.

Owen Dixon Chambers, 205 William Street, Melbourne 3000. Registration No. A 0034304 S.

This publication of *Victorian Bar News* may be cited as (2012) 152 Vic B.N. Opinions expressed are not necessarily those of the Bar Council or the Bar or of any person other than the author.

Advertising

All enquiries including requests for advertising rates to be sent to:

Ms Sally Bodman The Victorian Bar Inc. 205 William Street, Melbourne 3000 Tel: (03) 9225 7909

Email: sally.bodman@vicbar.com.au

Design and Production

Avalanche Creative Solutions Pty Ltd; www.avalanchecreative.com.au

Contributors

All contributions to *Victorian Bar News* should be in word format and are to be emailed to vbneditors@vicbar.com.au. VBN Boilerplate submissions should not exceed 400 words. All articles submitted for consideration for publication in *Victorian Bar Review* should be in word format and conform with the style guide prescribed by the Australian Guide for Legal Citation (http://mulr.law.unimelb.edu.au/files/aglcdl.pdf).

Cover Photo

Eddie Mabo and Dr Bryan Keon-Cohen AM QC outside the Supreme Court of Queensland. Aboriginal and Torres Strait Islander readers are advised that this publication may contain images and names of people who have died.

Victorian Bar News acknowledges the traditional owners of the Kulin Nation and pays its respects to their elders part and present.

Editorial

- The Editors Mabo, Vicbar and the Vibe
- 3 Chairman's Cupboard Independence, Service and the Stuff of Legend

News and Views

- 5 Mabo The Case that Made History
- 9 The Power of Sport
- 12 Two Years On
- 14 Launching the Law Library of Victoria
- 16 Women Lawyers' Achievement Awards
- 18 Victorian Bar Pro Bono Awards 2012
- 20 New Tricks for Old Dogs (and Old Tricks for New Ones)
- 21 Hanks, Gordon and Hill: Constitutional Law in Australia
- 23 International Commission of Jurists
- **24** World Bar Conference London 2012
- 27 New Magistrates Court Mediation Initiative
- 29 Ethics Committee Bulletin
- 31 Me and Myanmar
- 33 A Resolution to Mediate
- 35 Lifting the Bar to an Asian Practice
- 36 Doing Business and Resolving Disputes with China
- 37 Some History and a Little Lore
- 43 On the Retirement of the Hon Justice Hansen

Around Town

- 45 The 2012 Bar Dinner
- **51** Victorian Bar Dinner Speech
- 54 The Hon Justice Ashley Farewell Dinner
- 57 An Atlas Hugged: Sierra Leone
- 59 Criminal Bar Association Emmanuel Saffa Abdulai Dinner
- 61 The Third Bar Legends' Dinner
- 65 A Feral Win'd

Back of the Lift*

- 66 Quarterly Counsel
- 67 Silence All Stand
- **70** Gonged
- 71 Adjourned Sine Die
- 79 Obituaries
- **82** March 2012 Victorian Bar Readers' Course

Boilerplate

- 83 When on Circuit, who Leads out of Court?
- **84** Gallimaufry
- 86 Verbatim
- 88 Restaurant Review
- 89 The Wine Bar
- 90 Dear Themis
- 91 A Bit About Words Curry
- 93 Book Review: Call me Emilios
- 94 Book Review: Mabo in the Courts
- 96 VBN 151 Essay Competition Winning Entry
- 97 VBN 152 Caption Competition



^{*} Material in this section is current as at 23 September 2012

Mabo, Vicbar & The Vibe

Editorial



♦ his year marks the 20th anniversary of the High Court's judgment in Mabo. For most Australians the first they heard of Mabo and its implications was from the media maelstrom which surrounded the judgment at the time it was handed down. However it soon became so well known it even found its way into popular culture. Who can forget Dennis Denuto, the bumbling solicitor character in the 1997 film The Castle, submitting to the Court "It's the Constitution, it's Mabo, it's justice, it's law, it's the vibe..."? Mabo became a household name. Thankfully for Eddie Mabo and the other plaintiffs they had no Denuto-like legal representatives. Instead, their case was framed and fought for more than 10 long years by two members of the Victorian Bar - the late Ron Castan QC and Dr Bryan Keon-Cohen AM QC (as he is now). Ron and Bryan's combined intellect, strategic planning and tireless and sacrificial dedication to the case were at the heart of the success of Mabo. Earlier this year, Bryan graduated with a PhD from Monash University with his thesis being his book, "Mabo in the Courts: from Islander Tradition to Native Title: A Memoir". Fittingly on the twentieth anniversary of the landmark Mabo decision, this edition of Victorian Bar News contains an excellent feature article written by Louise Martin which takes a behind the scenes look at the case that made Australian history together with the people who brought about this commendable and inspiring outcome.

In keeping with this edition's theme, we also feature a review of Keon-Cohen's book, by Robin Ann Robinson.

The history and folklore of the Victorian Bar has been passed down from generation to generation of Barristers, usually from Mentor to Reader, or in the candid observations of our more senior members to guests during speeches at List or Bar dinners. The Legends Dinner held this year at the Essoign Club, was one such occasion and Victorian Bar News is delighted to have been able to capture the collegial bonhomie of the evening which celebrates the contributions of our legends to our Bar. Also, in keeping with our cultural heritage, former Victorian Bar News Editor, The Hon Peter Heerey AM QC, has chronicled some of the Victorian Bar's more formal traditions in an excellent piece which importantly records some of the more formal quirks of our lineage.

For many of us it is easy to become consumed by the demands of our work and so it is refreshing as always to include articles in this edition highlighting how some of our members occupy their time away from chambers - from Simone Bailey and her Olympic boxing tilt to Steven Anger and his travels to Myanmar to Ashley Halphen and his life changing experience in Sierra Leone.

The overall goal of Victorian Bar News is to provide a combination of current news of interest to Barristers, information which addresses matters of record, light-hearted material and scholarly content. The latter category will, for the most part, be contained in the Victorian Bar Review section of each edition. Our desire is to primarily source this material from our own members, many of whom publish excellent articles in other law journals. The Victorian Bar Review is a timely opportunity for the Victorian Bar to showcase the research analytical skills of our members and accordingly we invite and encourage our readers to submit to us for consideration for publication in Victorian Bar Review, any academically orientated legal articles which concern matters of law or practice.

In the meantime, we hope you will enjoy reading this edition.

THE EDITORS WED



Independence, Service & the Stuff of Legend

Chairman's Cupboard



Recently I was moved to write a letter to the editor of one of our local newspapers, taking issue with a reported comment, apparently made by a public health advocate, to the effect that advocating for, or representing, the tobacco industry was "indefensible". That view highlights a common misunderstanding of both our duty as barristers and the importance of our role within the legal system.

As barristers, it is our adherence to the "cab rank rule" that underpins the fundamental right of all to equal access to justice and serves as a protection for every member of the community. Yet, or so it seems, the public at large continue not to understand that barristers are not free to decline a brief because of any personal view they may have of the client or the client's cause or associations.

In his gem of a book on The Rule of Law, published in 2010, the late Lord Bingham observed¹.

"Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be."

This independence is a quintessential characteristic of all advocates practising at the Independent Bars. Not infrequently, representing unpopular clients and causes exposes counsel to public criticism but we remain unmoved and are not deterred from continuing to represent them.

For some of our colleagues, striving to maintain that independence can be even more challenging and exact a very high personal cost. Those of us who attended the World Bar Conference in London in late June were visibly moved by colleagues from other independent Bars who, in a session entitled "Advocacy Against the Odds", each described the very real personal challenges they face daily in their practices as advocates – in places such as South Africa, Zimbabwe, Pakistan and Belfast. Their steely resolve to uphold the rule of law, and represent those who cannot represent themselves, served as a stark reminder of the importance of our role within the legal system and in maintaining a just society.

Recent retirements and farewells have also served to highlight the enormous contribution made by members of our Bar on the Bench. During this calendar year we have seen the retirement of four of our most experienced and distinguished Judges - in the Supreme Court, Justices David Ashley, Hartley Hansen and Philip Mandie, each of whom has served with great distinction over many years in both the Court of Appeal and the Trial Division; and in the Federal sphere, Justice Geoffrey Giudice AO who retired from the Federal Court and the Presidency of Fair Work Australia after many years of distinguished service. Further, the ceremonial sittings held recently-to mark the occasion of the last sitting in Melbourne of Justice William Gummow AC and to acknowledge his Honour's significant contribution to the High Court and its jurisprudence; the retirement of Associate Justice Kevin Mahony from the Supreme Court after more than 29 years of distinguished service as the Senior Master; and to farewell Judge Tim Wood RFD after more than 141/2 years of distinguished service on the County Courtwere very well-attended by members of the profession. Many colleagues have mentioned to me how much they appreciate the opportunity to attend these ceremonial sittings and pay their respects.

In a similar vein, I am also very aware of just how delighted members of our Bar were to have the opportunity to acknowledge and honour each of the "Legends" who were inducted at the 3rd Legends Dinner held in the Essoign Club on 13 September 2012.² There are not many Bar events that are sold-out within 2 days of being announced, but this year's event, courtesy of Peter Jopling QC and his Committee – Paul Anastassiou SC, James Mighell SC and Wendy Harris SC—with Jonathan Beach QC and Phillip Priest QC from the Bar Council assisting, was a raging success!

The institution and designation as a "Legend" honours and celebrates some of the lore of the Bar – the real life-blood

and tradition of the Bar that encourages and sustains us as an Independent Bar. Since 1998, when Legends of the Victorian Bar was established, only thirty-four barristers have been accorded this status - this in the context of a Practising List of now just under 1,900.

The Honourable Justice David Beach, in his address at the 2012 Legends Dinner, likened the 18 Legends to a football team whose members "have made great contributions both to the administration of justice and society generally." He named John Gibson³ as team captain - "the person whose contributions, in appearing for and looking after [those in need], without fee, for years and years, without any expectation of reward or acknowledgment, have most gone unremarked." Ross Gillies OC followed at the podium, to deliver a rousing, robust and very amusing response on behalf of the 2012 Legends. On behalf of the Bar, I thank Peter Jopling QC and all who worked with him over many years in establishing this splendid tradition.

At our Bar Dinner, held in May of this year, we included as Honoured Guests, Debbie Mortimer SC, the recipient of the Law Council of Australia President's Medal, and The Hon Ron Merkel QC for being awarded the Human Rights Medal. These are the highest annual national awards, the one within the legal profession, the other from the Australian Human



Rights Commission. External public awards of this kind recognise the outstanding contributions and achievements of members of our Bar, and are fittingly celebrated by us.

Also in May, Attorney-General Robert Clark MP presented the Victorian Bar's Annual Pro Bono Awards and our Junior Vice-Chairman, Will Alstergren, won our highest award, the Bar Pro Bono Perpetual Trophy. Over and above his substantial personal commitment to pro bono work, Will was, as the citation says, instrumental in the establishment and building up of the Duty Barristers' Scheme. Will, together with Ian Hill QC, then Chairman of the Bar Readers' Course Committee, went in to bat for the Bar in meetings with Victoria Legal Aid and with the Courts. They had the strong support of Chief Magistrate Ian Gray and Magistrate Lesley Fleming for the 3 months pilot scheme in that Court. Now, 5 years later, the Scheme is a pillar of the Bar's pro bono efforts and contributions4, operating in every Victorian Court, including the Court of Appeal.

As I pen this note, I am all too aware that my time as Chairman is drawing to a close-nominations will be called for in mid-October and the new Bar Council will take office on 15 November 2012. In closing, may I say it has been a signal honour for me to serve as Chairman of the Victorian Bar. Whilst I have found virtually every moment in the role a challenge, I have nevertheless greatly enjoyed the role and the opportunities it brings to meet and work with others, especially the quite remarkable collection of people who constitute the Bar Council, and in particular Fiona McLeod SC (Senior Vice-Chairman), Will Alstergren (Junior Vice-Chairman), and Jonathan Beach QC (Honorary Treasurer), the staff in the Bar office, and also our colleagues at the Law Institute of Victoria with whom we work closely on a range of issues. On behalf of the Bar Council, I would also like to record our thanks to Bree Knoester, our Honorary Secretary, and Robert Craig, the Assistant Honorary Secretary, for their tireless devotion to the work of the Bar Council.

May I also take this opportunity to thank each of you for your support, at both a personal and a Bar Council level, and wish you well in the months and years ahead.

MELANIE SLOSS SC VEN



¹ See Lord Bingham, The Rule of Law (2010), Ch. 9: A Fair Trial.

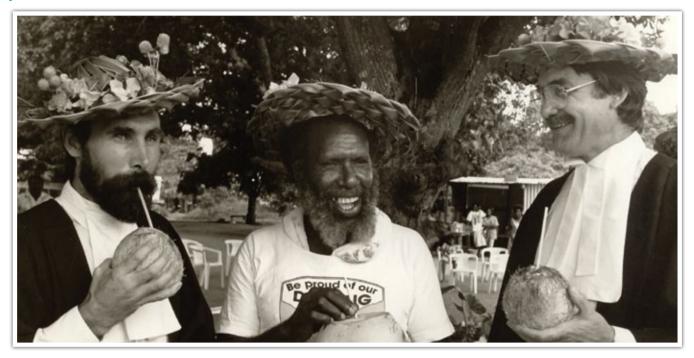
² The following members of the Bar were inducted as Legends: Peter J. O'Callaghan QC, A. Graeme Uren QC, Ron Meldrum QC, Richard J. Stanley QC, Andrew J. Kirkham AM RFD QC, Alan C. Archibald QC, Robert Richter QC, Dr John Emmerson QC, Ross H. Gillies QC, Allan J. Myers AO QC, Christopher J. Canavan QC, Colin L. Lovitt QC, Henry Jolson OAM QC, Philip J. Kennon QC, Philip A. Dunn QC, Beverley Hooper, John A. Gibson and Margaret L. Mandelert.

³ Sadly, John Gibson passed away on 28 September 2012.

⁴The Bar's hours of pro bono service provided during the past year have been valued at approximately \$13.8 million - a 15% overall increase in hours from last year, which itself had been an approximately 36% increase over the hours in the previous year.

Mabo - The Case That Made History

A Behind-The-Scenes Reflection



Greg McIntyre (plaintiffs' solicitor), Eddie Mabo, Bryan Keon-Cohen AM QC

his year marks the 20th anniversary of Mabo, one of the most significant cases in Australian legal history. In ending the legal fiction that Australia was empty before its European occupation, and upholding the claim that Murray Islanders were the traditional owners of the island of Mer in the Torres Strait, the case paved the way for a system of native title in Australia and was a small step in the long pathway towards reconciliation.

Underpinning this monumental victory is the behind-thescenes story of two Melbourne barristers, who worked tirelessly on the Legal Aid-funded case for the more than 10 years in which it ran. Ron Castan and Bryan Keon-Cohen represented the Murray Island plaintiffs in the myriad of interlocutory applications and procedural twists associated with the landmark case from its start to finish.

The case forged a long-standing professional alliance between Castan and Keon-Cohen. At the time it began, Castan was one of the most respected constitutional and commercial barristers at the Victorian Bar while Keon-Cohen had only recently joined the Bar, having worked at Fitzroy Legal Services and been a law lecturer at Monash University.

Reflecting on Mabo over a coffee at the Essoign, Keon-Cohen says that he first met Castan in 1979 at Taylor Square in Sydney, outside what was the then location of the High Court. While Castan was waiting for his case to be heard, Keon-Cohen says that he took the opportunity to ask if he could read with him.

Keon-Cohen was in Sydney because he was working at the Australian Law Reform Commission, where he had been conducting research for the reference on Aboriginal customary law within the Australian legal system. The Commission's two-volume report ultimately put forward a wide-ranging set of recommendations on the recognition of Aboriginal customary law in relation to marriage, children and family property, local justice mechanisms, and traditional hunting, fishing and gathering rights. As part of his research for the Commission, Keon-Cohen had looked at how other jurisdictions, such as Canada and the USA, had recognised indigenous legal traditions in their broader justice systems.

Castan wasn't able to take on Keon-Cohen as a reader, and, in any event, was made a silk soon after their conversation. But a week after Keon-Cohen was admitted to the Bar in September 1981, he received a call from Castan asking if he would be interested in working on the Mabo case. "I didn't know anything about Eddie Mabo or the Torres Straits," says Keon-Cohen. "But I knew about the issues and I came from a philosophy that a lawyer's time is well spent seeking justice for disadvantaged groups by way of law reform within the legal structures."

The case had come to Castan after another Melbourne barrister, Barbara Hocking, attended a land rights conference in Townsville in 1981. Hocking had presented a paper to the conference arguing that a test case should be brought in the High Court to establish the principle of native title as part of Australian law. At the conference, the land claim of

5

the Murray Islanders became one of two cases selected to be mounted to test the issue of native title. Hocking and Greg McIntyre, a solicitor who was also to remain with the case to the end, were retained to act in both cases. On her return to Melbourne, Keon-Cohen says that Hocking approached Castan asking him to appear in the case.

Hocking was involved in the case for its first five years before leaving the Bar to take an appointment position on a Commonwealth tribunal. Her academic knowledge about indigenous land rights issues was an invaluable foundation for the case, says Keon-Cohen. Richard Brear, who had been in the same readers' group as Keon-Cohen, was a fourth barrister in the legal team. Brear conducted much of the historical research and undertook a lot of important behind-the-scenes work.

The case was originally brought in the High Court's original

"We thought that we had

a High Court that was

interested in resolving this

issue and that some of the

judges were likely to be on

side. But, any more than

that, you can never predict."

jurisdiction, with the statement of claim being filed on 20 May 1982. The next step should have been for the parties to provide the High Court with an agreed statement of facts to allow it to determine the legal issues. But when they were unable to agree, the case was remitted by Gibbs CJ to the Brisbane Supreme Court to have its factual issues only adjudicated upon.

The trial, which did not begin until 1986, was originally scheduled to run for just three weeks. However, shortly before its

commencement, the Queensland Government passed the *Coast Islands Declaratory Act* 1985, which declared that any traditional rights that had existed, or still existed on the island of Mer, were retrospectively annulled without compensation.

Castan, Hocking and Keon-Cohen appeared for the plaintiffs in the first three weeks of the Supreme Court trial. Much of the time set down for the case was taken up with legal argument. When the case adjourned at the end of its scheduled three weeks, Eddie Mabo, who was only the second witness, was being taken through his evidence. He and his legal team had endured what Keon-Cohen says were "about 150 objections to his evidence on a variety of grounds".

Back in Melbourne, the frustrated and exhausted barristers were discussing the immense difficulties of running the case, acutely aware that, if the recently passed *Coast Islands Declaratory Act* was good law, their efforts had most likely been in vain. Castan decided at that point, says Keon-Cohen, that the Queensland Act should be challenged under s 109 of the Constitution for being in conflict with the *Racial Discrimination Act* 1975 (Cth). Almost three years later, in December 1988, by a slender 4-3 majority, the High Court agreed that it was.

When the trial resumed in the Queensland Supreme Court in 1989 the year after the High Court decision, Keon-Cohen says that he found himself calling Eddie Mabo to continue his examination-in-chief, which had begun three years earlier. The remaining four months of the trial were conducted by Keon-Cohen largely without a leader and, for several weeks, without an instructing solicitor. By that stage, Hocking had left the Bar and there was not the funding to have Castan in

Queensland running the trial every day. "He would come up when I rang him in a panic saying, 'Ron, Ron, there is an application to strike us out."

Their instructing solicitor, Greg McIntyre, who had been employed by the Aboriginal Legal Service in Perth, had to return to Perth and was unable to find a replacement solicitor. This, says Keon-Cohen, was "unsurprising, given the immense complexity and volume of material, and the hopeless Legal Aid funding".

It was at this point that Castan, who had often supplemented the case's funding by paying for items himself when he knew that an application to Legal Aid would take too long, made a more personal contribution to the case. He approached his daughter Melissa Castan, now a senior lecturer at Monash University and deputy director of the Castan Centre for Human Rights Law, and asked her to work on the case.

At that time, Melissa Castan had been holidaying at Surfers Paradise with her boyfriend, now husband, Robert Lehrer, having deferred her law degree. While they were up there, she says that her father rang up and said, 'Oh, you have to come and do some legal research with us and help Bryan'. Neither of us were qualified as lawyers, so we actually were Bryan's researchers and paralegal support." The two of them organised for the Murray Island witnesses to attend court by

booking their flights, helping them to negotiate the airport and find their way to a hotel, and arranging for them to talk to counsel before presenting their evidence to court.

Melissa Castan adds that, in addition to being a help to Keon-Cohen, there was an ulterior motive to her father's request. Her parents were keen to have her return to studying law and thought that being involved in Mabo might be a way of luring her back. As with many of Castan's strategic decisions in the case, it was a plan that worked. "I had thought that law was very boring and so I had stopped studying it. They rightly recognised that if I was doing something that was interesting, it wouldn't be boring. And so, they kind of, entrapped me back into law, but in a very loving, parental way."

As is now well known, when judgment was handed down in the Queensland Supreme Court on November 1990, only two of the five original plaintiffs in the case, Dave Passi and James Rice, succeeded in their claims. Notably, Eddie Mabo, despite being such a driving force in the case, lost all his claims. The legal team made a tactical decision in response to Mabo's defeat.

"We advised him not to appeal the judge's adverse findings but to rely on the other plaintiffs and to proceed straight to the High Court," says Keon-Cohen. "We advised him that a) his appeal would be risky; b) we didn't have the money: and c) the case might be held up for years and years and years. But we also advised him that his name would stay on the case as he would remain the first plaintiff."

Before the High Court, Keon-Cohen says that he and Castan appeared for Passi and Rice while Greg McIntyre appeared separately for Eddie Mabo. This, says Keon-Cohen, allowed

them to isolate some of the more difficult issues and focus on the successful plaintiffs before the High Court. "Eddie Mabo was at the High Court representing his family and his community group but made no submissions on his own behalf, other than adopting the submissions of law made by Castan on behalf of the two successful plaintiffs. That was very deliberate and was a good call by Ron. These are the procedural subtleties that he alone, with his experience in the High Court, had control of."

Before embarking on their final journey to the High Court in May 1991, Keon-Cohen says they were anticipating that the High Court, or at least some members of it, would be receptive to their arguments. "Through the mid-'80s, the Mason Court was a reformist Court. It was interested in stating overarching principles, and, if necessary, abandoning precedent to reflect both justice for the parties and the mores

of the Australian community. We thought that we had a High Court that was interested in resolving this issue and that some of the judges were likely to be on side. But, any more than that, you can never predict."

But, after the first day of submissions to the High Court, the legal team was desolate. "We thought that we had lost; we had been given a hard time. Queensland's position that we had insufficient facts to trigger the questions

of law, and that there was no basis to upset established precedent, seemed to be prevailing." By the end of the third day, says Keon-Cohen, the legal team was feeling more confident. "The Court had shown interest in reshaping the case in order to raise what to it was a fundamental question: native title being an expression not of individual rights but community rights. We figured that, had they not been interested, they would not have raised that question. And that is what we told Eddie Mabo on the last time we saw him at the end of those four days of submissions, when he drove North and we flew South."

Twenty years after their historic legal victory, Bryan Keon-Cohen is a practising member of the Victorian Bar. He has been a barrister for the last 31 years, the last 16 of those as a QC, and has acted in many subsequent native title claims. On 26 January this year, he was awarded a Member in the General Division of the Order of Australia (AM) for his 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. This was an award that Castan also was honoured with in 1993.

On 3 May this year, Keon-Cohen graduated with a PhD from Monash University with his thesis being his book, which was published in August 2011, Mabo in the Courts: from Islander Tradition to Native Title: A Memoir. He and Castan worked on many cases together following Mabo and both served on the committee of the Victorian Council for Civil Liberties. During the 1980s, Castan was its president while Keon-Cohen was secretary.

As is well known, six years after his High Court victory in Mabo, Ron Castan passed away in 1999 at the age of 59. In addition to Mabo, he had been involved in many other seminal legal test cases, such as Koowarta v Bjelke-Petersen and the Franklin Dam case, and had drafted what became the solution to the legislative standoff in the Senate over the Wik settlement.

Keon-Cohen says that working as Castan's junior on Mabo was an invaluable learning experience. "He had the High Court experience, the intellect, the ability to work with people and listen to their ideas and incorporate those ideas into strategy, pleadings and advices and generally move the case forward. He also had great standing with the High Court.

"From him, I learnt a great deal about the law, the High Court, the strategies about procedural options involved, the art of

advocacy and the commitment and determination necessary to hang in when

"Castan always packaged his intellectual contributions to the High Court in a conversational style, says Keon-Cohen. "He enjoyed discussing and debating with the High Court judges. He would listen to a question and then always came up with an answer; whether it convinced the judges or not is another matter, but he delighted in advocacy on his feet."

"[Ron Castan] saw the role the case has lasted a decade." of advocacy before the High Court as engaging at a very

high level in a discussion

with people who were

interested, as opposed to it

being an adversarial process"

"He always had a fine sense of what was a proper argument to put. He took the view that, however apparently devoid of authority or difficult an argument might be, if it had a proper basis in principle, and it advanced his client's interests, it should be put."

Melissa Castan says that her father saw the role of advocacy before the High Court as engaging at a very high level in a discussion with people who were interested, as opposed to it being an adversarial process. "He did have a very low-key style; he was not a very effervescent, actorly person. He was extremely low-key but also warm and quite collegiate."

Melissa Castan says that her father conducted other long-running test cases, such as Mabo, as part of his practice at the Bar, but that this particular case would have appealed to his great interest in social justice. "He definitely was very deeply motivated from a young age in social justice issues. He was very focused on the idea that the law could be a source of real change for the plaintiff or the appellant but also for society in general. I think that that was probably why he was driven to have a legal career and also then driven to take on causes that might have otherwise have seemed a bit unlikely or a bit ambitious in terms of legal doctrine because he was very keen to test the boundaries of the law as a vehicle for deep change."

A second edition of Bryan Keon-Cohen's Mabo in the Courts: A Memoir is in production and has an expected publication date of April 2013. Orders can be made to Bryan Keon-Cohen at bkcchambers@optusnet.com.au

Louise Martin VBN

Annexure 5.2.1 Castan's Demurrer Doodles: January 19881 Transcription² "(1) Assume facts as alleged [in the claim] with [High Court] bench of 7 [deciding the ultimate legal issues without any trial]; (2) Assume facts as alleged with bench of 6;3 (3) Prove facts [at a trial] as alleged with bench of 7 [deciding the ultimate legal issues after a trial]; (4) Prove facts as alleged with bench of 6 (v. unlikely); (5) Assume only admitted facts [ie, accepted by Queensland in its defence] with bench of 7 (v. unlikely); (6) Assume only admitted facts with bench of 6 (worry!); (7) Facts found against us, [at a trial] bench of 7; (8) Facts found against us, bench of 6 (v. unlikely)."4 Dated circa January 1988: see Ch 5.2; MC Vol WF 8/1(a). ² Inserted material [square brackets] introduced by way of explanation. ³ Ie, because of Murphy J's problems, causing him to stand down from the Court: see Ch 5.2. ⁴ See Memo, ARC, 2/2/1986 at MC Vol WF 1/pp 15-16.

How it is in the High Court; preparing to respond to all possible permutations of the problem

Remarks of The Hon Chief Justice Warren AC¹ on the occasion of the University of Melbourne 2012 Blues & Sports Awards Dinner University House, held on 20 April 2012.

May I extend my warmest congratulations to all the recipients of awards this evening, the full Blues, the half Blues and the other distinguished service awards. I would particularly congratulate the squash club and the Melbourne University women's squash team on their achievements this year.

Intervarsity has changed dramatically from my day. The fact of Australian University Games is a very wonderful and exciting development. In a sense it is a type of mini Olympics.

In the Supreme Court we have a number of University Blues recipients. Justice Chris Maxwell, President of the Court of Appeal, was awarded a full Blue in football. Justice Elizabeth Hollingworth who teaches at the University Law School is also a graduate of Oxford having been the Rhodes Scholar for Western Australia. She rowed for Oxford and has a double Blue in rowing and water polo.

My former colleague retired Supreme Court judge, the Hon Allan McDonald AO QC holds a Blue in athletics. He remains the 100 yard dash record holder for the University of Melbourne. In 1958, in his final year, of law he was first in the 100 yard dash at the University championships in the record time of 9.9 seconds. Of course later in time athletics switched to the 100 metres distance and so Allan McDonald retains the record.

And then I have my Blue in squash.

If I might turn to a serious topic relating to sport. As judges one of the most difficult things we have to do is sentence people. As you might appreciate, in the Supreme Court we

The Power of Sport

deal largely with many of the most serious and worst crimes that are committed in our community. Most cases are about death. As judges we have to grapple with the consequences of the death of the victim and, also, the impact on the victim's family. We also have to grapple with the potential for the rehabilitation of the offender. We must address the appropriate punishment of the individual for their crime.

In sentencing an individual, let us take the example of a fight outside a hotel where, after a scuffle, a punch is thrown and an individual falls to the ground, bangs his head on a hard surface or a kerb. Dramatic head injuries are suffered to the individual and he dies. In these sorts of cases, very often, alcohol is involved.

What are the sorts of things that judges look at? The court will be told about the positive features of the individual such as their youth, prospects of employment, difficult family circumstances and remorse. These are called mitigating circumstances.

"In my experience competitive sport helps to prepare young people for the competition they will face in life."

On the other side we will be told about the aggravating features of the criminal offending. We will hear about the aggression of the individual, perhaps the lack of remorse or insufficient remorse. We will be told about the level of drunkenness and the like. Judges will then weigh the factors up and take into account all the other things required under sentencing laws in Victoria.

I want to focus now on the connection or relationship between sport and criminal offending. Academic research shows that there are definite social benefits from sport.

Regrettably, in so many of the cases we deal with in the Supreme Court, the individual has come from a disadvantaged background, suffered abuse, often been affected by drugs or alcohol and presents as a tragic individual. The defence lawyers will say the person found it hard to help themselves in all the circumstances of the crime or, were in fact, a hopeless case. In my experience many individuals being sentenced in the Supreme Court have not been exposed to the benefits of extra-curricular sporting or other social activities during their childhood and their youth. They simply have not had the advantage of being driven to sporting events, encouraged to participate, having a parent on the sidelines keeping the score, a parent washing the football jumpers, attending cricket training, driving to basketball stadiums late at night and all the things that parents do and that our parents did for many of us.

My own life experience and that as a judge informs me that sport helps to keep young people out of trouble.

VICTORIAN BAR NEWS

Competitive sport is a good thing. It teaches young people how to win and lose with grace and dignity. It allows them to take risks - to risk failure. In my experience competitive sport helps to prepare young people for the competition they will face in life.

I am supported in my view by research published by the Australian Institute of Criminology and overseas research.

The criminologists tell us that "wilderness" therapy for young people at risk, including in Aboriginal communities,² has a marked effect. Research reveals that the consistency of sports programs has a clear correlation with reduced delinquency.³

In Western Australia programs involving young offenders led to a drop in recidivism by about 85 per cent.4

Involvement of young people in martial arts has been found by researchers to increase self-control, discipline and self-esteem.5

Overseas, various experiments and research reveal similar outcomes. It is not rocket science. There is evidence in England, Scotland, France and Canada.6

A study followed 16 children with severe disruptive behaviours aged between 8 and 10 years over a period of ten months. Half of the children were assigned to karate classes, the other half acted as a controlled group. Statistically significant

differences were noted in the behaviour of the children participating in karate in terms of intensity, mood and adaptability.7

In the United Kingdom research has been done on whether combat sport has an impact on the criminality of individuals.8 The findings reveal that those who engage in structured and supported leisure activities are less likely to take part in anti-social behaviour and offending. Some of the findings revealed a strengthening of family relationships and friendships; the positive influence of peers on behaviour; potential to meet and manage excitement needs usually gained by committing crime or using controlled substances the thrill-seeking is channelled into the sport; and a reduction in aggressive temperament and behaviour as well as an increase in participants' self-esteem.

One other example is some work done in England called the Second Chance Project.9 In South Gloucestershire a special program was developed for young offenders in custody to improve their behaviour. Using football as the sport in focus, 15 youths aged between 18 and 20 were found to be overwhelmingly positive about the program. Significantly the researchers found that sport proved to be an invaluable hook in engaging young people and establishing constructive relationships and achieving their resettlement in the community.

My thesis, therefore, is that based on my own experience and valuable academic research, sport, particularly competitive

sport, is a marvellous social phenomenon. I venture to suggest that we could do with a lot more sporting activities, competitions and facilities being available to all children and young people in our community. Desirably it should be readily available and organised so that it is accessible. Whilst there are obvious health advantages, there is also the positive social benefit that competitive sport plays in keeping young people out of trouble. When young people do get into trouble sport helps with their rehabilitation into society.

It also contributes to the development of good values and good behaviour as a citizen.

A very fine example of the portrayal of two of society's greatest values, courage and self-sacrifice, is demonstrated by the story of a Melbourne University Blacks footballer,

"The Melbourne University

Blacks Football Club now has

an award called 'The Brendan

Keilar Medal'. It is given to

the player who demonstrates

Keilar was respected for:

above all else, being a decent

and good human being."

Brendan Keilar. Brendan was a lawyer walking along an inner city street on his way to work in the morning, having said goodbye earlier to his wife and young children. Unfortunately, he passed by a night club where a man called Hudson was assaulting a woman, the two individuals having recently left the all the attributes that Brendan night club, it then being daylight and early morning. Drugs and alcohol were involved. Brendan Keilar and another man moved to intervene. Hudson pulled a gun, shot both the other man and Brendan. Tragically, Brendan died. The other man survived his life threatening

> injuries. Hudson was sentenced to life imprisonment. 10 He will never be released. His appeal was unsuccessful.11

Brendan Keilar was a much loved individual around the University Blacks football club. His selfless efforts in trying to help an individual who was being harmed led to him making the ultimate sacrifice. He was a good person trying to do the right thing in society. The Melbourne University Blacks Football Club now has an award called 'The Brendan Keilar Medal'. It is given to the player who demonstrates all the attributes that Brendan Keilar was respected for: above all else, being a decent and good human being. The number 16 football jumper of Brendan Keilar hangs in a frame in the old Pavilion club rooms at the University oval. The Brendan Keilar medal is valued as much as the best and fairest award.

The fact that most of the sports men and women in this particular room are university graduates or students can, I suspect, be partly attributed to commitment to competitive sport. Just as you have benefited from sport so society in turn benefits from the person that sport has helped to make you.

I congratulate each and every recipient once again for the awards. I wish you all well on the track, the court, the rink, the river or wherever you may be participating. At some point while running, riding, rowing, swimming or whatever you do, from time to time pause to reflect on just how important sport is to our society.

THE HON CHIEF JUSTICE WARREN AC



- ¹ The Chief Justice represented Victoria in squash in three Australian championships winning the teams title on each occasion. She was also a member of the all-Australian Combined Universities squash team on four occasions and led the Australian Universities team in international test series. She was the Monash University women's squash champion for ten years. She competed in men's state grade pennant at State B and C level. She was a member of four State A grade premiership teams in women's competition. She was awarded a full University Blue in Squash.
- ² Dr Harry Blagg, 'Working with Adolescents to Prevent domestic violence indigenous rural model' (1999), report prepared for the National Anti-Crime Strategy, by the Crime Research Centre, University of Western Australia.
- ³ Margaret Cameron and Colin MacDougall, 'Crime Prevention Through Sport and Physical Activity' (September 2000) 165 Australian Institute of Criminology, trends & issues in crime and criminal justice, 2.
- ⁵ Marc Theeboom, Paul De Knop and Paul Wylleman, 'Martial arts and socially vulnerable youth. An analysis of Flemish initiatives' (August 2008) 13 Sport, Education and Society 301; Mark T. Palermo et al, 'Externalizing and Oppositional Behaviours and Karate-do: The Way of Crime Prevention' (2006) 50 International Journal of Offender Therapy and Comparative Criminology 1; Craig Jenkins and Tom Ellis, 'The highway to hooliganism? An evaluation of the impact of combat sport participation on individual criminality' (2011) 13 International Journal of Police Science and Management 2, 117.
- ⁶ Professor Fred Coalter, 'The Social Benefits of Sport: An Overview to Inform the Community Planning Process' (January 2005) Sportscotland Research Report no.98; Richard Stead, Dr Mary Nevil, 'The impact of physical education and sport on education outcomes: a review of literature' (September 2010) – a report for the Institute of Youth Sport, Loughborough University; Michael King, 'Crime Prevention in France' (1989) 31 Canadian Journal of Criminology' 527; David Carmichael, 'Youth Sport v Youth Crime: evidence that youth engaged in organized sport are not likely to participate in criminal activities' (2008); Dr Rosie Meek, '2nd Chance project: interim evaluation report of the autumn-winter 2010 football academy at HMYOI Portland' (May 2011), University of Southampton, UK.
- ⁷ Mark T. Palermo et al, 'Externalizing and Oppositional Behaviours and Karate-do: The Way of Crime Prevention' (2006) 50 International Journal of Offender Therapy and Comparative Criminology 1.
- ⁸ Craig Jenkins and Tom Ellis, 'The highway to hooliganism? An evaluation of the impact of combat sport participation on individual criminality' (2011) 13 International Journal of Police Science and Management 2.
- ⁹ Dr Rosie Meek, '2nd Chance project: interim evaluation report of the autumn-winter 2010 football academy at HMYOI Portland' (May 2011), University of Southampton, UK.
- 10 R v Hudson [2008] VSC 389.
- 11 Hudson v R [2010] VSCA 332.

There is a place for law

CRICOS Provider: Monash University 00008C

Postgraduate law at Monash Law School

- 79 electives to choose from
- 23 postgraduate programs to choose from
- 1 city location 555 Lonsdale Street, Melbourne

www.law.monash.edu/future-students/postgraduate







Then the new government came to office in late 2010, there were many problems in the legal system that needed fixing, and many opportunities for practical and constructive reform that had been neglected.

It is timely after two years in office to review what has been done to date, and to outline some of the further reforms that are on the government's agenda.

Civil litigation

While criminal law matters tend to attract the headlines, civil law reform has also been a high priority for the government. In fact, the very first Bill of the new government to reach the statute book was a Bill to scrap the mandatory pre-litigation requirements in the *Civil Procedure Act* 2010, which threatened to add pointlessly to costs and to give rogues a new opportunity to avoid paying their debts.

Further civil procedure reforms have been introduced this year in relation to expert witnesses and costs orders, and to fix further anomalies in the 2010 Act regarding certifications by frequent litigators and by insurers and others having the carriage of litigation.

The government has also acted to seek to recover ground previously lost for Victoria in relation to commercial arbitration, with the introduction and passage of the *Commercial Arbitration Act* 2011, which sought to bring domestic commercial arbitration into line with international best practice.

Building on this, the government is continuing to support the work of the Victorian Bar and the Law Institute of Victoria to establish a commercial arbitration and mediation centre that can make available a range of facilities to host international and domestic arbitrations and mediations.

Courts and the profession

Strengthening the courts' independence and capacity to manage their own affairs has been another high priority for the government.

Two Years On

The State Government's Legal Reform Agenda

Currently, the administrative staff who support Victoria's courts do not ultimately answer to the judiciary, but to the Secretary of the Department of Justice. This is flawed both in principle and in practice. One of the government's election commitments was to establish an independent statutory body, governed by the heads of jurisdiction, to provide administrative support to the courts and VCAT.

A major step towards that goal took place on 1 July this year, with the commencement of a new, more autonomous Courts and Tribunals Service. The CTS brings key personnel supporting the courts and VCAT into a single, free-standing division of the Department of Justice, located in the William Cooper Justice Centre, with an advisory board made up of all heads of jurisdiction.

The government has also acted to end the financial haemorrhaging of the badly flawed and massively over-budget Integrated Courts Management System. The roll-out of the system has been limited to the Supreme Court and Coroners Court, and work is underway on projects to make up for ICMS's shortcomings and to find better IT upgrade options for the remaining jurisdictions.

The government has restored the VCAT Major Cases List, enabling faster determination of major planning cases, and further work is underway in conjunction with the new President of VCAT, Justice Garde, on possible reforms to the VCAT Act, regulations and procedures.

Work is also underway to establish a Judicial Complaints Commission to handle complaints about poor performance or inappropriate conduct by judicial officers and VCAT members.

The government is also moving to abolish the previous government's acting judges regime and replace it with a reserve judges regime based solely on former tenured judicial officers.

Work is continuing on uniform legal profession reforms, seeking to reach agreement with NSW and if possible with other jurisdictions.

The government has also implemented significant structural reform of Victoria's public prosecutions offices, establishing a unified and streamlined public prosecutions service under the direction of the DPP.

Law reform

The government has put in place a wide range of law reform initiatives over the past two years.

These include:

- Brodie's Law, making serious bullying is a criminal offence;
- double jeopardy reforms, allowing the Court of Appeal to order a new trial where there is new and compelling evidence of guilt;
- tightening the tests for Working With Children Checks;
- restoring balance in equal opportunity laws;

- introducing a journalist's privilege for professional journalists who receive information in confidence;
- restoring the independence of the Victoria Law Foundation.

Further reform projects are currently underway. These include reforms to vexatious litigant rules, based on the recommendations of the Parliamentary Law Reform Committee's 2008 report, and reforms to suppression orders based on the national model bill, although with less open-ended grounds.

Preparation has commenced of reforms to the law relating to powers of attorney and guardianship, based on the Parliamentary Law Reform Committee's 2010 report on powers of attorney and the Victorian Law Reform Commission's 2012 report on guardianship.

The government has also asked the VLRC to inquire into and report on possible reforms to Victoria's succession laws, including whether family provision rules are operating as intended.

The longstanding issue of discovery is receiving further attention, to which the Commercial Bar Association has made a substantial contribution.

Criminal law reforms currently underway include strengthening the bail system to make breach of bail conditions a criminal offence, enabling the outlawing of bikie and similar gangs where the Supreme Court is satisfied they are being used for serious criminal activities, and anti-fortification legislation enabling courts to order the removal of fortifications in similar circumstances.

The first round of legislation to reform jury directions is expected to be introduced into Parliament this year, to be followed by further legislation in 2013 in response to recommendations of the recently published Weinberg report. Reforms to improve and reduce complexity in sexual offence laws are also being examined, as is the law relating to defensive homicide. Work is also underway on possible reforms to committals.

Legislation is being prepared to clarify and simplify criminal investigation provisions, including forensic sampling, fingerprinting, questioning and warrant provisions.

As part of wide-ranging family violence reforms, legislation will be introduced to establish an indictable offence for serious breaches of intervention orders, to extend the operation of police safety notices from three days to five days, and to make a range of procedural reforms.

The government has also recently released a discussion paper seeking views on options for improving diversion programs for offenders under 18 years of age.

As well, the government has commissioned inquiries into 'sexting' by the Parliamentary Law Reform Committee, and into the Crimes (Mental Impairment) Act by the VLRC.

Sentencing

Reforms to achieve stronger and more effective sentencing were a key commitment of the incoming government.

Suspended sentences in the higher courts for serious crimes have been abolished for offences committed from 1 May 2011, and home detention has also been abolished.

The old plethora of community-based sentences has been replaced with a comprehensive Community Correction Order,

allowing the courts to impose orders with a longer duration and greater community service work obligations.

In addition to drug and alcohol treatment conditions, a CCO can include a new range of protective requirements including curfews, no-go zones, alcohol exclusions (not entering licensed premises) and non-association requirements. Judicial monitoring requirements can also be imposed.

The government has also legislated to simplify sentencing appeals and give greater scope for a single aggregate sentence to be imposed in cases involving multiple offences.

Legislation is being prepared for statutory minimum sentences for gross violence, which will provide for a minimum non-parole period of four years for adult offenders who cause serious injury in circumstances of gross violence, subject to a carefully defined range of "special reasons" for which the statutory minimum would not apply.

The government will also introduce baseline sentences, under which the Parliament will specify the starting point non-parole period sentence for serious crimes, to which courts will apply aggravating and mitigating factors in individual cases.

Other sentencing reforms in preparation include additional penalties for emergency worker assaults and a ban on violent drunks entering licensed premises for two years if they are found guilty of an alcohol-related criminal assault.

Facilities and funding

Despite difficult economic times, the government has secured ongoing funding for key justice services.

In this year's state budget, Victoria Legal Aid was provided with additional base funding of more than \$26 million a year. Ongoing funding totalling \$20.8 million over four years was also provided to extend Children's Court new model conferencing, as was funding to continue the Court of Appeal's highly successful Venne reforms.

In the 2011 budget, ongoing funding was provided to continue the Courts Integrated Services Program and family violence and regional programs operated by Community Legal Centres, for which no ongoing funding had been provided by the previous government.

The government is also undertaking long-overdue upgrades of the Bendigo and Wangaratta Courts (\$8.4 million and \$2.7 million respectively) and is providing \$17.1 million for a new Children's Court facility at Broadmeadows.

Conclusion

Much has been done in the government's first two years in office to tackle the problems we inherited and to strengthen Victoria's legal system for the future.

In working on these various reforms, I have greatly valued the constructive input and advice I have received from the Bar Council and from many individual members of the profession.

I would welcome receiving ongoing input and feedback from members of the Victorian Bar. Please feel free to email me at attorney-general@justice.vic.gov.au

THE HON ROBERT CLARK MP, ATTORNEY-GENERAL FOR VICTORIA



Launching the Law Library of Victoria

The Profession Moves to Protect and Grow our Common Knowledge



Dr Claire Noone, His Honour Judge Macnamara, The Hon Robert Clark MP, Attorney-General for Victoria, The Hon Chief Justice Warren AC, Chief Justice of the Supreme Court of Victoria, Deputy Chief Magistrate Lauritsen, His Honour Chief Judge Rozenes AO, Michael Holcroft and Melanie Sloss SC.

n 3 August 2012 the chief judicial officers of all jurisdictions in Victoria and representatives of the Victorian Bar, the Law Institute of Victoria and the Department of Justice signed a Memorandum of Understanding to create the Law Library of Victoria. The signing took place at a small ceremony held under the

dome of the reading room in the Supreme Court Library. The Attorney-General was present and gave the proposal his strong encouragement. Speaking at the ceremony, Chief Justice Warren AC commended the

MOU as providing "an historic opportunity to prepare all Victorian judges and lawyers for the future of legal resource delivery, and to make the Law Library of Victoria a national leader in its field".

The Supreme Court Library was established in 1854 by Sir Redmond Barry for the benefit of the judiciary and the legal profession. Since that time the legal profession has substantially funded the Library through admission fees. With the introduction of the National Legal Profession Reforms in 2013 that funding will all but disappear and without alternative funding the Supreme Court Library will

be insolvent by 2016. Accordingly, in August 2011 the Supreme Court's Library Committee chaired by Justice Maxwell the President of the Court of Appeal, the Honourable Justice Maxwell established a review to examine the strength and capacity of the Supreme Court Library and to develop a vision for its future.

"Without alternative funding That Review, led by Justice Macaulay, the Supreme Court Library will be insolvent by 2016."

consulted members of the Victorian Bar, the Law Institute of Victoria and the Department of Justice. Focus groups were conducted and input was obtained

from a range of subject matter experts, including those from the State Library of Victoria, the Bodleian Law Library, Oxford University, the Supreme Court of Queensland Library, Deloitte Digital and Heritage Victoria.

The Review proposed a new Law Library of Victoria, to be established as an independent statutory authority. The LLV will be governed by a board of directors comprising representatives of the Courts, the Law Institute of Victoria, the Bar and the Attorney-General. The key features of this new library will be the amalgamation and consolidation of existing libraries, including the libraries of the Victorian Bar and

the Law Institute, a "highly sophisticated" gateway to digital content, innovative technology platforms to extend the range and reach of services to users, opening hours which meet the needs of all users, a comprehensive textbook collection, the upgrade of facilities at regional centres, community

engagement through a content-rich and highly interactive website and the hosting of regular seminars and events, the provision of training and research skills for all users and greater collaborations with other organisations,

"The LLV will be jointly funded by the Courts, state government and the legal profession through the consolidation of existing library budgets."

after hours when the Supreme Court Library is inaccessible. In the future, as more and more material is available online, the ability to gain access to a bricks and mortar library may not be as important as it once was. However, the Bar is keen to ensure that the new LLV will have more flexible and

longer opening hours than those currently available at the Supreme Court Library. Until those flexible opening hours are achieved it is expected that the Bar's collection will remain at its current location.

including libraries, professional associations and educational institutions. Importantly, the new library will preserve the existing heritage collection and building of the Supreme Court Library.

The new library is to be implemented in three stages. The first stage will focus on the amalgamation of the libraries of the Courts of Victoria and VCAT. The second stage will see the merger of the Victorian Bar and Law Institute libraries with the LLV and the third stage will be the realisation of a library in the 'cloud' where all judicial officers and practitioners throughout Victoria will have electronic access to this new resource.

The LLV will be jointly funded by the Courts, state government and the legal profession through the consolidation of existing library budgets. It is intended that by amalgamating the resources of those participating in the MOU the LLV can deliver economy of scale benefits through consolidated purchasing power and a coordinated management structure.

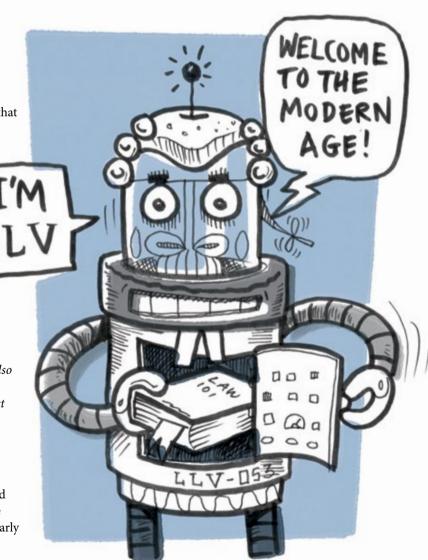
At the signing ceremony Justice Macaulay said that "This landmark agreement will pave the way for the amalgamation of numerous, separate legal libraries currently operating in Victoria into one, modern 24-hour law library for all Victorian judges, VCAT members and legal practitioners.

While preserving the essential and valuable hardcopy collection which has made our existing Supreme Court Library so envied, the new library will consolidate and reduce duplication amongst existing resources, but will also establish innovative technology platforms. By creating a highly sophisticated gateway to digital content, the project will bring legal library services in Victoria into the modern age."

The implementation of the second stage of the MOU, would see the Bar's own library, currently housed in the Richard Griffiths reading room, taken over and managed by the LLV. For many members of the Victorian Bar, the Victorian Bar Library is an invaluable resource, particularly

Despite the fact that so many primary legal resources are now available online and without charge, the costs incurred by barristers in keeping their libraries current seems paradoxically to increase every year. The vision of the LLV as a modern legal research facility available to be accessed at all hours is an exciting one that will improve the quality of practice of all at the Bar.

GEORGINA SCHOFF SC WEN



Women Lawyers' Achievement Awards

n Wednesday 30 May 2012, Australian Women Lawyers honoured Caroline Kirton SC of our Bar with an award at the 5th annual Women Lawyers Achievement Awards. Ms Kirton SC won the award in the category "General Excellence (Advocacy/Academic/ Judiciary)". Victorian Junior barrister Christine Melis was runner up for the award in that category.

Ms Kirton SC's award recognises her leadership of women lawyers, including as past convenor of the Women Barristers' Association and as past President of Australian Women Lawyers. In addition to her commercial practice, Ms Kirton SC holds several leadership positions at our Bar, including Chair of the Commercial Bar Association's Construction Law Section and Chair of the Bar's Equality and Diversity Committee. Ms Kirton SC used the occasion of the award to advocate for solicitors to increase the proportion of female barristers briefed in commercial matters.

The awards ceremony took place over a three-course dinner at the sumptuous Plaza Ballroom. The evening was sponsored by Delta Partners and Gordon & Jackson Barristers' Clerks.

The President of the Victorian Court of Appeal, Justice Maxwell presented the awards. His Honour had presented the awards at the same event a few years earlier. His Honour drew enthusiastic applause from the audience when he remarked that in the intervening period, Victoria had gained a female Chief Justice, a female Solicitor-General, a female President of the Law Institute of Victoria and a female Chairman of the Bar.

Dr Helen Durham, Head of International Law for Australian Red Cross and a fellow at Melbourne Law School, was guest speaker at the awards dinner. Dr Derham moved the audience with her account of working on international humanitarian law matters affecting women in the West Bank.

There were 13 nominees for the awards and the winners in the other categories were:

- Ms Brooke Dellavedova, a Principal at Maurice Blackburn Lawyers, in the class actions area, in the category of General Excellence (Private Practice).
- Ms Dominique Saunders, Presiding Member of the Mental Health Review Board and the General Counsel of a national health registration body (AHPRA), in the category of General Excellence (In-house/Government).
- Ms Kaylene Rawlings-Hunter, solicitor at Maurice Blackburn and past president of Tarwirri (the Indigenous Law Students and Lawyers Association of Victoria) and a delegate for the official Australian Government Delegation to the United Nations 56th Commission on the Status of Women in the category of Rising Star.

Georgina Costello 🚳





Christine Melis, Kate Ashmore, Eleanor Davis, Ruth Hamnett, Astrid Haben-Beer, Amira Alic, Clare Carrucan, Michelle Whyte, Patricia Athanasiadis, Amanda Stevens, Emily Hart, Bree Ryan and Natalie Devitsakis



The Plaza Ballroom, Collins Street, Melbourne



Lynda Slavinskis, Lara Labante, Helen Dellidis and Carolene Gwynn



Anna Robertson and Caroline Kirton SC



The Hon Justice Maxwell, Dominique Saunders, Caroline Kirton SC, Kaylene Rawlings-Hunter, Brooke Dellavedova, Patricia Athanasiadis (Photographs courtesy of Tess Kelly)

Bar Cover

Protection for barristers since 1962

The only insurer in Australia exclusively for barristers. New member applications and enquiries are welcome.

For further information and a PDS, please visit www.bsaf.com.au, call (02) 9416 0681 or email office@bsaf.com.au

Bar Cover is issued by Barristers' Sickness & Accident Fund Pty Ltd
ACN 000 681 317

BARRISTERS SICKNESS & ACCIDENT FUND

- ► Top quality sickness and accident insurance
- Low premiums, excellent value
- ► We cover up to 100% or your income
- ➤ You can claim up to 52 weeks from day one of your illness

You should read the Product Disclosure Statement and consider whether the product is appropriate before making your decision.

Victorian Bar Pro Bono Awards 2012

♦ hose barristers who do pro bono work know that the real reward lies in the act itself; in the knowledge that they are making a difference to the lives of those in our community who would not otherwise have access to justice; in the relationships formed with clients, solicitors and senior members of the Bar; and in the experience gained through exposure to challenging cases.

An increasing number of Victoria's barristers are devoting a portion of their time to pro bono work. In the last twelve months, members of the Victorian Bar gave more than 40,000 hours of free legal assistance to some of the most disadvantaged communities.

"In the last twelve months, members of the Victorian Bar gave more than 40,000 hours of free legal assistance to some of the most disadvantaged communities."

In recognition of their vast contribution, the Victorian Bar Pro Bono Committee established an annual Thank You function held during Law Week. This year's awards, held at the Supreme Court Library on 15 May, were presented by Victorian Attorney-General the Hon Robert Clark MP and Jane Dixon SC, Chair of the Victorian Bar Pro Bono Committee. The Attorney-General applauded the assistance provided by members of the Bar to people with disabilities, the homeless, asylum seekers and victims of discrimination, elder abuse and human trafficking and the positive impact on the community through work on environmental causes and the application of Freedom of Information.

Victorian Bar Chairman, Melanie Sloss SC praised all participating members of the Bar for the positive impact on the lives of individual Victorians, saying, "The Victorian Bar congratulates each of the award recipients and recognises that they represent the many who offer their service pro bono-freely and willingly -whether informally or formally through programs such as the Duty Barristers' Scheme and the Victorian Bar Pro Bono Scheme administered through PILCH."

2012 Award Recipients

1. Victorian Bar Pro Bono Trophy-Will Alstergren

Will has contributed selflessly and compassionately over a long period to representing clients in all jurisdictions, some facing incarceration. He was instrumental in the establishment of the Duty Barristers' Scheme in 2007 which now coordinates willing barristers to assist unrepresented litigants and is a hallmark of the Victorian Bar's long and proud pro bono tradition.

2. Daniel Pollack Readers Award-Jessie Taylor

Jessie signed the Bar Roll in October 2011 and has maintained the commitment to assisting and promoting the causes of asylum seekers, which is most publicly demonstrated in her award winning film 'Between the devil and the deep blue sea' which exposed the conditions for detention of refugees in

Indonesia. She continues her mission to change the treatment of asylum seekers and the laws that affect them and has undertaken a remarkable number of pro bono appearances in her short time at the Bar to date.

3. Ron Castan AM QC Award-Rupert Watters

Widely recognised for his empathetic approach, Rupert believes pro bono to be a moral obligation. He has worked on

> 15 matters in the past 12 months including many clients of the Homeless Persons' Legal Service, cases ranging from immigration to the environment, and a 22 day VCAT hearing relating to a new power station.

4. Susan Crennan AC QC Award-Adrian Finanzio

Among Adrian's pro bono cases, he led the VCAT hearing relating to a 'once in a decade' public interest case which tested for the first time provisions of the Environment Protection Act and the Climate Change Act as it related to a proposed new power station. Adrian acts regularly for the Environment Defenders Office pro bono.

5. Ron Merkel QC Award-Tom Hurley

Tom's pro bono work representing a community legal centre in a Freedom of Information appeal against the Department of Justice spanned 2007 to 2012 and involved multiple hearings at VCAT and appeals to the Supreme Court, and conferences with concerned parties - including while he was on holidays. The long running matter concerned the rights of prisoners, including access to justice, human rights and transparency in the prison system.

6. Public Interest / Justice Innovation Award-Debbie Mortimer SC, Richard Niall SC, Kristen Walker, Elizabeth Bennett, Matthew Albert & Craig Lenehan

This legal team has devoted countless hours to fighting for the legal rights of asylum seekers in cases related to the 'Malaysia Solution' which resulted in widespread public discussion and examination of government policy and a High Court challenge. The team acted for two asylum seekers, including one 16 year old child, due to be deported from Christmas Island to Malaysia for the processing of their refugee claims. In a 6-1 decision, the High Court held that under the Migration Act, the government could not send asylum seekers for processing to a third country unless that country satisfied certain criteria. This case ensured not only that each of these plaintiffs would have their claims for refugee status determined in Australia under Australian law, but that the fundamental tenets of access to justice, procedural fairness, executive accountability and the rule of law were protected and preserved.

Sally Bodman VBN









- 1. The winner of the 2012 Victorian Bar Pro Bono Trophy, Will Alstergren, receives his award from 2011 winner Debbie Mortimer SC.
- Jane Dixon SC, Chair of the Victorian Bar Pro Bono Committee welcomes guests to the 2012 Annual Awards held in the Supreme Court Library.
- 3. The Attorney-General congratulates the winners of the 2012 Pro Bono Awards. Left to Right, Rupert Watters, Elizabeth Bennett, Debbie Mortimer SC, Will Alstergren, The Hon Robert Clark MP, Richard Niall SC, Kristen Walker, Adrian Finanzio and Jessie Taylor.

New Tricks for Old Dogs (and Old Tricks for New Ones)

The Sixth ABA Advanced Trial Advocacy Course

anuary for a barrister is usually the time for leave taking. Not so for those of us who booked in for the sixth ABA Advanced Trial Advocacy Course on 23 January 2012 for an intensive 5 days of advocacy training. The course was conducted on a residential basis as many participants had travelled from interstate and overseas. Being in residence promoted the collegiality of the course. The Federal Court Victorian District registry generously made its facilities available so that the course could be provided in courts and associated facilities in conditions as near as possible to the working environment of the Bar.

Participants ranged from the older brigade, like myself, down to those with only a few years under the belt, from silks to juniors. The course pre-requisite was at least 2 years at the Bar. A number had attended previous courses and spoke enthusiastically about it. The drawcard for us all was the high reputation of the course. The stated underlying philosophy of the course was "that the skills of a barrister are best learned in an environment that is close to the real experience as possible".

The course reminds us that advocacy is a craft that can and should be taught as a skill in its own right. It is no longer good enough that the skill of advocacy is regarded as acquired "on the job". It demands a range of attributes and abilities of a lawyer to be applied in testing conditions. It is also a continuing process throughout one's career as practice develops and changes. The course was designed around a hypothetical Federal Court brief in which each participant was briefed for the Applicant or the Respondent to prepare a case analysis and opening address, examination in chief of witnesses, cross examination of witnesses, leading evidence from expert witnesses, cross examining experts and the final address. Each component was broken down to a daily task beginning on the first day with addressing and analysis of the opening of the case.

Before each task was commenced in separate groups the whole group was addressed on the theme of the forthcoming task by an eminent judge or lawyer. Usually the talk was supported by a demonstration of the task to be performed.

The group was divided into sub-groups of six so that the performances of participants could be reviewed and analysed in respect of each task. The strength of the course was its emphasis on participants performing each task and being assessed on it. Assessment was in the main undertaken by legal coaches who were drawn from judges and senior practitioners. Legal coaches assessed performance on structure, direction, content, strategy and, of course, any gaps or shortcomings in the presentation. Practical guidance was given by demonstration on better ways to put questions or lines of examination as and when needed.

The performance coaches, whose background was from the performing arts or the media, were concerned with advocacy as a performance. How best to start and create the right impression with the bench as well as the witness.

How to stand, how to begin speaking, attention to breathing, what to wear, what to do with papers, what to do with glasses, and so on were addressed by these coaches. Maintaining the awareness of the bench was seen as a key requirement of performance. Distracting behaviour was identified and suggestions made to deal with it. Over several performances with appropriate care and attention such behaviour was checked, if not removed. Many bad habits are caused by the need to have props to overcome nerves or to make us less concerned. But they are distracting to the bench and as well to the advocate. At the conclusion of the course one of the performance coaches observed that she was pleasantly surprised by the enthusiasm of the group to willingly accept suggestions without any display of the much vaunted barrister egos.

Each group was assigned to their own room or court. Each participant performed the task which was recorded on a microchip so that he or she could leave the group and sit down with a coach together to review the performance on DVD playback. Coaches also addressed participants after the group performances to sum up issues. We all found these sessions of enormous benefit. Here were leading exponents of the craft of advocacy providing the distilled wisdom of their experience on the diverse requirements of examination in chief, cross examination and examination of witnesses. Of particular interest were comments on pitfalls in examination of experts.

Witnesses were volunteers from the profession and elsewhere. Expert witnesses with accounting background were supplied from Deloittes. Even although the process was based on role playing the witnesses often proved recalcitrant in examination in chief and difficult in cross examination with some unexpected results.

Participants were encouraged to try new things in an environment where experimentation would not run the risk of prejudicing a client's case. Such experiments included moving the lectern to one side or on an angle to improve eye contact with the witness or the bench, addressing without referring to papers, quoting from authorities holding the material up so as to continue eye contact with the bench, trying new approaches to examination of witnesses. We were surprised at how small changes could improve presentation.

The week ran smoothly and passed very quickly.

The course deserves the high reputation that it has established in Australia and abroad. The course director, Phil Greenwood SC and his team are to be congratulated on organising a splendid course. As an older member of the profession I found it particularly valuable and I commend it to others.

Full details of the next ABA Advanced Trial Advocacy Course to be held in Brisbane from 21 – 25 January 2013 can be found at http://www.advocacytraining.com.au/

DAVID BAILEY VBN



Hanks, Gordon and Hill: Constitutional Law in Australia

n the evening of 27 June 2012, List G Barristers had the pleasure of hosting the launch of the third edition of the well known text: 'Constitutional Law in Australia. The authors of the third edition are Peter Hanks OC, Frances Gordon and Graeme Hill. Peter and Frances are members of List G and Graeme is a member of Dever's List.

The launch was held, appropriately, in the splendid surrounds of the Library of the Supreme Court.

Joining members of List G Barristers for the occasion were the guest speaker, the Hon Justice Hayne AC of the High Court of Australia, the Hon Justice Gordon of the Federal Court, the Hon Justice Tate of the Court of Appeal, the Hon Michael Black AC QC, former Chief Justice of the Federal Court, as well as many colleagues from the Bar.

Invitations were also accepted by representatives of the Australian Government Solicitor, the Victorian Government Solicitor, Victoria Legal Aid and of major law firms including Allens, Clayton Utz, Corrs Chambers Westgarth, Freehills, Holding Redlich, King & Wood Mallesons, Maddocks, Middletons, Minter Ellison, as well as members of the Faculties of Law of the University of Melbourne and Monash University.

The number and range of attendees reflected the regard of the profession for the text and its authors, and the importance of its subject matter to the practice of law.

Peter Jopling QC welcomed the guests on behalf of List G and the authors and introduced the Hon Justice Hayne AC.

His Honour reminded the guests of the enormity of the task of writing such a text and spoke of the indebtedness of all legal practitioners to the few who do. His Honour also emphasised the centrality of the Constitution not only to the practice of law in Australia, but to the civic life of Australia. As His Honour pointed out an understanding of the Constitution is central to understanding the proper functions and nature of government in Australia.

His Honour also referred to the many significant developments in the interpretation if the Constitution since the last edition of the text and noted (perhaps with the intention of encouraging the authors in further efforts) that, just a week before the launch, the Court had handed down its decision in Williams v Commonwealth of Australia [2012] HCA 23. On a more personal note, as His Honour also pointed out, Frances and Graeme are both former associates of his.

Peter Hanks QC responded on behalf of the authors, speaking warmly of the experience of working with his co-authors.

List G Barristers is grateful to the Honourable Justice Hayne AC for speaking at the launch, to the Supreme Court for permitting the use of the Library, and to the Essoign Club for providing the catering.

JANE KING* WEN





*Jane King is the barristers' clerk for List G

VICTORIAN BAR NEWS



Peter Jopling QC, The Hon Justice Hayne AC, Peter Hanks QC



Supreme Court Library

International Commission of Jurists

The "opening" of the legal year has its origins in the middle ages, when judges prayed for guidance at the start of the Michaelmas term, after returning from the long summer break. In those days, the judges would walk the two miles from Westminster Hall to Westminster Abbey, having fasted before taking communion. As the Hon Sally Brown AM has wryly observed "Now we eat breakfast and are driven."

Some form of event to mark the beginning of the legal year has taken place in Melbourne since at least 1938.

For many years, the only ceremonies were religious ones, held in religious premises, and attended largely by lawyers and judges. However, more recently, the International Commission of Jurists decided to expand the traditional concept of the opening ceremony, to include the role of the community in the administration of justice and therefore to invite community members and leaders to the event. This re-focus enables the highlighting of the importance of the rule of law and equality before the law in a diverse and complex community, all without the need for robes. Every year since 2008, the ICJ has hosted opening ceremonies which have been very well attended by community representatives, as well as lawyers and judges. This year's ceremony was no different, being attended by the heads of the Supreme Court, Court of Appeal, County and Magistrates' Courts, as well as many other judicial officers, lawyers and a broad cross-section of the general community.

Instead of prayers and sermons, the ceremony usually involves some musical entertainment, as well as short addresses by two or three interesting speakers. The speakers reflect on some aspect of our laws and legal system, and invite us to recommit to maintaining and applying the law in the coming year with fairness, impartiality and courage. Morning tea ensues.

At the 2012 event, we were fortunate to hear thought-provoking addresses from Fr Frank Brennan SJ, (Professor of Law at the Australian Catholic University), Professor Carolyn Evans (Dean of Melbourne Law School), and two student speakers from MacRobertson Girls' High School. Past speakers have included the event's patron and long-standing supporter, Chief Justice Warren (Chief Justice of Victoria), as well as Rev Tim Costello AO (CEO, World Vision Australia), Professor David de Kretser (Governor of Victoria), The Hon Catherine Branson QC (President of the Australian Human Rights Commission), and Professor Marcia Langton (University of Melbourne).

For the first four years, the event was held in Queen's Hall at Parliament House, a relatively long trek for many of us. This year, the event was held for the first time in the Waldron Hall at the County Court. Thanks to the support of Chief Judge Michael Rozenes AO and the judges of the County Court. Next year's event will also be held in the Waldron Hall.

The ICJ invites you all to attend the opening of the 2013 legal year.

THE HON JUSTICE HOLLINGWORTH







- 1. Waldron Hall, County Court
- 2. Prof Frank Brennan

World Bar Conference - London 2012

he International Council of Advocates and Barristers arranges a World Bar Conference every two years. This year the conference was devoted to the theme of advocacy itself with participation from skilled and superlative advocates from around the world.

Over a weekend from 29 June to 1 July, nearly 300 delegates from 16 countries including the referral Bars of Australia, New Zealand, South Africa, Zimbabwe, Scotland, Northern Ireland and the Irish Republic met and examined the differences and similarities between them on the theme of "Advocacy, past, present and future: constant values for a modern Bar". This was the first occasion the Bar of England and Wales had hosted the event. Unsurprisingly, perhaps, given the attractions of the Temple, and of London in an already packed summer calendar, it was also the first conference at which delegates from abroad outnumbered those from the host nation.

Events commenced with a tour of the Rolls Building, introduced by Mr Justice Christopher Clarke and Chairman of the Bar, Michael Todd QC. Fittingly for a global audience, Sir Christopher described the "bee-line" to the Rolls Building of international parties, especially those from "countries east of Berlin ending in '-stan." Unhappy memories of litigating in a St Dunstan's "broom cupboard" were banished, in what we were told is by far the largest business court complex in the world. The Rolls Building's preparedness for the much-heralded move to paperless trials was explained by Royal Courts of Justice (RCJ) director, Dave Thompson, although bundles marked A-Z (and beyond) flanking the audience spoke to an ambition yet to be completely fulfilled.

Having seen its physical location in the Rolls Building, the functioning of the software used in the substantially paperless Berezovsky case was later demonstrated, including excerpts from the questioning of Mr Berezovsky by Lord Sumption (who also appeared at the conference).

Formal opening

The formal opening of the conference took place at the Supreme Court in Parliament Square, which delegates were kindly invited to tour. The tour began in the library where, over the stairway, this inscription can be found:

"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality tied in a single garment of destiny. Whatever affects one directly affects all indirectly."

The opening addresses took place in the crowded Court 1 and adjacent screening room. We were warmly welcomed by Lord Phillips, President of the Supreme Court, and who shared a brief history of the establishment of the Court.

A series of addresses by judges of superior courts provided delegates with do's and don'ts of advocacy in such a forum.

We heard from Australia (Chief Justice Robert French), South Africa (Justice Edwin Cameron) and the United Kingdom (Baroness Hale). Themes for the conference were set–qualities of good advocacy including brevity (good news for the reader) and personal integrity (you can rely on this report), the need for mutual respect between the Bench and counsel, and ultimately the role of the law in mediating social change.

From the Supreme Court we made our way to a reception at the House of Lords. This was a particular highlight for the Antipodean delegates, who were keen to experience the history and tradition of Westminster. We congregated in the Cholmondeley Room for drinks and canapés. The balcony assured us of excellent views of the Thames. The only speech was a very short one by our host, Stephen Hockman QC-co-chair of the International Council of Advocates and Barristers. He thanked Baroness Deech, chair of the Bar Standards Board for her support of the function and promised all present that there would be no other unnecessary speeches, a promise upon which he delivered.

Saturday began with the Lord Chief Justice's keynote address on the court's expectations of the advocate, which served as a timely reminder of the fact that our judges still view oral advocacy as the key discriminator, even when 200-page documents bear the title "skeleton argument", and of the importance of those decisive adjustments made on their feet by skilled advocates who "respect the moment". Some may also take Lord Judge's address as proof that every good speech should contain at least one extended sporting analogy.

Advocacy master class

As for the rest of Saturday's programme, Desmond Browne QC, the conference's programme director, and Stephen Hockman had secured a stellar cast of speakers. A highlight was the session on advocates of the past, in which advocates of today championed Cicero, Erskine, Curran and F. E. Smith. It would be unwise to draw too literal a lesson from these forebears; each of the lectures came with a "do not try this at [your] home [court]" health warning, particularly the latter three's talent for the judicial put-down, but their championing by Dr Michael Crennan SC, Lord Sumption SCJ, Michael Collins SC and Michael Beloff QC was an advocacy master class in itself. My vote, in this unofficial contest between historical advocates, went to John Philpot Curran for the feat of delivering a 15,000 word address from 30 words of notes, and for much more besides.

For inspiration, though, one needed to look no further than the session on advocacy against the odds. Sir Sydney Kentridge QC chaired talks by advocates from Northern Ireland, Pakistan and Zimbabwe and gave some of his own recollections of apartheid in South Africa. The fact that one scheduled speaker, Beatrice Mtetwa, had remained in Zimbabwe to represent some 29 political dissidents before a hostile court arrested and detained without bail, spoke

eloquently to her commitment to her clients. For those of us for whom advocacy against the odds is a weak case before a slightly impatient judge, it was humbling to hear first-hand from counsel who, despite assault and imprisonment, continue fearlessly to represent those whom the government opposes.

World Bar Conferences are premised on the idea that much may be gained from the discussion of "difference and similarity" between the various referral Bars and this was further explored in the specific context of prosecution advocacy in various tribunals. More generally, in the tea breaks and lunches hosted by Inner Temple, there was plenty of opportunity to compare and contrast experiences across national boundaries. Such conversations continued in the grand environment of Middle Temple Hall, at Saturday's gala dinner, at which the Attorney-General - perhaps with the more florid advocacy of the past in mind – put the case for emotive submissions as a reminder that the law is, ultimately, about the relationships between us.

Sunday's focus was more practical. The sessions started with "Advocacy training: what the young Bar really needs". It became apparent that the issues for the young Bar of England and Wales are replicated in other jurisdictions: disproportionately low fees for those undertaking publicly funded criminal work, and limited opportunities for real-life advocacy on privately funded briefs. David Nicholls, chairman of the Young Barristers' Committee, drew an analogy between counsel and surgeons. Young barristers hold themselves out as experts in advocacy when often they only get to run a handful of cases each year. Such a level of practical experience would not be tolerated in a surgeon proposing to carry out complex surgery. There was discussion about whether ongoing advocacy training should be mandatory to seven years' Call. One idea floated was that young barristers should be required to attend court with their pupil supervisors (or mentors as they are known elsewhere) and engage in discussion about the cases so that they understand the strategy. Retired judges could also observe young barristers in court and provide feedback. This would make the training and experience of young barristers more akin to the experience of trainee surgeons.

Fiery sessions

The fieriest session by far was that on the imminent Quality Assurance Scheme for Advocates (Crime). It was said to be a response to advocates accepting instructions outside their competence. With both the regulator and the criminal Bar represented, there were bound to be contrasting views. And there were. If ever in trouble, we most definitely would want Max Hill QC in our corner. Of greatest concern to the criminal Bar is the accreditation of a category of advocate known as "plea only advocates", who in the view of the criminal Bar, will not be qualified to advise on alternatives for clients. The regulator remains firm that this category will remain within the scheme for the first two years. All advocates should observe its operation carefully as quality assurance will in due course be extended to other areas of practice, and also to other jurisdictions.

Choral Matins was held at 11.30 am in the Temple Church. After hearing the magnificent choir singing, inter alia, Zadok the Priest, we were treated to a thought-provoking address by Justice Crennan of the High Court of Australia. Her theme, derived from the readings of the day, was "the way of truth", "the light of justice" (which she urged us to keep shining) and "the sun of understanding".

After drinks in the Master of the Temple's garden, and lunch, the delegates reassembled for the final sessions of the conference. Advocacy at public inquiries allowed us an insight into the challenges of inquiries such as the 7/7 London bombings inquest, the Malaysian inquiry into the death of Teoh Beng Hock, and the 2009 Victorian Bushfires Royal Commission and the 2011 Queensland floods inquiry. This was followed by ruminations on the future of advocacy and the continuing necessity of an independent Bar.

Delegates left the conference feeling renewed and inspired as to the role they play, not just as members of their own local Bars, but as actors in a broader common law universe, joined together in the "single garment of destiny". Thank you to the organising committee, to the Bar Council, to the Inner and Middle Temples, and to Freshfields who allowed the use of their conference facility for the conference sessions themselves. The next World Bar Conference will be in Auckland, New Zealand (where the sailing is excellent). We highly recommend that you put 21 April 2014 in your diaries now...

JANE TRELEAVEN AND SA'AD HOSSAIN





VICTORIAN BAR NEWS









- 1. Dinner at Middle Temple Hall
- 2. Caroline Kirton SC, Melanie Sloss SC, Fiona McLeod SC
- 3. Fiona McLeod SC
- The Middlesex Guildhall. The new home of the Privy Council
 Supreme Court Library, Supreme Court of the United Kingdom, Parliament Square, London



New Magistrates Court Mediation Initiative

awyers are urged to obtain orders for mediation by consent in the Magistrates Court of Victoria, opening the door for increased mediation work for members of the court's Single List of External Mediators. Known as SLEM, the list comprises barristers, practitioners and other professionals accredited under the National Mediator Accreditation System. Despite SLEM having been in operation for over a year in the Melbourne registry, take-up has been low. However, recent changes will increase the numbers of cases available for mediation.

- Registrars are now assessing more cases as suitable for mediation.
- Registrar mediations will no longer be free following new courts fee regulations later this month.
- Use of the List is to be offered at metropolitan and regional courts.

Both the Bar and the Law Institute have already agreed to fixed lower fees for SLEM mediations to stimulate use of SLEM. More importantly, the steady increase in mediations and a high settlement rate show practitioners are confident that the scheme is a real option for litigating clients.

Lawyers may obtain mediation by consent at any time, regardless of whether there is a court referral, and should seriously consider doing so after a Notice of Defence has been filed and all available information is to hand.

Bar representative on the ADR Committee, Carey Nichol, said:

"Quite simply, if you can say to a client that we can sort this matter within 7 days and use court- auspiced mediators at a fixed fee in neutral premises, as against the usual 7 week turnaround in the Magistrates' Court which even though for a court is relatively quick, then that is a very attractive option."

The Magistrates' Court SLEM list has now 172 members appointed by the Chief Magistrate and more may now apply. Announcing a review of the list at the latest meeting of the Court's Dispute Resolution Committee, Deputy Chief Magistrate, Peter Lauritsen, said:

"The Court has transformed the civil jurisdiction in the Court by making use of professional mediators, first with using professional mediators gazetted to the Dispute Settlement Centre for less expensive matters – up to 40,000, and second, by establishing the SLEM list for more expensive matters. The Court has also set up early neutral evaluation for complex matters which means that a senior experienced magistrate reviews the material very quickly, listens to the parties and provides a non-binding indication of the likely outcome. Each of these initiatives has produced very high settlement rates, cut the civil list dramatically, slashed delay and allowed

the Court to concentrate on developing high level civil expertise for the remaining difficult cases. We have also noticed more of these since the profession has seen that the Court is indeed becoming highly specialised with the steady stream of difficult cases."

In supporting use of the scheme at the first regional court to participate, Regional Coordinating Magistrate of the Frankston Region, Franz Holzer, said:

"This initiative of the Court will enhance the opportunity of suburban courts to resolve civil disputes earlier and more cost effectively to facilitate the overarching purpose of the Civil Procedure Act 2010."

Single list of external mediators - how it works

In matters over \$30,000, parties may advise the Court within 21 days of filing of a Notice of Defence that a mediator has been appointed by consent. Settlement agreements made at mediation may be filed with the Court and enforced in the same way as other agreements. Scales for professional costs for counsel and Australian lawyers attending mediation are similar to those for attending Pre-Hearing Conferences, except that there are additional allowances for each subsequent hour of the mediation after the first 4 hours. Mediators are accredited under the National Mediator Accreditation System. The other features of the list are:

- the Court will only refer mediation to those claims where the monetary relief exceeds \$30,000;
- the decision as to suitability for mediation is made by one
 of the Court's experienced registrars or deputy registrars,
 although practitioners may obtain mediation at any time by
 consent;
- if considered suitable, the parties are advised in writing and given 21 days in which to raise any matter relevant to the question of referral to mediation;
- after 21 days, if the proceeding is still considered suitable, an order referring it to mediation will be made;
- within 14 days, the parties must nominate a mediator and notify the relevant registrar of the agreed details. That means that the parties must make arrangements directly with their preferred mediator, including the payment of fees:
- if the parties do not advise of an agreed mediator after 14 days, the Court will appoint a mediator from the list. The mediation must have occurred within 30 days;
- list mediators have agreed to charge a flat fee of \$1,100 to conduct the mediation. If there is a cost for the use of a venue, that is separate;

VICTORIAN BAR NEWS

- at the completion of the mediation, the mediator completes a Form 50A and sends it to the relevant registrar. This form appears in the Magistrates' Court General Civil Procedure Rules 2010. It advises of the outcome. If unresolved, it contains information enabling the listing of the proceeding for trial;
- to enable the proper working of the mediation process, r 50.12 effectively suspends the time for taking steps under the Rules.

SLEM mediations may also be initiated by the Court in matters over \$40,000 disputes and currently only at Melbourne and Frankston.

NERIDA WALLACE

Mediators' contact details are listed on the website of the Court together with links to short biographical sketches, to assist the selection process.

Professionals seeking membership of the list should write to the Chief Magistrate before the end of February 2013.

LINKS

http://www.magistratescourt.vic.gov.au/node/913

http://www.magistratescourt.vic.gov.au/publication/mediation-process-2011-flowchart-0

http://www.magistratescourt.vic.gov.au/publication/civil-jurisdiction-scale-costs



Back Row: Mark Vendy, Ross Nankivell, Michael Sweeney, Roger Young Middle Row: Carey Nichol, Nerida Wallace, Mark Hebblewhite

Front Row: Ragini Durai, Deputy Chief Magistrate Peter Lauritsen, Julian Ireland

Ethics Committee Bulletin*

LEGAL SERVICES COMMISSIONER v J [2012] VCAT 372

Conduct Out of Court

On 2 April 2012 a Senior Member of the VCAT made orders penalising a barrister for professional misconduct. This decision demonstrates that an allegation of professional misconduct may extend to conduct undertaken by a practitioner in his or her domestic affairs. It also illustrates the penalty that may be imposed for the same or similar offending.

Liability

J pleaded guilty in the Magistrates' Court to one count of making a false document and six counts of using a false document. Each count related to the forgery of his then wife's signature on documents; being an application to register a company and a number of tax-refund cheques. There was no allegation that J had misappropriated funds, or that the interests of his then wife or anybody else haWd been adversely affected.

The Legal Services Commissioner (LSC) commenced disciplinary proceedings in the VCAT. The LSC submitted that the forging of a signature is an offence involving dishonesty within s 4.4.4(c)(iii) of the Legal Profession Act 2004. Thus, the offences were capable of constituting professional misconduct. The LSC submitted that the repeated nature of the conduct (seven offences over 9 and a half years) elevated it above the less serious allegation of unsatisfactory professional conduct.

J pleaded guilty to professional misconduct. The VCAT accepted the plea and noted the expectation that clients, courts, and other institutions may rely on solicitors "being utterly honest in all their dealings". Although the offences arose out of J's own domestic affairs "they were transactions of a nature which solicitors routinely carry out for clients".

Penalty

The LSC proposed that J be punished by way of:
(a) reprimand; (b) fine of \$5000; and (c) an order that he pay the costs of the LSC. J consented to this disposition. The VCAT was satisfied that the orders were appropriate. The Senior Member noted his obligation to consider the disposition that best serves the objective of protecting the public. He found there was no need to make a further order interfering with J's right to practice. Of this, it was relevant that the conduct had occurred in J's domestic affairs and did not involve any misappropriation of funds.

The full decision may be found on the Legal Services Commissioners' website: http://www.lsc.vic.gov.au/disciplinary-decisions/

*As at 14 September 2012

ETHICS COMMITTEE BULLETIN NO 1 OF 2012

Email Communications with Courts and Tribunals

Recent instances of barristers communicating with court or tribunal staff via email without notice to their opponents have been brought to the attention of the Ethics Committee. The Ethics Committee wishes to remind barristers of the Rules of Conduct relating to communications and to provide guidance with respect to email communications with court staff.

Rules of Conduct

Rules 54, 55 and 56 are of general application. They provide:

- 54. A barrister must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:
- (a) the court has first communicated with the barrister in such a way as to require the barrister to respond to the court; or
- (b) the opponent has consented beforehand to the barrister dealing with the court in a specific manner notified to the opponent by the barrister and has an opportunity to participate.
- 55. A barrister must promptly tell the opponent what passes between the barrister and a court in a communication referred to in Rule 54.
- 56. A barrister must not raise any matter with a court in connection with current proceedings on any occasion to which the opponent has consented under Rule 54(b), other than the matters specifically notified by the barrister to the opponent when seeking the opponent's consent.

Guidance

Recognising that email communication between court staff (including Registry staff and Associates) is a common occurrence in civil and criminal cases, the Ethics Committee provides the following guidance:

- Apart from those situations where the rules or practice directions of a court or tribunal provide for the electronic lodgement of documents, before communicating with a court or tribunal by email a barrister should notify his or her opponent of the intention to do so.
- It is essential that the barrister provide his or her opponent with a copy of any such email communication.
- Email communication with court staff should be confined to matters which are routine and uncontroversial.
- Such communications should not be argumentative or tendentious, and should avoid the possibility of the court staff becoming involved in any dispute between parties or legal practitioners.

VICTORIAN BAR NEWS

 All email communication should, unless the court or tribunal has otherwise directed, be confined to matters of practice and procedure. Such communications should not be used as a vehicle for the provision of unsolicited submissions or evidence.

 Barristers should familiarise themselves with any rules, practice directions or notices issued by the relevant court or tribunal which may bear on email communications with court or tribunal staff.¹

RICHARD W McGarvie SC VBN



1 For example, the Chief Judge of the County Court has issued a Notice to Practitioners, "Communication with County Court Associates", dated 23 February 2011, NTP 1-2011.



Providing the highest quality hand made solid timber furniture we welcome all enquiries and are always happy to quote. We use environmentally considered materials and finishes, take great care in our design and preparation process and fully design and install all our work.

Library | Study | Shelving | Conference Tables | Quality Cabinetry

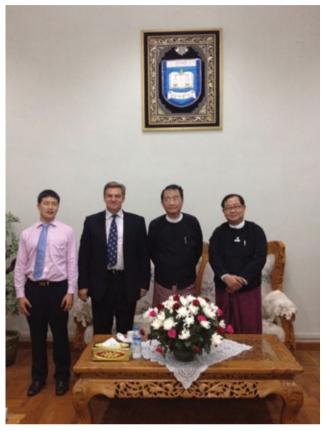
Workshop at 261 Albert Street, Brunswick 3056

www.thegentlemanfurnituremaker.wordpress.com

Contact us at: thegentlemanfurnituremaker@gmail.com | 0433 334 310

Me and Myanmar

Steven Anger Looks Back Through Burmese Daze



Meeting with his Excellency, Dr Tun Shin, Attorney-General of Myanmar. Eugene Quah, Steven Anger, his Excellency and his deputy.

fter a heavy spate of criminal trials spent in the trenches of defence for the first half of 2012, I decided to spend July in Burma or Myanmar, as it is now called. I had in mind a gin sipping visit to bars of old empire, a spattering of temples and curries imbibed whilst trying to find the monsoonal wave on the east coast, along with convivial meetings with the natives. Joe Toal (of counsel) wanted to come initially and had a vision of the both of us in pith helmets asking for the racetrack. I think he thinks the Strand Hotel Rangoon/Yangon is an Asian version of the Great Western, complete with TAB betting machines.

I also had in mind to make connection with the legal fraternity of Myanmar and suggest links with its Australian relations. I informed the Victorian Bar Council of my intention to have discussions about a friendship association between the Victorian Bar and whatever the appropriate legal association of Burmese lawyers was; Burmese lawyers association, Rangoon Bar Council, Myanmar Bar Council, whatever. The Bar Council seemed to think it was a nice idea and would be happy to hear from me when I got back. I think they were secretly hoping I would be detained as a seditionist and they wouldn't have to bother with me again.

Before I departed I attended a seminar sponsored by the Federal Attorney-General's department, conducted at the University of Melbourne Law School and addressed by Professor Chris Lamb, two time ambassador to Burma. He spoke about the announcement by President Thin Sein, of Myanmar's intention to promote and live by the rule of law and the opportunities for a new legal engagement with Burma. He mentioned the Myanmar Attorney-General, Dr Tun Shin, being approachable and fluent in English having been educated in England and Belgium and, unlike their Chief Justice, having a law degree. I contacted the Australian embassy in Rangoon and Mr Eugene Quah an Australian lawyer working in Rangoon, whom I had been referred to as a good first point of contact by academics at Melbourne University and The Hon Murray Kellam AO QC who is remembered fondly and highly regarded in Rangoon.

After a tic tac of emails and letters of introduction, a meeting was organised in Napydaw the new capital of Myanmar, a place that makes Canberra look exciting. Eugene Quah and I travelled the 4 hour road trip together because he wanted to discuss his plan to put Myanmar law on line through Austlii in order to make the law accessible and transparent. Much of Myanmar law is not published and only accessed on a "need to know" basis.

We met His Excellency in a state room reminiscent of the King and I, our initial meeting filmed by Myanmar State television, a must for insomniacs. After Eugene had finished his discussion, I told Dr Tun Shin that I was interested to initiate a friendship society between the Victorian Bar and whatever the appropriate body in Myanmar was. He told me that would be the Myanmar Bar Council and when I asked who headed it, he was pleased to announce that he and the deputy attorney general, present and smiling agreeably, were the president and deputy of that august body. Later I learned from Michael Min Sein, everybody's first choice of lawyer, that there is an independent body elected by lawyers, called the Burmese Lawyers Council or Association which had been sidelined for some years but was once again becoming active and vibrant. He suggested that perhaps we could propose an association with both bodies to Dr Tun Shin.

I met with various other local and foreign lawyers in Myanmar; Professor Daw Kin Mar Yee, the head of the law department at the University of Yangon, eager to make contact with her counterparts in Australia; a group of inspiring young lawyers who had started the Yangon Legal Clinic, a free community legal service operating in Yangon and its districts; Steve Marshall who has been heading up the International Labour Organisation's Yangon office conducted a conference on freedom of association whilst I was visiting. I had dinner with Dr Chris Sidoti, former Australian human rights commissioner, visiting with the Asia Pacific Forum to meet with the Myanmar Human Rights Commission, which was recently created.

VICTORIAN BAR NEWS

Whatever scepticism one might reserve, there is an undeniable sense of progression and awareness of the need to adopt workable systems of law and civil procedure that has emerged in Burma. Certainly it is a country that needs assistance, having once been described as the "rice bowl of Asia" it has been left to die on the vine, or in the rice paddies, by neglect and self interest on the part of its military leaders. While this has left a charming colonial city in Rangoon, jaded by the ravages of time but untouched by the negative aspects of urban development, it is in need of commercial development and the injection of foreign capital. Decent city footpaths would be a start! I was always stumbling on my many walking tours around the city, especially it seemed when I left the Strand 'happy hour' on Friday nights. If you stand still long enough in the bar at the Strand Hotel you will meet every expat in Yangon and a good number of the Burmese professionals. I made it a matter of research.

The Burmese are a wonderful people who will greet you with a warm smile and offer you hospitality which belies their impoverishment. Their nation is in urgent need of rebuilding. They need and want foreign assistance especially from the west. We have a common legal heritage and are in a unique position to assist in the establishment of a new legal culture through education and mutual engagement. Eugene Quah and I want to organise an Australian/Burmese legal conference some time in 2014 just preceding the general election to be held in 2015. I can only but encourage any barristers with an interest in Myanmar or a desire to travel there, to get involved

in a dialogue with lawyers there. Eugene is always happy to hear from and assist anyone interested in the betterment of Myanmar or simply wanting some travel tips and local knowledge.

Whatever your field of practice from commercial to criminal, there is a constructive contribution that can be made. The ability of foreign lawyers to work in Burma is becoming more widespread and the right person who is willing to adapt to local circumstances can enjoy a positive exchange. Several of my travelling companions are now residing and working in Rangoon, having been infected with its pervasive charm.

As for me, I am now back in the trenches of crime and missing happy hour at the Strand. Best martinis! I can confirm that there is a surfable wave on the east coast during monsoon season, July to September, bring an old board and leave it there when you go. I'm sure the young kids on the coast would produce a Mick Fanning with time and encouragement.

Joe Toal regrets not coming and is sure that he could have found a cock fight or something to bet on had he accompanied me. His pith helmet is at the ready. And I say to my other colleagues here at the Victorian Bar: Rangoon is a day's flight away and is ready and waiting for you to come and visit. There is much to be mutually gained between us and our legal colleagues in Myanmar, through fostering a collegiality in jointly promoting throughout our region, the shared values of the maintenance of the rule of law and judicial independence.

Steven Anger W





Supreme Court in Rangoon/Yangon

A Resolution to Mediate

The Lawyers Mediation Course Experience

A fter many years of procrastination I finally determined earlier this year that I should learn more about the black art of mediation.

As luck would have it, my clerk mentioned she thought the Bar was conducting a mediation course. A quick search on the Bar website confirmed that indeed the Bar did conduct such courses and there was one occurring in April/May 2012. I managed to secure the last available place.

Some basic facts

The Victorian Bar website describes the course thus:

"The Lawyers Mediation Certificate is an accredited mediation course designed by and run for lawyers and others who work in the justice system. All instruction, coaching and assessment is conducted by barristers."

The course is conducted over six days and is conveniently blocked into the Friday, Saturday and Sunday of successive weeks. It is held on level 1 of Owen Dixon Chambers East.

The course is divided into two parts. Part 1 is the first five days of the course and provides participants with the requisite number of training hours to meet the requirements of the NMAS. To become accredited under the NMAS, participants must complete an accreditation day which is in Part 2 of the course—day 6. Participants have the option of doing Part 1 and completing Part 2 at another time or with another Registered Mediation Accreditation Body. By completing Part 2 successful participants will be eligible for national accreditation as a mediator.

The fee for the course is \$2,250.00 (GST inclusive) for Victorian Bar members and \$2,550.00 for others, which is lower than many mediation courses. Discounts of 10% are available to participants in the 2012 Bar Readers' Course. The price includes lunch, morning and afternoon tea and workshop materials. The course is limited to 18 participants.

Further information can be obtained from the Victorian Bar website.

My motivation for doing the course

As a barrister of some longevity I confess to being curious (rather than sceptical) about what such a course had to offer me. Prior to doing the course I had participated in many mediations and conducted a considerable number myself. What I thought I needed was a far better theoretical understanding of mediation and a more coherent sense of process. I was also interested to learn whether practices which I intuitively engaged in were orthodox or heretical. I can say that the course responded to my needs in ways I had anticipated and otherwise.

The April / May 2012 Course I attended

The 18 participants in my own course were mainly barristers but included several solicitors and an academic. There was a fair spread of experience (and curiosity/scepticism) from veterans to novices. To the best of my knowledge none of us has previously had formal mediation training.

The course was conducted by Peter Condliffe and Dr Elizabeth Brophy, both members of the Victorian Bar. Both Peter and Liz are very well qualified mediators and brought to the course a vast array of academic and practical expertise drawn both from their experience in mediation at the Bar and in the wider community.

The course was, I thought very well structured and conducted. The bulk of the time is spe,nt in learning a particular 9 stage mediation model and in practising the theory of this model in role-plays. As the course moved towards its end role-plays and coaching became more and more the stuff of each day's work.

Peter and Liz conduct the course in a relaxed, user friendly manner and manage to combine the communication of their knowledge with a very congenial, collegiate atmosphere. Whilst a considerable part of the first few days is spent introducing participants to some broader intellectual theories of mediation and to the specific 9 stage model the course imparts, there was always a willingness on the part of Peter and Liz to respond to the many and varied questions of the participants.

As everyone relaxed into the course it became both informative and a source of great fun. As the readers of this article might imagine, any collection of 18 lawyers is likely to expose a number of frustrated thespians and this course was no different. Role-plays provided ample opportunity for participants to reprise their version of client stereotypes ranging from unscrupulous builders of uncertain European origin to histrionic would-be beneficiaries in testator family maintenance proceedings—you all know who you are!

From my own point of view I felt I profited greatly from learning the 9 stage model and associated techniques which Peter and Liz taught. In particular I gained an understanding of how to structure a mediation so that it develops its own logical momentum and, via demonstration from the course leaders, how to psychologically better manage typical scenarios one encounters in a mediation. Even for experienced lawyers, both when acting for clients or engaged as a mediator, productively managing power imbalances, recalcitrant parties and emotionally charged disputes are not reflexive skills. Indeed the adversarial model so intuitive to an experienced lawyer, is quite foreign to the skill set of a good mediator.

What this course achieves is to deconstruct some unhelpful paradigms and build a new awareness and technical skills from the ground up. Whilst one can always read and hear about such things, having it located in an intellectually coherent model, and seeing it demonstrated by such skilled operators as Peter and Liz, was invaluable.

Summary

This is a course I would unhesitatingly recommend to my fellow practitioners. There is indeed much to be learnt about the theory and practice of mediation which standard legal education and practice does not prepare one for. That it is taught in such a congenial environment is a real bonus. It is demanding in terms of intellectual content and time commitment but the dividends are obvious to me. I now much better understand what I should endeavour to do when engaged as a mediator and when representing a party and why the model taught, appropriately adapted to particular legal circumstances, is so conducive to good outcomes. I profited from the course and greatly enjoyed the society of my fellow participants in doing so.



BAR MEMBERS... SAVE THOUSANDS ON ANY NEW CAR



































































Save time and money by buying your next new car through your own personal buyer's advocate.

Members can now enjoy the fleet-buying power of MBA Car Assist. Vehicles are purchased at significant savings over the retail prices, whilst avoiding all the hassles and upsells of the dealership sales process. We also arrange all of the paperwork and keep you updated on the progress of your vehicle's preparation or production. Your new car is even delivered to your home or work with a full tank of fuel.

So how does it work? MBA Car Assist purchases new vehicles every week, which gives them access to fleet pricing. That discount is then passed on in its entirety to you. Now that's buying power!

Should you have a trade-in or require finance and insurance, your consultant will be able to ensure that the entire process can be completed simply, with maximum savings of your time and money. To ensure you're getting the absolute best price for your new vehicle, your personal consultant will include a number of different dealerships (including your local) in the tender process, with each competing for your business.

Are you looking to buy a new luxury vehicle from BMW, Mercedes-Benz, Audi, Mini, Lexus, Jaguar, Land Rover or Volvo? Members will also enjoy the massive savings of up to 5 years free scheduled servicing on these vehicles.



For further information about this offer and more, log into the members area of www.vicbar.com.au and click on the Member Benefits tile. Email info@mbabenefits.com.au or call Divesh 0434 667 896 or Tony 0418 174 974

Lifting the Bar to an Asian Practice

The September Super Trade Mission to China

he Premier of Victoria, the Hon Ted Baillieu MLA, led an historic trade mission to the People's Republic of China between 17 to 21 September 2012. It was Australia's largest ever trade mission abroad, comprising more than 400 Victorian businesses and organisations, representing a diverse range of industries. Fifteen industries were represented in the trade mission, which involved visits to thirteen Chinese cities.

The Victorian Bar and the Commercial Bar Association were, amongst other organisations, represented as part of the professional services sector. It was also an historic occasion for the legal profession through the participation of the Victorian Bar and the Law Institute of Victoria.

It is estimated that China has over 1.3 billion people. Beijing has a population of approximately 19.6 million. GJ Clark (2008) estimates that in 2007 there were about 120,000 lawyers in China. It is likely to be approaching 200,000 today.

The Chinese legal system is influenced by Confucian philosophy of social order, morality and education. As such, laws are codified as statements of principles. China's legal system today, however, is primarily based on the civil law system. However, China appears to be undergoing gradual reforms influenced by the role of the common law in Hong Kong and the need for China to develop its rule of law in accordance with international standards.

In 2009-10 Victoria's combined exports and imports with China were over AUD\$12 billion. According to the Department of Foreign Affairs and Trade, legal services sector is an area with rising export potential for Victoria. The recent Australian Bureau of Statistics figures show that people born in China are the third largest group of overseas-born residents in Australia. Mandarin is now the second most spoken language in Victoria.

As China's economy grows and numerous Victorian companies are seeking to enter into commercial arrangements with entities in China, the Victorian Bar is well placed to offer its members' superior range of services for Victorian companies entering the China market. The converse is also applicable. Many of the largest Chinese companies including CITIC Resources, Minmetial, MMG, Hisense, and Changhong have headquarters in Victoria.

The Premier of Victoria believes that "China's dynamic economic growth and rapid urbanisation present exciting new opportunities for Victoria and China."

With this objective in mind, participating in this trade mission strengthens the Victorian Bar's involvement in the Asian century. The target is to establish the market for Victorian Bar members' skilled services in Asia by engaging with the Asian economies. The process is hoped to be achieved by:

• Promoting the Victorian Bar as the leading association

of advocates, advisors, arbitrators and mediators, which association is of strategic importance to both Victoria and China given the Victorian Government's desire to establish Victoria as part of a national grid for international arbitration.

- Showcasing the service offerings of the Victorian Bar, namely in advocacy, international arbitration, international mediation, conflict management and resolution, and professional education and training.
- Forging new relationships and connections between Victoria and Asian law associations, arbitration institutes, education institutes, and the courts.
- Participating in the Victorian Government's mission to strengthen its investment relationship with China in order to generate substantial new opportunities for both economies.

China's rise as an economic powerhouse provides a new market for Victorian Bar members to export their specialist advocacy skills and services.

While international arbitration has been around for quite some time, it is still regarded a "closed circle" practice. However, international mediation is taking off, and now considered as the "new thing" for dispute resolution involving foreign companies doing business in Asia, particularly in Hong Kong and China.

In Asia, it is far more important to build the correct relationships than to seek out new opportunities. The most effective way of doing so is to engage in face-to-face meetings. Collaboration through the exchange of education programs is another avenue to build strategic relationships.

While it is not easy to develop a legal practice in Asia, the Victorian Government's trade mission into China provides a good pathway for Victorian barristers to participate in the future.



Doing Business and Resolving Disputes with China

hina is now Victoria's largest trading partner. As China's economy continues to grow and commercial ✓ investments between Victoria and China increase, the potential for commercial disputes also rise. Such disputes are likely to be resolved by international arbitration, which is the preferred method of dispute resolution for trans-border

While China acceded to the New York Convention in 1985, its modern arbitration system was only formalised since the unification of Arbitration Law of China in 1994. Many of the principles of modern arbitration (as articulated in the UNCITRAL law on international arbitration) are now adopted and observed by the Chinese Courts.

As 2012 marks the 40th anniversary of the resumption of diplomatic relations between China and Australia, it was timely for the International Chamber of Commerce Australia to conduct a roadshow across the major cities in Australia focused on business relationship with China and its commercial dispute resolution process. The Melbourne roadshow was held on 30 July 2012. The Victorian Bar was one of the major sponsors of the Melbourne roadshow.

The Hon Robert Clark, MP, Attorney-General for Victoria, provided the opening remarks to an audience of over 70 participants. He said, "Victoria can play a vital role as part of the development and strengthening of international arbitration." The Hon Marilyn Warren, Chief Justice of Victoria delivered the opening address. Her Honour observed that Victoria is well placed to play an important role in furthering international arbitration given the quality of Victorian practitioners and the support from the Victorian Government and the Court.

On the China Disputes Panel, Judge Fu Xiaoqiang of the Supreme People's Court, China spoke about the recognition and enforcement of foreign arbitral awards. Judge Fu said, "the New York Convention is strictly observed by Chinese courts." His Honour also observed that often respondents raise the violation of public policy as a defence to resist enforcement of foreign awards. His Honour said emphatically, "the Supreme People's Court of China always takes a prudent approach in dealing with this matter, restricting the application of public policy in the recognition and enforcement of arbitral awards".

Harry Liu, a partner at King & Wood Mallesons, spoke about the major obstacles to the development of international arbitration in China. He said that the ICC had 796 cases with a total claim value of US\$90 billion, and involving parties from 139 jurisdictions. He argued that arbitrators and lawyers need more international exposure and more proficiency in foreign languages. He cited statistics showing that in 2011, 21.8% of arbitrators appointed by CIETAC (the premier arbitration institution in China) were foreigners. He also thought that neutrality and independence of the Chinese arbitration institutions could be improved.

Peter Cash, a partner at Norton Rose, dealt with other contemporary issues in Chinese dispute resolution and shared his own experience running a CIETAC arbitration.

Participants also got to hear the Australian Arbitration Panel discussion led by Albert Monichino SC who spoke on "The temporal operation of the new s.21 - beware of the black hole." Albert considered two recent cases which have "thrown the cat amongst the pigeons" in the enforcement of international arbitration awards in Australia – Castel (2012) 201 FCR 209 and Rizhao (2012) WASCA 50. These cases have exposed weaknesses in the drafting of the International Arbitration Act. Most significantly, there is a potential legislative black hole in respect of certain categories of arbitration depending on the temporal operation of the new s 21 (the centrepiece of the 2010 amendments) - a matter which the legislature did not expressly deal with.

Andrew Stephenson, Partner at Clayton Utz, spoke about recent developments in the enforcement of arbitral awards in Australia. Andrew discussed the recent case of *Norden* [2012] FCA 696 in which Foster J declined to follow majority of the Victorian Court of Appeal in Altain Khuder (2011) 253 FLR 9 as to the nature of the onus and burden of proof cast upon an award creditor seeking to enforce a foreign award against a non-signatory to the arbitration agreement. Andrew also briefly discussed the upcoming constitutional challenge that the High Court is due to hear on 6 November 2012.

The afternoon sessions were led by John Sharkey AM and Kim Kit Ow, Asia Regional Director for ICC Arbitration and Amicable Dispute Resolution. The discussions focused on doing business in China.

An impressive panel of business leaders shared their extensive experiences in China and proffered valuable advice. They were Grant Dooley, Retired Consul General in Guangzhou, James Embleton, Managing Director of Embelton Industry Ltd and Richard Holyman, President of Australia's Chamber of Commerce and Industry and Managing Director of Martin & Pleasance Pty Ltd, and Peter McMullin.

There is no doubt that China is resolved to improve its arbitral system and construct innovative and fair processes to meet the demands for just resolution of foreign disputes and its enforcement in China. Recognising the developing legal system in China and its desire to translate theory into practice by bridging the gap between Chinese and Western expectations of adjudication, the participants were provided with first-hand information about the impact of the China factor in doing business and resolving disputes with China.

William Lye VBN



Some History and a Little Lore

"Two features distinguish barristers at a

not partners, and being retained by a

solicitor on behalf of the lay client."

Reflections on the origins and some oddities of our Bar

Amalgamation

s part of our heritage as a British settler nation we have two legal professions, or at least one profession with two branches, barristers and solicitors. Each has its own governance, hierarchies, rules, customs, ethics, values and prejudices. Each draws from the background of the professions in England, Scotland and, particularly in the case of Victoria, Ireland.

Two features distinguish barristers at a separate Bar: practising law as individuals, not partners, and being retained by a solicitor on behalf of the lay client. Notwithstanding some modifications in recent times,

those indicia remain still as the distinctive characteristics of a separate Bar.

There have for many years been barristers practising at organised, separate Bars in every State and Territory of Australia. However, only in New South Wales and Queensland is there legal separation, that is to say in those States lawyers are not admitted as barristers and solicitors of the Supreme Court but as either barristers or solicitors.

The Victorian experience is unique on a number of grounds. It is the only Australian jurisdiction, and probably the only jurisdiction anywhere, in which a legally separate Bar was abolished by legislation but then replaced by a voluntary separate Bar. That same legislation, alone certainly in the common law world, dealt with barristers' liability for negligence and ability to sue for fees.

What is now Melbourne commenced somewhat irregularly in the 1830s with the arrival of Van Diemen's Land settlers who conceived the idea while drinking in Launceston's Criterion Hotel. Until 1851 Victoria was run from Sydney as the Port Phillip District. That year saw the creation of Victoria as a more or less self-governing colony and the start of the Gold Rush.

The early barristers and judges in Victoria, and for much of the 19th century, were Irish rather than English (or Scottish). They tended to be Anglo-Irish Protestants from Trinity College Dublin, but Irish none the less. This was the case with the first barristers, E J Brewer and James Croke, and judges Jeffcott, Therry, Stawell, Barry, Molesworth and Higginbotham.

Ireland in the 19th century was directly governed from London, the Irish Parliament having been abolished in 1798. Ireland was in a parlous state following the disastrous famine of the 1840s and large-scale emigration. Professional opportunities were limited, as illustrated by the explanation of Stawell, who was admitted to practice here in 1843:

"When I saw forty hats on the Munster Circuit and not enough work for twenty, I felt it was time to go and so I came to Australia.2"

The Irish influence in Victoria lives on in the Supreme Court building in William Street, completed in 1884 before the depression of the 1890s. A showpiece of the architectural arts and sciences, with the unfortunate exception of acoustics. Visitors to Dublin will feel an instant pang of recognition on

seeing its inspiration, the Four Courts building, the home of the separate Bar: practising law as individuals, Irish courts, on the banks of the

> Less well known is the Irish connection in the internal layout of courts in Victoria. Unlike

courts everywhere else in Australia, in Victoria, as in Ireland, instructing solicitors sit facing counsel and with their backs to the judge. This works efficiently, enabling eye contact from judge to counsel and counsel to solicitor and solicitor to client.

Until amalgamation of the two professions in Victoria in 1891, solicitors and barristers were admitted separately. After admission it was not possible to change from one branch to

Only barristers had a right of audience in the Supreme Court. Solicitors could, and did, appear in lower courts such as the County Court, the Court of General Sessions and the Court of Mines (a very busy court in those days). In these courts probably three-quarters of litigation took place.4 The solicitor advocate was an everyday figure. The inability of solicitors to appear as advocates in the Supreme Court was prominent among the grievances which led to the 1891 legislation.

Even before separation from New South Wales there had been unsuccessful attempts to amalgamate the profession. From the 1870s onwards the question became a subject of public controversy and a number of private members' bills for the amalgamation of the legal profession were tabled.⁵ One such was introduced in 1875 by the famous theatrical figure George Coppin, who was also a Member of the Legislative Assembly.⁶ Another in 1884 resulted in hearings by the Legislative Council with 23 witnesses (22 of whom were judges, barristers or solicitors) extending over eight sittings.⁷ All these bills were passed in the Legislative Assembly by "immense majorities" but defeated in the Legislative Council.8 Finally, after much vigorous Parliamentary debate, the Legal Profession Practice Act 1891 (Vic) was enacted.

As usually happens, there was no shortage of complaints about the failings, real or imagined, of barristers. One raised by proponents of the legislation was that members of a small group of sought after counsel would accept several briefs for the one day and charge fees for all, whether they appeared or not. In his history of the Victorian Bar, A Multitude of Counselors (1968), Sir Arthur Dean deals sternly with this claim. He writes:

'It is certain that no reputable barrister would retain a fee paid when he had not appeared, and it is improbable that there was ever any ground for such a complaint.'"

However, there is ground for thinking there was some basis for these allegations since the practice was defended by opponents of the legislation in the Legislative Council. It was said the client bought the chance the barrister would appear for him and the certainty that the barrister would not appear against him. ¹⁰ Moreover, s 8 of the 1891 Act provided for the taxing master to disallow fees which had not been earned by "substantial attendance" to a matter in court, which rather suggests that charging for non-attendance was an existing practice and had come to the attention of legislators.

Note: Rodney Garratt QC observes that the problems of fees for non-attendance may not have been confined to Colonial Victoria. In Gilbert & Sullivan's Iolanthe the Lord Chancellor's reminiscences of his career at the Bar includes the following:

My learned profession I'll never disgrace

By taking a fee with a grin on my face,

When I haven't been there to attend to the case,

Said I to myself - said I!

The Act, in contrast to modern statutes dealing with corporate law, tax, consumer law and the like, is a model of lapidary elegance. Section 3 provided that every person previously admitted as a barrister should by virtue of the Act be admitted as a solicitor and entitled to practice as a solicitor. Section 4 made a corresponding provision for practice as barristers for persons previously admitted as solicitors.

Section 10 provided that after the passing of the Act no person should be admitted to practise as a barrister or solicitor solely, but every person should be admitted both as a barrister and solicitor.

Centrally for present purposes, s 5 provided that "(e)very barrister" should in future be entitled to recover from the solicitor or client by whom he had been employed fees, costs and charges for professional work. The section continued:

"And every barrister shall in future be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor is now liable to his client for negligence as a solicitor." (emphasis added)

Section 5 was re-enacted in subsequent consolidations in 1915, 1928 and 1958, the words "in future" and "now" being omitted and the phrase "on the twenty-third day of November one thousand eight hundred and ninety-one" being added. It was the equivalent of s 5 in the 1958 Act, s 10(2), which fell to be considered by the High Court in Giannarelli v Wraith 11

The common law background was that the barrister's immunity for negligence was the converse of the inability to sue for fees. Both rules sprang from the doctrine that the barrister did not have a contract with the client (or the instructing solicitor).12 No contract, no negligence. No contract, no right to sue for fees. Proponents of the 1891 legislation saw the doctrine as a "fiction".13 But whether fiction or not, the doctrine was certainly seen at the time as the foundation of immunity.

When *Donoghue v Stevenson*¹⁴ established that negligence was a tort independent of contract it became necessary to seek for lofty principles of public policy to justify barristers' immunity. This the House of Lords did in *Rondel v Worsley*¹⁵ and *Saif Ali v Sydney Mitchell & Co.*¹⁶ For present purposes we shall pass over these issues (pausing only to note that the absence of advocates' immunity does not appear to have caused major problems in the great common law nations of the United States and Canada) and look at the intriguing questions of statutory construction and Victorian history.

In *Giannarelli*, Mason CJ, Wilson and Dawson JJ held that as at 23 November 1891 solicitors in Victoria were immune from liability for negligence when acting as advocates and that the Act simply put barristers, and lawyers subsequently admitted as both barristers and solicitors, in the same position.¹⁷

Deane, Toohey and Gaudron JJ held to the contrary. Their Honours pointed out that there was no case prior to 1891, and no text book, suggesting that the barristers' well known immunity for liability for negligent advocacy applied to solicitor advocates.¹⁸

It might be added that there is not the slightest hint in the Parliamentary debates that legislators believed that solicitors already enjoyed the immunity when appearing as advocates and that it would extend to the new breed of practitioners who would be both barristers and solicitors. The mover of the Second Reading Speech in the Legislative Council, the Honourable G Young, said:

"One great evil of the present system that cannot be defended – I have not heard any honourable member nor any legal practitioner defend it – is that solicitors are responsible to their clients for negligence or incapacity whereas barristers are not so responsible." ¹⁹

On the theory of Giannarelli, Mr Young would have gone on to say something like:

"But of course, as we all know, solicitors today are immune from liability for negligence when acting as advocates, and that will continue to be the case for barristers and solicitors in the future."

The critical vote against the appellants was that of Brennan J. His Honour held that s 10(2) of the 1958 Act, and its predecessors going back to 1891, were transitional provisions. The "barrister" who was to be "in future ... liable for negligence" was simply the barrister who had "heretofore been admitted" as a barrister and who by force of the Act had become admitted and was entitled to "practice as a solicitor", that is to say an 1891 barrister. Practitioners subsequently admitted as barristers and solicitors were not covered. Once the statute the High Court was considering was enacted repeated to provide uniquely for negligent barristers at least 90 years old. There is also the problem that the valuable new right to sue for fees would only apply to barristers admitted as such up to 1891.

The writer, who appeared in *Gianarelli* at all levels, has the distinct recollection that the transitional argument was put in somewhat half-hearted fashion before the trial judge (Marks

J) and expressly abandoned in the Full Court. Certainly there is no trace of it in the reported argument of the barrister respondents in the Commonwealth Law Reports.²¹

The issue of barristers' immunity came before the High Court again in D'Orta-Ekenaike v Victoria Legal Aid.²² In the meantime, the House of Lords in *Arthur J S Hall & Co v Simmons*²³ had abandoned common law immunity. In three years under this regime there was no evidence, or even suggestion, that the British legal system had suffered the evil consequences predicted by the upholders of barristers' immunity.

In *D'Orta-Ekenaike* the majority judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ, without a great deal of

obvious enthusiasm, "prefer(red) the construction adopted by the majority in *Giannarelli*" but thought that anyway the Court should not depart from a finally resolved question of construction.²⁴ However,

1900. No 1 is J B Box"

out, the difference in early as 1903 created a Course in Gianarelli meant early in McHugh I's members nor members

"The present Roll commences with

three signatures on 21 September

as McHugh J²⁵ and Kirby J²⁶ pointed out, the difference in reasoning among the majority Justices in *Gianarelli* meant that the decision had no ratio decidendi. In McHugh J's view, it simply became a matter for applying the decision to a case whose facts are not relevantly distinguishable. Kirby J dissented as to the ultimate outcome.

We leave this peculiarly Victorian legal saga with sympathy for those negligent nonagenarian barristers of 1958 and a sense of wonder that the Parliament in 1891, in a wave of anti-barrister sentiment, nevertheless wished to confer on barristers, and the new breed of practitioner qua barrister, a valuable new right to sue for fees while retaining their immunity from liability for negligence. Still, according to *Giannarelli*, that's what happened.

The Organisation of the Victorian Bar

In 1984 the Victorian Bar celebrated its centenary. A splendid dinner was held at the Moonee Valley racecourse. The guest of honour, High Court Chief Justice Sir Harry Gibbs, intrigued those present with his idiosyncratic pronunciation "sentnary", which other speakers sycophantically adopted. There may have been observations on the coincidence of the year with that in George Orwell's famous novel, but the writer's recollection of the event as a whole is a trifle hazy.

But whether 1984 was the true 100th birthday is open to legitimate debate.²⁷ The 1884 origin is based on a meeting held on 17 July 1884. The meeting was prompted by the continuing threat of amalgamation.²⁸ The meeting laid down detailed professional rules of conduct and a constitution providing for committee elections etc. One of the rules prohibited the acceptance of briefs on what would today be called a no-win-no-fee basis. However, there is no record thereafter of any continued existence of the committee, or other indicia of an organisation such as minutes, regular elections, annual reports etc.²⁹

In December 1891, within weeks of the passing of the 1891 Act, an association of those practicing exclusively as barristers was formed and rules of conduct published. It was hotly opposed by the Law Institute and in the press. One member asked in the Parliament whether it was a conspiracy for the purpose of defeating the Act.³⁰ Another member asked the Attorney-General what steps he "proposed to take to suppress this newest form of Communism."³¹

In the light of all this uproar the association met on 4 February 1892 and after a heated debate decided to abolish itself.³²

It would appear that barristers continued to practice as such without any formal organisation until on 20 June 1900 a meeting of barristers agreed to appoint a committee which adopted rules.³³ The organization known today as the Victorian Bar has certainly operated continuously from that

date. As will be seen, the present Roll of Counsel commences in 1900. Notwithstanding the earlier hostility before and immediately after the 1891 Act, the Victorian Bar obtained statutory recognition as

early as 1903 when the Legal *Profession Practice Act* 1903 (Vic) created a Council of Legal Education which included three members nominated by the Law Institute and three by the Committee of Counsel, as the governing body of the Bar was then called.³⁴

The Roll of Counsel has an independent provenance. According to the special edition of Victorian Bar News published for the Centenary celebrations in 1984, the original Roll was in book form with resplendent illuminated cover. It probably started some time in the 1870s. Early names on the Roll were in pencil, presumably with the intention to write them in ink if the barrister was dead or could not be found. This Roll ceases in 1891 with amalgamation.³⁵

The present Roll commences with three signatures on 21 September 1900. No 1 is J B Box, whom it is noted was appointed a County Court judge in October 1906. No 3 is Henry Bourne Higgins who became a celebrated High Court Justice and the father of Australian industrial law. The most recent name at the time of writing is that of Oya Girgin, No 4510, signed on 1 September 2012. The writer's is No 810 on 10 May 1967.

There is something oddly agreeable in reflecting that each of us has a distinctive number and place in an unbroken line stretching back to J B Box and Henry Bourne Higgins, including Sir Owen Dixon (No 117) and his only reader, Sir Robert Menzies (No 155).

Although two very senior and distinguished counsel advised the Bar Council in 1984 that 10 July of that year was the true centenary of the Bar,³⁶ the writer would suggest that the Victorian Bar of today, as a professional organisation with a continuous record of governance, dates from 1900. The fact that the 1884 Rules might have been referred to by barristers from time to time before that date does not alter that conclusion, particularly in the light of the formal dissolution of the association in 1892. On the other hand, if the criterion is the existence of a group of lawyers who practiced in the same way as did barristers in the British Isles, it might be said that the origin is somewhere in the 1840s.

But one must have sympathy for those advisors in 1984. It would have taken a heroic level of objectivity to say: "Sorry everyone, we will have to wait for our dinner for another 16 vears."

Counsel's Chambers

Perhaps uniquely among professions, the physical accommodation of members of a separate Bar is an essential part of its organisation and culture. In England there were the four Inns of Court and associated chambers. In Ireland there

was the famous library in the Four Courts where barristers simply had a prescriptive seat at a table.

In Australia, the Victorian Bar has been unique in taking on the corporate responsibility for

making accommodation available on a monthly tenancy basis. This has important effects for encouraging competition since there is not the barrier to entry that there is at the Sydney Bar where mostly chambers must be bought for hundreds of thousands of dollars.

Counsel's chambers were located in part of Little Collins Street known as Chancery Lane as early as 1853.37 In 1881 a company, The Barristers Chambers Company Limited, was formed with a capital of £25,000, a considerable sum in those days, to provide accommodation for barristers. The building, known as Selborne Chambers, opened in the following year and before long forty counsel had moved in. It is remarkable that, as we have seen, this was well before there was any formal organisational structure for the Bar.

In modern times we have what is now Owen Dixon Chambers East (1961) with an additional four floors (1964) and Owen Dixon Chambers West (1984).

There are substantial privately owned chambers elsewhere, but approximately 60 per cent of the Bar is housed in Barristers Chambers Ltd premises.

In the foyer of Owen Dixon Chambers West there are splendid tapestries made by the Victorian Tapestry Workshop donated by the 86 Silks in practice in 1986 (including the writer). The tapestries, designed by Murray Walker, capture well the spirit and life of the Bar.

The early Owen Dixon Chambers were not all that encouraging to collegiality, long corridors with closed doors presenting something of a cabins-in-a-ship appearance. But over the years more and more chambers are grouped with attractive common areas for secretaries, library etc. Counsel share common expenses. Unlike similar arrangements in London and Sydney, counsel will not all have the same clerk. But these types of chambers have greatly encouraged the camaraderie, friendship and mutual assistance which are such attractive features of our profession.

Clerks

There was already a well-developed clerking system by the 1880s.38

At the Victorian Bar clerks have been influential figures. The number of counsel on a clerk's List is much higher relative to the whole Bar than is the case in other separate Bars.

Clerks have, whether accurately or not, long been regarded as having a cornucopia of "floating" work, briefs provided by solicitors to be allotted at the discretion of the Clerk. This was probably more the case in the past when personal injury work formed a higher proportion of the Bar's work than it does today. Dark stories have floated around over the years of counsel making generous Christmas presents to their clerks,

including, in one perhaps apocryphal case, a refrigerator.

'Dark stories have floated around over the years of counsel making generous Christmas Work at the Bar presents to their clerks, including, in one

In the last forty years or so the kind of work at the Victorian Bar has changed. In the 60s and

70s the mainstay of civil work at the Bar were personal injury claims, either from road accidents, known by the evocative label as "running down", or industrial accidents. This was before the introduction of the "serious injury" regime.

Much work was done in the County Court in cases arising out of accidents resulting in "whiplash" injuries. These often produced, or were said to produce, soft tissue injury undetectable by X rays and rather vulnerable to symptom exaggeration, whether subjectively genuine or not. A well known psychiatrist was often called to say the plaintiff had suffered "mild to moderate depression and anxiety" which "should resolve after eighteen months to two years."

Negotiations could be brutal and sometimes featured the notorious technique known as the "phantom phone call", as illustrated in the following example.

Counsel for the defendant has authority to settle for \$8000. Negotiations between counsel proceed along the following lines.

Plaintiff: We will take \$7000

perhaps apocryphal case, a refrigerator."

Defendant: Sorry, I can't go beyond \$6000

Plaintiff: What about \$6500?

Defendant: I'll see what I can do (goes round the corner of the corridor, ostensibly to the public phone - this is long before mobiles.)

Defendant on return: OK, \$6250.

Plaintiff: Done. What about coffee?

Quite a lot of prosecutions for less serious criminal jury trials were briefed out to the private Bar. Since the Crown was not particularly concerned with the result, as long as the jury was not discharged, there was not a great deal of pressure and fairly junior counsel got good experience in advocacy before juries. There is a discipline about advocacy in criminal jury trials that has no equivalent in more relaxed civil jurisdictions. Asking the wrong question, or forgetting to ask the right one, may have unfixable consequences.

Another area of work that has largely disappeared for the Bar is the Magistrates Court claim for property damage arising out of motor car collisions, the "crash and bash". On the top scale these carried the then attractive brief fee of \$35. The writer can recall negotiating a settlement of such a case with Alan Archibald (obviously not then QC) at the Broadmeadows Magistrates Court. Usually the conference was held with one's client on the footpath outside the court at 9.30. The instructing solicitor never attended. The wise advice of your clerk was that if you lost, you should ring the solicitor from the court and get your version of the disaster to the solicitor before that of the client.

Juniors were also often briefed to appear before Supreme Court Masters (now Associate Justices). These often concerned squabbles over interrogatories and whether they were "oppressive", "vague", or that favourite all-purpose pejorative of lawyers, "fishing".

At a more elevated level, it was not until the 1980s that people would

speak generally of the Commercial Bar. Rather the term used tended to be Equity Bar, reflecting the preoccupation of those counsel with wills and trusts. Common lawyers, used to high decibel levels to wake up jurors, spoke of Equity Bar counsel as "whisperers". It was said that to be audible was regarded as rather bad form.

Silk

The first Victorian Queen's Counsel, Sir Archibald Michie and Richard Ireland, from, respectively, the English and the Irish Bars, were appointed in 1863.³⁹ The title was changed to Senior Counsel in 2000. Currently there are 238 practising Silks at the Victorian Bar.

Uniquely in Australia, Victorian Silks wear a rosette on the back of their silk gown. The rosette is made of gathered black silk ribbon mounted on an oblong backing of black silk. The origin is not, as is sometimes suggested, Irish; it is certainly not worn by Irish Silks today. Its original purpose was to prevent powder from the wig as worn in the 18th century from staining the back of the coat. Historically, in England, it was not worn with a gown but only when no gown is worn as, for example in a Royal Court. Writing in Victorian Bar News the late Douglas Graham QC observed:

"The Victorian practice of wearing a rosette with the silk gown thus appears to involve some disregard of courtly niceties, a degree of ignorance, perhaps an element of indolence, but most of all, a strong attachment to tradition."

Until about the late 1980s there were two restrictive rules applying to Silks. They could only appear with a junior, and that junior had to charge a fee equal to at least two-thirds of the Silk's fee. The rationale was that Silk should be confined to substantial cases which could justify the extra cost. It had the consequence that sometimes a busy junior would find that his or her practice was of a kind that could not "carry Silk".

Unlike in some other States, although the formal appointment is by the Governor in Council, the effective decision to award Silk has been that of the State Chief Justice. This appeared likely to change recently in this state, but fortunately our Chief Justice has agreed to carry on the task, which does involve a heavy administrative burden for her Honour and others

involved in the process.

In Sydney there has long been a practice that Silk, when robed, should never be seen carrying any books or papers. The converse is that juniors when robed must always carry something, even if it is only a single sheet of paper. The theory is that this somehow is consistent with the role of the Silk as being the strategic leader, taking the broad view, not bogged down by minutiae.

No such practice has applied in Melbourne. This may be an example of a paradox. Melbourne is supposed stereotypically to be stuffy and conservative, Sydney laid back and larrikin. Yet in the law sometimes the reverse is more accurate.

"Today most counsel will shake hands with each other when meeting."

A pleasant tradition is the red bag, a silk bag for carrying briefs embroidered with the owner's initials. Normally these brief bags are blue, but when senior counsel thinks that a junior has done a

particularly good job in a case, he or she will give the junior a red bag.

Etiquette

A firm rule is that between counsel, however famous and eminent the one and however junior and obscure the other, titles Mr, Mrs, Dr, Ms etc are never used. Sometimes those following this rule used to take the course of using just the interlocutor's surname. But in an Australian setting this always seemed a little awkward and self-conscious, redolent of Eton and Harrow. Certainly today nobody should feel reluctant to use counsel's given name.

Another practice, said to come from the English Bar, is that counsel never shake hands with each other, presumably because shaking hands historically was a manifestation of mistrust; two people meeting grasped each other's sword hand to ensure a peaceful exchange. Today most counsel will shake hands with each other when meeting.

It is impolite to leave the judge sitting in court looking at an empty Bar table. Counsel should remain until other counsel turn up, or the judge adjourns. However, if there is likely to be a substantial delay, it is in order to politely ask the judge if counsel may be excused.

In court, other counsel should be referred to as "my learned friend". In truth, the other counsel may be considered a barely literate casual acquaintance. But like much in the law, ceremony and etiquette have an importance going beyond the merely ritualistic.

Reading

Everyone coming to the Victorian Bar must have a Mentor (formerly called a Master). The tyro is referred to as a Reader; in some other separate Bars the term "Pupil" is used.

This is a special relationship. Throughout their careers, Readers will turn to their Master/Mentor for career advice, help with ethical issues or other serious professional problems. Major professional milestones, like taking Silk or appointment to the Bench, will usually be celebrated by a dinner with Readers. A barrister's career summary will always

include the name of the counsel with whom the barrister read, and the counsel who read with him or her.

The Future of the Bar

Despite the changes and challenges the writer has touched on, and many more, the Victorian Bar continues to attract outstanding men and women of ability and promise.

- ¹ See generally, Rush, Irish Australian Legal Links, Victorian Bar News Summer 2003 at 62
- ² Dean, A Multitude of Counsellors, F W Cheshire, 1968, at 14. Footnote to a footnote: a tasteful photograph on the dust jacket shows a group of counsel walking up the steps of the Supreme Court. The writer is third from the

A talk given to the Victorian Bar Readers' Course on 26 September 2012. Many thanks to Justice Anthony Cavanough, Peter O'Callaghan QC, Clifford Pannam QC Jacqueline Stone and Ross Nankivell. Opinions expressed are those of the writer.

THE HON PETER HEEREY AM QC



- 3 Dean at 85
- ⁴ Dean at 87
- ⁵ Gianarelli v Wraith (1988) 165 CLR at 563, 589, 599
- 6 Dean at 88
- 7 Dean at 93
- 8 Victorian Parliamentary Debates, 19 August 1891 at 915
- 9 Dean at 99
- 10 Victorian Parliamentary Debates, 18 August 1891, at 931
- ¹¹ (1988) 165 CLR 543. Declaration of interest: the writer appeared as counsel for one of the appellants
- 12 In re Le Brasseur and Oakley [1896] 2 Ch 487 at 494
- 13 Victorian Parliamentary Debates, 19 August 1891 at 915
- 14 [1932] AC 562
- ¹⁵ [1969] 1 AC 191. See Heerey, Looking Over the Advocate's Shoulder: an Australian View of Rondel v Worsley (1968) 42 ALJ 3
- 16 [1980] AC 198
- 17 165 CLR at 561, 563-570, 590
- 18 165 CLR at 587, 602-610, 610
- 19 Victorian Parliamentary Debates, 19 August 1891 at 915
- 20 165 CLR at 581
- 21 165 CLR at 550-553
- 22 (2005) 223 CLR 1
- 23 [2002] 1 AC 615

- 24 223 CLR at [24]
- 25 223 CLR at [133]
- 26 223 CLR at [257]
- ²⁷ See generally Victorian Bar News, Centenary Edition 1884-1984
- 28 Dean at 89
- ²⁹ Dean at 93
- 30 Dean at 101
- 31 Dean at 102
- 32 Dean at 102
- 33 Victorian Bar News at 5
- 34 Dean at 107
- 35 Victorian Bar News at 1
- 36 Victorian Bar News at 5
- ³⁷ See generally Dean at 296 et seq, chapter by F Maxwell Bradshaw
- 39 Dean at 259
- 40 Heerey, Victorian Bar News, Spring 1987 at 26
- 41 (1954) 28 ALJ 237, Kelly, Victorian Bar News, Spring 1979 at 7, Opas, Victorian Bar News, Spring 1988 at 12
- 42 Summer 1988 at 17



Planning an adventure for the next Legal Break?

As part of the ABA's Members Benefits Program, Travel Club Getaways offers members access to expert travel advise, superior products and services, and specifically negotiated rates, all provided by a dedicated and experienced Travel Manager.

If you can imagine it, Travel Club Getaways can organise it!

Contact the ABA's dedicated travel team today: 1300 556 155 Email: vic@fctravelclub.com.au



Travel Club

On the Retirement of The Hon Justice Hansen

The Chief Justice made the following remarks on the occasion of the retirement of The Hon Hartley Hansen QC from the Court of Appeal.

The Chief Justice

acknowledge the presence at the Bar table this afternoon of the Chairman of the Victorian Bar Council, Ms Melanie Sloss SC, and the Senior Vice-Chairman of the Bar Council, Ms Fiona McLeod SC. I am most grateful for their attendance this afternoon, together with other counsel.

It is an auspicious occasion as this marks the last occasion on which my dear colleague, the Honourable Justice Hansen, sits as a member of the Supreme Court and as a member of the Court of Appeal. It is indeed an auspicious occasion and indeed a very sad one.

I should make some remarks about his Honour as his Honour has, in his usual modest way, declined to have a public farewell. Of course that means that the Chairman is saved having to prepare a speech and I anticipate it would have been a very warm but long speech.

I will speak briefly.

His Honour has been engaged in the legal profession since his articles commenced 46 years ago. He had a very successful career at the Victorian Bar and was appointed Queen's Counsel in 1984. He was a Senior Vice-Chairman of the Victorian Bar Council and acquitted himself with extraordinary distinction. He was a great contributor to the Bar at all times. Indeed, he held very significant positions including Chairman of the Bar Ethics Committee. He was also Chair of the Dispute Resolution Committee and other ad hoc committees throughout his time as a member of the Bar.

His Honour was appointed to the Supreme Court on 6 April 1994. He subsequently came to be appointed to the Court of Appeal on 19 July 2010. His Honour has sat in all jurisdictions during this distinguished 18 years on the Supreme Court.

During his time in the Trial Division, he was the judge in charge of the commercial list, later the state taxation appeals list and also the corporations list. In those days the lists were very large and his Honour is one of the few judges in the Court to have endured for an extensive tenure—a period of over three years at running the commercial list and at times also the corporations list. I can personally vouch for the fact that is a significant feat.

Immediately prior to his Honour's appointment to the Court of Appeal, he was the Principal Judge of the Commercial and Equity Division of the Court. As Chief Justice, I was most grateful for his Honour's active leadership as he took the Division to greater heights.

His Honour has also been a great contributor outside the Court. He was a member of the Clinical Ethics Committee of Melbourne Health from 1998. He is also former Chair of the Syllabus Advisory Committee of the Judicial College Of Victoria.

His Honour's judgments have always been referred to

and regarded as correct and judgments to be closely considered. Indeed, the High Court of Australia, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, rarely, for a trial judge, acknowledged his Honour's commercial judgment in *Koorootang Nominees Pty Ltd v Australia & New Zealand Banking Group Ltd*. The Court was constituted by Chief Justice Gleeson and Justices Gummow, Callinan, Heydon and Crennan. An unusual feat, as I say.

It is indeed a very sad occasion. Justice Hansen has been an extraordinary contributor to the Court as he was at the Victorian Bar. He is a colleague who is greatly respected and very much cherished. He will be missed greatly. It is a privilege to sit with his Honour on the occasion of his last sitting in the Supreme Court.

Finally, I observe that in the course of this afternoon, his Honour is wearing the distinctive garments of the black robe. I have to say, as a commercial colleague, I think that is most apposite.

Justice H R Hansen

our Excellency, Chief Justice, President, Friends and Family.

Welcome everyone. Rosalind and I are pleased that you could be here and join in signing off on my career in the law. I am not going to say much. Indeed I thought I'd avoided speech making by declining the usual farewell in Court given by the profession. While I much appreciated the profession's welcome on my appointment in1994, I thought by this stage the appropriate thing was for the old judge to move quietly aside for the next person.

And what would I say? I have no complaints and I would not give gratuitous advice.

So this function was settled on as an alternative. As you can see, however, I have failed in my aim of no speech making, for someone who has great authority in these matters said that I should- so there- but I will keep it short.

As the title of the book says, I have had A Fortunate Life. I was brought up by supportive parents in a household with a strong sense of ethical values, and given an all round education.

I was fortunate to obtain articles in 1996 at Whiting & Byrne. I earned the princely sum of £1 per week, which rose to 30 shillings, but-really-the money was irrelevant. The firm, which had an ancient lineage in Melbourne, would now be described as "old fashioned"; the office was Spartan with linoleum floors, desks that had seen better days, plain venetians that needed a dust and a typing pool over which Mrs West ruled with an iron rod. But the practice was conducted with the highest standards of ethics, propriety and professional skill.

One of the partners, the late Howard Berry, who was married to my cousin Kaye, suggested who I should read with when I went to the Bar. This chap, he said, was "going places". That was Daryl Dawson and when I saw him he took me on without question. Again, in his chambers I observed the same rigorous standards being applied. So the foundation stones were good.

One of my principals at Whiting & Byrne was Rosemary Balmford. It was a very pleasant thing, a rounding of the circle so to speak, when, several years after my appointment to the Court, Rosemary was herself appointed, the first woman to be so honoured.

In the few years since then it has been pleasing that more women have been appointed to the Court, in both the Trial and Appeal divisions. Moreover Marilyn Warren was appointed Chief Justice, the first such appointment of a woman to a superior court in Australia. What has been disappointing though, is the relatively small number of female barristers appearing in leading roles in litigation in the Court. There is no reason why that should be so.

I will not reminisce. Too many memories and reflections come to the surface, and I fear inaccuracy if not plain embellishment may creep in. I enjoyed my time at the Bar. I did a bit of committee work which had its own reward. When I was the Honorary Secretary I observed the late Bill Harris chair meetings of the Bar Council; he was I think the most urbane chairman I have seen. He was followed by Dick McGarvie with whom I also worked closely and from whom

I learned much. Then there was a period, when the Bar was under the pressure of external enquiries, when I found myself working closely with old friends, David Harper and Andrew Kirkham, and finally up to the time of my appointment with Susan Crennan when important work was done.

For some silly reason there is something I do recall and perhaps out of a facile sense of humour I will mention it. It was the incident involving a rather rickety, about 1910 wooden model, filing cabinet which I had acquired as a young barrister. The time came to upgrade to a modem

Brownbuilt. The problem was, what to do with the old thing ... you couldn't sell it. I edged the rickety exhibit up the passage way of the 6th floor of Owen Dixon Chambers, selecting a time when no-one would be around, and I was just near the lift when Hartog Berkeley came on the scene, and enquired what I was doing. He was a larger than life character, who always seemed to know the way forward. He suggested doing what he once did with an old chair he wanted to get rid of. He had brought it out to the lift, pressed the button, and when the lift arrived, and being vacant, he placed the chair in the lift and pressed buttons for lower floors. When the lift came up again the chair was gone. Voilà! While my memory is a little vague on precisely what happened to my cabinet, I know it did not return to my room.

When I was offered appointment to the Court I accepted without hesitation. I thought then, and I still consider it, the greatest honour and fulfilment of my professional career. When I was appointed J H Phillips was Chief Justice and he and his wife Helen warmly welcomed Rosalind and me to the Court. And it was in this room on 17 June 1994 that on our appointment the judges gave a dinner of welcome to John and Margaret Batt, myself and Rosalind and Philip and Marilyn Mandie. As you can see, it is a splendid room for such an occasion. Indeed, as John Phillips would often say, he thought this to be the most beautiful room in Melbourne, and I think it is.

There has been a lot of change at the Court since then; the separate Court of Appeal was established, the Trial Division split itself into divisions, the Old High Court building was acquired and the number of judges has expanded considerably. It has been an exciting and interesting time, and there have been many challenges. Generally speaking, about the hardest thing I found was deciding disputed issues of fact.

I would like to congratulate the Chief Justice and The President on their leadership and, before them, John Phillips and John Winneke, in keeping the place on an even keel. I should particularly like to thank Marilyn and Chris for their support and encouragement and the warmth of their friendship. The same goes for all of the judges and associate judges.

Altogether, I have had a very happy and enjoyable time as a judge and leave the Court with the fondest memories.

The most frequent question I am asked is: 'What are you going to do?' - Or I am told that: 'You have of course organised things to do!' with the questioner then pausing to be informed, and so on. To these interlocutors it seemed a little thin to suggest a return to golf, more time with Rosalind at

"...It has been pleasing that

more women have been

appointed to the court. What has

been disappointing though, is

the relatively small number of

female barristers appearing in

leading roles in litigation in the

Court. There is no reason why

that should be so."

Main Ridge, etc. Perhaps the trouble lies in the word 'resign'; it seems so clear cut, definite, as though it requires an immediate substitute. Then the answer to my interlocutors came to me: I will 'move on' In the way of modern expressions which sound good but convey nothing it seemed to satisfy. Or, alternatively, I was just considered a lost cause. In truth, I look forward with confidence to the next phase in my life and think it a good thing that there is not too much predictability about it.

I know, if I become at all restless, the family will have a list of things to do. I know too that I am not expected

to be at home for extended hours during the day. I think this explains the large pile of brown paper bags I recently discovered in our pantry. They are of the size that would accommodate a sandwich and an apple for a gentleman's lunch if he went out for the day. (I just made that up).

Rosalind and I are blessed with our family. They are all here with their children tonight. We are proud of them all and I thank our children for their friendship, support and pearls of advice over the years; may it continue. I've worked out how to keep the peace: I avoid saying anything about politics or anything contentious and they can say what they like! Above all, I am completely indebted to Rosalind for her love, support, encouragement and advice over the years without which I could not have managed anything. You are a wonderful wife.

It is easier to thank my Associate of many years, Michael Wilson, without whose assistance I could not have managed. Also John Vardy who was my Tipstaff for 10 years or so, who is the very model of a Tipstaff. Each is a family friend.

These thanks too go to all of my Associates and Tipstaves over the years. We could not manage without them.

I have said too much. Thank you for coming and sharing the moment with us. Enjoy the night.

The 2012 Bar Dinner

Myer Mural Hall

n a cold 25 May this year, 476 very well dressed late night shoppers threaded their way through a field of plasma screens on the top floor of the Myer building into the Myer Mural Hall. What did the security guards think of these sartorially incongruous customers? What were they there for? What did they want? (A bargain on a 56" perhaps?) Would they behave?

And so the 2012 Bar Dinner began. The evening was presided over by Melanie Sloss SC, whose footwear had been chosen in anticipation of kicking a few left-footed torps down the aisles of home theatre accessories after dessert. But before that came the introduction and speeches.

The number of attendees was impressive –almost all of the 40 honoured guests were able to attend, as were 27 of the 31 Readers from the March 2012 intake, as well as several clerks and solicitors' representatives from the Law Institute of Victoria and the Honorable Robert Clark MP, Attorney-General for Victoria.

In addition to being honoured by the presence of numerous current and former judicial officers from several jurisdictions, this year's Bar Dinner played host to what seemed to be a 'special sitting' of the High Court. Justices Hayne, Heydon, Kiefel and Bell all enjoyed the keynote speech given by Justice Crennan as much as the rest of the lively audience (their honours Chief Justice French and Justice Gummow were overseas).

Her Honour's speech invited the listeners to indulge her in reminiscing about her time at the Bar and as Chairman of the Bar Council and the evening's second speaker, Philip 'Dunny can' Dunn QC, also entertained with a rolling series of war stories (from a mad client offering 'protection' by hovering over the Dunn matrimonial bed with an axe, to Dunn driven to quoting Shakespeare at the Bendigo Court fireplace). Justice Crennan's excellent speech is reproduced later in this VBN, but the fact that Philip Dunn's speech is not reproduced is no reflection on the quality of Dunny can's offering. To an advocate like Dunn, the task of speaking at the Bar Dinner is like taking a chance to ride a galloping tiger down a corridor lined with burning CLRs -he could do it in his sleep and clutching a fistful of notes could hardly assist.

Now, it may be fairly said that barristers, as a rule, do not find much that is attractive in the prospect of listening to another barrister's reminisces. Marlon Brando's quip about actors, "if you aint talking about them, they aint listening," could well apply to barristers. However, that 'rule' was emphatically smashed in the case of the two speakers at the dinner this year. Both speeches did what 'reminiscing' speeches do at their best: they reflected a shared history, built on the lore around our profession, celebrated its legends and mythologised appropriately. The audience was imbued with the speakers' dedication to the ideals of this profession: courage, collegiality and independence being given prominence, and rightly so, in each speech.

And so, after the speeches came the mood lighting and the Band. Although there was dancing and general mayhem, the crowd eventually dispersed, emerging passion-filled and exhausted, like excited sale patrons clutching a bargain, back into the night.

Justin Tomlinson 🕬



On behalf of the Bar, may I extend a big thank you to Sally Bodman and Courtney Bow of the Bar office for their efforts in the organising of the event. Their contribution of the 'many behind the scenes' aspects of the evening was invaluable.

MELANIE SLOSS SC





- 1. Melanie Sloss SC welcomes the Hon Justice Beach, the Hon Justice Davies, Stewart Anderson SC, David Shavin QC and George Beaumont QC (among others)
- 2. Paul Willee RFD QC, the Hon Justice Heydon AC, his Honour Judge Murphy and his Honour Judge Dean

VICTORIAN BAR NEWS



46

7. Andrew Bailey, Michael Crennan SC, Daniel Crennan, Kathleen

Crennan and Matthew Hooper

- **8.** Brent Young receives a firsthand account from the Hon Justice Davies
- 9. Dunny can! Philip Dunn QC addressing the dinner
- **10.** The Bar Band Justin Wheelahan, Eugene Wheelahan, Duncan Talbot, Alister McNab, Gordon Johns and Michael Galvin
- **11.** The Hon Justice Macmillan
- 12. Michael Ruddle and Katharine Gladman
- 13. Guitar Legend, Paul Connor

















- 19. Fiona McLeod SC and Kylie Evans
- 20. Jim Delany SC, Jacqualyn Turfrey, Peter Jopling QC
- **21.** Back row: James McIntyre, Ekbol Taghdir, Eitan Makowski, Paul Glass, Jane Warren and Jessie Taylor
 Front row: David Sanders, Jim Stavris, Andrew Conley
- 22. Rebekah Sleeth, Anna Robertson, Alison Umbers, Dr Elizabeth Boros
- 23. Simon McGregor and John Richards SC
- **24.** Mark Derham QC, David Curtain QC, Michael Wyles SC and William Alstergren
- **25.** Eugene Wheelahan, Maree Norton, Adrian Muller and Patrick Wheelahan











- **26.** Chris Doidge, David Carlile, Justin Bourke SC, Jonathan Beach QC, Paul O'Grady, Alan Nash and Murray McInnis
- 27. Nicholas Goodfellow, Aimee Kinda, Stella Gold and Leisa Glass
- 28. William Alstergren, Fiona McLeod SC and Stephen O'Meara SC
- **29.** Peter Fox and the whole room rolling in the aisles
- **30.** Standing ovation for the Hon Justice Crennan AC, led by the Hon Justice Bell AC
- **31.** Julianne Jaques, Mark Moshinsky SC and the Hon Robert Clark MP, Attorney-General for Victoria
- **32.** Warren Fagan QC and Paul Willee RFD QC
- **33.** Tom Warner, Michael Galvin and Justin Wheelahan

33

Victorian Bar Dinner Speech

Speech delivered at the 2012 Bar Dinner by The Hon Justice Crennan AC



The Hon Justice Crennan AC

et me begin by thanking the Chairman for her invitation to speak tonight. My first speech to this dinner, was as you have heard in 1990 as junior silk and my next a few years later as Chairman. This was also a long time ago, so I apologise in advance especially, to younger members of the Bar, for reminiscing a little tonight and indulging in some "confession and avoidance" in relation to events long past.

The Victorian Bar has taken great pleasure in having one of its favourite sons appointed as His Excellency the Governor of Victoria, Alex Chernov. This role exploits his capacity for speech making which became legendary at the Bar when he made a wholly improvised speech of welcome to a newly appointed judge –the Deputy Chairman of the time, who was supposed to deliver the speech, having failed to arrive. The new judge was none the wiser.

Tonight I will not be telling the story about Alex's sailing experience, some years ago in the rip of Point Lonsdale. Since then, Alex is often seen near the water reading instruction manuals for the handling of boats. I am going to tell you of another occasion, also involving Alex's famous seamanship, when Alex was briefed as leading silk in a patent case. It concerned an invention called the "seabrake" which reduced "drag". By "drag" I refer of course to the co-efficient of friction of a boat's hull in the water. The judge in the case was Justice Beach, the original Justice Beach, Justice Barry Beach who had been a legendary common law barrister and enjoyed watching a good cross-examination. Alex was cross-examining the expert on the other side. The expert was a very impressive,

very tall, retired sea captain. He had written a textbook on seamanship. In fact, he had his book beside him in the witness box like so. During the course of cross-examination, Alex generally displayed his superior knowledge of seamanship and Alex got so carried away he finished up accusing the expert of knowing very little, possibly nothing, about "drag". At this point the exasperated sea captain looked at Alex and looked up appealingly at the judge. Then he put his hand on his own textbook and said: "But your Honour, this is the bible of drag."

I'll go back in time now for a moment. My Bar Roll number is 1537, having signed the Victorian Bar Roll on 13 March 1980. On that day at cocktails to welcome new readers, I noticed two major differences between the Bar of New South Wales (from which I had come) and the Victorian Bar. First, when asked to describe the sort of practice you hoped to have it was best not to reply "Equity". In New South Wales that was an unremarkable answer. In Victoria that answer made people drop their champagne glass or give you a withering look or in Dowling's case drop the champagne glass, give you a withering look and laugh extremely loudly.

The second difference I noticed was the clerking system. I commenced a long and vigorous letter writing campaign designed to change my clerk and to get onto one or the other of the two premier lists. Answers (when I received them) were invariably "No". I only mention this because it demonstrates the truth of a military adage which my late friend Xavier Connor repeated often: "Time spent in reconnaissance is never time wasted".

VICTORIAN BAR NEWS

By the time I became Chairman, I well knew that the numbers at Bar Council meetings dropped off in winter, especially after Easter, in May/June, only picking up again as election drew near. There was however, a simple way to secure absolutely full attendance. I had observed that members of the Bar Council who were also members of the various list committees. however erratic their attendance record might otherwise have been would always and invariably turn up in strength should there be any reference to clerking in the agenda. Their attendance was not, as I recall, for the purpose of promoting change. Accordingly, for the meeting to be held in May I instructed Anna Whitney as she was, now Anna Berkeley, that Item 5 on the Agenda should be one word -"Clerking" and I said to her type under that, two words -"For discussion. It was simple enough to adjourn that over a couple of times, and attendance soared.

At Bar Council meetings swift solutions to problems were common. Beach, now Justice David Beach, and Curtain arrived a little late—they came from a long and pressing engagement at the Flower Drum, after receiving the result in Howarth v Adey. The symptoms they displayed after this, even for them, marathon lunching session differed. Beach was unusually voluble. Curtain fell into a dreamless sleep. Those who remained conscious discussed the longstanding and riveting problems with the bathrooms on the ground floor of Owen Dixon West. We employed the time honoured solution—set up a temporary committee. No-one could be persuaded to chair the committee until Beach, I think, proposed Curtain for that job which was quickly seconded, by Middleton perhaps. Curtain woke up as the inaugural Chairman of the Victorian Bar Plumbing Committee or such Committee.

It was a relief that we didn't set up one of our temporary committees to organise a competition for the naming of the chambers we now call "Joan Rosanove Chambers". Those chambers are rightly named in honour of the first woman at the Victorian Bar to take silk. Had we set up a committee for selecting the name–someone would surely have come up with "Owen Dixon North by North West.

This, however, might not necessarily have pleased Sir Owen Dixon. When Owen Dixon Chambers (now East) opened in 1961 and Sir Owen Dixon's familiar portrait was unveiled he remarked that the naming of a building in his honour was a high compliment then said, perhaps with a little irony, "If this is an enduring memorial to the Bar I shall share in the happiness of having a memorial."

Now that there is a great deal of flexibility in relation to chambers it is sometimes forgotten that tremendous personal efforts were expended by certain individuals to secure inexpensive accommodation for members of the Bar positioned reasonably close together. In the case of Owen Dixon East, the then Chairman Oliver Gillard, later the original Justice Gillard, was credited with overcoming much strident opposition to the project. The building has served the Bar well.

Those who chaired BCL over the years-all silks, Tait, Hulme, Buckner, Habersberger, Myers, Robson, Anastassiou and now

Derham-all did, and in Derham's case do, the Victorian Bar a great service, frequently underappreciated. Furthermore, a great deal of credit has always been accorded to O'Callaghan for the amount of work he put into establishing and signing up on Owen Dixon West, another building which, despite some initial problems, has served the Bar well.

O'Callaghan signed the Victorian Bar Roll on 1 February 1961, his Bar Roll number is 622. He took silk on 12 November 1974. A wily handler of witnesses, in 38 years as silk, it is said that only once has he ever turned to a junior to help him frame a question for a witness. That happened when another member of the Victorian Bar, Dr Emmerson gave evidence in a particular case. A reference was made to Dr Emmerson's qualifications, which included a doctorate in nuclear physics. As you might expect, Dr Emmerson's evidence was careful, comprehensive and flowed effortlessly over some time. During cross-examination by Meldrum, Dr Emmerson was moved to describe Heisenberg's "Uncertainty Principle"². When that model witness was finished, O'Callaghan turned to his junior and whispered: "Not much I can ask him." Howard, trained in the arts of the criminal law, ever helpful and never lost for words said: "Ask him to spell Heisenberg".

A Chairman of the Bar receives a great deal of correspondence and many phone calls. One of the oddest letters I received came from an unidentified sender. It was addressed to the "Chairman of the Bar Victorian Bar" and read:

"Dear Missus,

My barrister [name] he no [expletive] good. He a [expletive] stoopid [expletive]. We go court, he lose, I pay fine \$250 and he wants me pay HIM \$260!

You fix please."

Enquiries were made. It turned out that this allegedly no good, stoopid [many expletives], barrister was not a person who had ever signed the roll of counsel.

In the early 1990's there was an "Access to Justice" agenda, which included many ideas about changing the way the Bars operated and reducing the costs of litigation. Most of those ideas had been transposed from the United Kingdom. As it happens, the notion of a Bar having a "direct access" rule was an idea which had accidentally gotten onto Lord Woolf's reform agenda and remained there. At this time independent Bars faced savage public attack. It was thought that there were two matters worth fighting for and preserving:-

- 1. independence; and
- 2. the right to arrange accommodation as members of the Bar saw fit.

At about this time I travelled to Canberra to discuss many aspects of the public debate with relevant policy makers, including the Attorney-General for the Commonwealth. When the topic of "direct access" came up a view was expressed that the Victorian Bar was reactionary. Bearing Xavier Connor in mind, I pointed out that those expressing such views had not spent enough time in reconnaissance.

After considerable debate, the Bar Council passed a minimalist "direct access" rule. Uproar ensued. A Petition for a General Meeting was signed by 40 members. The General Meeting itself was crowded, rowdy and the vote against direct access was overwhelming. A former Chairman said to me "You'll have to reverse that-that's what a Chairman always does when they're rolled at a General Meeting." Not this Chairman, as it happened.

For obvious reasons the direct access rule stayed although not, I am sure, without some subsequent difficulties. At the Bar Council Christmas party that year, Wilson, that is Santa, reached into his large sack, pulled out a big bottle of Grecian 2000 and gave me the following unusual season's greetings: "Happy Christmas Chairman, try this-Bill Gillard says it really works."

Phone calls prefaced by the words "Have you heard the one about ..." often made me laugh. The one about how Stuart Campbell, received his red bag after being on circuit at Warrnambool, was one of those. Apparently, after dining quietly, well, fairly quietly with his leader, Meldrum, they were both returning on foot to their lodgings when it became apparent to Campbell that his learned leader was, as the Irish tactfully put it, "tired and unwell" no doubt as a result of the long case in which they were appearing. As fortune would have it, Campbell came upon an abandoned, or at least strayed, supermarket trolley and his offer to push Meldrum the rest of the way in that conveyance was accepted with Meldrum's usual aplomb. This trip did not, as it happens, continue without further incident. Mysteriously, the trolley got out of control. Campbell's duty was clear-and he discharged it. Seeing Meldrum's fall was imminent, he hurled himself to the ground beneath Meldrum thus ensuring a soft landing. In gratitude for Campbell's thoughtfulness, courage and most of all his embonpoint, Meldrum gave him a well-deserved red bag.

I'm looking forward to our next speaker. One day early in my career my clerk said to me-"Well I don't have any briefs for you-and you don't have any-you could do worse than go over the road and watch Phil Dunn-he's doing a plea today."

The plea was being made on behalf of an accused, a young husband who had stabbed his wife's lover, although not fatally. Dunn mentioned that the accused had only discovered the lover on returning home unexpectedly from one of his two jobs. Dunn explained to Justice Peter Murphy that the accused loved his wife and was willing to do anything for her. "Nothing", said Dunn, "was too good for her". The judge had seen plenty of life having been an RAAF navigator

who completed some 30 missions during World War II. He remained imperturbable as Dunn elaborated on those propositions about how much the accused loved his wife and was willing to do anything for her. "Your Honour," said Dunn gesturing towards the accused, "he concreted the backyard for her and that cost \$6,000. After that he saved up more, in fact, your Honour, he worked two jobs. Then he took up the front lawn and he concreted the front yard for her as well. Then your Honour, for her birthday, he gave her Mag wheels". At this point, Dunn held up his hand-"Four Mag wheels". That equity practice beckoned.

When I last presided at a Bar dinner I tapped my watch frequently to make sure no-one spoke for too long. I distinctly saw Sloss tapping her watch right now. That's a pity because there's a lot more I could say but I will hurry up. Gillies is an irresistible advocate but that's not all there is to him. However I don't really have time to tell you the one about Gillies in Phuket and the baby elephant.

I also don't really have time to tell you the one about McPhee and Ruskin and the tomato sauce.

I do, I think, have the time to tell you the one about Shaw and Ruskin. On one occasion Beaumont and I were appearing in the special leave list in the High Court watching those more senior, listed ahead of us. Shaw, with a junior beside him, deftly presented his application for special leave to appeal in a tax matter. He was followed by Ruskin, who was briefed to oppose the grant of special leave with a leader who went missing at the very last minute. When Shaw rose to do his reply Justice McHugh took pity on Ruskin and stopped Shaw with the words: "Mr Shaw, Mr Ruskin does have a point doesn't he?" Shaw looked disbelieving. He thought for a moment then said to Justice McHugh: "Well, Mr Ruskin does have a point your Honour, but it's such a silly point" then he sat down.

Stop I must. Before I do let me say I count it a privilege to have been a barrister for 25 years, on the practising list of the Victorian Bar for 24 years, and once its Chairman. In my experience, the Victorian Bar was a mixture of things-you could encounter high ideals, rampant nostalgia, cut-throat competition, passionate views for and against, anything proposed by the Bar Council, legal scholarship, and common wisdom. A defining constant has been the Victorian Bar's independence. Preserve it. I ask you now to stand and join me in a toast both to the Victorian Bar and to all the other independent Bars of Australia.

THE HON JUSTICE CRENNAN AC

¹ Generally traced to Sun Tzu's Art of War, 1800 BC.

² Concerning the uncertain relation between the position and momentum (mass times velocity) of a subatomic particle, such as an electron.







How will you interact with clients in 2020?

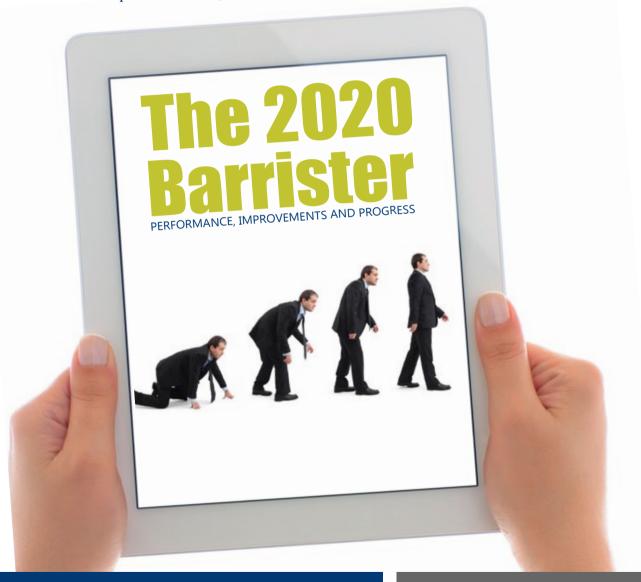
How will you access information in 2020?

How will you run your practice in 2020?

The 2020 Barrister

Save the date

Program and Registration available on the member section of the Vic Bar website www.vicbar.com.au or enquire at vicbar@vicbar.com.au or 03 9225 7111



Victorian Bar 3rd Annual CPD Conference



Friday 15 and Saturday 16 March 2013

Hilton on the Park East Melbourne

The Hon Justice Ashley Farewell Dinner



A dour Ashley JA (as he then was) ready to take the field for the ABA XI against the Western Circuit of the English Bar in Winchester, 2009.

Address in honour of the Hon Justice Ashley given by the Common Law Bar Association on 29 February 2012 to mark his retirement from the Court of Appeal.

David Martin asked me last Friday to speak about your life prior to your appointment to the Bench. That, in some ways, is a difficult task. Your Honour was appointed to the Supreme Court on 24 August 1990.

I had the great pleasure of being Your Honour's junior for the first time just three years before when by accident I was launched into the Western Australian case of Simpson v Australian Blue Asbestos that concerned the Wittenoom Mine.

In conducting some research one of your Court of Appeal colleagues noted that Justice Ashley was not really one to generate stories:

"He is devoted to his cattle – his wife and children – his grandchildren"

It is not entirely clear whether that was a deliberate or random order of devotion.

You, in your younger years, when, as you would say, "cricket was cricket", had a great affection for the game. You were, as a contemporary describes you, a solid batsman with the Melbourne Grammar School First 11. The cricketer's thesaurus is unkind to "solid" batsman using terms of "dour", "very hard to get out", "technically correct".

The legend that your Honour's cricketing career was based on the very dour English batsman, Ken Barrington, is untrue.

On your memorable 60th birthday you and Jenny booked out a cricket ground in Camberwell that rather romantically was/or perhaps is, called "Frog Hollow". There your guests, a rather ecumenical bunch divided into two teams and over the course of the day, assisted by generous libations, conducted a cricket match. For one of your guests the evocative memory of days gone by was too much. Perhaps it better that the guest go unnamed. For the purposes of the story, let us call him Simon Kemp Wilson QC – the name that he recorded himself in the scorebook.

Now 10 years ago Willow could still jog – a bit. Determined to put on a show, and to the consternation of paramedics, he put an enormous effort, over a long run up, into his first ball. He let go with a vicious bouncer that felled the middle aged woman to whom he was bowling. Your Honour did not need to ask him to slow down – he was thereafter exhausted.

Your Honour was no academic slouch, matriculating with first class honours in 1958 a second year matric in 1959. You gained an Honours Degree in Law from Melbourne University in 1964.

After Articles at Maddock Lonie & Chisolm you signed the Bar Roll when 23 years of age and read with Barry Beach on the 10th floor of Owen Dixon Chambers – now Owen Dixon Chambers East.

Both yourself and John Dee (later Judge Dee) read with Barry Beach at the same time.

It was said of your Honour at your Honour's welcome as a Judge of the Supreme Court:

"It is a mark of your Honour's extreme punctiliousness that, unlike Judge Dee with his legendary appetite, you did not

cricketing career was based on

the very dour English batsman,

Ken Barrington, is untrue.

"The legend that your Honour's Master's lunch".

It is difficult for those of us who were not there to imagine two readers with such different personalities and physical

attributes sitting side by side in the chambers of Barry Beach.

It is recorded that the chambers were a large oblong shaped room – the carpet royal blue with a fleur de lis motif – Beach at one end, large desk and lovely furniture – Dee and Ashley side by side at two tiny desks at the other end of the room.

VICTORIAN BAR NEWS

Dee of great bulk, tie undone, shirt hanging out, largely sustained by Noons meat pies, eaten with relish at any time of day, the blue carpet around his desk covered with a layer of pie crumbs. Ashley, immaculate, tidy, groomed, with a facial expression reserved for Dee that later became famous.

Your Honour had two sets of chambers, both on the 10th floor. Initially sharing with John Larkins QC and then with Neil McPhee QC.

David Ashley became a legend of the Worker's Compensation Bar. Both in Melbourne and on circuit, particularly in Bendigo, you built up a prodigious reputation for your unparalleled preparation, advocacy and knowledge of the law. Judge Gordon just unremitting in your dedication once remarked you had the entire list to the case and to your client. of Bendigo, over 40 briefs, and he could call on any case and you would be prepared.

You were the joint editor of the Victorian Worker's Compensation Practice.

Your readers were Ireland, Jewell, Schneider, Bromley, A. Maguire and Nightingale. It is uncertain how you managed with Maurie Nightingale. He was regularly seen blowing smoke out of your chambers window. You gave much to your readers. Julian Ireland commented that whenever a reader went on circuit with you - you paid for everything.

Upon taking silk in 1983 your practice truly diversified. You undertook significant common law, trade practices and industrial cases. In the High Court you argued a number of significant cases including Hackshaw v Shaw and Australian Safeway Stores v Zaluzna. Simpson v ABA, and then Heys and Barrow v ABA and CSR were very significant Wittenoom cases in Perth. It is a testament to your remarkable commitment that you, in effect, for over a year moved to Perth, returning home to Jenny and a young family on weekends.

In the Federal Court in Sydney you undertook the case of Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd. The Mudginberri dispute between 1983 and 1985 generated a test case in the Federal Court where the station and abattoir owner, Jay Pandarvis, backed by the National Farmer's Federation tested the use of s45D TPA regarding secondary boycotts - what was an attempt to introduce contract labour.

Tony North was your junior. Ian Callinan QC was on the other side.

For those of us used to appearing both with you and in front of you, we can readily bring to mind your Honour's countenance when Morling J, in comments during the course of the case, provided the clear impression he intended to find for the employer. On two occasions you unsuccessfully applied for his disqualification.

But even worse for you was compliance with the daily Sydney tradition of counsel adjourning for morning tea with the Trial Judge in chambers. One needs no imagination to envisage how fully you would have participated in the conversation over morning tea.

It is the tradition of stud cattle breeders to name their progeny in alphabetical order. Thus for your Honour it has been Morning Time Agis, Grand Champion Melbourne Show 1980, Morning Time Clearchus, Senior and Grand Champion Sydney 1985, Morning Time Hasset, Champion Bull Bendigo 1986. Your Honour's bull "Rough Justice Morling" not only broke the tradition, but let the side down in 1987.

You were briefed in the case of TC v Australian Red Cross Society and Others with Stanley QC and myself as junior. As was noted at your Honour's farewell, your Honour's commitment to the case and to the Plaintiff was demonstrated

"As a barrister you were

by your preparedness to refuse a Supreme Court appointment if you felt that your departure would jeopardise the case.

In a hearing in that case, prior to the start of the main trial, an event occurred that underscored my appreciation of the high regard your Honour placed in the traditions and professional courtesies of the Bar.

You came to Court not long before the opening of the Court. Richard Stanley QC and I were already seated. Stanley had taken silk on the same day as you - the 22nd November 1983.

Seniority had been fixed in the issue of the letters patent: Neesham, Stott, Ashley, Guest, Kirkham, Stanley, Evans, Mandie and Archibald – in that order of precedence.

Could Stanley have forgotten? It must surely have been in a moment of distraction that he had taken the seat at the Bar Table nearest the lectern – the senior place. Rather than embarrass Richard by pointing this out, your Honour took simple and direct action.

It was said of that other "man of steel" - the fictional one - that he was "faster than a speeding bullet; bound over buildings in a single stride." So your Honour bounded over all that lay between you and your rightful place of seniority.

Stanley said something under his breath. I couldn't quite hear what it was - but I don't believe it was an apology for having usurped the senior place.

You also appeared in the case of *Pilmer v McPhersons Limited* in 1985 - a trial before Gobbo J and jury of six. The first successful mesothelioma claim in this state and the country. The jury awarded \$222,500.00 - the verdict was appealed. Against you on appeal was Jack Winneke who argued the award was excessive. Justice Kaye QC in rejecting the appeal noted that \$50,000.00 was not the maximum amount a jury could award for pain and suffering. It seems entirely appropriate that in one of your last judgments you upheld arguments of Dick Stanley that a jury award of \$730,000.00 for pain and suffering should stand.

As a barrister you were unremitting in your dedication to the case and to your client. This was characterised in a number of ways. You would invariably immerse yourself entirely in the case, being on top of every detail. On the other hand, when appearing in Court you could never stand accused of being inscrutable.

In an article in the spring edition of the Victorian Bar News in 1990, marking your elevation to the Bench, it was said:

"The Trial Judge had given a number of rulings adverse to the interest represented by the future Mr Justice Ashley. While sorely aggrieved by these

silent. Nonetheless the Trial Judge indicated that his Honour's painful facial expressions demonstrated such a want of enthusiastic approval as to be regarded as less than desirable."

rulings, his Honour remained "That in your time on the bench the Supreme After St Kilda lost the grand Court has returned to be an outstanding common law court is an important legacy of yourself and other Judges."

It is normally not a good experience to attend a St Kilda Football Club match with D. Ashley. His passion for the Club is notorious. Regrettably, it seems the further St Kilda get ahead the more likely it is that they will lose. The relief of the final siren sends blood pressure back to normal.

> final to Collingwood in 2010 there was some trepidation as to, how shall I put it? Your frame of mind – how you might approach the appeal listed the following Monday.

The article went on:

"No doubt that his Honour on the Bench with his innate sense of fairness, not to say his ever present courtesy, will make it impossible for counsel to rely on the Judge's genial countenance as indication of the workings of the judicial mind".

I am not sure that "your genial countenance" became such a good indication of the inner workings of your mind.

Barristers, both your juniors and those who appeared in front of you, were never left in doubt as to what your Honour was thinking. Your Honour could eloquently express your thoughts, usually with one word whilst looking away. Sometimes you didn't need to say anything. This applied both in Court and out of Court.

In the Western Australian Supreme Court case of Simpson in 1987 you asked instructing solicitor, John Gordon, now at the Victorian Bar, to go away and put an assortment of documents into a folder. He dutifully returned with the documents in a folder. Your response:

"Why are you giving me this - it's a blue folder".

During that trial John Gordon celebrated his 30th birthday. On a Friday night after Court we returned to the Slater & Gordon offices in Perth where his staff were putting on drinks to celebrate. A "kiss-o-gram" had been arranged.

An attractive blond headed girl arrived and read a message to John and then kissed him.

Your comment "How interesting", gave a full description of what you thought of the event.

Ruskin and Kennan were opposed. They took a pragmatic approach – settled the appeal at the door of the court. Ruskin spoke with you shortly thereafter. He had no doubt they'd made the right decision.

You have been, throughout your life, a person who has stood by your convictions. A barrister who always ensured a client had the best possible representation. I read your brief address in response to comments made at your welcome in 1990. What you said, I think, leaves no doubt as to the values that made you an outstanding barrister and judge.

"I look at things still from the standpoint of a barrister, and perhaps my views will change: but, first, I take it to be very unfortunate that the jurisdiction of this Court is so changing that I practice ordinary people with cases of importance to them find it hard to get a hearing, whereas corporate interests take up much of the Court's time at first instance. I regard the seriously injured member of society and the individual involved in some employment or industrial dispute as having no less a right of audience in this Court as the failed or failing entrepreneur. Personal injuries litigation is traditionally a jurisdiction of this Court."

That in your time on the bench the Supreme Court has returned to be an outstanding common law court is an important legacy of yourself and other Judges.

The numbers tonight reflect the regard in which you are held by the Common Law Bar.

We wish you, and especially Jenny, well for the future.

JACK RUSH RFD QC 🚳



Bar Cover

Protection for barristers since 1962

The only insurer in Australia exclusively for barristers. New member applications and enquiries are welcome.

call (02) 9416 0681 or email office@bsaf.com.au

For further information and a PDS, please visit www.bsaf.com.au,

Bar Cover is issued by Barristers' Sickness & Accident Fund Pty Ltd ACN 000 681 317

BARRISTERS SICKNESS & ACCIDENT FUND

- Top quality sickness and accident insurance
- Low premiums, excellent value
- We cover up to 100% or your income
- You can claim up to 52 weeks from day one of your illness

You should read the Product Disclosure Statement and consider whether the product is appropriate before making your decision.

An Atlas Hugged: Sierra Leone



Ashley Halphen, a member of the Victorian Bar, travelled to Sierra Leone on Christmas Eve 2010 and spent several months working with the Society for Democratic Initiatives (SDI), a local non-government organisation working to entrench democratic governance and to protect and promote human rights.

"It is important to realise

the only worthwhile thing you own is what you have to give to others."

This tragic event caused Emmanuel to ask himself, 'what can I do to stop another child being killed in such a gruesome manner?' He has dedicated his life to answering this question...by action.

In 2003, he established SDI, a non-government organisation dedicated to challenging those circumstances that contributed to the war. The SDI strives to ensure that history never repeats itself. It is a small office with few resources but acts as human's right protector and pioneer for developing an entire country.

Civil society groups assemble regularly at the SDI. I watched as Emmanuel emphatically engaged his audience. He was a leader among his number with a presence enlivened by his passion and attachment to his country. My conviction of

> the difference he could make with more support transformed into a promise I made to him.

That promise materialised when I shook his hand in winter, 2012 on Australian soil.

ASHLEY HALPHEN WIN



happened to come across a website posting. Two days later, I secured a voluntary position at the Society for Democratic Initiatives (SDI) in Freetown, Sierra Leone, West Africa – population 6 million; colonised by the British; gained independence in 1961.

When I finally arrived, I had clocked in 44 hours since farewells, managing an injury free passage after an airport riot and an on flight affray. The ferry to the mainland carried a swell of people in their many hundreds, cars, animals, market stalls and faeces. A cab ride to the city centre was a frightening tour. There was not as much as a hint of normality. Imagine a world without power, sewerage or infrastructure. Where an urban reality equates to mayhem in filthy, polluted, dilapidated streets, cluttered in obscene traffic jams. How was I going to complete my tenure?

I was confined to a room over the festive season. No cigarettes, no sleep, no light, no sound, nothing to eat, no books to read. I was becoming weaker and dizzier by the minute. I paced from wall to wall breathing deeply for sanity; it was like a scene from Apocalypse Now.

That time is a blur, but for my first meeting with Emmanuel Saffa Abdulai, a lawyer and the director of SDI. I soon learned his story. He had an older brother. His mother sent Emmanuel to the streets of Freetown and his brother to Liberia; a fatal decision for his brother.

A brutal civil war brought the country to its knees, displacing nearly half the population and causing death and widespread destruction. Emmanuel's brother was forcibly abducted into the Revolutionary United Front. He fought as a child soldier for two years before he was killed. His corpse was never returned to the family.

oday, Sierra Leone is peaceful and friendly. Courted by a coastline heralding sublime tropical paradise; where beach fishmongers sell fresh produce with salt water still dripping; where you only hear the water itself, slapping against the shore; where itinerant vendors balance heavy loads on their heads, negotiating paths fit for tightrope walkers. And as the graduating moonlight spills like coolness, there remains the anticipation of being suckled by the night.

How transition has permeated onto the streets of Freetown is captured in this brief account of one day during my trip:

One morning, I heard men yelling on the street. A skinny boy was being savagely beaten. His clothes were torn from his body. A pistol was produced and pointed directly at him. He immediately took flight and dashed down the street totally naked. What happened? Why was a boy so violently shamed?

Work colleagues who also witnessed the calamity, protested about how much they hated thieves.

Later, I witnessed a bloody street brawl. The fight started when a man recognised another as his former neighbour and unleashed a hatred brewing since the war.

By lunchtime I had found calm. I went to the market. The energy oozing from the surrounding mayhem was so strong I could smell it. Suddenly, an old lady grabbed me from behind. My arms were stuck by my side within her tight embrace. Somehow, I managed to get hold of some ransom money. When she saw the notes, I was no longer her hostage.

At the gospel church, each stage of the service unfolded in classic African style. The congregation fired questions at the teacher

who commenced the service. Some questions were answered by reference to the New Testament while others received a 'Hallelujah' or 'Amen'. I soon managed to decode this religious speak. 'Hallelujah' really meant, 'we will leave that question for another day because I don't know the answer.' 'Amen' was a polite way of saying, 'that question has nothing to do with what we are talking about, so can we move on.'

The service turned to musical prayer then a preacher was called to the pulpit. 'Who is your master? Who is your protector? Who is your boss?' he cried out from the bottom of his big belly. He finished with a plea to place fate in the hands of a higher power, promising all then would be good. I was enthralled but perplexed by his words. 'How about taking some responsibility for your actions?' I asked him after the service. He smiled at me and said, 'Hallelujah, Amen!'

As I thought of the naked boy, a complete stranger appeared from nowhere and shared my stride as I shared my immediate thoughts. He knew the boy. He told me the boy had been orphaned by the rebel forces, 'the war made so many ones lose their beds,' he said.

Where was the boy's master when his parents were shot right before his very eyes? The woman who had grabbed me was not old but the mother of a child conceived in a pack rape during the war. Where was her protector then? When a rebel soldier indiscriminately fired into a village killing his neighbour's younger brother, where was the boss?

The aftermath of the war has linked seemingly random events by turning day to day occurrences on their head. Religion cannot provide an explanation. I try to paint a picture of a once thriving colonial nation that was transformed into a developing country by a war. But only in part not in whole as nothing is quite what it appears to be.

...In much the same way as a blade of grass will eventually find its way through a crack in concrete, hope will surface even in areas where it has been seemingly stamped out...



59

Criminal Bar Association Emmanuel Saffa Abdulai Dinner

During his 2010 visit to Sierra Leone, Ashley Halphen was convicted of the difference Emmanuel Saffa Abdulai could make with more support. The opportunity for members of the Melbourne legal community to provide support was realised through a visit to Melbourne by Emmanuel during which he was guest speaker at a dinner hosted by the Criminal Bar Association.

mmanuel Saffa Abdulai arrived in Melbourne on the 28th July, some ten months after the original planned date of his trip. So many itineraries and so many planned events were consigned to the Trash Folder as we went back to square one in our efforts to get him here. With our comparatively seamless infrastructure we found it difficult to understand the obstacles Emmanuel had to go through to obtain his all-important visa. But, eventually, obtain it he did and I was finally greeting him at the airport. There was little time to chat and catch up given the hectic schedule we had arranged for him in Melbourne.

Emmanuel spoke at a number of universities and forums, among them the International Commission of Jurists. These presentations were punctuated by a host of radio interviews where he was as equally informative and engaging as he is in person. The common thread in discussions was about transitional justice and the rule of law in a country still stricken by the aftermath of dictatorial leadership culminating in civil war

He was only once less than calm and composed when he called a radio headline highlighting blood diamonds and child soldiers a 'western mantra'. I understood his frustration. The stigma it connotes is utterly misleading. Today, although the wounds left by the civil war are still healing, Sierra Leone is peaceful and friendly.

The central event of Emmanuel's trip was the dinner hosted by the Criminal Bar Association. The venue was filled with all walks of legal professional life. The guest speaker hadn't left his sharp intellect, insights and charisma at home. Emmanuel held his audience agog in fascination as he traversed issues of political and judicial corruption, the civil war and the trauma and triumphs of transitional justice. He pressed the point that corruption within elite circles was the genesis of the war and lauds the enhancement of the rule of law as the key instrument to ensuring good governance and transparency. No one finished dessert without an appreciation of the circumstances facing a country evolving beyond infant democracy.

The next guest speaker was the Hon Justice Lasry who visited Sierra Leone in 2005 to appear for an ex-police officer facing criminal charges. His Honour gave a succinct and powerful picture of the unenviable legal and poverty stricken landscape.

Darren Lunny who reported the case then provided a visual dimension to his experiences with a photographic presentation of day to day life in Sierra Leone.

Overall, it was an informative evening that opened minds to challenges of transition in a post conflict era and the plight of a world away.

Emmanuel had been quietly hoping for some assistance from the Melbourne legal community. Never would he have imagined the armoury of support ultimately offered. Envisaged is judicial backing, advocacy workshops, provision of law reports, computers and texts and perhaps even a short documentary.

Much gratitude is expressed on behalf of Emmanuel to the Victorian Bar, the Criminal Bar Association and of course, Sally Bodman who brought many of the joint ideas to life.

ASHLEY HALPHEN W



Emmanuel Saffa Abdulai addresses the Criminal Bar Dinner at The Essoign









- **1.** The Hon Justice Lasry spent time in Sierra Leone in 2005 leading Victorian Policeman Peter Halloran's successful appeal against sexual assault charges.
- 2. Dr Greg Lyon SC and Emmanuel Saffa Abdulai
- **3.** Photojournalist Darren Lunny was in Sierra Leone during the civil war covering the Peter Halloran case.
- **4.** Candid photo taken by Darren Lunny during his time in Freetown.
- **5.** Darren Lunny's compelling photos taken on the streets of Freetown illustrated vividly the experiences of all the speakers.

The Third Bar Legends' Dinner

ho are these so-called Legends of the Bar? And what must one do to acquire such lofty status? With an open and inquiring mind, I approached the 3rd Bar Legends' Dinner on 13 September 2012 searching for answers. To the wholly uninformed, one might imagine that excessive consumption at the Essoign was the determinative consideration, but I knew better. If one of the chosen few was Chris Canavan QC of the planning bar, I supposed an agile mind, a handsome profile, a fickle charm were the key selection criteria. This narrow view was to be shattered when we gathered in record number for a sold out celebration at the Essoign Club to induct 18 new Legends. Occasionally, grand traditions can be established by a single event and it would seem that Peter Jopling QC made a lasting contribution to the folklore of the Bar by initiating this custom back in 2003.

In addressing the assembled company, special guest the Hon Justice Beach regaled us with the exploits and idiosyncracies of the latest members of the Legends Team, a first XVIII of leading barristers who have secured a special eminence. Relying on tales told by friends, colleagues and other Legends, his Honour avoided a lengthy recitation of Who's Who entries and resorted instead to that most reliable of sources, the profiles featured on the Victorian Bar web site, penned with accuracy and fitting humility by the Legends themselves.

His Honour's appointment of John Gibson as captain of this team of Legends met with unanimous approval. Although unable to attend the occasion, he was present in the hearts and minds of the guests and with his recent premature passing, this affirmation of Gibson's contribution to the life of the Bar is poignant and powerful.

The vice captain was left unnamed so that each of the inductees could imagine himself or herself rightfully in that role.

His Honour touched lightly on the sensitive question of the salary cap.

In reply on behalf of the freshly distinguished Legends, Ross Gillies QC entertained the crowd by translating the settlement negotiation techniques of common lawyers for the confused commercial lawyers present and by expressing respectful gratitude to Justice Beach for his "gentle roasting" of the Legends. Gillies reflected on the deceit or conceit which this new standing conveyed. He acknowledged amongst the inductees his friends of 40 years. His claim that there is "no better racket" than the Bar encountered no debate and the company settled in for a convivial night.

So what have I learned of the preconditions for such recognition? To join this team, maleness helps, but is not mandatory. Letters following one's name are also useful, but again not essential. An inability to secure any other gainful employment is close to imperative. Ego mandatory? Longevity, a must. Legend status is unavailable to those who

have offended, declined or not yet come to the notice of the Attorney-General in matters relating to judicial appointment. Finding favour with Peter Jopling's committee is probably important. Curiously, notwithstanding the closed process, the secret criteria, and the anonymity of the selection committee, the appointments were all warmly welcomed and apparently uncontroversial.

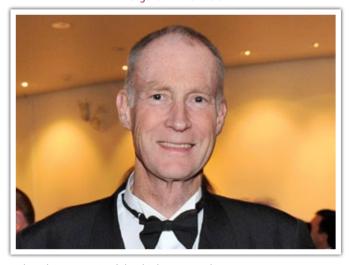
Perhaps this is because all inductees demonstrate the qualities of integrity, independence, justice, and dedication which the Legend tag denotes together with what Justice Goldberg described in the original inductees as "an absolute commitment to acting in their client's interests and not being deterred from standing up to irascible judges".

The occasion was altogether enjoyable and offered another insight into the curious rituals of the great institution of the Victorian Bar.

Finally, dear reader, heed this warning: your website profile may prove relevant in the most unlikely circumstances. Update it carefully.

Susan Brennan (B)

Peter J. O' Callaghan QC A. Graeme Uren QC Ron Meldrum QC Richard J. Stanley QC Andrew J Kirkham AM RFD QC Alan C. Archibald QC Robert Richter QC Dr John Emmerson QC Ross H. Gillies QC Allan J. Myers AO QC Christopher J. Canavan QC Colin L. Lovitt QC Henry Jolson OAM QC Philip J. Kennon QC Philip A. Dunn QC **Beverley Hooper** John A. Gibson Margaret L. Mandelert

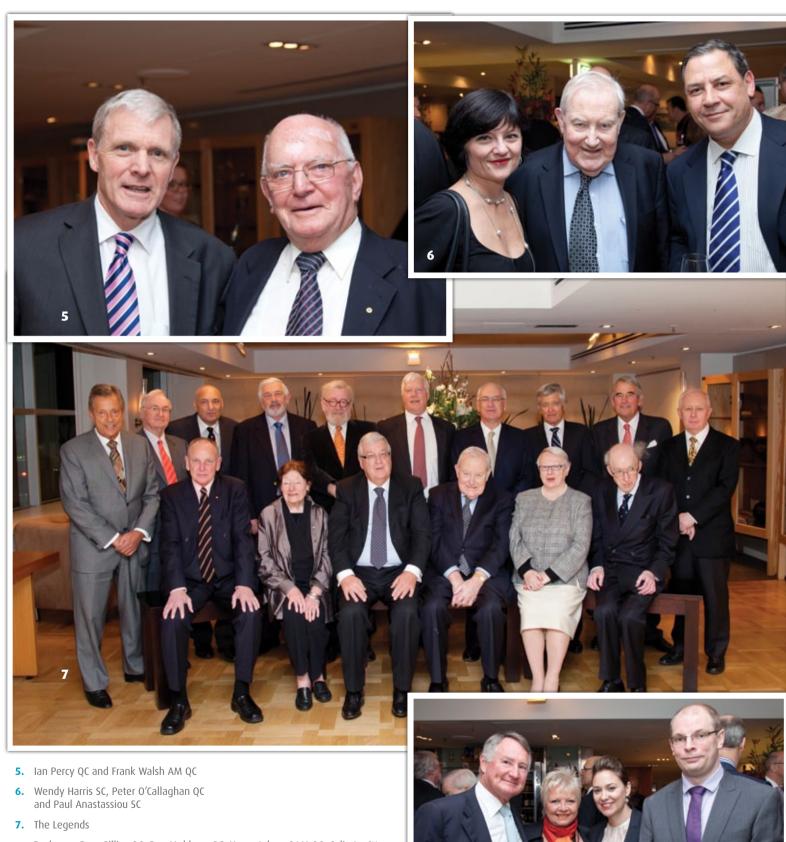


John Gibson, Captain of the third Bar Legends team





- 1. James Mighell SC, Peter Jopling QC, Stephen O'Meara SC, David Curtain QC
- 2. Stewart Anderson SC and the Hon Justice Beach
- 3. Joye Elleray, Ian McDonald and Anthea MacTiernan
- 4. Alice Carter, Mary Stavrakakis and Helen Dellidis



Back row: Ross Gillies QC, Ron Meldrum QC, Henry Jolson OAM QC, Colin Lovitt QC, Robert Richter QC, Philip Kennon QC, Allan Myers AO QC, Christopher Canavan QC, Richard Stanley QC, A. Graeme Uren QC

Front row: Andrew Kirkham AM RFD QC, Beverley Hooper, Philip Dunn QC, Peter O'Callaghan QC, Margaret Mandelert, Dr John Emmerson QC Absent: Alan C. Archibald QC, John Gibson



- **8.** Christopher Wren SC, Julie Davis, Nicola Collingwood and Rupert Watters
- 9. Colin Lovitt QC, Philip Dunn QC and Robert Richter QC
- 10. Ross Gillies QC
- 11. 2012 Victorian Bar Council Chairman Melanie Sloss SC

A Feral Win'd

2012 Frank Galbally Cup

It was always going to be a fight to the death. After a monumental yet close victory in 2011, we were prepared for an onslaught from the Solicitors. The 2012 Frank Galbally Cup was played between Barristers and Solicitors in honour of the late Frank Galbally and to raise money for Reclink Australia – a charity that improves the lives of the disadvantaged in our community.

On the morning of 29 July 2012, there was something in the air at Visy Park. I suspected that it might have been the lingering aroma of Chris Judd's cologne. It didn't matter for I was just hoping that I would not have to apply a mild "chicken wing" tackle in order to get a kick.

As the sky grew darker and the wind blew more feral, our team slowly gathered to prepare for battle. Little did I know that in the midst of the inclement weather a band of brothers was coming together.

Our coach, Gavin Crosisca, was magnificent. He could have simply dismissed us as a bunch of "has beens who never were". Instead, Gavin constructed a game plan that appeared brilliant but, upon close analysis, was pretty simple. With his words, "Get the ball and kick it forward" ringing in our ears, we ran onto the paddock. After a short warm up, some of us were ready for the showers. As it turned out, we had a terrific group of players who, to a man, played with enthusiasm and courage.

History will record it as a narrow loss (5 points). It will also record our slightly inaccurate kicking (04.14). There is no point saying that we should have won the game, for that much is obvious. However, the manner in which we played the game, having never played together before that day, was inspiring. The fight went down to the wire. The way we ran the game out when most of us were completely exhausted was commendable. We left the field weary but proud.

Best on ground for the Bar was Kane Loxley. Kane's ability to get the ball and then dispose of it so efficiently allowed us to move the ball into our attacking forward line on many occasions. Kane was supported beautifully by seasoned campaigners Dermott Dann, Jamie Gorton SC and the youthful Glenn Meldrum (Junior). Chris Farrington did a power of work in the ruck and, on many occasions, gave us the advantage at the centre bounce. The strength of Ash Kennedy was also on display as was his hardness at the ball.

Up forward, we had the benefit of the experience, size and talent of big Stephen Jurica. The boy hasn't lost too much and had plenty of touches. He had numerous shots at goal and, although he wasn't quite as accurate as he had hoped, without him our score would have been less! Dan Christie and Ben Ilhe were integral to our offensive game while another stalwart for the Bar, Dugald McWilliams, stood solid in defence and repelled many an attack from the Solicitors.

A nice, albeit a slightly different illustration of the father/son rule came when Paul Santamaria SC and talented son, Al, ran side by side down the wing. While they seemed for a brief moment to match each other as they ran, the former needed a significant rest afterwards while the latter ran all day.

The other warriors who pulled on the Bar football jumper and fought for our honour and pride that day were: Morgan McLay, Stephen Linden, Marc Testart, Nick Anderson, Al Johnson, Louis Cosentino, Danny Cole and Joseph Hartley.

Mark Gibson volunteered as an umpire and, once again, he demonstrated impeccable fairness and judgement, not to mention fitness! As in previous years, Wayne "Moose" Henwood made himself available for some last minute advice on the "Laws of the Game" as well as offering encouragement and taking some lovely photographs. Finally, I express my gratitude to Justin Whelen for managing the Bar team on the day. It is no easy task and his input and initiative were invaluable.

Of course, the game was played in wonderful spirit as it always is. The winner is Reclink – something in the order of \$25,000 was raised to assist them in their great work. The Bar team were also winners. When so much of our professional lives revolve around conflict and opposing one another, it's a special feeling to stand by your mates, some old, some new, and play a game of footy as part of the one team.

For that experience, we are all winners.





OUARTERLY COUNSEL



Simone Bailey

Simone Bailey was called to the Victorian Bar in 2010 and read with Hamish Austin, having previously been Associate to The Hon Justice Osborn of the Supreme Court of Victoria. Simone's main practice area is common law, where she has a particular interest and expertise in maritime law. She also has a developing construction law practice. This year women's boxing was included in the Olympic Games for the first time. Simone had set her sights high to represent Australia in London in the flyweight category, but narrowly missed out on selection. Simone hasn't been deterred though by this year's

disappointment, and is currently preparing to represent Australia internationally in late November 2012. The next stop is Glasgow where she will fight for the chance to be Australia's first female boxer at a Commonwealth Games, before embarking upon one last campaign for Olympic glory in Rio De Janeiro in 2016. "I enjoy the challenge that both elite sport and the law offer" said Simone, "and I have learnt plenty from each which has served me well in the other".

Silence All Stand

High Court Of Australia

The Hon Justice Gageler

On 9 October 2012, Justice Stephen Gageler was sworn in as the newest Justice of the High Court of Australia. Justice Gageler is the 49th appointee to the High Court. He replaces Justice William Gummow AC, who retired at the compulsory retirement age of 70 after 17 years of service to the Court.

His Honour was born in 1958, and grew up in the small town of Sandy Hollow in the Upper Hunter region of New South Wales, on a property that was home to the family sawmill business, C Gageler and Son.

His Honour was educated in the public school system of his local area. He started at Giants Creek Primary and then went on to Muswellbrook High School, where his Honour received what he has described as a "superb education".

Towards the end of his school years, his Honour began to develop an interest in the law, despite having had almost no contact with lawyers. As luck would have it, Sydney barrister Bryan Beaumont (later the Hon Justice Beaumont of the Federal Court) bought the farm across the road from Giants Creek Primary. Beaumont advised the young Gageler to get a law degree, a few years' experience, a masters, and then to turn up at the Bar. And so his Honour did.

His Honour completed a Bachelor of Economics, followed by a Bachelor of Laws (First Class Honours) at the Australian National University in the early 1980s. At the ANU, he met his wife Carla, with whom he has had three children. He later studied at Harvard University – including courses with the future President of the United States, Barack Obama – and obtained a Master of Laws.

His Honour was admitted in 1982 and worked for two years as an employee solicitor of Erlingtons Solicitors in Canberra.

His Honour was called to public service early in his career. He was Associate to the Hon Justice Mason KBE of the High Court from 1983 to 1985. Then, between 1985 and 1989, he worked in the Office of General Counsel in the Commonwealth Attorney-General's Department (now a part of the Australian Government Solicitor) and also held the position of Counsel Assisting the Solicitor-General (then Gavan Griffith QC).

And so, with "a few years' experience", his Honour went to the Sydney Bar in 1989. He built up a highly distinguished practice in constitutional, administrative and commercial law, and took Silk in 2000. During his time at the Bar he appeared in many significant cases, including Lange (the Political Free Speech case), Kruger (the Stolen Generations case) and the constitutional challenge to the Howard Government's Work Choices reforms. His clients at the Bar were varied and included Betfair, the Humane Society, and the then Prime Minister John Howard. During this time, he also published

widely, edited the Australian Law Reports, chaired the Constitutional Law Section of the NSW Bar Association and was a member of the Administrative Review Council.

In 2008 his Honour was appointed Solicitor-General of the Commonwealth, a position he held up until his appointment to the High Court. As Solicitor-General, his Honour represented the Commonwealth in a number of high profile and complex matters before the High Court, including the Tobacco Plain Packaging Case, Plaintiff M70 (the Malaysia Declaration case) and Pape (the Tax Bonus Payments case).

Outside of the law, his Honour's passions include tae kwon doe, in which he is a black belt.

Federal Court of Australia

The Hon Justice Ross AO

Justice Iain Ross was born in Scotland and emigrated to Australia with his family when he was six months old.

Educated at Caringbah High School, he went on to complete tertiary qualifications in law, economics and business administration from the University of Sydney and Monash University. He was conferred a PhD in law from the University of Sydney under the supervision of Professor Ron McCallum.

In 1986 his Honour relocated from Sydney to Melbourne to work as an Industrial Officer of the Australian Council of Trade Unions. His Honour tells the story of his first day at the ACTU, when he asked then Secretary Bill Kelty what his role would involve. The response: "You can do anything you want here except make a mistake".

His Honour can't have made too many mistakes, as in 1990 he was elected Assistant Secretary of the ACTU. His election took place on his return from a six-month posting as a micro-economic reform consultant to the then Federal Treasurer, Paul Keating.

As Assistant Secretary, his Honour was significantly involved in tripartite consultations that led to the landmark reforms introduced by the Keating Government's Industrial Relations Reform Act 1993. The current Minister for Employment and Workplace Relations, Bill Shorten MP, described his Honour's contribution to those reforms in the following terms: "survivors of that process of legislative development still speak in awe of the immense amount of work that [his] Honour undertook to help the nation move from the then central awards-based system to fair and effective collective bargaining".

His Honour's involvement in law reform continued over the coming decades that followed, through roles with each of the Australian, New South Wales and Victorian Law Reform Commissions.

In 1994, at the age of 35, his Honour was appointed as Vice-President of the then Australian Industrial

Relations Commission; the first of his Honour's numerous appointments to tribunals and courts. In that role he was charged with establishing and heading the new enterprise bargaining division.

His Honour's skill as a negotiator and problem solver came to the fore at this time in his career. His stewardship of the negotiations of industrial arrangements for the East Link construction project resulted in a project that was completed ahead of time, under budget, with very little time lost in industrial action and no industrial deaths.

As Vice-President his Honour also handed down decisions in important matters, including the 2002 reasonable hours case, the 2004 redundancy case, and numerous national wage cases.

After 12 years as Vice-President, his Honour left the AIRC in 2006 to join the partnership of Corrs Chambers Westgarth. It was not uncommon in those days for his Honour to be seen hard at work at his desk, dressed in the same shorts and t-shirt he'd worn to the gym earlier in the day. Although the back of his Honour's chair was regularly adorned with a necktie or two, his Honour's neck was not.

In 2007 his Honour returned to public service, accepting an appointment as a Judge of the County Court and Vice-President of VCAT. At VCAT his Honour headed the Civil Division and, within that division, the Legal Practice List. He brought his characteristic industry to this role-during his time as a Vice-President, the Civil Claims "list blitz" cleared a staggering 1000 cases in just eight days.

In 2009, almost two years to the day since his appointment to the County Court and VCAT, his Honour was appointed to the Supreme Court. Although his Honour was assigned to the Common Law Division, much of his time was spent sitting as an Acting Judge of Appeal in both civil and criminal matters. Despite his relative inexperience in criminal law, his Honour earned the respect of his colleagues in the Court of Appeal. Earlier this year the High Court dismissed the appeal in DPP (Commonwealth) v Bui, a case in which his Honour wrote the lead judgment (Nettle and Hansen JJA agreeing).

In April 2010 his Honour returned to VCAT, this time as President. His first priority was to respond to the ten-year review report that had been published. His Honour consulted with the profession, visiting nine regional and seven metropolitan locations for meetings and public forums. This process culminated in the launch of the "Transforming VCAT" strategic plan in September 2010. Although the strategic plan was intended to be implemented over five years, his Honour brought his trademark energy to the project, which morphed into a three-year plan that was in fact rolled out over 18 months!

Unsurprisingly, his Honour's drive and enthusiasm are also evident in his personal life. In addition to having a winery that produces wine under the label "No Small Feat" (a reference to the survival of the vines), he is a keen baker and regular competitor in country shows. He has collected prizes in numerous categories, and for the last five years has won second prize in the Lilydale Show light fruitcake division, each time pipped at the post by a formidable CWA member.

In a career characterised by verve and a capacity to rise to new challenges, it's no surprise that his Honour has returned to the national industrial umpire, this time at its helm.

Supreme Court of Victoria

The Hon Justice Gregory Garde AO RFD *Bar Roll No. 1126*

Justice Gregory Garde was educated in East Bentleigh at Vaulkstone State School and later as a scholarship student at Scotch College. He was awarded a residential scholarship to Ormond College at the University of Melbourne, but elected to be a non-resident member of the college, attending for tutorials only.

His Honour studied Arts/Law at the University of Melbourne, graduating with Honours in both disciplines. His Honour's academic excellence was further recognised through the following exhibitions: the Supreme Court Exhibition in Equity (1971), the Harrison Moore Exhibition in Advanced Constitutional Law (1972) and the Jenks Exhibition in Conflict of Laws (1972).

In 1973, his Honour served his articles with Peter Kelly at Mallesons (now King & Wood Mallesons). His Honour's sights were set on the Bar and after working as an employee solicitor for around six months post-admission, he came to the Bar in 1974, reading with Bill Gillard (later Justice Gillard of the Supreme Court).

During his early years at the Bar his Honour combined legal practice with academia – first completing a Masters of Law at the University of Melbourne, before going on to lecture in administrative and constitutional law in the Council of Legal Education course at RMIT.

His Honour had three readers before taking Silk in 1989: Andrew Jackson, Richard Pithouse and Nicholas Francis. He served on a range of Bar committees, including the Commercial Bar Association Committee, the Administrative Law Committee, the Administrative Appeals Tribunal Consultative (Heavy Users) Committee and the Academic & CLE Steering Committee. He also served as Chairman of each of the Planning and Local Government Committee and the Law Reform Committee.

His Honour had a wide civil practice at the Bar. His practice encompassed areas of law including planning, environment, compulsory acquisition, revenue, trade practices, retail leases and discrimination.

Appearing in a series of utility regulation cases, his Honour had the last laugh with a recalcitrant expert witness. The witness, a mathematician, remarked during his Honour's cross-examination that his evidence would be clearer if the cross-examiner understood mathematics. His Honour gave a faint smile and went on to show through a skilful cross-examination both the shortcomings of the expert's evidence, and just how much he did in fact understand the discipline. How was the expert to know that his Honour's Arts Honours degree was in pure and applied mathematics?

In addition to his practice at the Bar, his Honour has had a distinguished military career, beginning in 1967, when he

enlisted in the Melbourne University Regiment. His Honour became a commissioned officer in the Royal Australian Infantry in 1970, and in 1971 undertook full-time service in Papua New Guinea with the Second Battalion Pacific Islands Regiment.

His Honour's military awards and decorations are numerous and include the Blamey Prize in Military Tactics (1981), appointment as the Army's first Director-General of Reserves (1998), and promotion to the rank of Major General (2001), upon which the then Chief Justice John Harber Phillips convened a ceremonial sitting of the Supreme Court of Victoria.

His Honour went on to be appointed Chief of Reserves and Head of Reserve Policy, the highest position available to a Reserve officer in the Australian Defence Force. In 2004 he joined the ranks of Lieutenant General Sir Edmund Herring and General Sir John Monash in being appointed Honorary Colonel of the Melbourne University Regiment.

His Honour's distinguished military service was further recognised when he was made a Member of the Order of Australia in 1995, and later elevated to an Officer of the Order of Australia in 2005.

His Honour now commences the next chapter in his formidable career, as President of VCAT.

County Court of Victoria

His Honour Judge Macnamara

Bar Roll No. 1431

Judge Michael Macnamara was appointed to the County Court on 7 February 2012 having served with distinction as a Deputy President of the Victorian Civil and Administrative Tribunal and, before that, the Administrative Appeals Tribunal of Victoria for a total of more than 17 years.

His Honour was born in London and came to Australia at a young age. He attended St Patrick's College, East Melbourne and Xavier College in Kew. In 1975 his Honour graduated from the University of Melbourne with Honours Degrees in Arts (a double major in History) and Law, winning the Supreme Court Prize.

His Honour served articles at Corr & Corr and remained with that firm as a solicitor for a little over a year, coming then to the Bar and reading with Ken Hayne (now Justice Hayne of the High Court). In a manoeuvre that many barristers will perhaps find difficult to imagine, his Honour returned to Corrs in 1979 as an employee solicitor. In 1981 his Honour was made a partner of that firm, and remained one for more than 13 years.

In 1994 his Honour accepted an appointment as a Deputy President of the Administrative Appeals Tribunal of Victoria. On the creation of VCAT in 1985 his Honour became a Deputy President of VCAT. His Honour served with distinction in that role, sitting on practically every list in VCAT – 14 of the present 16 specialist lists.

In his time at VCAT his Honour earned a well-deserved reputation for collegiality and assistance to fellow members.

His Honour also developed a reputation among counsel for courtesy, a sense of practical justice and appreciation of legal principle. His Honour is reported to have an insatiable fascination and passion for law. So much so that he reads law reports for pleasure–even, at the beach.

His Honour's long and distinguished service as Deputy President of VCAT doubtless stands his Honour in good stead to meet the challenges of the County Court. The Bar congratulates his Honour and wishes him well in his new role.

County Court of Victoria

His Honour Judge Stuart

Bar Roll No. 1373

Judge William Stuart practised law for 34 years before his appointment to the bench–appearing in more than 300 criminal trials.

After being educated at Xavier College and obtaining a Bachelor of Jurisprudence from Monash University and a Bachelor of Laws from The University of Melbourne, his Honour completed the Leo Cussen Institute's Practical Training Course. His Honour was admitted to practice in November 1977 and signed the Victorian Bar Roll of Counsel in February 1978, reading with Graeme Uren. Between March 1998 and March 2001, his Honour was in-house counsel with the Commonwealth Director of Public Prosecutions. His Honour took Silk in November 2011.

The law is very much part of his Honour's family. His older brother Tim is a solicitor in country Victoria. His Honour's mother, Eileen, graduated with his Honour from The University of Melbourne in 1976, mother and son then did the Leo Cussen Practical Training Course together and were admitted to practice on the same day and in the same sitting in 1977 – their admissions were moved by the late David Ross QC who had taught them at Leo Cussen. They then signed the Bar Roll within 4 months of each other and had rooms in the same chambers when they started at the Bar. Eileen, aged 100 (and on the Bar's Retired List), was present at his Honour's welcome ceremony.

His Honour's first criminal trial might have deterred an advocate of less fortitude. His Honour was briefed for the Prosecution before his Honour Judge Alan Dixon. The case was listed as a plea however when his Honour arrived at Court he discovered that it was to be a trial. After having the matter stood down until after lunch, his Honour ran the case. So began an outstanding criminal career at the Victorian Bar. His Honour's early capacity to run a trial competently unlead and to deal with unexpected challenges continued. Of all 300 or so trials – many long and complex–his Honour was only lead in two; his first murder trial by the late Charles Frances QC and in his second murder trial by Colin Lovitt QC.

His Honour's instructing solicitors and juniors appreciated and respected his thorough knowledge and understanding of the law, careful preparation and attention to detail, unassuming style, and willingness to engage them in the preparation and running of a trial.

His Honour had four readers - Jillian Fischer, Kerry Paull,

Nick Button and Jim Stavris – all of whom praise his Honour's generosity and patience. His Honour's generosity of time also extended to serving the Bar and legal communities by being secretary of the Young Barristers' Committee, Treasurer of the Criminal Bar Association, teaching in the Bar Readers' Course and the Leo Cussen Practical Training Course and chairing the Holmes List Committee.

County Court of Victoria

His Honour Judge Brookes

Bar Roll No. 422

Judge David Brookes was appointed to the County Court on 7 August 2012. His Honour's appointment followed 33 years' successful practise at the Bar and was enthusiastically received by his many admirers, as a well-attended welcome attested.

His Honour was educated at St Bede's College, Mentone. He studied Law at the University of Melbourne (an initial brush with the medical school was thought better of) and was a resident at Newman College.

His Honour served articles at McCaffrey & Shacklock in Moorabbin and was admitted to practice on 3 November 1975. The late Jack McCaffrey–father of Paul McCaffrey of our Bar–served as his principal.

After a short period as an employee solicitor, His Honour signed the Bar Roll on 14 September 1978. He read with E.W. Gillard, later Justice Gillard of the Supreme Court. His Honour's first brief was from Jack McCaffrey. The back sheet was endorsed "God in His Almighty Wisdom, Mercy and Benevolence leading David Brookes of Counsel". Ably led as he was, his Honour chalked up the first of many wins. In fact, the claim was undefended!

Later, His Honour's clerk, the late Percy Dever "suggested", with his unique persuasiveness, that His Honour appear at the Workers' Compensation Board. Thus began a long and successful association between his Honour and a large number of injured persons.

From the early 1990s his Honour broadened his practice into common law and appellate work including medical negligence cases. He appeared in the Court of Appeal and the High Court, often opposed by senior counsel while himself still a junior.

His Honour was never a "fierce advocate" from central casting, however he was extremely effective. With a cross-examination style described as "insidious reasonableness", His Honour could often obtain helpful answers from witnesses who unwisely came to trust in His Honour's good-natured demeanour and affable questions. Counsel appearing before His Honour would be wise to recall this.

His Honour also appeared in a number of Royal Commissions and Inquiries. He acted for The Hon Marie Tehan in the Ambulance Services Royal Commission and for a director with respect to the HIH Royal Commission, achieving conspicuous success for both.

In addition to this, His Honour conducted a significant mediation practice, generally squeezed in between pressing court dates. Again, His Honour's persuasive charms were put to good use cajoling settlements in this forum.

In 2007 His Honour took Silk. As a Silk His Honour was most renowned for his work with difficult and complex serious injury cases on behalf of plaintiffs – often on the Warrnambool circuit. He also appeared in complex medical negligence cases usually defending doctors.

Throughout his time at the Bar his Honour shared chambers with (before his appointment) Judge Bowman, now of the County Court, Chris Wren SC, David Martin and Paul McCaffrey. He was an ideal chambers colleague, always good humoured and helpful. However, the chaotic state of His Honour's room, and cards from solicitors acknowledging the anniversary of a delivery date for briefs to do paperwork, became legendary.

His Honour was an outstanding barrister both as a junior and a Silk, not least because of his unflappable disposition and his obvious sense of fairness. Those skills, which served his Honour so well at the Bar, will also make fine qualities in a judge. Although he will be much missed by his colleagues, the Bar wishes His Honour every success in his new role, and trusts that His Honour will become an ornament to the Court.

Gonged!

Professor the Hon Gareth John Evans AC QC,

who was elevated to a Companion of the Order of Australia, for eminent service to international relations, particularly in the Asia Pacific Region as an adviser to governments on a range of global policy matters, to conflict prevention and resolution, and to arms control and disarmament.

Adjunct Professor Simon Richard Molesworth AO QC,

who was elevated to an Officer of the Order of Australia, for distinguished service to conservation and the environment, to heritage preservation at national and international levels, to the professions and natural resource sectors, and to community health organisations.

The Hon Haddon Storey AM QC,

who was made a Member of the Order of Australia, for service to the Parliament of Victoria, particularly through law reform and contributions to cultural reinvigoration, to the arts through executive roles with cultural organisations, and to education.

Mr Henry Jolson OAM QC,

who was awarded a medal of the Order of Australia, for service to the law, particularly in the area of alternative dispute resolution, to professional organisations, and to the community.

Adjourned Sine Die

High Court of Australia The Hon Justice Gummow AC

Justice WMC Gummow AC retired as a judge of the High Court on 9 October 2012. His Honour's retirement brought down the curtain on one of the great judicial careers of recent

The first measure, though perhaps of limited value, of the contribution made by a judge to the judiciary, the profession and the wider community is quantitative. More precisely, the number of years of service in a judicial post. Justice Gummow tallied 26 years of service as a Justice appointed under Chapter III of the Constitution – almost 9 years as a Justice of the Federal Court of Australia and more than 17 years as a Justice of the High Court of Australia. Were the Constitution differently worded, his Honour might have attempted to better the impressive record of Judge Learned Hand who served more than 50 years in office. His Honour leaves very much at the height of his powers, and his prodigious work ethic gives every reason to think he might have come close.

The second measure, and far more important, is qualitative – the judge's particular contribution in his or her capacity as a judicial officer and as a benefactor of the legal profession generally. Justice Gummow's erudite analysis and application of the law is widely recognised. Of particular note was his Honour's continuing commitment to the development of the common law and equity by principled advances, always based upon analytical exposition of traditional doctrine. To be able to effectively undertake that task, in the thorough and productive manner in which his Honour did, was an achievement to which few can lay claim.

Justice Gummow's wide-reaching knowledge of the law crossed various "subject" lines as delineated by the universities – and by those barristers who proclaim that one can no longer succeed as a "generalist". At Justice Gummow's swearing-in as a High Court judge on 21 April 1995, Susan Crennan QC (as she then was) demonstrated her appreciation of Justice Gummow's breadth of learning when she said:

"Your Honour is steeped in the values, history, doctrines and remedies of equity, a body of law going far beyond the pre-judicature notions of conscience of even the greatest of the 19th century Lord Chancellors and central to an ample understanding of today's law."

His Honour's learning went beyond the principles of equity and touched all aspects of law and political and social history. And his writings did not refer to history simply for history's sake – they endeavoured to use the past to explain the present, and provide a guide for the future. The quality of his Honour's judgments stemmed from a deep appreciation of legal history coupled with intellectual rigour, yet tempered by an awareness of practical realities. The latter concept encompassed both the realities for the trial judge during a hearing, and the realities

of the parties at the time of the events in question. The quality of his Honour's reasoning is evidenced by the number of joint judgments in which his Honour participated – a fact which also makes difficult the task of assigning credit for his individual and collaborative writings.

Given their number, it is not possible to survey all the exceptional judgments produced by Justice Gummow as sole author. A few can be motioned however. His Honour's decision in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, concerning silence and its relationship to misleading or deceptive conduct is a good example of the clarity his Honour brought to difficult areas of the law while on the Federal Court.

In Grollo v Palmer (1995) 184 CLR 348, a case about telephone interception warrants, and one of the first High Court cases in which he participated, his Honour published separate reasons concurring in the result. Evident in that concurring judgment was his Honour's keen appreciation of constitutional limits on the exercise of power in our system, and the fault lines which those limits create. Also apparent was his Honour's preparedness to analyse related issues under American constitutional law and use these to make insightful comparisons. In Grollo v Palmer, his Honour re-examined the Boilermakers doctrine (R v. Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254) in a way that demonstrated his concern for practical reality, to which reference was made above. Perhaps significantly when one reads the judgment, his Honour had in fact appeared in the earlier federal warrants case of Hilton v Wells (1985) 157 CLR 57 as junior to Gavan Griffith QC.

Some 15 years later, in *Tabet v Gett* (2010) 240 CLR 537, a medical negligence case, his Honour (this time as Acting Chief Justice) demonstrated, again, his affinity with and understanding of, North American jurisprudence. Revealed also was his ever-present awareness of the broader effect of decisions on particular questions, and the interplay between all the principles to be found in the legal universe. His Honour's brief diversion into the history of British theatre and the discovery of PG Wodehouse, while explaining the link between damages and lost opportunity, is further evidence of his appreciation of the detail to be found in legal precedent and understanding of its link to both social history and practical consequences for litigants.

Justice Gummow was widely reputed as a fierce questioner from the bench. The Honourable Michael McHugh, in a 2005 speech, said the following:

"Now, I don't mean to imply that every moment of a High Court hearing is the judicial equivalent of a Woodstock or Nimbin love-in between the bench and the bar. For example, counsel often find the questions of Justice Gummow quite disconcerting. This is almost always the case when his Honour asks questions like, 'Why has no one noticed before now that this case is in federal jurisdiction?' or when he asks: 'Is there a 'matter' here for the purposes of Chapter III of the Constitution?'

Those sorts of questions drain the blood from counsel at the other side of our warm and friendly court. But penetrating as they are, Justice Gummow's questions seem mild compared to the questions of Sir Anthony Mason, which justifiably in my view earned him the title of the heavyweight champion of the federal judiciary."

There might be reason to doubt the conclusion expressed in the last two lines of this passage. In *Network Ten v TCN Channel Nine* [2003] HCATrans 338, a one-day appeal, the transcript records 260 interventions by Justice Gummow; on a Friday, no less!

Almost as formidable as his Honour's ability to drive to the heart of the case at hand, was his ability to use the indices to the Commonwealth Law Reports and even recall the particular volume in which a High Court decision could be found. His command and recall of cases was widely known and regularly deployed in the course of argument, as many members of counsel can attest.

On the occasion of Justice Gummow's appointment to the Federal Court in 1986, the Hon Lionel Bowen AC, Deputy Prime Minister and Attorney-General for the Commonwealth, noted that, apart from his being a practitioner of the highest standard, Justice Gummow had devoted much time to lecturing in law and assisting tutors who subsequently became law lecturers. The profession is greatly indebted to Justice Gummow for his contribution as an educator as well as a judge.

As might be expected after such a lengthy judicial career, his Honour leaves behind a loyal staff; a long-time tipstaff, personal assistants and many associates from the Federal and High Courts. Associates particularly have benefited enormously from his Honour's generosity as a mentor and tutor. Some have already made their own significant contribution to the law, and doubtless others will do so in the future. When one adds to these the many practitioners who have benefited directly from his Honour's teaching, the contribution made by his Honour as an educator and mentor is remarkable.

However, his Honour's most important legacy lies not just with those who knew him personally, but with the profession as a whole. Each of us, whose job it is to engage with the law—to advise clients, to fight cases, to formulate policy or to propose reform—is the beneficiary of the immense contribution made by his Honour in pronouncing, explaining and developing the law in this country. His Honour's contribution in this way was unusual in its breadth and utility, even by the very high standards regularly set on the courts of which his Honour was a member. The Bar thanks his Honour for the outstanding contribution he has made to the administration of justice in this country and wishes him every satisfaction in whatever life after the High Court should bring.

Federal Court of Australia

The Hon Justice Sundberg

Bar Roll No. 885

Justice Ross Sundberg departed quietly and without ceremony from the Federal Court of Australia on 9 August 2010 after 15 years of service on the Bench.

His Honour was admitted to practice on 2 May 1966 and came to the Bar in October 1969. Having read with J.D. Phillips (formerly Justice J.D. Phillips of the Court of Appeal), he practised at the Bar from 1969 to 1995. His Honour took Silk in 1984.

His Honour's early practice was in equity, property and constitutional law. In the Victorian Bar News article marking his appointment to the Federal Court of Australia, his Honour was described as "probably the last of the old time equity practitioners".

As a junior, his Honour developed an extensive High Court practice in constitutional law. Indeed, in relation to a significant number of cases, his Honour not only appeared as junior counsel, but also served as the reporter to the Commonwealth Law Reports. See, for example, the following reported decisions of the High Court of Australia: Russell v Russell (1976) 134 CLR 495; The Queen v Joske; ex parte Shop Distributive and Allied Employees Association (1976) 135 CLR 194; Attorney General (WA) v Australian National Airlines Commission (1976) 138 CLR 492; Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth (1977) 139 CLR 54; Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (1979) 145 CLR 330; Gazzo v Comptroller of Stamps (Vic) (1981) 149 CLR 227; and State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282.

His Honour made a noteworthy contribution as a principal reporter to the CLRs, an onerous and time-consuming task for any barrister let alone one with his Honour's demanding practice. This contribution is readily apparent from the vast number of reported cases in which the initials "R.A.S." sit at the foot of the report. Volume 180 of the CLRs is a good example. His Honour reported twenty-five of the thirty cases appearing in that volume.

As a judge of the Federal Court of Australia, his Honour served with distinction, politeness and efficiency. It is likely that the speed and efficiency with which his Honour disposed of cases influenced the development of the docket system and the "fast track" regime. That speed and efficiency meant that the two Chief Justices under whom his Honour served often called on him to deal with cases requiring prompt attention in States other than Victoria. There is one good example. In August 2004, following extensive hearings in many remote locations, his Honour delivered a judgment on the native title claims of the Ngarinyin people. This judgment recognised the applicants' exclusive possession of nearly 30,000 square kilometres of country. His Honour delivered that judgment at Anbada, in Gubungarri clan country, about 300 kilometres up the Gibb River Road from the town of Derby.

His Honour delivered many authoritative judgments, each of which reflects an incisive mind and ability to explain complex

ideas with great clarity. There are many intellectual property and tax judgments falling into this category. In *McBain v State of Victoria* [2000] FCA 1009, His Honour declared invalid a Victorian law precluding a provision of IVF treatment to an unmarried women not in a de facto relationship. The judgment demonstrates the dispassionate, principled manner in which his Honour approached all disputes – including those which had aroused passionate views in the wider community.

His Honour's learning and industry is also apparent in many judgments of the Full Court of the Federal Court of Australia. It is clear that his Honour was responsible for many such judgments or large portions of such judgments.

His Honour's wit and dry sense of humour also emerges from a reading of some judgments. See, for example, *Edward Baillieu & Anor v Australian Electoral Commission* [1996] FCA 1202 at [11] – a breach of copyright case in which his Honour was called on to analyse two postal voting brochures. His Honour described one of these brochures as follows:

The brochure used in the 1993 general election consists of a single sheet which folds up in the same fashion as the Commission's brochure. The front of the page is in three segments. The left hand segment contains the words in large capital letters "Your vote is important in the electorate of ...". Underneath that are representations of four electors gathered around a post box, each elector holding an envelope which is about to be inserted in the box. The electors are all smiling and apparently excited at the prospect of posting their letters. Obviously none of them is in prison, they do not look ill, and so they must be holidaying out of their electorates and unable for that reason to vote in the customary manner. The post box is also excited at the prospect of receiving the letters, because it is smiling, its eyes are twinkling, its eyebrows arched, and it is swaying on its pedestal...

Since his departure from the Bench, his Honour has re joined the community of Ormond College. That is an institution with which his Honour has had a long and rewarding association, both as a student, and later as a tutor and Director of Studies in Law. It is a little known fact that, as a student, his Honour once held the position of College Piper. Recently, and consistently with his Honour's long-standing commitment to education and legal scholarship, his Honour has been leading discussion groups as part of the Law Programme at the College.

The Bar wishes his Honour a happy retirement and trusts that he will continue to enjoy the pursuit of his many and varied interests.

Federal Court of Australia

The Hon Justice Finkelstein

Bar Roll No. 1136

On 1 July 2011 Justice Ray Finkelstein retired after 14 years as a judge of the Federal Court of Australia. His Honour was appointed in 1997 and served with enormous dedication and distinction. He brought to his work as a judge many of the qualities that had earned him a stellar commercial practice before his appointment.

His Honour signed the bar role in 1975 and took silk in 1986. In 1992 he was appointed Victoria's acting Solicitor-General. As counsel, he was involved in a number of significant commercial and constitutional cases, and appeared numerous times in the High Court.

Many barristers will regret his Honour's departure from the Court, In his typically self-effacing way, his Honour refused the many entreaties to have a Court farewell.

His Honour's judgments have been highly influential in the development, and practice, of commercial law in this country. Partly, this was because his Honour was especially learned. Those appearing before him, or reading his judgments, were regularly assisted by reference to old authority, often from the early days of the Chancery Division. His Honour was frequently able to discern enduring principles from these cases, decided in a very different time and context, and apply them effectively to the fast-moving and complex commercial disputes before him. Moreover, he was not shy of venturing into American and Canadian authorities in search of fresh approaches and answers to controversies already considered by those courts. During his time on the Court his Honour produced hundreds of judgments, covering many different topics, including some which had not previously been the subject of judicial exposition.

His Honour was also a reformer. He was instrumental in the development of new procedures in the Federal Court designed to shed cost and expense from the litigation process, and to achieve expeditious but just outcomes. Two reforms merit particular mention. His Honour was one of the instigators of the "fast track list" (or "rocket docket" as it quickly became known) and in fact drafted Practice Note CM 8 by which it was introduced. His Honour's efforts in effecting the introduction of this important regime for the speedy resolution of disputes and the minimisation of unseemly discovery and pleading disputes should be applauded.

His Honour was also an enthusiastic user of, and participant in, "scheduling conferences". These were designed to reduce cost and improve efficiency by replacing interlocutory hearings with informal meetings; often conducted around a table rather than in court. They sought to move past process and expose the true issues necessary for resolution of a dispute. His Honour took enthusiastically to these conferences, promoting a less formal atmosphere in which candid discussions about the real issues could, and very often did, take place. It was sometimes remarkable how much progress could be made when dialogue between Bench and Bar occurred in such a manner. As with many reforms promoting flexibility, the process placed significant responsibility on the shoulders of counsel and solicitors. Formulaic mechanisms and rules were dispensed with and practitioners were required to engage substantively with the issues. His Honour's great acumen and the respect in which he was held were of real assistance in ensuring these conferences achieved their purpose.

His Honour also broke new ground with substantive law, particularly in the areas of corporations, insolvency, intellectual property, competition law and class actions. In the 1990's, the Victorian registry heard a significant volume of the corporate cases commenced in the Federal Court (at one point reportedly over 90%) and his Honour took personal responsibility for many of these important cases.

His Honour was also a significant presence on, and President of, the Australian Competition Tribunal and presided over some of the most significant cases in that jurisdiction, including the enormous rail access dispute between Fortescue, BHP and Rio Tinto. In addition, his Honour was Deputy President of the Copyright Tribunal.

During his time on the Court, his Honour became something of a living legend – unconfirmed reports began to circulate at law schools to the effect that, as a barrister, his Honour had declined fees in favour of jam sessions with rock-stars for whom he had acted.

Intelligence suggests that his Honour was rebellious and disobedient as a secondary student. One can only hope that we see more defiant youths put their rebellious spirit to such good use. The Bar congratulates and thanks his Honour for his outstanding and memorable contribution as a Judge of the Federal Court of Australia.

Federal Court of Australia; Fair Work Australia

The Hon Justice Giudice AO

Bar Roll No. 1942

Justice Geoffrey Giudice was farewelled as a Federal Court Judge and President of Fair Work Australia at a ceremonial sitting of Fair Work Australia in Melbourne on 24 February 2012, after nearly 15 years of distinguished service on the Bench and a legal career that spanned some 33 years.

His Honour graduated in law from the University of Melbourne in 1970 before spending nine years working in the health and retail industries, including as an industrial relations manager at The Myer Emporium Ltd. His Honour was admitted to practice on 1 August 1979. He was employed as an articled clerk and then solicitor and partner with Moule Hamilton and Derham (which later became part of Freehill Hollingdale & Page).

His Honour signed the Victorian Bar Roll of Counsel on 22 November 1984, reading with Chris Jessup QC (now Justice Jessup). His Honour specialised in industrial relations and employment law matters, often representing major clients in significant cases that laid down new industrial law principles. Yet, the last brief he was offered was to appear in the Melbourne Magistrates' Court.

His Honour was appointed as President of the Australian Industrial Relations Commission and as a Judge of the Federal Court on 17 September 1997. His Honour became the inaugural President of Fair Work Australia when it commenced operation on 1 July 2009.

At his Honour's welcome in 1997, then President of the ACTU, Jennie George, noted that the Commission's "fundamental responsibility as an institution which defends fairness and equity in the workplace and advances the interest of society generally must continue into the next century" and that the "the whole country [was] waiting, to

see how this uniquely Australian institution evolves under your leadership and adapts to the challenges of the new Act [Workplace Relations Act 1996] and more significantly, the new millennium". As it transpires his Honour's tenure and the new millennium brought its fair share of challenges and change. His Honour himself recently noted that the last 20 years in industrial relations was "revolutionary rather than evolutionary". His Honour saw the implementation of significant legislative changes under the Workplace Relations Act, Work Choices and the Fair Work Act, determined minimum wages, undertook an extensive award modernisation process and delivered the first Equal Remuneration decision under the Fair Work Act. Speakers at his Honour's farewell commended his Honour for his admirable leadership during these difficult and controversial times, for meeting the challenges and all the while acting impartially, fairly, patiently and politely. As a result of his efforts it was said that Australia was 'stronger and fairer' and a 'better place'.

Supreme Court of Victoria, Court of Appeal

The Hon Justice Ashley

Bar Roll No. 770

Justice David Ashley has dedicated himself to more than 46 years of service to the law, including over 21 as a Judge of the Supreme Court. He leaves behind him a significant legacy, particularly in the areas of common law, criminal law and sentencing.

His Honour was educated at Melbourne Grammar School, which was then known as Melbourne Church of England Grammar School. During his time at the school, he was a left-handed opening batsman in the first XI cricket team.

His Honour went on to study at the University of Melbourne, from which he graduated with an Honours Degree in Law. He undertook articles with Don Chisholm of Maddock, Lonie & Chisholm (now Maddocks). His legal career began as it would continue: working on cases significant to the development of personal injury law. As an articled clerk he assisted Bill Crockett QC and Barry Beach (both of whom were later appointed to the Supreme Court) in the case of *Tremain v Jones & Lilley*, a major motor vehicle accident case in which the damages verdict was, at the time, the highest in Victoria.

Shortly after completion of his articles, his Honour signed the Roll of Counsel and read with Barry Beach. During his early days at the Bar he took on a variety of work through his clerk, Percy Dever. As a result, he appeared regularly in the Court of Petty Sessions before Stipendiary Magistrates, and the Honorary Justices of the Peace in the Second Division.

Over time his Honour developed a leading common law practice, acting both for defendants in accident cases, and for plaintiffs in the workers' compensation and common law jurisdictions of the Supreme and County Courts. Of particular note was his Honour's involvement in a series of negligence claims concerning asbestosis and mesothelioma, both in this State and in Western Australia. These cases were legally and factually complex, long-running – one trial ran for 133 sitting days – and ground-breaking. The 1985 Supreme Court case of

Pilmer v McPherson's Limited was the first Australian case in which common law damages in negligence were awarded to a mesothelioma victim.

This work also saw the beginning of the professional relationship between his Honour and Peter Gordon of Slater & Gordon. In his book Blue Murder journalist Ben Hills observed of this pairing: "[y]ou could hardly cast an odder couple than David Ashley and Peter Gordon - the broad-ribbed, ruddy-faced "Westie" from the wrong side of the Maribyrnong River and Ashley, the lean elegantly-dressed barrister ... son of a doctor, honours degree ... pictures of stud livestock from his country property decorating the walls of his Chambers". Yet, elegantly-dressed or not, his Honour was not afraid to get his hands dirty. On Easter Day 1987, he flew in a chartered plane with his instructors, a team of photographers, engineers, industrial hygienists and other experts to inspect the mine at Wittenoom. Undeterred by a chained gate, his Honour observed that "the gap in the gate [didn't] seem prohibitive to entry", and so in they went.

His Honour had five readers before he took Silk in 1983. Some six and a bit years later, in 1990, he was appointed a Judge of the Trial Division of the Supreme Court, where he was assigned to the Industrial Property List. In 2000 he was appointed Principal Judge in the newly created Common Law Division.

His Honour was an influential trial judge for some 15 years, during which he earned a reputation for skilled management of complex and long trials. His Honour presided over jury trials in defamation suits brought by two iconic Victorians, Jeff Kennett and Ron Clarke. Famously, Kennett lost, while Clarke (having made an unsuccessful settlement offer of \$75,000) walked away with damages in excess of \$700,000.

In 2005 his Honour was elevated to the Court of Appeal, where he continued to apply his mind to cases in multifarious areas of both civil and criminal law. He was invariably diligent – no document, footnote or line of a medical report escaped attention. His Honour was clear on the approach to be taken, particularly in serious injury appeals ("start with the affidavits"), and often urged counsel to "read on" from a document, when that was the last thing counsel wanted to do.

Undoubtedly, his Honour's greatest contribution has been to the common law in areas including negligence and accident compensation, in particular the development of doctrine in relation to serious injury applications under the *Accident Compensation Act* 1985, which has been of central importance to the running of trials in the County Court. His Honour's influence on the jurisprudence in cases including *Grech v Orica Australia, Church v Echuca Regional Health* and *Jayatilake v Toyota Motor Corporation Australia Ltd* is, plainly, unsurpassed.

His Honour has also been influential in areas of criminal law, not only in the development of legal principle, but also through his significant leadership on the so-called Venne reforms, which have seen the list of pending criminal cases in the Court of Appeal drop from 679 in January 2010, to 259 by the end of 2011.

His Honour's mark on the law of this State is indelible. It would be remiss not to acknowledge the assistance he has had 'behind the scenes'. Mention must be made of the generous family support given to his Honour during his career as a lawyer and Judge, in particular his wife Jenny.

His Honour and Mrs Ashley have well earned a relaxing retirement, however if comments given by his Honour in favour of retired judges in his farewell speech are any indication, his 'retirement' may well be an intellectually active one. At the very least one expects that he will exert his characteristic dedication and industry to breeding Beef Shorthorns at his Kayoga property, and (his Honour undoubtedly hopes) to cheering the Saints on to take the flag.

Supreme Court of Victoria, Court of Appeal

The Hon Justice Hansen

Bar Roll No. 802

Justice Hartley Hansen was born in 1942 and educated at Melbourne Grammar School, which was then known as Melbourne Church of England Grammar School.

Having completed an Honours degree in law at the University of Melbourne, his Honour served articles under Gilbert Farrow of the firm Whiting & Byrne, and was admitted to practice in 1966.

His Honour read with Sir Daryl Dawson (later Justice Dawson of the High Court) and signed the Roll of Counsel in 1967.

He built up a wide general commercial practice at the Bar, which included building and arbitration work. Notably, he held a brief as junior counsel to Leo Hart QC (later Judge Hart of the County Court) to assist the Board of Enquiry into casinos which was constituted by the Hon. Xavier Connor QC. The brief involved, among other things, overseas travel, including a trip to Las Vegas where local gaming lawyers rolled out the "red carpet" (which included, peculiarly, a mirrored ceiling in junior counsel's hotel room) . It's not surprising in the circumstances that his Honour has described this as "the most enjoyable brief [he] ever had".

His Honour had seven readers, including Geoffrey Nettle (now Justice Nettle of the Court of Appeal). He took Silk in 1984.

During his time at the Bar, his Honour contributed generously to a range of committees. He served for nine years on the Ethics Committee, including three as Chairman. He also served on the Bar Council for nine years, including as Junior and later Senior Vice-Chairman. He served a term as the Bar Council's Honorary Secretary, during which a new administrative structure was introduced, including a reorganised committee system.

Successive Chairmen of the Bar Council relied on his Honour's encyclopaedic knowledge of the administration and established practices of the Victorian Bar, and his wise counsel on difficult matters during difficult times. It has been said that his elegant prose style improved much of the Bar Council's correspondence.

His Honour gave generously of his time beyond the Bar, as an active Rotarian and Old Melbournian, and as a member of the Melbourne Savage Club and the Peninsular Country Golf Club, the latter of which he served a term as President. At the first dinner following his election as President, one of the club's members asked his Honour's wife, Rosalind, what "QC" stood for, to which she replied "Quite Cute".

His Honour served with distinction as a Judge of the Supreme Court for more than 18 years following his appointment in 1994, including more than three years as a Judge of Appeal after his elevation in 2010. Immediately prior to serving on the Court of Appeal, Justice Hansen was Principal Judge of the Commercial and Equity Division. He also served as Judge in Charge of the Commercial List, the State Taxation Appeals List and the Corporations List. His Honour ran the Commercial List for over three years, at times concurrently with the Corporations List.

His Honour was noted for his "no nonsense" approach to managing commercial litigation – often utilising (with great success) tight timetables as a way to focus the parties' minds. His favourite time of the year was during the so called "Spring Offensive", when case after case would be disposed of with great efficiency – an initiative which saw the introduction of court books as a regular feature of commercial litigation.

Justice Hansen was generous to a fault with each of his Associates, ensuring that they understood the intricacies of the cases before him, introducing them to the ways of the Bar and making a particular effort to point out the qualities that made for an excellent advocate, so that each of the aspiring lawyers in his charge might obtain maximum benefit from the experience of working with him.

His Honour has an excellent sense of humour, often recounting one of his first conversations with Fred Saul, the then Associate to Mr Justice Brooking. With great solemnity, His Honour would say that on one notable occasion, Fred had seen fit to give the "new judge" some advice on how to conduct himself as an Acting Judge of Appeal: "Just say three words" was Fred's sage advice. What were the three words? "I agree!" his Honour would tell his confused audience, then adding, with a twinkle in his eye, "I never did work out what the third word was".

His Honour looks forward to a relaxing yet active retirement. While there will no doubt be more time for family, travel, concerts and gardening, his Honour will also continue to pursue his interest in ethics as a Member of the Clinical Ethics Committee of Melbourne Health, a position he has held since 1998.

Supreme Court of Victoria, Court of Appeal

The Hon Justice Mandie

Bar Roll No. 872

On 31 August 2012 Justice Philip Mandie retired. In keeping with his self-effacing style, his Honour did not have a farewell.

His Honour graduated from the University of Melbourne in 1965 with first class honours. He was the Supreme Court prize winner in his year and also the EJB Nunn Scholarship winner in the 1965 Law Honours examination.

His Honour served articles of clerkship with Russell Kennedy and Cook under Mr R.W. Lloyd and was admitted to the profession on 2 May 1966.

Soon after, his Honour travelled to the United States to pursue further studies. In 1967 he was awarded a Master of Laws Degree from Yale University. Later in 1967 his Honour returned to Australia and worked again for Russell Kennedy and Cook, while also lecturing at the University of Melbourne law school.

On 27 March 1969 his Honour signed the Bar Roll. He read with Mr Peter Brusey. He quickly earned a reputation as an exceptional junior, with a broad commercial practice involving both regular court appearances and advice work. His Honour had two readers, John Gibson and Jennifer Davies, now Justice Davies of the Supreme Court.

His Honour took Silk in 1983, and established a practice that matched his earlier success as a junior. During his time at the Bar his Honour was also a very active contributor to many Bar committees, including the Ethics Committee and the Attorney-General's Working Party on the Legal Profession Act among many others.

On 10 May 1994 his Honour was appointed to the Trial Division of the Supreme Court. As a trial judge, his Honour had a formidable and, at times, intimidating reputation. Universally regarded as among the brightest judges on the Court, his Honour was appropriately short or even gruff with counsel seeking to press poorly thought-out arguments. In the way of very good judges, his Honour had a knack for proceeding directly to the heart of the matter in dispute and the most significant points in the case. Counsel strayed to the periphery at their peril.

Although his Honour's style was very sparing and direct – seldom an unnecessary word fell from the Bench–his Honour was always scrupulously fair. In disposing of cases before him, his Honour always gave very careful consideration to the evidence. One never sensed any pre-judgment in cases heard by his Honour.

While on the Trial Division, his Honour spent a significant period sitting as a Commercial List Judge with Chief Justice Warren (as she now is). In remarks made by the Chief Justice to mark the occasion of his Honour's final sitting, her Honour made mention of his Honour's time in that list and the significant contribution his Honour had made to the recognition and standing of the Supreme Court with respect to corporations matters and commercial litigation.

As the Commercial List judge his Honour took on very difficult and burdensome cases. Notable among these was the high profile case reported as *Australian Securities and Investments Commission v Plymin (No 1)* (2003) 175 FLR 124, involving civil penalty proceedings against directors of Water Wheel Mills Pty Ltd and Water Wheel Holdings Ltd. This was a difficult and complex decision reported over 141 pages. When delivered, it had all the hallmarks of his Honour's meticulous care. On appeal no reason was found to fault it.

On 11 August 2009 his Honour was appointed to the Court of Appeal. On that Court his Honour heard cases involving

a wide range of jurisdictions and subject matters. In his Honour's judgments in these cases, a lifetime devoted to legal thinking was regularly on display.

As a colleague at the Bar his Honour was famously reserved. The practice of extravagantly re-telling a day's court exploits to colleagues (not unheard of at the Bar) was not adopted by his Honour. Although ever polite, his Honour was never one to celebrate victories or lament defeats. In many ways his Honour's reserved nature was perfectly suited to judicial office.

In light of his Honour's taciturn qualities, it is interesting to observe the enormous warmth and regard expressed by those who are close to him. His Honour's former readers and associates paint a picture of an enormously capable and very generous man; and one with a dry sense of humour little seen from the well of the Court.

In today's fast-paced world of Internet, 24-hour news and celebrity, there is much to be admired in the quiet, distinguished and decent way that his Honour conducted himself on the bench. Although his Honour was involved in a number of high profile and controversial cases, it is his Honour's inherent sense of justice for which the Bar will most remember him. That, and the deep, rich baritone of his Honour's voice. Few things have ever carried such inherent gravitas.

The Bar thanks his Honour for an outstanding contribution to the administration of justice in this State, both as a barrister and a judge, and wishes him a long and contented retirement.

Supreme Court of Victoria

The Hon Associate Justice Mahony

Bar Roll No. 799

On 7 September 2012 Associate Justice Kevin Mahony, retired after more than 29 years of service to the Supreme Court, first as the Senior Master and subsequently as an Associate Judge.

His Honour was the last sitting judicial officer to have been appointed during the tenure of Chief Justice Young. His Honour's departure in that sense, among others, represented the end of an era.

His Honour was admitted to practice in April 1964. He served articles with Mr William Bourke, a sole practitioner in Greville Street, Prahran. Mr Bourke was also the Member for Faulkner in the Federal Parliament between 1949 and 1955. Prahran was at the time, an interesting place. The Prahran CIB Office was on the first floor of the Municipal Building in Greville Steet. In circumstances that were unclear, a suspect being interviewed in that office went through the first floor window and fell to the street below. When this happened a second time, a prudent decision was taken to install bars on the offending window.

His Honour signed the Bar Roll on 7 February 1966. He read with Ken Jenkinson, later Justice Jenkinson of the Supreme Court, and later still, the Federal Court. Charles Wheeler, later Master Wheeler, was Jenkinson's first reader. The three of them subsequently shared chambers.

In his early years at the Bar, Mr Bourke and Mr John Keating who acquired Mr Bourke's practice, regularly briefed his Honour. There were many trips to Prahran Magistrates Court to appear before Stipendiary Magistrates. Earthy and persuasive advocacy was well received in that jurisdiction. It is reported that his Honour once tendered a broken toilet seat in support of a claim against a council which had negligently cleared land and demolished a still serviceable out-house.

Effective forensic skills were not his Honour's only quality, and his Honour soon developed a significant practice primarily in equity, trusts, testator's family maintenance claims, contracts and corporations law. However, the importance of an advocate remaining engaging was apparently never lost on his Honour. A former reader claims that she was persuaded to read with his Honour after observing him run a dust-dry trust case in a way that had both the bar table and bench in fits of laughter. The inherent unlikelihood of achieving this is testament to His Honour's powers.

His Honour had four readers: Jennifer Davies (now Justice Davies of the Supreme Court), Fran Hogan (now Judge Hogan of the County Court), Michael Shand QC and Tom Gyorffy SC.

In April 1983 his Honour was appointed as the Senior Master in the Supreme Court. In his Honour's time in that office, which extended over 29 years, enormous growth in the work of the Masters, and of the Senior Master's office took place. A significant aspect of the Senior Master's responsibilities, and subsequently the Associate Judge who was the Senior Master's responsibilities, was funds in Court. In 1983 funds in Court totalled about \$60 million. Today the fund administered by the Office of the Senior Master totals approximately \$1.3 billion. The staff required to supervise those funds has grown from 4 to nearly 80. Consistently with His Honour's very significant contribution to this area, his Honour's decision in Smith v. Reynolds (No. 2) [1990] VR 391, relating to the administration of funds in Court, is to date the only judgment of a Master or Associate Judge of the Supreme Court to have been reported.

Throughout his Honour's long career both at the Bar and as a judicial officer, his Honour was noted for his integrity, diligence and high standards. In administering the Office of the Senior Master, and the jurisdiction relating to funds in Court, his Honour showed great leadership and developed a tradition of loyalty and long service in that office.

His Honour was also a very significant contributor to the Supreme Court Rules Committee and to the extensive re-writing of the *Supreme Court Rules* in 1986.

The Bar thanks his Honour for his long and distinguished service as the Associate Judge of the Supreme Court who was the Senior Master. It wishes him well in his retirement.

County Court Of Victoria

His Honour Judge Wood RFD QC

Bar Roll No. 1103

Judge Tim Wood was born on 15 April 1947 and was educated at Caulfield Grammar School. He completed his law degree at the University of Melbourne.

His Honour served articles at Boothby & Boothby under the late N B "Peter" Boothby. It's little wonder he left the firm upon being admitted – tasks allocated to him by his Principal included measuring the office for new carpet, collecting theatre tickets and picking up various farming necessities for Boothby's farm.

Immediately following admission his Honour took a short service commission with the Royal Australian Navy as a legal officer between 1970 and 1974, attaining the rank of Lieutenant in 1971. As a legal officer, his Honour appeared at courts martial both as Counsel for the Prosecution and the Defence, and as a Judge Advocate. On one trip to the United States his Honour was involved in an Australian court martial which had the distinction of being convened on American soil. His Honour could be seen walking the streets of Baltimore wearing dark Ray Ban shades, his wig and gown worn over his Navy uniform—it's no wonder photographs of his Honour and his fellow countrymen featured in the local press.

In 1974 his Honour left the RAN, however his naval career was far from over–he immediately joined the Royal Australian Navy Reserve. His Honour subsequently rose up the ranks, became the Deputy Judge Advocate General (Navy) of the Australian Defence Force and was promoted to the rank of Commodore.

1974 also saw his Honour sign the Roll of Counsel, having read with John Winneke (later President Winneke of the Court of Appeal). His Honour had a wide practice at the Bar, including crime, common law, commercial work and in particular building cases. He had three readers: Duncan Allen (now Judge Allen of the County Court), Lou Vatousios and Chryssa Anagnostou. He served on various committees during his years at the Bar, including three years on the Ethics Committee, and as Vice-Chairman and later Chairman of the Essoign Club.

His Honour took Silk in 1994, following which he appeared in numerous and complex building cases and arbitrations, including a case concerning the spire of the Arts Centre.

For many years his Honour kept chambers on the tenth floor of Owen Dixon Chambers East, where he joined his Master, John Winneke, his good friend Stuart Campbell (later Judge Campbell of the County Court) and characters including Neil McPhee, Brian Bourke and Ron Meldrum. The tenth floor was a convivial setting and during his Honour's tenure as Deputy Head of Chambers (self-appointed) the sign on his door read "consultation times not between 12 and 3".

One story goes that his Honour and Campbell – both keen sailors – hatched a plan to buy a good sea-going craft, following which they would each get appointed to the County Court, only to sail away to the Cayman Islands, leaving but a forwarding address for their judicial salaries. The pair achieved the first two steps of the plan, but fell at the third.

Although his Honour's appointment caused him to be limited mainly to domestic waters, it did not hold him back. Among his seafaring adventures were a trip to King Island and a circumnavigation of Tasmania.

His Honour was appointed a Judge of the County Court on 2 December 1997, and served over fourteen years in that role. He was the last President of the Administrative Appeals Tribunal before it became part of VCAT in 1998. Sitting as a Vice-President in VCAT his Honour decided important freedom of information applications in the lead up to the 1999 State election, which saw the resignation of the Kennett Government and the establishment of the Bracks (minority) Government. His Honour also heard the Cabrini Hospital Development Planning case, which was remarkable for the opposing resident's tactic of petitioning the Pope.

In 2001, His Honour returned to the County Court, where he heard cases in both the civil and criminal jurisdictions. From 2006 onwards he sat exclusively in crime, and for the last three years in the Long Criminal Trials List.

His Honour left the civil jurisdiction in style, however. His last civil case involved a nervous shock claim. The plaintiff claimed that two police officers had breached a duty of care to act to prevent her husband from committing suicide. His Honour took the matter from the jury, finding that there was no duty of care in the circumstances. His Honour's decision was overturned in the Court of Appeal, but later upheld in the High Court. That was not the only occasion on which the High Court upheld one of his Honour's decisions, another example being that Court's endorsement of his Honour's sentence of Glenn Wheatley following a guilty plea to

In addition to this technical ability, his Honour was known for his human touch, both at the Bar and on the Bench. His court was a place of dignity and respect, and his Honour placed great importance on ensuring, as best he could, that parties left his court satisfied that they had been listened to and treated fairly.

It is hoped that despite his Honour's retirement from the Bench, he might still from time to time "consult" from the Essoign between the hours of 12 and 3.

Obituaries

Charles Francis Kilduff

Bar Roll No. 1760

Charles Kilduff was born on 16 April 1924 and died on 22 April 2012, at the age of 88.

He saw active service in World War II and Vietnam. He began as an Army signaller, and was later commissioned and rose to the rank of Major.

A former Chief Magistrate of the Australian Capital Territory, he came to the Victorian Bar in 1982 after more than 25 years practise as a Barrister, as a Barrister & Solicitor, and as a Solicitor in New South Wales, the Australian Capital Territory, the Northern Territory, and in Papua New Guinea.

In the Northern Territory, he served as Principal Legal Officer in the Attorney-General's Department and, variously, Assistant Crown Law Officer and Acting Assistant Crown Solicitor (Defence) (1969-73).

In 1973, he was appointed a Magistrate. A year later, in 1974, he became the first Chief Magistrate of the Australian Capital Territory.

In July 1980, he returned to practice as a barrister in New South Wales and the ACT, before coming to the Victorian Bar, where he practised for more than 12 years. Among his clients were Mickelberg brothers, whom he represented with Peter Searle and Peter McCoy in the "Fine Cotton" affair (1982-95). He remained a member of our Bar on the list of Retired Counsel.

Charles' son, Peter is, and has been for nearly 20 years, a practising member of our Bar.

Denis Brian Xavier Smith

Bar Roll No. 1172

Denis Smith died on 8 May 2012. Born 24 April 1939, he was 73.

Denis was educated at St Kevin's College and Monash University. He worked for some years in the Department of Defence before studying Law at Monash, from which he graduated in Arts and Law.

He served articles with Julian Lucas at Oakley Thompson and was admitted to practice on 2 June 1975. A soon as he was admitted, he came straight to the Bar, signing the Roll on 17 July 1975. He read with Leo Hart (now retired from the County Court Bench).

Denis practised at the Bar for more than 37 years. He had six readers. A long-time instructing solicitor said of Denis, "He did absolutely everything!" Denis had a substantial personal injury practice and also did crime, common law and family law. Denis said in his website biographical sketch that he appeared "in virtually every jurisdiction from Magistrates Courts to the High Court of Australia". He had a special interest in the law of costs.

Denis appeared regularly on circuit, in both Victoria and New South Wales. He was a very familiar face on the Mildura, Bendigo and Latrobe Valley circuits. A barrister through and through, Denis always fought hard for his clients. He enjoyed juries. And he told a good story. He will be much missed by his friends and colleagues at the Bar.

Ronald Alan Clark RFD

Bar Roll No. 1909

Ronald Alan Clark RFD died 10 May 2012. He was 70.

For nearly 20 years, Ron Clark was a Victoria Police officer attaining the rank of Senior Sergeant. In the late 1970s, in order to concentrate on a law degree at the University of Melbourne, Ron left Victoria Police and worked as a law clerk for 18 months with Coady, Dwyer & Associates.

Ron was admitted to practice on 3 November 1980. After admission, he practised as an employee solicitor with Ellison, Hewison & Whitehead. In May 1981, he established his own practice, Ronald A Clark & Associates.

In 1984 he signed the Bar Roll and read with Denis Smith. He practised at the Bar for nearly 12 years, mainly in the area of criminal law.

In April 1996, Ron left the Bar and returned to practice as a solicitor. He practised for another 16 years – most recently under the firm name Manningham Legal.

In 2008, Ron completed post graduate certificates in Fraud Investigation at La Trobe University and Investigative Studies at the Australian Security Academy. He lectured at La Trobe and RMIT Universities, the Leo Cussen Institute and Holmesglen TAFE.

While in the Victoria Police, Ron served in the United Nations Forces in Cyprus as a Police Peacekeeper. He served 20 years in the Army and RAAF Reserves reaching the rank of Wing Commander and leading the RAAF Legal Officers' Panel for Victoria 1996-2002.

The Hon William Kaye AO QC

Bar Roll No. 382

The Hon William ("Bill") Kaye, who died on 12 May 2012, was a man who achieved much in the several facets of his long and fulfilling life. His work, his achievements, and how he lived, are a testament to a man of exceptional quality.

He was born on 8 February 1919. His parents, Zelman and Anna Rosa Komesaroff came to Australia from Brejansk in the Russian Ukraine in 1913. Kaye was always conscious of his family's origins, and particularly of his parents' struggle and sacrifices in their early years in Australia. This instilled in him a deep appreciation of his country, and of its tolerant and democratic society. He was always genuinely proud to be an Australian.

He was educated at Kew Primary School and then at Scotch College. After leaving school, he attended Melbourne University, where he undertook a combined Arts/Law course.

When war broke out, Kaye interrupted his studies to enlist in the Royal Australian Navy in 1941. He was commissioned as a Lieutenant in the Royal Australian Navy Volunteer Reserve and served on HMAS Warrego and HMAS Cowra, engaged in, amongst other things, anti-submarine operations.

Kaye married his wife, Henrietta Ellinson, while he was on leave on 18 May 1943. He died just one week before celebrating their 69th wedding anniversary. During the end stages of the war, Kaye completed his law studies while on ship. He sat his final law exams at the naval base at Rushcutters Bay in late 1945. He was demobilised in February 1946.

Having completed his articles at BA Rank & Robinson, he was admitted to practice on 1 October 1946. Three days later he signed the Bar Roll. Thus began an outstanding career in the law, which spanned almost 45 years.

The Victorian Bar was then small in size, but it was an immensely powerful Bar. A number of its members, like Kaye, were returning from war service, and were busy establishing their practices. Competition for work was fierce. Despite this, Kaye rapidly developed a large practice. He was a true all rounder. He frequently appeared in common law (personal injury) cases. However, he also appeared in a number of significant criminal trials, and in large commercial cases. At the same time he developed a large circuit practice, particularly in Geelong. He was frequently absent on circuit for up to five months each year. Kaye earned a reputation as a powerful advocate. He was a fierce and relentless cross-examiner, and was given the nickname "the white pointer".

In August 1962, he was appointed Queen's Counsel. From there, his practice grew further, and he became a leader at the Victorian Bar.

In his latter years at the Bar, Kaye became involved in a number of prominent inquiries, including the Marine Inquiry into the burning of the Western Spruce at Port Welshpool (1961), the Board of Inquiry into allegations of corruption by police in connection with abortion (1970), and the Royal Commission into the collapse of the West Gate Bridge (1971).

Despite his busy practice, he still found time to provide considerable service to the Victorian Bar. He was a member of the Bar Council for six years, on which he served, successively, as chairman of the Ethics Committee, Vice-Chairman of the Bar Council, and Chairman of the Bar Council. He was also president of the Australian Bar Association for two years, an executive member of the Law Council of Australia for two years, and a director and deputy chairman of Barristers' Chambers Limited.

At the same time, he was also actively involved in the cause of legal education. He was a member of the founding committee of the Faculty of Law at Monash University. He was also a member of the Faculty Board for five years, and was a consultant in the law of torts to the Faculty of Law. From 1970

until 1972, he also served as chairman of the Proctorial Board of LaTrobe University.

On 1 March 1972, Kaye was appointed as a Justice of the Supreme Court of Victoria. He was the 51st Supreme Court Judge in Victoria. He took pride in the fact that he was the first Jewish judge appointed to the Court in its then 121-year history. His Honour was very proud of his Jewish faith, and of its history and tradition. He was a long-standing member of the International Association of Jewish Lawyers and Jurists. He was also the founder and first president of the Victorian Branch of that association.

Throughout his term of office, Kaye worked very long and hard hours. He set for himself the highest standards, and took enormous care in his judgments, his charges to juries, and his sentences. A number of his judgments have stood the test of time, and are still regularly cited in court. In his latter years on the court, he was a regular member of the Full Court and of the Court of Criminal Appeal. He had a deep appreciation of, and commitment to, upholding the role of the Supreme Court in our system of justice, and in our democratic society.

In the farewell speech to him in 1991, the Chairman of the Bar Council described Kaye as follows:

"Dignified, humane, hard working and learned, with a strong determination to achieve justice."

Kaye's contribution to his country, to the law and to the community, was recognised in 1990 when he was awarded an Order of Australia. He retired from the Bench in February 1991, having completed 19 years of distinguished service to the State of Victoria as a Judge.

In retirement, Kaye rapidly became actively involved in service to the broader community. He was a member of the Advisory Board of the RSPCA, which he served on from 1992 to 2000, and became a life member of that organisation. His activities in retirement also involved interfaith work, which he saw as an important means of building bridges in the Australian community. He was an active member of the Victorian Council of Christians and Jews and of the Australian Council of Christians and Jews, and served terms as Chairman of each.

For many decades, Kaye was a keen and dedicated golfer. He was a long-standing member of Greenacres Golf Course. In 1970, he bought a farm at Main Ridge near Westernport Bay, which he cleared, fenced and stocked with black Angus cattle. In doing so, he was careful to balance the impact of farming against preservation of the environment. He fenced off large stands of trees and bush, which are still thriving habitats for native wild life, including kangaroos, koalas and echidnas.

His Honour's legacy at the Victorian Bar is continued by his son, Justice Stephen Kaye of the Supreme Court, and granddaughter, Roslyn Kaye, both of our Bar.

Kevin Gerard Hogan

Bar Roll No. 1234

Kevin Hogan was born on 11 March 1929 and died on 19 May 2012, at the age of 83.

He was educated at the Marist Brothers' College, Bendigo; at Xavier College, Kew; and at the University of Melbourne.

Kevin interrupted his law studies to volunteer for service in the Korean War and saw active service as an infantryman in the 3rd Royal Australian Regiment. Upon his return to Australia and discharge, he resumed his studies and graduated LLB in 1956.

Kevin worked as a law clerk for 6 years, first with his father and brother in the family law firm in Bendigo, then with Madden Butler. Following his admission to practice on 1 March 1962, he practised as a solicitor for 14 years with Madden Butler, largely in the field of common law, and became an Associate of the firm.

He signed the Bar Roll on 12 February 1976 and read with Allan McDonald (later Mr Justice McDonald of the Victorian Supreme Court). Kevin practised at the Bar for 25 years to his retirement in December 2000. He continued as a member of the Bar on the list of Retired Counsel for a further 11 years to the time of his death.

As a young man, Kevin was a tenacious back pocket rover. He carried that tenacity into his practice in the law, earning the nick-name 'King Araldites'. An Irish twinkle in his eye, he was a great story teller. He was a friend and mentor to many young lawyers at Madden Butler.

William Michael Raymond Kelly QC Bar Roll No. 571

William Michael Raymond Kelly QC, formerly Judge Kelly of the County Court died on 15 June 2012, aged 78.

Michael Kelly was educated at Xavier College and the University of Melbourne. He served articles at Weigall & Crowther and was admitted to practice in March 1957. He remained with the firm as a solicitor for a year, and then read with JWJ Mornane (later Judge Mornane), signing the Roll of Counsel in February 1958. His dress was that of the quintessential barrister: black jacket and waistcoat, striped trousers, homburg or bowler hat, watch chain and cigar.

His Honour had six Readers – Barry Moorfoot, Bob Kent, Lou Hill, Peter Rosenberg, John Bleechmore and Doug Salek – seven, if one counts John O'Brien who spent so much time in Kelly's chambers that he may as well have read with him. Former Readers and others established WMR Kelly Chambers on the 6th floor of 180 William Street in his honour in November 2007.

His Honour specialised in criminal work, but never exclusively. Indeed, he earned his red bag in a mammoth case before the Trade Practices Commission.

After he took Silk in 1977, Kelly became the first criminal law Silk to specialise in appellate advocacy, although he still appeared in many trials. Kelly would spend long periods considering and refining precisely how he wanted to present his argument. One of his last appearances, was in the High Court in *Ward v R*, which determined precisely where the boarder of Victoria and New South Wales is in relation to the watercourse of the River Murray. His opening comments to the High Court in the special leave application remain

instructive and demonstrate his finely crafted use of the English language and ability instantly to arouse interest in the question being sought to be agitated (enhanced by his lisp, which he undoubtedly used to his advantage). He opened as follows:

May it please the Court. It is said that foreign travel is dangerous and being the nature of man to be forever curious, gregarious and venturesome, it is sometimes to be seen that from time to time a Victorian, clutching his courage, as it were, in one hand, and his poker machine money in the other, ventures across the River Murray into the terra incognita of the State of New South Wales. He is warned of the risk by a sign which reads: "You are entering New South Wales", or more simply: "New South Wales". That sign is usually found at the southern end of the bridge where the bridge runs on level land leaving the bank to shelve the weight of the stream beneath. Our special leave point, if the Court pleases, might be simply stated, is that where the sign should be?

After the hearing of the appeal, the Associate to the then Chief Justice, Sir Garfield Barwick, came to the robing room and requested Kelly to accompany him to the chambers of the Chief Justice. Kelly's opponents, including his close friend, the then Solicitor-General for the State of Victoria, Daryl Dawson QC, had no objection to that course. Kelly took his junior with him (albeit on the proviso that his junior not disclose something that would be revealed in the discussion with the Chief Justice until it became public). Sir Garfield expressed great pleasure in the fact that he had learned that Kelly was to be appointed to the County Court, along with disappointment that the Bar would lose such a capable and powerful advocate. It became very clear to Kelly's junior that Sir Garfield and the other members of the High Court at that time held Kelly in great esteem.

Kelly was a great believer in the collegiate nature of the Bar and his door was always open to assist any of its members. Not surprisingly then, when in the late 1970s Colin Lovett determined barristers practising in crime needed to band together, Kelly was the natural choice to be the inaugural Chairman of the Criminal Bar Association. He remained in that position until appointed to the Bench. It is in no small way thanks to the Chairmanship of Kelly that that Association survived and is as strong as it is today. His Honour also served on the Bar Council, and chaired the Bar's Criminal Practice Committee. He played a major part in establishing the Bar Readers' Course and taught in that course at the Leo Cussen Institute.

Kelly made many friends at the Bar and he and they were regulars at the Four Courts Hotel, until it was redeveloped into what is now Menzies Chambers, and then more latterly the Metropolitan Hotel. Among his friends at the Bar was the Hon. Sir Daryl Dawson AC, KBE, CB, who delivered a moving tribute at his Honour's funeral.

His Honour was very devoted to his family, and never got over the sudden and premature death of his wife Michele. He hated air travel. Travelling to Sydney for the Ward case, his junior noted that he seemed very nervous. When he revealed that he hated air travel the junior asked how he coped with overseas travel. He replied that Michele had only ever got him to go overseas once, and he would never return to Tasmania. Eventually Michele convinced him to venture overseas and he loved it.

His Honour served as a Judge of the County Court from 12 March 1980 to 1 July 2004, then as an Acting Judge from 29 November 2005 to 13 May 2009. He has been described as "one of the great Judges of the County Court".

David James Lamprey Bremner

David Bremner Executive Director of the Bar for 7 1/2 years from April 1997 to October 2004. David held a Bachelor of Commerce degree from the University of Melbourne and was a Certified Practising Accountant. He came to the Bar from where he was Commercial Services Manager at Blake Dawson Waldron. Before coming to work in the law, he had been Finance & Administration Manager of the Epworth Hospital.

In October 2004 when David Bremner retired from the Bar, then Chairman, Robin Brett QC, said that David had brought a new level of professionalism to Bar administration and Bar finances, particularly in the introduction of forward financial planning. His work had been exemplary. He also provided valuable insights and support to the Chairman and Board of Barristers Chambers Limited in returning BCL to a sound financial footing. His work with Michael Shand QC and the Professional Indemnity Insurance Committee was also of great assistance.

March 2012 Victorian Bar Readers' Course



March 2012 Readers

Back Row: Fiona Spencer, Joel Harris, Luke Stanistreet, Joel Fetter, Jennifer Trewhella, Matthew Hooper, Leisa Glass, Phillip McAloon, Aimee Kinda, Lynda White **Centre Row:** Jacqueline Stone, Damian Plummer, Tasman Fleming, Peter Creighton-Selvay, Stella Gold, Alexandra Fogarty, Andrew deWijn, Steven Stern, Andrew Morrison, Fiona Batten, Wendy Pollock

Seated Row: Premala Thiagarajan, Annette Charak, Sarah Hession, David Lambu, Nicholas Kotros, Jeremy Masters, Kane Loxley Front Row: Sandip Mukerjea, Gideon Boas, Andrew Sykes, Patrick Kelly, Nicholas Goodfellow, Daniel Hochstrasser

When on circuit, who leads out of court?

Red Bag Blue Bag

RED BAG

The first question any good junior should ask about being on circuit is "where?" Research as to venue, as with the case, is crucial. For instance, Sydney is very much a different proposition to Sale. And then there's Canberra...

The destination usually betrays the type of matter and hence the junior's responsibilities.

The entertainment program is really irrelevant if you're in Sydney, which generally means you'll be in a commercial case and each evening you'll be working with your leader on a running draft of the submissions, usually over a room-service hamburger (hold the fries), with a Perrier to wash it down, until well after midnight. In commercial matters, in and out of court, your leader leads - don't ever forget that. And in Sydney, that means carrying the folders and pushing the trolleys, while Silk keeps one's hands free, to symbolise that we are there to argue the case. Even the travel arrangements are best left to Silk (or the Silk's PA or Clerk to be more accurate), especially if the recent efforts of a certain earnest and naive junior (now destined for a career in admin law) are any indication. Booking you and your leader on Tiger to Sydney (to save the client money), while the client (an ASX Top 100 company) and the solicitors all travelled in business class on Qantas is not an astute career move. Be warned juniors, never try to lead your leader on travel matters - your impoverished imagination of business travel can never match your leader's hard won and habitual experience.

If in Sale, chances are you'll be appearing in common law or crime. Here, your leader will be glad to relinquish control on out of court matters. Usually this is because your youth, overall coolness and general fortitude are likely to guarantee your resilience in court the next morning after a big circuit dinner the night before. There are six things a good junior must do to lead well out of court on circuit in the common law or crime jurisdictions:

- 1. Find out who is in town and who is likely to be good company over dinner.
- 2. Identify and book for dinner, the best restaurant in town and invite opposing Counsel along.
- 3. Defer to your leader when choosing the wine though (you'll dine better this way).
- 4. Politely ensure the glass of the opposing Counsel is constantly well-refreshed while your leader sips slowly and alternates between wine and mineral water.
- 5. Ensure you get your leader back to the motor inn and into his or her room before midnight.
- 6. Revise and note up the daily transcript before breakfast.

Finally, If you're in Canberra, hang on, you're past the point of no return and it's sure to be a wild ride. When it comes to who leads out of court in Canberra, it is usually a case of who leads the prayers.

BLUE BAG

This is an excellent question, one perhaps trumped only by "who should get there first?" It is true that circuit work affords a break from the oppression of cosmopolitan Melbourne, but if your practice is almost exclusively as a commercial junior, your tailored suit freshly pressed, your iPad charged and Perspex framed glasses jutting proudly from your sleek cognisant nose, your question might be, "how in the name of all that is good and tax deductible did I come to be here? In Morwell."

The answer to the question in the title, however, will of course depend on the location of circuit and when.

If in Wangarratta, say, on a Thursday –intervention order day –the junior should always follow the leader into and, with luck, through the fray. Senior Counsel did not spend years as a senior-junior smiling knowingly from the bar table at potential judicial referees, ignoring the pungent waft of new readers in chambers and singing heartily at the Red Mass every year, only to miss the chance of ploughing through (parting the seas of) the throng of spit fuelled fury of IVO respondents gathered on the front lawn. Leaders embrace the chance to mentor a junior in how best to respond to, "I bet you're some [colourful verb]ing Family Lawyer, you [colourful noun]." (Hint -the lesson is in the fancy footwork).

In Warrnambool, leave first. Before final addresses is preferable. There's a table to be booked at the Victoria Hotel in Port Fairy.

Mildura: stay where you are. Make no sudden movements. Be still and quiet. Pray.

When in Horsham and being the well prepared junior, you'll know in advance that the helicopter only has enough fuel to get one of you out of town. You're also a discerning intellect and know that your leader need not be troubled with every teensy tiny piece of information you gather. Excuse yourself on the pretext of needing to copy a headnote from the Dimboola Law Reports, then bolt. Draft your leader's obituary on the way back and stick it in the lifts.

Moe. Moe? You were never there. It was a bad dream. It's over

Of course, it will also depend on who is leading you. If being led by one of the Falstaffian members of the common law bar, walk carefully behind, head low in thought, making sure to let out a few faux shocked guffaws at the jokes –even if there are none, and especially at the ones you've heard before.

If being led by an austere and serious criminal defender, walk ahead with strong strides of indignant rage at the result/ systemic unfairness/judicial bias/weather (this applies even, or especially, if you win). Look everybody in the eye like a sort of mad animal. Hail a cab or horse.

When you return to Melbourne your position will become secure -about two and a half steps behind your leader. Remember, this means you'll be in front should the need arise for a hasty retreat to be called.

VBN

Gallimaufry



t the risk of immediately alienating 40% of readers, I intend to write about Australian Rules football.¹

I started barracking for Essendon and attending the Windy Hill football ground in the days of the great John Coleman. Apart from the

"It was at the MCG in 1993

when I had my first out of

body experience."

same first name, and the first three letters of the surname, and joint membership of the human race, regrettably, we had little in common. Coleman's graceful soaring marks bridged the gap between sport and the theatre.

In those far off days, my father would take me into the outer where, playing shamelessly upon my lack of height and puny body, (as it then was), I would eventually worm myself to a position

on the fence. My father was not so fortunate. At only 5' 3" (on the old scale), and with all the attributes of a champion rover, except talent, he would have to battle for a view from the terraces. However, in order to combat the fact that the Coldreys (at least height-wise), were a rung or two behind the rest of the population on the evolutionary ladder, my father would take with him to the football a wooden box. He wrapped it in good quality brown paper, and referred to it as his "grandstand". By mounting it he suddenly became what was known as a "Collingwood six footer", and was able to view the play.

Since he operated his own small company this may be regarded as a very crude forerunner of the corporate box.

My own football career began with street football played on a bitumen ground outside my home at No. 32 St Kinnord Street, Essendon. (For those of you who may be interested, I understand that St Kinnord was the patron saint of two bedroom weatherboard houses).

Four of us in St Kinnord Street had decided to form a football team. Fortunately, we all owned maroon jumpers. It must have been the fashion colour of the season. I wanted No. 10 on my jumper which just happened to be the number worn by John Coleman. My mother, however, was, to put it nicely, manually underprivileged in the sewing department. She announced that there was no way she could cope with cutting out and sewing a nought but she did offer to sew on No. 11. My tantrums were a tad ungracious given that she could have opted for No. 1. Actually, No. 11 was not too bad because a champion Essendon rover of the time, Ron McEwin was boarding two houses down the street and consequently also had a place in my football pantheon.

Football on the bitumen was character building, and scab

forming. I still wince when I think about it.

For a short period of time I played with the Essendon Baptist – St John's Football Club; an organisation which produced such champion forwards as Ron Evans and Ken Fraser. My own speciality was hovering around the outskirts of the packs, waiting to receive a handball.

I was reflecting recently on the career of a friend who was so successful at goal kicking in a country league that he was nicknamed "golden boot". The nearest I ever came to that appellation was the day when, wandering aimlessly towards the half forward flank I accidently trod on a dog turd. (The adverb 'accidentally' is quite unnecessary in this account. No one deliberately treads on a dog turd).

I mentioned Ken Fraser. Through much of his football career Ken was also a lay preacher. I am informed that, on one occasion, members of the Hawthorn half back line were, shall we say, casting aspersions on Ken's religious convictions.

He happened to mention this in the dressing room at half time. As the team was about to re-enter the field of play, the fearsome centre half back Bluey Shelton clapped him on the back and remarked: "Don't worry Ken, I'll show them whose side Jesus is on!" And he did!

It was at the MCG in 1993 when I had my first out of body experience. Michael Long had just run from around the centre of the ground, slalomed his way past a number of Carlton players whilst casually bouncing the football, then kicked a goal. I suddenly found myself standing on my seat punching the air and screaming out: "it's inspirational, it's inspirational!"

My next memory is of being severely reprimanded by a grey-coated official. Apparently this sort of thing is frowned upon in the Members pavilion.

Michael Long is one of a number of great Aboriginal footballers from the Northern Territory that enhanced Essendon as a football team. I understand that at one period, Michael played for the Pioneers Football Club in Alice Springs. Many, many years earlier my friend Geoff Eames (now the Chief Justice of Nauru) also played for that team. One of the most memorable days in his football life was when the Pioneers played-off for the premiership. The game was against their arch rivals, Rovers - a Northern Territory equivalent of the Carlton Football Club. Just before three quarter time the Pioneers trailed Rovers by about eight goals. It was then that various fights erupted. Allegedly, one of the chief protagonists was a footballer who I will call Walter. He was from a family whose members were known in Alice Springs for their more than ample size. In architectural terms, Walter was built like a municipal toilet block.

By the end of the third quarter, Walter had been reported

five times, two of those occasions being for striking umpires. Some of the rare photographic records still in existence show a goal umpire arms outstretched, body tilted backwards, just commencing to succumb to the effects of gravity; and several Rovers players bent over, each clutching their abdomen.

Whether it was because the Pioneers coach's three quarter time expletively enriched oration was hugely inspiring, or whether it was because the Rovers (also known as the Blues), had had enough, is not clear. However, Pioneers kicked 10 goals to one point in the final quarter, and won the flag.

"Of course every silver lining has a cloud."

defence, which to was that, at the oration was that, at the oration was because the Pioneers (also known as the Blues), had had

Of course every silver lining has a cloud. On the following Tuesday Walter (among other lesser lights), had to face the local Football Tribunal.



No lawyers were permitted at the Tribunal but players could be represented by their colleagues. So it was that Chief Justice Eames, strictly in his role of players advocate, and not lawyer, appeared before the Tribunal for Walter.

> Initially Walter was inclined to plead not guilty. For example, he suggested the demise of the goal umpire may have been an accident due to over enthusiastic shepherding. One of the problems of this

defence, which the astute Eames discerned immediately, was that, at the critical time, (being the time of impact), the football was at the other end of the ground.

Ultimately Walter was persuaded to plead guilty. An impassioned plea followed. After a short retirement, the Chairman of the Tribunal announced that, the Tribunal had been minded to disqualify player Walter for life. However, influenced by the eloquent plea made on the player's behalf by his representative, Mr Eames, the Tribunal had reduced the penalty to 16 years.

As they left the Tribunal Walter was heard to remark to his representative: "Eloquent plea! 16 years! I'd hate to bloody get you on one of your bad days!"

Lest there be any among you still hoping for some intellectual content in this column, may I refer you to the forensic football fracas of Lewis v Judge Ogden (1984) 153 CLR 682. The result of this contest was, (and here I briefly adopt the terminology of "the round ball game," Barristers 1, Judges 0). So you might think it is well worth a read!²

THE HON JOHN COLDREY QC 🕮





Get in early for 2013 with Travel Club Getaways deals on Europe and North America

Now is the busy season for arranging travel for 2013. With great deals available by booking early, planning now can save you hundreds on airfares, tours, cruises and accommodation. Our expert Travel Managers will help you get the best value out of next year's holiday.

Contact the ABA's dedicated travel team today: 1300 556 155
Email: vic@fctravelclub.com.au



Travel Club

¹ Warning: this material contains traces of recycled speeches.

 $^{^2}$ For those unfortunate folk addicted to Rugby League see: Commissioner of Taxation v Cooper (1991) 29 FCR 177.

Verbatim

VBN Court Reporter

Supreme Court of Victoria

Before The Hon Justice Croft 24 August 2012

Peter Clarke as Trustee of the Clarke Family Trust & Ors v Great Southern Finance Pty Ltd (Receivers & Managers Appointed)

HIS HONOUR: There is some storage space in the small rooms of this court. I appreciate there might be – parties might be concerned about confidentiality and the rooms can be locked. There's a storage room there. There's one behind there and there's one over there. So we can provide some storage in lockable rooms in this court.

MR BIGMORE QC: Yes, yes, we certainly will, Your Honour. I think it sounds – it's a very generous position for the Commercial Court to be taking to be supplying secure storage. When I started I can remember wheeling a steel cabinet up to the Supreme Court and parking it in the foyer of one of the court rooms.

HIS HONOUR: Yes, well, we wouldn't like that. But, I mean, as you know – I mean, the problem is this was a state of the art building in the latter part of the 19th century, but it's – and it really was.

MR MOLLER: That's when Mr Bigmore meant, Your Honour.

MR BIGMORE: I think that is Mr Moller's best submission for today.

HIS HONOUR: I hope that's on the transcript.

Supreme Court of Victoria

Before The Hon Justice Macaulay 24 May 2012

Dalkeith Resources Pty Ltd v Regis Resources Limited

MR ANDERSON SC: Mr Cowan, before I commence, could I ask you do you have a copy of the Court book, has that been provided to you?

WITNESS: Yes, I almost got a hernia carrying it here.



Federal Court of Australia

Before The Hon Justice Gordon 20 March 2012

Kirby v Centro Properties Limited

In this case there were 26 Counsel seated at 4 rows of tables. Mr McHugh SC was in Row 4 and Mr O'Bryan SC was in Row 3.

MR JOPLING QC: Your Honour, that is just the limit. Now we're being asked to speculate about what Mr Nenna thinks about all this.

HER HONOUR: Even Mr McHugh has got a smile on his face.

MR JOPLING QC: I've sat here very patiently and your Honour makes rulings, but it doesn't seem to go north of the border and we just persist. As my learned friend said earlier in the day, with all the charm that goes with north of the border, it just proceeds on. Now, we all may have a little bit of a laugh, but this man has been here for two days and we all forget what it's like being in that witness box, because many of us haven't been there.

HER HONOUR: I don't forget Mr Jopling. Mr McHugh, there is a limit, I think we've been through this process about three or four times about what the limits are.

MR McHUGH SC: Your Honour from where I am here and in Mexico---

HER HONOUR: –I think that's south rather than north

MR JOPLING QC: I'll lend him a compass to find his way home.

MR McHUGH SC: Your Honour, I'll leave this document and move on.

Federal Court of Australia

Before The Hon Justice Gordon 29 March 2012

Kirby v Centro Properties Limited

MR LEE SC: I'll withdraw the question and I'll put it again. If you have difficulty clarifying it, please tell Her Honour. I'm asking you for your view, your view, as to the directors expressing views around the board table. Do you understand what I mean, the consensus, the discussion within the board of directors of Centro as at October 2007?

MR O'BRYAN SC: Your Honour, I object to that question on the grounds of relevance. The answer cannot assist your Honour to resolve this case.

HER HONOUR: I don't know what right you've got to object, Mr O'Bryan, other than you're bored and you haven't spoken for a month . Have a seat. Mr Lee, can you put the question again, please?

High Court of Australia

Before French CJ, Gummow, Hayne, Kiefel, Bell JJ

Bui v Director of Public Prosecutions for the Commonwealth [2011] (7 December 2011)

MR TEHAN QC: The effect of section 6AAA of the Sentencing Act (Vic) is that a court has got to make a statement as to what the sentence would have been but for the fact that the appellant pleaded guilty.

GUMMOW J: That seems to involve some relationship with these provisions in the Federal law that we have been looking at.

HAYNE J: You have to have an equivalent statement under 21E of the Federal Act, that is, is the order taken out in error? You have to have under – because the reasons at appeal book 165 where you have an undertaking by the prisoner to co-operate under 21E – have we some glitch in the taking out of the order rather than the court's consideration?

FRENCH CJ: The judge makes it clear at 165, paragraph 97, I think, the Court of Appeal decision:

But for the respondent's 21E undertaking I would have imposed a sentence of – et cetera.

MR TEHAN QC: Yes, but that relates to the undertaking.

HAYNE J: I wonder whether the registrar has too readily adopted a common form from the State law which is completely inapposite to the orders as made by the Court of Appeal.

MR TEHAN QC: I am sorry, your Honour. Well, no.

HAYNE J: No?

MR TEHAN QC: Yes, I think that is right, your Honour, because it is five with two and a half and that dovetails with the five with two and a half that is mentioned at 97. No, I am sorry. The section 6AAA statement is, in fact, made in the reasons at 99.

BELL J: Yes.

HAYNE J: Different.

MR TEHAN QC: That is our sentencing Act.

GUMMOW J: Ours?

MR TEHAN QC: I should not say that.

HAYNE J: We live in a federation, Mr Tehan. You may not have noticed.

MR TEHAN QC: I am sorry. I have to have that reality brought home to me every time I appear. The sentence would have been six with three.

Victorian Civil and Administrative Tribunal

Before Member Buchanan

28 August 2012

Bin Yue Pty Ltd v Kota Pty Ltd and P Kostarakis

MEMBER BUCHANAN: "What do you say to that Mr Armstrong?"

MR MONTGOMERY: My name is Montgomery not Armstrong sir.

MEMBER BUCHANAN: Sorry Mr Montgomery, I must have been thinking of the astronaut Armstrong (Neil) who has just died.

MR MONTGOMERY: That's okay Sir, as long as your order doesn't also strip me of my seven Tour de France titles.



Restaurant Review



Orto

The Venue: Orto Kitchen & Garden

Address: Level 1, 302 Burwood Rd, Hawthorn

Telephone: 03 9819 2200
Website: www.orto.com.au
Email: info@orto.com.au

t was Schweinhaxette's 43rd birthday. It was also 24 years since I first met Schweinhaxette when she had her hair in piggy tails and was wearing a dirndl.

I needed a restaurant where the food would be excellent but where Schweinhaxette's father (aged 82) could still participate in proceedings and our two boys (aged 9 and 11) would not feel intimidated and where their boisterousness could be hidden. I decided to go to Orto.

"Orto" in Italian means "vegetable garden". We arrived with the extended family at Orto on a Saturday night. Look for the vegetable and herb garden to the left of the entrance. Orto was full and buzzing.

We started the proceedings by ordering beers, cokes (yes we capitulated to our boys!) and a Dal Zotto Prosecco from the King Valley in northeast Victoria. The Prosecco was the perfect aperitivio–bursting with pear, citrus and zesty bubbles.

We went straight to the plates "to start and share" on the menu. A couple of serves of Arancini with smoked mozzarella, peas and tomato were quickly devoured. These were delicious, with the smoked mozzarella really adding some flavour. We also passed around a bowl of mussels, delved into them, discarded the shells and soaked up the 'jus' with bread. The mussels were sautéed and then splashed into a saffron and tomato broth with Sardinian fregola. The calamari ended up in front of our 9 year-old son and was immediately knocked off. The calamari had been dusted in semolina and then fried and then placed on a bed of fennel, rocket, and radicchio with a balsamic aioli.

Next we hopped into some hand-stretched pizza bed with mozzarella, tomato and basil. Finally, we shared a grilled cotechino sausage with braised red lentils and mostarda di Cremona. This was my favourite dish. Mostarda di Cremona is made from candied fruits and added a sweetness and complexity to the sausage that was delicious.

All of these starters were washed down with a Frankland Estate Riesling from Western Australia.

Next we ordered a Chianti from the Azieda Agricola Colognole winery located northeast of Florence. Like all Chianti it is to be enjoyed with food and that is precisely what we did

I had the Brodetto di Mare-a fish and shellfish stew with tomato, white wine and garlic. It included mussels, calamari, prawns and a large piece of well-cooked snapper. The stew was not too fishy. One of the boys knocked off gnocchi with smoked mozzarella, tomato and basil and the other a whole thin-based margarita pizza.

Schweinhaxette's father had slow braised goat with potatoes, peas, mint and Tuscan pecorino. Schweinhaxette had the same. I managed to secretly plough my fork into this dish for a bit of a taste. The mint and Tuscan pecorino really lifted the goat. Lovely! We also ordered some broccolini in parmesan, olive oil and garlic and some rocket in balsamic and parmegiano reggiano to share.

The restaurant had a boisterous, buzzing feel to it. Not too loud, not too quiet. It was also the sort of place where you could swap seats, move around and talk to others at the table. Our waiter was a jolly man who looked less like a waiter and more like a chef who had stepped straight out of the kitchen.

Finally, Schweinhaxette had yoghurt pannacotta with poached baby white figs and almonds and pistachio crisps. I also ploughed my spoon (not secretly this time) into it and took a nice big scoop – a terrific combination. The boys had a house selection of gelato. If I hadn't had so much food I think I would have ordered the hot Italian doughnuts with nutella! These would have been terrific with a short black and maybe a sweet sherry. Another time.

All in all maginifico! We will be back!

SCHWEINHAXE WEN

The Wine Bar

Introducing the wines: a Maverick Wines 2008 Shiraz from the Barossa in South Australia (\$22.99 from Purvis Cellars); a Mitchell Harris Wines 2009 Shiraz from the Pyrenees in Victoria (\$29.99 from Red White & Amber) and a Cape Mentelle 2010 Shiraz from Margaret River in Western Australia (\$37.95 from Red White & Amber).

The scene was set. Three bottles of Shiraz from different wine regions in Australia and at different price points. Each bottle placed upon a single piece of paper. Keen tasters on the ready—a wine distributor, a wine collector, some assorted wine lovers and some common folk. The task: for the tasters to sample the wines, write their comments on the pieces of paper and rank the wines. The tasters sampled the wines but had to be reminded to write their comments!

Maverick Wines 2008 Shiraz, Barossa Valley

Maverick Wines was established in 2004. Its objective is humble: to become one of the top premium boutique wineries in Australia! Well it has certainly come close to this objective with its 2008 Barossa Shiraz.

The 2008 Barossa Shiraz is a blend of Shiraz from its four Barossa vineyards. Strong and rich in colour, with a big nose and a palate displaying lovely rich and dark Barossa berry fruits, black pepper and finely balanced tannins. A full and fleshy Barossa Shiraz!

Maverick Wines states that this wine would be terrific with grilled and roast meats, game or strong cheese. We enjoyed it with a butterflied leg of lamb marinated in extra virgin olive oil, loads of garlic and lots of lemon juice. An excellent match!

The verdict: 8.5/10

Mitchell Harris 2009 Shiraz, Pyrenees

Wine maker John Harris was recently the winemaker at Domaine Chandon in the Yarra Valley. He has now returned home to the Pyrenees and joined the Mitchell family to form Mitchell Harris Wines.

The 2009 Shiraz has a very deep purple colour. This is a wine with concentrated spicy fruit, a touch of white pepper, and good balance and length. The oak plays an excellent support role – complementing the fine fruit. The cooler Pyrenees region makes this a fine, elegant wine and the inclusion of just 3% viognier gives it a lift. The best of the three wines.

This wine would drink very well with beef roasted in a charcoal BBQ or with a soft French cheese with figs and thinly sliced toasted raisin bread.

The verdict: 9/10

Cape Mentelle 2010 Shiraz, Margaret River

A wine with a lovely vibrant colour. It has been matured in 100% French oak. This, coupled with its cooler climate origins gives this wine a lighter, finer style. It also has very good fruit – more red fruits than the typical warmer climate black fruits, with a hint of floral notes. It is a refined, structured wine. However, it lacks depth and palate weight. This is a disappointing finish given its price.

Given its lighter style this wine could be very much enjoyed with a veal ragu pasta or some roasted quail with herbs and verjuice.

The verdict: 7.5/10

THE BESOTTED GRAPE







THE START OF A REWARDING JOURNEY FOR VICTORIAN BAR MEMBERS.

Behind the wheel of a BMW or MINI, what was once a typical commute can be transformed into a satisfying, rewarding journey. With renowned dynamic handling and refined luxurious interiors, it's little wonder that both BMW and MINI epitomise the ultimate in driving pleasure.

The BMW and MINI Corporate Programmes are not simply about making it easier to own some of the world's safest, most advanced driving machines; they are about enhancing the entire experience of ownership. With a range of special member benefits, they're our way of ensuring that our corporate customers are given the best BMW and MINI experience possible.

BMW Melbourne, in conjunction with BMW Group Australia, is pleased to offer the benefits of the BMW and MINI Corporate Programme to all members of The Victorian Bar, when you purchase a new BMW or MINI. Benefits include:

BMW CORPORATE PROGRAMME.

Complimentary scheduled servicing for 4 years / 60,000km

Reduced dealer delivery charges

Complimentary use of a BMW during scheduled servicing*

Door-to-door pick-up during scheduled servicing

Reduced rate on a BMW Driver Training course

MINI CORPORATE PROGRAMME.

Complimentary scheduled servicing for 4 years / 60,000km

Reduced dealer delivery charges

Complimentary valet service

Corporate finance rates to approved customers

A dedicated Corporate Sales Manager at your local MINI Garage

Your spouse is also entitled to enjoy all the benefits of the BMW and MINI Corporate Programme when they purchase a new BMW or MINI.

For more information, please email VICBAR@bmwmelbourne.com.au, or contact Simon Reid or Chris Mayes on (03) 9268 2222



BMW AND MINI CORPORATE PROGRAMME.

BMW Melbourne

118 City Road, Southbank. Tel (03) 9268 2222. www.bmwmelbourne.com.au LMCT 8155

MINI Garage Kings Way

209 Kings Way, South Melbourne. Tel (03) 9268 2222. www.melbourne.minigarage.com.au LMCT 8155



Dear Themis

On Sleeping in One's Chambers

Dear Themis,

Things have been pretty uncomfortable at home of late and I am now finding myself working longer hours. Starting early and finishing late. Recently, one night while working back in East, I flopped on to the couch in my room in chambers and before I knew it, I was fast asleep only to wake up in daylight the following day. Luckily, it wasn't a problem, as I cycle in to chambers (from Abbotsford on my recumbent bicycle) and as such have a few days' supply of shirts and underwear stored in my robing cupboard. It was actually rather convenient. A quick shower downstairs in West, a skinny decaf chai latte and a muesli bar at Dominoes and a quick perusal of The Age and I was ready to seize the day. Giving my challenging domestic environment at the moment, I am thinking of doing this again. What do you think? Is this ok?

Kind regards,

Bearded Wanderer.



Dear Bearded Wanderer.

Before I consider your sleeping arrangements in chambers, allow me to speculate on your sleeping arrangements at home. I venture to say that 'home' might be a little more welcoming if you were to lose the beard, have a proper breakfast and ride in on a regular bike. If you were to gently embrace these three small changes, then I expect your conundrum of sleeping in chambers might disappear. However, I suspect you're a person who stubbornly resists change, so I offer to you the following as to your plans to sleep in the shop, as opposed to above it.

A review of the BCL website under the Policies tab reveals BCL's Standard Terms and Conditions ('STCs'), which interestingly do not prohibit sleeping in one's chambers. However, under the STCs if you wish to share your room with another person, then you first must obtain BCL's approval (Clause 10), which of course rules out the possibility of shacking up in one's room with 'the other person', no matter how expedient. Although judging from your letter BW, I'd be extremely surprised if there was someone else and therefore Clause 10 shouldn't be a problem for you.

Strangely, I see your point. It is possible to live in the urban jungle that is Owen Dixon Chambers if you have a sofa (not a couch) in your room to sleep upon. Television can now be enjoyed online. Restaurants in the CBD deliver meals to teams of commercial lawyers working back late at night, so why shouldn't the same apply to someone living there. Not sure if there are any vegan restaurants in inner Melbourne which deliver though. Some rather unusual members of chambers keep a small fridge in their rooms and on most floors there are microwave ovens and dishwashers in the kitchenettes. There are loos on each floor. There is running water. There are showers downstairs in West. Laundry can be sent out via one's Clerk with it all to be returned clean and pressed within 48 hours. So, can one live in one's chambers? Sure, why the hell not!

Well, there is a good reason why not. Consistently spending more than 12 hours a day working in chambers, and then living there as well, is probably not good for your mental health. Have you ever heard of work/life balance BW? No, I figured as much. Plainly, whatever self-awareness you might have once possessed has already evaporated. And what about your colleagues? I am sure all of them will think that it is a really bad idea, especially those Counsel occupying neighbouring rooms.

At the end of the day BW, it really is a matter for you and your life choices, because from where I sit, BCL is powerless to stop you. If you are going to start using your room as your CBD pied-a-terre, might I suggest to you that you do not eat vegetable curry in your room overnight; you dispose of all food scraps in the industrial bin downstairs behind East; and you refrain from burning incense.

And I advise accordingly.

THEMIS WEN



A Bit About Words Curry

was in Sri Lanka when I began to write this essay. With the unmistakable stamp of Dutch, Portugese and English colonial times still clear on its landscape and language, it seems natural to explore some of the ways Sri Lanka has left its mark on English.

Curry is a ubiquitous dish in Sri Lanka. It was introduced into England in the 16th century by English explorers. W. Phillips in 1598 wrote: "Most of their fish is eaten with rice, which they seeth in broth, which they put upon the rice, and is somewhat soure..but it tasteth well, and is called Carriel." And in Knox's History of Ceylon (1681) "They..boyl [fruits] to make Carrees, to use the Portuguez word, that is somewhat to eat with and relish their Rice." It was not a Portugese wordit is a Tamil word-but the Portugese had it from their travels, and Knox assumed it was Portugese. The Tamil word was *kari*, and the Portugese was *caril*, but in days before Johnson, when English orthography and the British Empire had not reached their maturity, the wrong spelling and inaccurate attribution are both understandable.

Also from Portugese is *vindaloo*.¹ It comes from a Portugese dish called *Carne de Vinha D'Alhos*. (The OED2 also has it as *vin d'alho*). Whatever spelling you prefer, it was Portugese for "wine and garlic". The *vin(h)* bit *is wine*, obviously enough. But the English *garlic* is unrelated to its romance counterparts: French *ail*, Spanish *ajo*, Italian *alio* and Portugese *alho*. Although garlic was, for a long time, foreign to English cooking, the word *garlic* comes from an Old Engish root *gare* + *leek* and is thought to correspond to the Norse *geirlauk*. Perhaps because it is so closely associated with the Mediterranean, the Esperanto for garlic is *ajlo*. And the botanical name of the plant is *Allium sativum*. Although garlic crept into Indian and Sri Lankan through the Portugese

influence of vindaloo, it did not get to Indonesia, where garlic is called *bawang putih*.

We have quite a few words from Tamil, including anaconda ("having killed an elephant"); cheroot, conjee, coolie, mulligatawny ("pepper water"), pariah, popadam and teak. Strangely, we have very few words directly from Sinhalese. The only familiar ones are beri beri (from Sinhalese beri meaning weakness) and tourmaline, and it has to be conceded that tourmaline is not all that familiar, although it has the edge on chena (a form of shifting cultivation in Sri Lanka) and dissava (a governor of a district of Ceylon) and punatoo (the preserved pulp of the fruit of the palmyra palm).

Tourmaline is a brittle pyro-electric mineral which occurs in crystals. It is a complex silico-borate with a vitreous lustre, it comes in black (schorl), and also blue (indicolite), red (rubellite), and green. Sometimes it is colourless. It also occurs in various rich transparent or semi-transparent forms and is used as a semi-precious gemstone.

However Sri Lanka has left an indelible mark in our language, in a quite unexpected way. Known since ancient times the island, which sits as a tear-drop below India, was originally called Taprobane. Later it was called Serendip, then Ceylon and now Sri Lanka. In 1557 Michele Tramezzino pubished a book titled "Peregrinaggio di Tre Giovani Figlivoi del Re di Serendippo" (which translates in English as "Wanderings of Three Young Sons of the King of Serendip"). It was later translated into French and German, and from the French into English (in 1722), although it was not translated directly into English until 1965. The book told the exploits of three princes whose success in exotic adventures owed much to chance, although in the original stories, the princes show powers of deduction which would have impressed Sherlock Holmes.



VICTORIAN BAR NEWS

Having read the 1722 translation, Horace Walpole (son of prime minister Robert Walpole) coined the word *serendipity* and referred to it in a letter on 28 January 1854 addressed to Horace Mann, George II's envoy in Florence. He wrote "This discovery, indeed, is almost of that kind which I call *Serendipity*." In the letter, he went on to explain how he coined the word. "I once read a silly fairy tale called The Three Princes of Serendip: as their highnesses travelled, they were always making discoveries, by accident and sagacity, of things which they were not in quest of for instance, one of them discovered that a mule blind of the right eye had travelled the same road lately, because the grass was eaten only on the left side, where it was worse than on the right – now do you understand serendipity? …"

It is a mark of Walpole's standing (then) as a writer that he could create a new word, *in a private letter*, and that word became embedded in the language. But the OED notes that the word was not much used until the 20th century, and it does not record an instance of its use until 1880, so Walpole probably did not realise that he had left a permanent mark on the English language. It is a mark of Walpole's standing (now) as a writer that *serendipity* is remembered while his novels are all but forgotten.

In the collected edition of *Notes & Queries: For Readers*, *Collectors and Librarians* Edward Solly wrote that Walpole had coined the word as referring to a particular kind of cleverness. He gave a more accurate account of it in 1878 and defined it as "the discovery of things which the finder was not in search of". In 1880 Solly refined the thought when he wrote: "The inquirer was at fault, and it was not till some weeks later, when by the aid of Serendipity, as Horace Walpole called it—that is, looking for one thing and finding another—that the explanation was accidentally found." This quotation is given in the OED, but not the comments from 1875 and 1878.

It is notable that *serendipity* came to be used with increasing frequency in the 20th century: by 1958, it had been used in print about 135 times; during the 1990s it was used in newspapers about 13,000 times. It is thoroughly familiar now, although its meaning has been degraded so that it is now used as a synonym for *chance* or *accident*.

And from Serendip we also have *serendibite*, a boro-silicate of aluminium, calcium, and magnesium, found as bluish triclinic crystals. It was first found (presumably while looking for something else) in Ceylon and was revealed to the world in an article by Prior and Kumaraswamy in Nature on 20 February 1902. (In the manner of the times, Kumaraswamy's name was spelled as Coomára-Swámy).

Because the English dominated Ceylon for a relatively short time (1796-1948), the language of Ceylon had much less opportunity to influence the English language. By contrast, the long presence of the English in India (which originally included the areas that are now Pakistan and Bangladesh) presented us with a rich legacy of Hindi words. These include (among about 400 other words) such thoroughly naturalised words as: *chutney, dungaree, jungle, kedgeree* and *pundit*. Less obviously, they include:

basmati (fragrant): now specifically a fragrant variety of rice;

chintz: a false plural from Hindi *chint*, a painted or stained calico;

choky: a lock-up, from Hindi choaki;

damn: an ancient coin of very little value; hence 'not worth a damn';

juggernaut: the uncouth idol of Krishna at Pūrī in Orissa, annually dragged in procession on an enormous car, under the wheels of which many devotees are said to have thrown themselves to be crushed;

loot: goods taken from an enemy in time of war;

mandarin: (from Hindi *mantri*: a generic name for all grades of Chinese officials; there were nine ranks, each of which was distinguished by a particular kind of 'button';

phut: broken down (nowadays it sounds a bit old fashioned);

pukka: proper or correct in behaviour, socially acceptable;

punch: the drink traditionally made from five ingredients, from Hindi *panj* meaning five. This derivation is treated by the Oxford as contentious (see the OED2, vol XII, p. 835). I prefer to accept the side which attributes it to the Hindi origin. Dr Johnson accepts that origin without hesitation. He asserts that "Punch is an Indian word expressing the number of ingredients". He lists five ingredients. I am with Johnson on this

shampoo: to shampoo originally meant to press or massage, and became more general in meaning, so now to subject (the scalp) to washing and rubbing with soap, etc;

thug (originally *thuggee*): one of an association of professional robbers and murderers in India, who strangled their victims; and

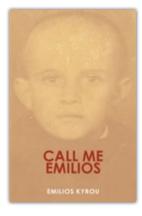
veranda. This has mixed origins. It is from India, where it is found in Hindi *varanda*, Bengali (and modern Sanskrit) *baranda*. Parallel constructions are found in Portugese and Spanish *varanda* /*baranda* meaning railing, balustrade or balcony. It is possible it was introduced into India by way of those languages.

And of course the *bungalow*, which generally has a verandah, is a corruption of the Hindustani *bangla*: belonging to Bengal.

Julian Burnside 🕮

¹ I am indebted to Sally Bodman for this little nugget.

Book Review



CALL ME EMILIOS BY JUSTICE EMILIOS KYROU

The baby-naming custom in Sfikia, a remote village in northern Greece where Emilios Kyrou was born, was for the child's godparent to have full discretion to choose the child's name, and for the parents to be informed only after the baptism, which they would not attend. So it was that Kyrou's parents were somewhat dismayed to learn, after the baptism, that the 25-year-old woman they had chosen to be the

godmother had named their son Emilios, after the hero in a popular romantic novel called *The Beautiful Girl of Peran*. "What sort of a name is that?" his mother asked.

Fast forward 10 years to 1969. The family has immigrated to Australia, and Kyrou is the victim of racism at Broadmeadows Primary School, made more difficult because of his first name: "Children know how to be cruel to someone with an unusual name even if there is no issue of ethnicity. When someone who looks different and has a name that is not only unusual but also foreign, children can be brutal." When he starts a new school - Dallas North Primary School-soon afterwards, Kyrou decides to adopt the name "John", his father's name, to reduce the taunts. And this continues for his first years at Upfield High School.

But by the age of 15, Kyrou feels uncomfortable using the name John, and decides to revert to his real name. "By asking people to call me Emilios, I reclaimed my identity. This was an important step along the path of acknowledging – and later embracing - my Greek heritage," Kyrou writes.

Call Me Emilios is Justice Emilios Kyrou's memoir of his first 23 years, from birth in Sfikia, to commencing his legal career as an articled clerk at Corr & Corr (now Corrs Chambers Westgarth). It is a moving personal account as well as an important historical record of the immigrant experience in the Australia of the late 1960s and 1970s.

The journey starts in the Sfikia of Kyrou's grandparents and parents. At its height, Sfikia had about 750 inhabitants living in approximately 150 houses. The houses did not have running water, electricity or gas until the 1970s. Water for drinking, cooking and bathing was collected from four open water pipes situated in various parts of the village and carried to the houses in large pitchers. Entertainment in the village traditionally revolved around Greek Orthodox feast days and national public holidays.

There is a remarkable photograph of the town's children and adults, assembled in the village square for Greek National Day in 1967. Although they did not know each other at the time, Kyrou and his future wife, Peris, are sitting less than a metre from each other in the crowd of children. (They met later, in Melbourne.)

In 1967, a Greek government organisation that was (perhaps unusually) promoting emigration to Australia and West

Germany sent letters to the Sfikia Shire Council seeking applications for migration to those countries. Glossy brochures about life in Australia accompanied the letters. Kyrou's parents decided to apply, wanting to leave Greece because of their poverty. The original plan was to work hard, save money and then return to Sfikia after two years. But later, once they began to build a new life in Australia, they decided to extend this period and, ultimately, to stay.

Kyrou describes with painful honesty the racism he experienced at school as well as his self-consciousness about his parents and heritage. But this began to recede from about Form 3 as, with growing self-confidence, he developed an interest in his Greek heritage. He developed an ambition to become a lawyer and set himself the challenge of gaining entry into the law course at Melbourne University: "I knew that the course was very popular and that students from private schools had a head start over students who attended a disadvantaged government school. In my mind, the answer was simple: in order to have the same chance of getting into law as the students from private schools, I needed to study more."

Kyrou was successful in gaining entry to a combined law / commerce degree at Melbourne University but, as the only law student from Upfield High School, he initially felt awkward and isolated. Finding the other students much more confident and articulate, he decided to keep quiet in lectures to avoid making a fool of himself.

Again, his strategy to overcome his perceived disadvantage was to work hard. He drove to university early each morning and studied in a quiet area of the Union Building basement until the Law Library opened. He entered the Law Library as soon as it opened and worked in the periodicals section on the first floor. At the end of his first year, he was awarded the top marks in all four subjects of the combined law and commerce course. As he had kept a low profile, the lecturers did not even know who he was.

Kyrou's devotion to his studies and will to succeed can be seen as both the outsider's response to alienation, as well as fulfilling his parents' injunction to value education. In the years after their arrival in Australia, Kyrou's father worked in a foundry and would return home with his clothes covered in thick layers of dust. "The image of my father arriving home from work exhausted and covered in soot is etched in my mind. At those times, my father would say to Theo and me that if we did not study hard and obtain a good education, we would end up like him: ignorant and doing heavy and dirty work for little remuneration. ... It was a powerful message, which helped shape my life."

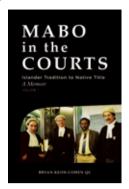
Call Me Emilios is a well-written and engaging story, both of the classic child immigrant experience as well as Kyrou's personal journey. The message it sends is, overall, uplifting. It says a great deal about Australia that a child who arrives at the age of eight and a half, not understanding a word of English, can ultimately rise to the pinnacle of their profession.

Call Me Emilios is available from the Law Institute Bookshop.

MARK MOSHINSKY SC VBN



Mabo in the Courts



Entitled to be an agitator 1 -Mabo in the Courts: Islander Tradition to Native Title -A Memoir

by Bryan Keon-Cohen AM QC

Bonita and Jessie Mabo describe Keon-Cohen's book as "an important record of a significant... landmark along the journey towards justice".2 In Mabo (No 2), the High Court declared that Indigenous people's rights to their traditional lands, in accordance with

their laws and customs, survived in part the acquisition of sovereignty by the Crown as a form of common law native title.3 Further, that the doctrine of terra nullius justifying acquisition of territory by occupation on behalf of the Sovereign did not apply to our shores.4

The author recounts his experiences as junior barrister for the Murray Islander plaintiffs in a test case that culminated in the Mabo (No 2) decision. He draws upon personal recollections, private conversations and public records. The book's narrative is carefully crafted and layered in a way that will appeal to mixed audiences. Peel the layers back slowly with a bamboo knife, however, and always at its core is the author. On memoir writing, William Zinsser states: "Be yourself, speak freely and think small." The author has demonstrated his mastery of the craft. The book is written for the general public, and is peppered with humour (frequent allusions to "north of the Tweed") and colourful idioms.

The litigation journey commenced in 1982 with proceedings instituted in the High Court. The plaintiffs sought declarations that they held native title over their respective lands. The matter was remitted to the Supreme Court of Queensland in 1986 for a trial of facts before Moynihan J. The hearing in Brisbane was subsequently adjourned to permit the full bench of the High Court in Canberra to hear a demurrer to establish whether the Queensland Coast Islands Declaratory Act 1985 was valid and had legal effect. The Act declared that annexation of the Murray Islands in 1879 vested full rights in the Crown without encumbrances and created waste lands of the Crown in Queensland. In 1988 the High Court declared the Act invalid by virtue of the Racial Discrimination Act 1975 (Cth) and s 109 of the Constitution.6 The hearing of the remitter continued in Brisbane and on Murray Island in 1989 with Moynihan J delivering his determination under the terms of the remitter later that year. The High Court delivered its judgment in 1992.

The litigation is juxtaposed with accounts of the author's personal life, including the upheaval of moving his family to Brisbane for the second part of the trial of facts before Moynihan J. These domestic interludes provide welcome relief to the gruelling 10-year saga. It also reminds us that this is

not a battle of the Titans, but that of ordinary people. Overall, however, the book is forthright, engaging and highly readable.

Mabo was preceded by a case that raised similar issues before the Supreme Court of the Northern Territory twenty-one years earlier. In Milirrpum v Nabalco Pty Ltd the Aboriginal plaintiffs contended that pre-existing rights under native law or custom survived annexation by the Crown and were capable of recognition at common law.7 Justice Blackburn disagreed. He found that an Aboriginal system of law existed but did not establish proprietary rights in the land.8 The case never went to appeal and the decision was widely criticised.9 This conclusion was subsequently overturned in *Mabo* No 2.

The impetus for the Mabo litigation came from diverse sources: the Torres Strait Islanders' long history of discontent with the administration of their affairs by the Queensland authorities; Eddie Mabo, an Indigenous rights activist from Murray Island; and Australia-wide social and political foment for Indigenous land justice. It was also opportune that the old people on Murray Island were available to give evidence of their knowledge of laws and customs as the evidence of the younger ones may not have been adequate to satisfy the courts.10

The calibre and dedication of the litigation team were integral to the Mabo success. The team also included barristers Ron Castan QC, Barbara Hocking (until 1986), and solicitor Greg McIntyre. Richard Brear assisted with research. Melissa Castan and Robert Lehrer assisted with preparing documents and witnesses. There were other supporters and contributors along the way.

The litigation, however, was beset with funding shortfalls from the inception of the claim in May 1982 to just days before the final hearing before the full bench of the High Court in June 1992. We share the author's anxieties, frustrations and uncertainties, partly due to the Commonwealth's administration of funding and partly due to the unpredictable nature of the litigation. The author refers to Ron Castan's personal commitment and generosity as contributing to the Mabo success. McIntyre also appeared to play a crucial role in securing funding at different, often unforeseen, stages of the litigation.

What now after Mabo? Bonita and Jessie Mabo write that Mabo (No 2) delivered land rights, and restored pride amongst Indigenous peoples as the "First Australians". 11 The author, however, still describes the nation's response to Mabo as "sadly inadequate". 12 This is perhaps because it will take some time before the Australian polity fully understands and respects the principles behind native title. Whatever the reason, the author leaves us with one certainty: the Mabo journey refuses to end.13

ROBIN ANN ROBINSON*





^{*} Indigenous Barrister specialising in Native Title and a PhD candidate at Melbourne University.

¹ Justice Murphy in Neal v The Queen (1982) 149 CLR 305, 317.

 ² Bryan Keon-Cohen, Mabo in the Courts: Islander Tradition to Native Title
 A Memoir (Chancery Bold, 2011) viii.

 $^{^{\}rm 3}$ Mabo v Queensland (No 2) (1992) 175 CLR 1, 2 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

⁴ See the reasoning of Brennan J in 32-4.

⁵ William Zinsser, "How to Write a Memoir" (2006) The American Scholar http://theamericanscholar.org/how-to-write-a-memoir

 $^{^6}$ Commonwealth of Australia Constitution Act 1900 (imp) 63 & 64 Vict, c 12.

⁷ (1971) 17 FLR 141, 149.

⁸ Ibid 143.

 $^{^9}$ See Richard H Bartlett, Native Title in Australia (Lexis Nexis Butterworths, 2nd ed, 2004) 11-12.

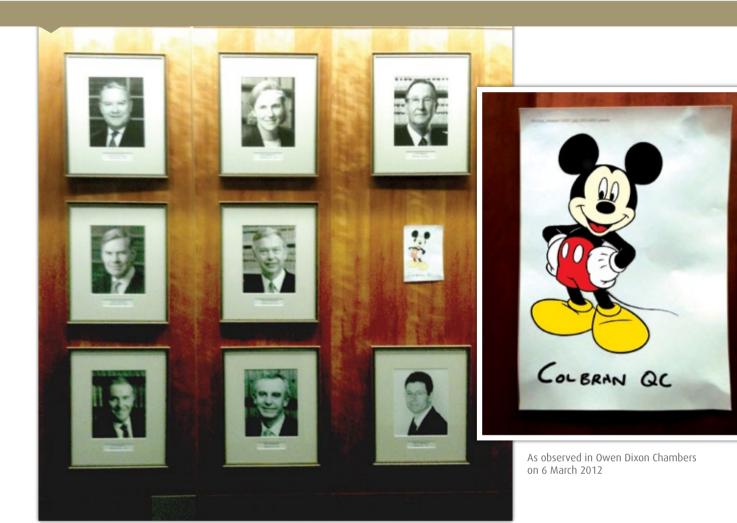
¹⁰ Described by the author at page 71 as a "window of opportunity", and reflecting its inherently fragile nature.

¹¹ Above n 3, viii.

¹² Above n 3, 4.

¹³ Above n 3, 3.

VBN 151 Essay Competition Winning Entry



The winner of the VBN 151 Essay competition was the sole entrant, John Box, for his essay entitled Leaders of Stature. Box has won the transferable prize of a lunch voucher to the value of \$100.00, which will be claimed on Box's behalf by the VBN Editorial Committee.

Leaders of Stature

Not to be confused with former Bar Council Chairman. Michael Colbran QC, according to Wikipedia, 'Mickey Mouse is a funny animal cartoon character created in 1928 by Walt Disney and Ub Iwerks at The Walt Disney Studio'. A moment's reflection upon both Colbran and Mouse reveals that they each occupy near identical sizes in their respective fields, which they charismatically and enthusiastically led to great heights during their respective reigns.

But that is where the similarity ends. It has been said that Colbran did in fact have his Chairman's photo ready to go for some time, it's just he couldn't reach high enough to hang it in the vacant space which awaited it. Cogniscent of their

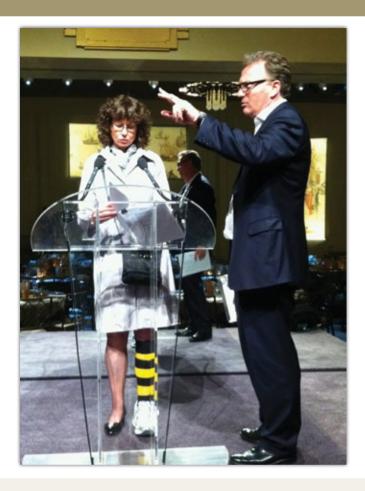
similar stature, Mickey of course being the publicity-seeking opportunist that he is, took a leaf out of many a human rights lawyer's publicity manual and had Goofy post his photo there instead, thinking that no-one would notice – a tall order indeed. As it happened, some of our newer members of the Bar were a little confused for a time and indeed one ventured to say that she has never seen Colbran in red hotpants – he always seems to wear a very smart suit!

However, all this confusion can be easily put to rest. A close examination of Mickey's left hand in the photo betrays three rather than five fingers which infers that the picture is in fact one of Mickey, not Colbran. You see Walt Disney has previously explained that "Artistically five digits are too many for a mouse. His hand would look like a bunch of bananas". And those of us who know Colbran know that he has four fingers and a thumb. And that he also enjoys the occasional banana. Mystery solved. Case closed.

John B Box 🐵



VBN 152 Caption Competition



Victorian Bar News Caption Competition

Win a \$100 Lunch Voucher at the Essoign Club!



COMPETITION RULES:

- 1. Write a caption for the above photo.
- 2. Submit your entry to vbneditors@vicbar.com.au before the 12:00pm, Friday 8 Febuary 2013 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 2013 Autumn edition of Victorian Bar News and the author(s) agree for their entry to be so published.
- 5. START WRITING!



Welcome to the private travel club for ABA Members

Travel Club Getaways is pleased to be associated with the Australian Bar Association. The club offers members access to a range of amazing travel benefits. From the moment you join you'll enjoy access to superior travel products and services, including a dedicated consultant to assist with every planning and booking detail.

Travel Club Getaways is backed by the global negotiating strength of Flight Centre Limited, so whether you're travelling first class or economy you'll always get the best possible fares and rates.

Some of the benefits ABA members enjoy:

- · Plan your itinerary with the expert insights of your dedicated travel consultant
- ABA's Travel Club operates from a dedicated off-street office, ensuring your travel plans receive our full attention and are always our priority.
- Your consultant can completely tailor your holiday from the ground up
- · Access products and services and specially negotiated rates
- · Quick and personal service just call for same day travel quotes*
- · 24/7 worldwide emergency assistance from a trusted locally based team of consultants
- The Travel Club Price Promise* is our commitment that we won't be beaten on price.

 If you happen to find a cheaper available price, we will beat it.

Get the personal service and attention to detail you deserve.

Contact us today to make enquiries about your next holiday or business trip:

Tel: 1300 556 155 Email: vic@fctravelclub.com.au

Or access monthly travel deals by registering at: fctravelclub.com.au/user/register/aba



*Your quote must be in writing and must relate to standard fares and travel products available to the general public. Your genuine written quote must be presented to us prior to booking. Travel must originate in/depart from Australia. If your quote is cheaper, we will BEAT it by \$1.00. Fare must be available and able to be booked by the general public when you bring it to us. Fares available due to membership of a group or corporate entity or subscription to a closed group are excluded. Must be for same dates and flight class. Only valid until deposit or payment is made. *Same day quote is subject to the complexity of the quote. If a quote cannot be obtained the same day, we will be in contact within an appropriate timeframe. Australian OpCo Pty Ltd (ABN 30 003 279 534) trading as Travel Club Getaways. State licence No: VIC 32360





Have your wig cleaned professionally

Legal wigs are made from 100% horsehair. Just like your hair it absorbs moisture and perspiration. Given time, the wig will become unhygienic and may pose a health hazard. A cleaned wig will look good, smell fresh and be free of sediment, sweat and oils.

\$185.00

Includes overnight return freight Cleaning generally takes 2-3 days, depending on the condition of the wig.

For a short time only, all wigs received for cleaning will receive a complimentary tidy up and trim.



Harvey Norman

COMMERCIAL PROJECT DIVISION



Tel (03) 8530 6300

harveynormancommercial.com.au