ISSUE 153 WINTER 2013

VICTORIAN BAR NEWS

The Formidable Sir Hayden Starke

By JD Merralls

Legal Aid in Chronic Decline

Punch Drunk

The Law of Drugs in Sport

The Paris Bar

A Study in Contradictions

QC *or not* QC?

IBAC

A Sheep in Wolf's Clothing?

153

The 2013 Victorian Bar Dinner All the Highlights and Photos

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.

MBA CAR ASSIST
MEMBERS BENEFITS AUSTRALIA

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

ISSUE 153 WINTER 2013

VICTORIAN BAR NEWS

8

20

64

85

ISSUE 153 WINTER 2013
VICTORIAN BAR NEWS

Editors: Sharon Moore and Justin Tomlinson

***Victorian Bar News* Editorial Committee:** Sharon Moore and Justin Tomlinson (Editors), Georgina Costello, Anthony Strahan (Deputy Editors), Louise Martin and Maree Norton

Contributors: His Honour Magistrate Alsop, Richard Attiwill, David Bailey, Simone Bailey, The Hon Chief Justice Bathurst, Denise Bennett, Sally Bodman, Timothy Bourke, Richard Brear, Amy Brennan, Elizabeth Brimer, Julian Burnside, The Hon Stephen Charles QC, Michael Colbran QC, John Coldrey, Georgina Costello, Tom Danos, The Hon Justice Dodds-Streeton, The Hon Mark Dreyfus QC MP, Fiona Ellis, Kurt Esser, Her Honour Magistrate Fleming, Kathleen Foley, Guy Gilbert, Michael Gronow, Her Honour Judge Hampel, Justin Hannebery, Robert Heath, Peter Heerey AM QC, Sara Hinchey, Dr Jacqui Horan, Ben Ihle, Diane Jacobson (Melbourne Hebrew Congregation Magazine), The Hon Justice Keane, Tony Lewis, Paul Liondas, Louise Martin, Richard McGarvie SC, Glenn McGowan SC, Fiona McLeod SC, James Merralls AM QC, Simon Moglia, Sharon Moore, Debbie Mortimer SC, Ross Nankivell, Anthony Neal SC, Keith Nicholson, Maree Norton, Rob O'Neill, Max Perry, The Hon Justice Robson, His Honour Chief Judge Rozenes, Adrian Ryan SC, Tim Seccull, Sam Stafford, Anthony Strahan, Helen Symon SC, Justin Tomlinson, Brian Walters SC, The Hon Chief Justice Warren AC, Michael Wheelahan SC and Michael Wyles SC.

Photo contributors: Fiona Basile (Kairos Catholic Journal), Peter Glenane, Justin Hill (Jason Zorzut Photography), David Johns, Tira Lewis, Stephen Reynolds and Paul West.

Cover illustration: Guy Shield

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 (2013) 153 Vic B.N. Opinions expressed are not necessarily those of the Bar Council or the Bar or of any person other than the author. To the best of our knowledge, the information in this magazine was correct at the time of printing.

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: The Slattery Media Group; www.slatterymedia.com; askus@slatterymedia.com

Contributions: All contributions to *Victorian Bar News* should be in word format and are to be emailed to vbneditors@vicbar.com.au. All articles submitted for consideration for publication in *Victorian Bar Review* should be word format and conform to the style guide prescribed by the Australian Guide for Legal Citation (http://www.law.unimelb.edu.au/files/dmfile/FinalOnlinePDF-2012Reprint.pdf)

Engaging with the Life & Lore of the Bar

The Editors

Welcome to the 153rd edition of *Victorian Bar News*.

At the outset, it is incumbent on us as new editors to acknowledge the enormous contribution of outgoing editor Paul Hayes, whose last edition (152) was an excellent collection of worthy material. Paul was appointed editor in April 2009 and he edited (either with co-editors or on his own) six editions during his time as editor. His contribution to producing this journal of the Bar, in terms of effort and time devoted, cannot be overstated.

As incoming editors we have sought to enhance all that *Victorian Bar News* has offered, as well as to look forward and offer even more.

We wish to attain something, which, although it may seem grand, is nonetheless important. That is, to engage the Bar in a conversation that will inspire and develop the profession. Our profession is a grand institution. It deserves to be treated with respect and also to be challenged. For it is only with challenges that a thing tests and strengthens its mettle. We hope to attain this by increments, but to attain it nonetheless.

Our hope is to have *Victorian Bar News* not be merely a vessel to record events, which are important nevertheless, but also to inspire intellectual engagement by barristers in the institution of the Bar. This means taking a reflective look at our past as well as wrestling with issues in our present and looking interestedly at our future.

There are articles from venerable contributors, including J D Merralls, Stephen Charles QC and Peter Heerey QC. In addition, this issue has been honoured by contributions from Chief Judge Rozenes, and Federal Attorney-General, and member of our Bar, Mark Dreyfus QC.

There are articles on some of our members who are drawn to professional appointments outside of the Bar; the legal issues surrounding drugs in sport; reports of the third annual CPD conference; and a reflective look at our system of advocacy in an international context, as Amy Brennan reports back on studying the methods of the Paris 'Bar' at L'Ecole du Formation du Barreau de Paris. We also commend to your attention the excellent contributions to the 'Back of the Lift' section.

None of what the *Victorian Bar News* is and could be is possible without your contributions and the hard work of the editorial committee (Georgina Costello, Anthony Strahan, Louise Martin, Maree Norton and Denise Bennett and Sally Bodman from the Bar office), for which we are very grateful.

This is your journal. Of your life and lore of your Bar.

We hope it engages you.

THE EDITORS

The editors: Sharon Moore and Justin Tomlinson

PHOTOS BY PETER GLENANE

ABOVE AND TOP:
St Paul's Cathedral
LEFT: The Dean of Melbourne the Very Revd Dr Andreas Loewe

Opening of the Legal Year

Justin Tomlinson

Nowadays it might be thought that there is no real need for a ceremonial opening of the legal year. Courts do not break for lengthy vacations as they once did and terms are hardly recognisable.

Why then have a ceremonial opening of the legal year?

One ready answer is that it is a chance to reflect on the profession's place and role in the community. The legal arm of government is bigger than business. The profession takes time every year to pause and give thanks, seek solace and reflect on the greater obligation owed to the community, beyond the aspiration to individual profit.

So this year, on 29 January, the profession, the judiciary, our own arm of government, opened the legal year with religious and non-religious ceremonies.

The International Commission of Jurists Victoria held its sixth Community Opening of the Legal Year, convened at Waldron Hall at the County Court. Speakers at the non-religious event included Aunty Carolyn Briggs, Professor Peter Norden (formerly chaplain of Pentridge prison), two Kew High School year 12 students and Chief Justice of the Family Court, Diana Bryant AO. Chief Justice Warren AC attended as the event's patron. The event was hosted by Justice Lasry (President of ICJ Victoria). Aunty Briggs led the Welcome to Country and expressed her pride in Melbourne's rich indigenous history and how many have started to recognise the need for reconciliation. Professor Norden strongly advocated for the abolition of capital punishment around the world. Chief Justice Bryant then spoke about the importance of the rule of the law and contrasted Australia's experience with that of some of her overseas colleagues in trying to maintain judicial independence.

At the Melbourne Hebrew Congregation (Toorak Synagogue) about 100 attendees, made up of judges, magistrates, barristers and solicitors, attended a service conducted by Rabbi Avrohom Jacks and Rabbi Doivn Rubinfeld. Short prayers were offered and readings from the Torah were made by Justice Sifris, Chief Judge Rozenes AO, Judge Lewitan and barristers Henry Jolson OAM QC, Simon Rubenstein, Oren Bigos, Renee Sion and Roslyn Kaye. Prayers were offered that as the legal year commenced, practitioners (and the congregation at large) ought dedicate themselves to the ideal of natural law.

The Red Mass was held at St Patrick's Cathedral in a service led by Archbishop Denis Hart. Special guests attending the Red Mass included Justice Crennan AC,

ICJ Victoria's Community Opening of the Legal Year, Waldron Hall, County Court

ICJ Victoria's Community Opening of the Legal Year, Waldron Hall, County Court


Melbourne Hebrew Congregation


Henry Jolson OAM QC reads from the Torah


Melbourne Hebrew Congregation

PHOTOS BY STEPHEN REYNOLDS

Chief Magistrate Lauritsen, Michael McGarvie (Legal Services Commissioner), Bevan Warner (Chair of Victoria Legal Aid), Geoff Bowyer (President Elect LIV), Jim Peters SC (representing the Bar) and former Governor of Victoria Sir James Gobbo AC CVO KStJ QC.

In his homily, Bishop Elliott (brother of Paul Elliott SC) invited those gathered to reflect on their own journey of faith as men and women who serve the law. "What you do, how you serve people through the law each day, is the work of God," he said.

The Ecumenical Service was held at St Paul's Anglican Cathedral and was presided over by the Anglican Dean of Melbourne, the Rev Dr Andreas Loewe. The President of the LIV (Reynah Tang) and Vice-Chairman of the Victorian Bar, Will Alstergren SC, read lessons. This was the last opening of the legal year service of Dr June Nixon AM who, the very next Sunday, retired after more than 40 years as Organist and Director of Music at St Paul's.

With thanks to Glenn McGowan SC; Fiona Basile/Kairos Catholic Journal; Diane Jacobson/ Melbourne Hebrew Congregation Magazine; Ross Nankivell


Justice Crennan AC leads the judiciary to The Red Mass, St Patrick's Cathedral


The County Court judiciary

Paul Elliott QC leads members of the Bar to the Red Mass, St Patrick's Cathedral

PHOTOS COURTESY OF FIONA BASILE/KAIROS CATHOLIC JOURNAL

2013 VICTORIAN BAR DINNER

Myer Mural Hall

FRIDAY 24 MAY 2013

Speech delivered by the Hon Justice Keane

Your Excellency, Mr Attorney, and Colleagues.

Thank you very much for inviting me and for doing me the honour of asking me to speak to you.

Tonight, I would like to say something about our profession; and by that I mean the profession of the Bar to which, as Francis Bacon said, each of us is accounted a debtor.

I realise that my choice of topic reveals little in the way of imagination. I will talk about some old Victorian lawyers — and a couple of New South Welshmen.

I justify that radical addition on the basis that it is one of the chief glories of our profession in Australia that each Bar has its eccentrics and eccentricities while we continue to share an abiding underlying unity of identity.

Australian lawyers generally seem to have a unique reputation abroad for robustness. When I was last at a meeting of the American Law Institute, Dame Sian Elias, the Chief Justice of New Zealand, was being introduced.

The master of ceremonies explained to the international audience that they should understand that New Zealand's lawyers were very much like their British Commonwealth cousins, the Canadians: competent, polite, responsible, reserved and modest; and quite unlike Australians who are the lost tribe of Texas.

He was talking about you Victorians, too, you know. Even at the time, I thought that was a little unfair on you.

Melbourne is, with Adelaide, Australia's most civilised city.

One of the treasures of civilisation that Victoria has given the world was Owen Dixon.

I was recently reading "Jesting Pilate" again, and noted that on the occasion on which Sir Owen Dixon was awarded an honorary degree of Doctor of Laws at the University of Melbourne in 1959, he spoke warmly and fondly of his time at the University and particularly of Professor Thomas George Tucker and Sir William Harrison Moore who had greatly influenced him while a student.

What caught my eye in Dixon's speech was his reference to the Latin inscription that used to appear on the stones in the cloisters. The inscription read "*saeviter aratus*" – savagely ploughed.

It struck me, as it obviously also struck Sir Owen, as a remarkably vivid description of the rigour of Melbourne University's dedication to learning.

The phrase "*saeviter aratus*" might be rendered idiomatically as "No stone unturned" — and that would be a peculiarly apt motto for the Victorian Bar.

Certainly no-one from the other Australian Bars would ever accuse Victorian barristers of leaving any stones unturned. In times past, cases that elsewhere would take three days could here take six. And the idea "*fiat justitia ruat caelum*" — let justice be done though the sky may fall — has always seemed to have greater appeal to Victorian lawyers than to those of us from civilised but more pragmatic parts of the country.

The Victorian Bar with its passions and ructions and eruptions has always been the Bar militant. It tends to put the rest of us in mind of Goethe's comment about the Germans: "They make so much trouble for themselves — and for everyone else."

I pause to note that I have already used two Latin expressions. I fear that I will have affronted Chris Maxwell who, as you know, is against the use of Latin in public places. He will not be happy until, stripped of their beautiful Latin dignity, your State's name is "Victory", and our country is called "the southern place". No English words are really adequate to render the passion in the Latin expressions I have mentioned, and while I have no sympathy for Chris' desire to eradicate the use of Latin, I can understand his concern that we should not be seen to be indulging ourselves in vanities.

Some think that the use of Latin is just one of the many ways in which we as a profession indulge our own high opinion of ourselves. I noticed in *The Australian* newspaper of April 12 a slighting reference by that journal's legal affairs writer to "the status-mad world of the judiciary".

May I say, on behalf of my judicial colleagues, that I have never detected any obsession with status among Australian judges. Poverty perhaps, but not status. I rather think that that has long been the case.

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

When New Zealand's Sir Robin Cooke was appointed to the House of Lords, he stopped signing his correspondence "Robin Cooke" and began affecting the signature "Cooke of Thorndon". Sir Anthony Mason, having received a letter so signed asked Sir Gerard Brennan whether he should change his signature to "Mason of Mosman". Sir Gerard replied: "No, people will think you're a used car salesman."

May I also say on behalf of my judicial colleagues that the unremitting grind of our never diminishing lists means we long ago ceased to worry about vanities, such as our place in the history books and whether our judgments will be read in fifty years' time.

I don't pretend to speak for the female judges, but I can say on behalf of the male judges that we know full well that the best that we can hope for in fifty years' time is that people will say: "Isn't it marvellous that he's still sexually active."

There are very real differences between the Australian Bars, and the local eccentricities they have inherited over time. Notwithstanding these differences, we should be capable of recognising the merit in each other, just as we are capable of recognising the unity of our common ethical purpose. Some of the eccentricities of the Victorian Bar derive from its Irish roots. Those roots are deep here; and I find that something of an inspiration.

You will all recall what Dr Johnson said about the Irish: "The Irish are an honest race: they seldom speak well of each other."

Well, tonight, I would like to speak well of Sir Maurice Byers, a New South Welshman who distinguished himself by speaking well of Victorians.

But first I want to speak of Sir Garfield Barwick, a New South Welshman who spoke well of virtually nobody.

There was unveiled earlier this year in the public spaces of the High Court building in Canberra a new portrait of Sir Garfield Barwick.

It is an informal portrait of the great man. It is huge and quite lifelike. Unfortunately, it is also quite frightening. It looks like the portrait of Vigo from Ghostbusters II.

Our colleague, Susan Kiefel, tells me that, since the unveiling, the number of weekend visitors to the building has halved. I predict that the picture will become known as "Gar the Impaler".

Many of you will not remember Sir Garfield on the Bench. Those of us who appeared before him remember him as a brilliant judge who had been the leader of the Australian Bar and who, as a judge, wrote beautifully lucid judgments. In his last few years, he was also perhaps the leading exemplar of the angry old man school of judicial deportment.

It was a school which was very strong in the New South Wales Court of Appeal. It had very active local branches in the other states as well. Those days are, I think, gone, and that is a very good thing.

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

2013
VICTORIAN
BAR DINNER
Myer Mural Hall
FRIDAY 24 MAY 2013

"Certainly no-one from the other Australian Bars would ever accuse Victorian barristers of leaving any stones unturned. In times past, cases that elsewhere would take three days could here take six. And the idea "fiat justitia ruat caelum" — let justice be done though the sky may fall — has always seemed to have greater appeal to Victorian lawyers than to those of us from civilised but more pragmatic parts of the country."

Appearing in the courts presided over by the angry old men of whom Sir Garfield was primus inter pares put one a little in mind of Churchill's description of the Royal Navy in Nelson's time, that is, a place of "rum, sodomy and the lash."

Compared to those angry old men, even Churchill himself appears to be an endearing character. Churchill is not well remembered in this country, but he did have some endearing moments. When he turned 90 he said: "People say to me: 'Who would want to live to be 90 years of age?' I say to them: 'Anyone who is 89'."

And in 1940, after he returned to the Admiralty, one of his senior civil servants, observing that Churchill did not wash his hands after urinating, said: "Sir, at Eton we were taught to wash our hands after using the urinal." Churchill replied: "At Harrow, they taught us not to piss on our hands."

Sir Garfield Barwick represented the negative pole of the spectrum of human endearment.

At the other end of that spectrum, and certainly the most endearing New South Welsh barrister I encountered, was Sir Maurice Byers. He was, by any measure, the most successful advocate of his time and he was a great gentleman as well.

Sir Maurice was a master of the soft word that turns away wrath. On one occasion, he was halfway through the opening sentence of his address in the High Court when Barwick CJ cut him off to point out the difficulties in the argument he apprehended Sir Maurice intended to put. Sir Maurice began again, only to be halted again by a blast from the Bench.

At this point, Sir Maurice chuckled amiably and said: "Your Honour, I apologise; but I distinctly thought I heard the Court Crier say when he opened the Court just now: 'Give your attendance and you shall be heard.'" He then proceeded to make his argument without further interruption.

And, finally to get to my point, Sir Maurice had a soft spot for Victorians. In a famous speech given by Sir Maurice after 50 years at the Bar, he spoke of the time when the Victorians, Latham CJ, Starke and Dixon JJ dominated the High Court. Sir Maurice spoke of the fierce Sir Hayden Starke, on the one occasion on which Sir Maurice appeared before him, sitting "wigless and radiating menace".

Sir Maurice described Sir John Latham as being scholarly and dryly humorous. He described Sir Owen Dixon's "angular face shining with vivacity, intelligence and a unique Mozartian charm".

Sir Maurice went on to make some observations which were not entirely to the credit of the judges of New South Wales as compared to the judges of Victoria.

He mentioned an incident when the great Sir Frederick Jordan CJ had occasion to sentence to death a man convicted of murder. Having passed sentence and removed his black cap, Sir Frederick absent-mindedly ordered that the costs of all parties should be paid out of the deceased's estate.

More importantly, Sir Maurice spoke of the Supreme Court of New South Wales as having "long favoured a form of pragmatism where the likely social or legal disturbance that new ideas might give rise to become the test of their validity." He went on to say: "That was not then and is not, I think, now the case with the High Court."

I should not wish to verbal Sir Maurice, especially posthumously, but it is clear that he was paying a real compliment to the influence of the Victorian lawyers on the High Court, in their insistence that principle, rather than pragmatism, should prevail.

He was, as the consummate professional advocate, paying tribute to the abiding professional ethos that doing justice is our only business and to the great Victorians who embodied the great ideal expressed in the maxim "*fiat justitia ruat caelum*".

That deep devotion of members of the Victorian Bar to the cause of justice, whatever the cost and inconvenience, goes back from Dixon and Fullagar and Menzies, to Isaacs and Higgins and forward to the late Ron Castan and to today's Victorian barristers who, pre-eminently in our nation, continue to ensure that great issues do not want for a hearing because the client wants for money. Thanks to Victorian barristers like them justice has been done in Australia, and continues to be done, no stone has been left unturned, and the sky has not fallen.

Although Sir Maurice's legend depends on his success in constitutional cases, he was a great all-rounder, and as I have said, the consummate professional.

It is, I think, a sad thing that ever narrowing specialisation has made it difficult for a barrister nowadays to sustain an all-round practice. These days the furrows we excavate are ever deeper, but much narrower than in times past. The narrower our specialty, the greater the economic power of the client, and its solicitors, over the barristers who practise in that field. That increase in economic power poses a significant threat to our professional independence.

Just as the tyranny of the billable hour has blighted the professional lives of a generation of solicitors, we are in danger that the American model of law as a business will subsume the Bars.

Your Chief Justice and my colleague Justice Kiefel have both spoken on this topic recently. Tonight, I would like to add my voice to theirs to emphasise the vital importance of maintaining the professional ethos we share to maintaining the trust and confidence placed in us by our clients and fellow citizens.

It is that independent professionalism which makes the best barristers, and also, in the end, makes an unelected judiciary acceptable as the third branch of government in a democracy.

With the all-rounders becoming ever more rare and specialisation accelerating, the professional independence of the Bar remains all the more essential to the survival of the Bar and, in turn, to the due administration of justice.

Notwithstanding the complaints of the shock jocks on radio and the tabloid press, the administration of justice in this country is very successful in terms of the maintenance of public confidence.

One reliable practical measure of the level of public confidence is that judicial appointments in this country almost invariably attract bi-partisan support. That state of affairs stands in marked contrast with the United States where, at the federal level, the executive and legislature struggle to agree on appointments to the federal bench.

On 6 April, the *New York Times* reported that, of the 856 federal district and circuit court seats in the United States, 85 are unfilled. The problem is getting worse. That ten per cent vacancy rate is nearly double the vacancy rate at the beginning of President George W. Bush's second term.

The problem is now of such long standing that more than a third of the current vacancies have been declared "judicial emergencies" based on court workloads and the length of time that the seats have been empty.

The problem is due to the unwillingness of the United States Senate to confirm presidential appointments for reasons described by the *New York Times* editorial board as "politics, ideology and spite".

The most striking example of the judicial emergency in the U.S. Federal Courts is afforded by the prestigious and important United States Court of Appeals for the District of Columbia Circuit. It is an important feeder to the Supreme Court of the United States. It decides most appeals from federal regulatory agencies and exercises exclusive jurisdiction over national security matters.

It is an eleven seat court; four of those seats are vacant, and the last time that the Senate could bring itself to agree to confirm an appointment was in 2006.

In this sclerotic failure of process, we are witnessing the pathology of the separation of powers, as the attitude of the legislative branch for the executive's nominees to judicial office sours from a healthy but respectful scepticism to a jealous suspicion of lawyers who have no professional identity independent of their clients for whom they will do and say anything short of committing an actual crime.

That we have avoided this appalling state of affairs is, no doubt, due to a number of factors, structural and cultural. But I would venture the suggestion that, vital among these is the professionalism which characterises the work of our Bars and our courts.

The professionalism of the Australian Bars has always been such that our advocates are not, and are not seen, as mere mouthpieces for the client, mere spear-carriers for agenda pursued by others. With us, professional advancement does not depend on identification with a powerful client.

And the professionalism of our judges is fostered, in turn, by the standards inculcated by their experience at the Bars, where they are acculturated to regard themselves, first, last and always, as officers of the Court.

By professionalism, I mean, first of all, the crucial difference between competence and mere self-confidence. The former can only be gained by dedication and hard work. It is the ability and willingness of our advocates to engage in the rigorous, and often tedious, process of ensuring that the facts are marshalled and presented in the most efficient way and that a given legal issue is turned over and looked at from all sides, that identifies the competent barrister.

And secondly, I refer to a dedication to the clients' interests above a concern for the success of one's own business, but not a dedication which slides into subservience to the client at the expense of the advocates' primary duty to the court. Independence does not mean merely independence from the State; it also connotes a degree of independence from the client. Maintaining that independence is a challenge; but in maintaining it, we maintain the very thing that gives us our edge, and thereby ensures that we remain indispensable.

May I conclude by commending to you the preservation of the model established in the relationship between the Inns of Court and the Courts at Westminster, whereby the judges and the Bar share a common experience of professional development, and whereby our advocates regard themselves first and foremost as officers of the court and all of us as servants of justice.

Thank you for your attention.

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

2013 VICTORIAN BAR DINNER

Myer Mural Hall

FRIDAY 24 MAY

1. Will Alstergren SC, Fiona McLeod SC and Jonathan Beach QC ready to greet guests 2. John Langmead SC and Graham Fricke QC 3. John Richards SC and Fiona Forsyth 4. The Hon Justice Dessau AM and Patricia Byrnes 5. Nicki Mollard, Robert Williams, Jaclyn Lontos, Kieren Mihaly and Gemma-Jane Cooper 6. Paul Duggan 7. Mara Ray and Ross Ray QC 8. Kate Anderson 9. His Honour Judge Brookes enjoying the speeches 10. The Magnificent Myer Mural Hall 11. The Governor, the Hon Alex Chernov AC QC 12. Andrew Di Pasquale, Ben Jellis, the Hon President Maxwell, Carolyn Symons, Jennifer Collins and James Hooper 13. John Coldrey

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

1. Phoebe Knowles **2.** Simon Molesworth AO QC **3.** Jim Peters SC, his Honour Judge Cosgrave and Caroline Kirton SC **4.** The Hon Justice Priest **5.** Richard Niall SC and Jack Fajgenbaum QC **6.** Peter Little, Terence Guthridge, Nicholas Jones, Ian McDonald and Brian McCullagh **7.** The Bar Band **8.** Hayden Rattray and Nicole Papaleo hit the dance floor **9.** Hayden Rattray takes another partner - Fleur Shand – for a spin **10.** The Chair and Vice Chair cutting up the dance floor **11.** Sarah Lean and Kieren Mihaly show their style

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

One Great Big Happy Family

Speech delivered by Debbie Mortimer SC

Your Excellency, Mr Attorney, distinguished guests, and colleagues.

And a special greeting to my Clerk, John Dever. (We are well brought up on Dever's list, you see.)

The weeks leading up to this have been filled with people giving me advice, telling stories about awful speeches and memorable ones.

Last week at the Readers Dinner I heard the Governor describe how an empty bottle of wine was thrown at one speaker, and I have my own memory of one junior silk who donned helmets, top hats and even a G-string during his speech.

Don't hold your breath.

Plenty of people have told me that the principal convention on an occasion such as this is that one should not talk about sex, religion or politics.

As you might know, I am a stickler for convention. I always do what I am told.

So, let me start with politics

Marriage equality... Wait. All I am going to say is this:

NZ – 1

Australia – 0

Now you might think I'm talking about marriage equality laws. Well, you might think that.

In fact, I'm talking about singing in Parliament. On the passage of the marriage equality legislation in NZ recently, the NZ Parliament, both the gallery and parliamentarians, erupted into the beautiful Maori love song "Pokarekare Ana". Now imagine, our politicians here singing in Parliament after the passage of legislation.

I'm pretty confident the 1-0 politics scorecard will remain, in the singing department at least.

Second: religion.

Why is it that cases about religion always go on for ever? Since 2007, I've been acting for same sex attracted young people who wanted to go camping on Phillip Island and, they alleged, were refused accommodation at a camp run by the Christian Brethren. The case is now reserved before the Court of Appeal. But the irony of all this is that I am not religious, so facing two theologians and a number of Christian pastors all giving evidence about what the Bible said on homosexuality, I used a "Bible Cheat Sheet" prepared by my hardworking juniors who knew more about the Bible than me. I hope my use of that cheat sheet wasn't too obvious to my opponent – his Honour Justice Gregory Garde of the Supreme Court and an honoured guest tonight.

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

2013 VICTORIAN BAR DINNER

Myer Mural Hall

FRIDAY 24 MAY 2013

Thirdly: sex

Do you think I'm really going to speak about sex?

Well, all right. Just a little bit. I'll tell you about alpacas and sex. Not in too much detail, although they are remarkable creatures and there is a lot that could be told. But a notable feature of alpaca mating rituals is the behaviour of the female alpaca. Female alpacas are induced ovulators, so they are, shall we say, always interested. Except when they have ovulated and conceived, and then they are no longer interested, and we can tell this because when you bring the keen male alpaca close such a female, she will spit at him – not just a polite dribble, but a good cup full of putrid green bile, from all the way down in her gut. I always thought that was a handy attribute to have available.

Moving now to being moderately more serious...

In preparing for tonight, I thought about this tradition of having speeches at dinners. Where might this combination of gathering together, sharing a meal, and listening to speeches come from?

One suggestion is the symposium in Ancient Greece. Reliable Google translations and Wikipedia tell us "symposium" means "to drink together".

A symposium was then, a bit of a drinking party. Sounding familiar?

It was for men only of course (well we have fixed that one) – a forum for debate, for recounting triumphs, celebrating special occasions.

Those attending would recline on pillowed couches set up against the walls. Food and wine were served. There was entertainment, or flute-boys.

And here, close on 2500 years later, we still share food, and thoughts through speech making, on many special occasions – perhaps not as in Ancient Greece, but more as a **family** might. Let's talk about this family.

Like any family, the Bar has its generations. When people come to the Bar, we call them **"baby" barristers**, no matter what their age. The adjective aptly describes not only their place in the family, but the experiences which await them.

Baby experiences like learning to manage food. Have you seen how babies take their spoon and work hard at getting some food on it, and into their mouth? That's a bit like how baby barristers approach their briefs – finding a bit of evidence, what do I do with this? Aims, fires, misses, bits of evidence slopping around the sides, not quite there but in the right general direction.

Gradually the tag of' baby" is cast off and we become simply a "junior", still bottom dwelling in many respects, but at least on the way through school, walking confidently and generally able to speak. With their playmates, or brothers and sisters, these juniors form a bit of a gang, hanging around, watching the big kids.

But still unable to share toys – *"No, the clerk promised ME that brief in the Practice Court"*.

Next we see the **teenagers**, slightly swaggering as teenagers do.

These are the **mid-level juniors**, not yet sweating over when to apply for silk, cash flow more or less under control, texting on their phone while their opponent is making boring submissions, finally emerging from the need to have a permanent parking space at the Heidelberg Magistrates Court.

> "Like all families, we squabble. We have our scandals and our triumphs. We never have enough quality time together. But we come together once a year, to share food and listen to speakers and feel a sense of common cause and celebration. Like all families, we are basically pleased to have a shared history and a shared future."

Beyond the teenagers are the **twenty-somethings**. At this stage, these members of the Bar's family are getting comfortable. They know the way the family works, who to schmooze, who to avoid, they know their way around the neighbourhood, indeed they are often out alone these days, although they do spend rather a lot of time locked in their rooms:

» image is all. The clothes, the hair, the accessories, the body…
» they are networking constantly, who's hot to be led by, and who's not, what are the coolest cases to be seen in, how to avoid cases which might have you labeled as a loser

These are the **senior juniors**, of course.

Then, sitting on a designer couch, with a glass of good wine in their hands, reading the New Yorker on the iPad, are the **thirty-something members** of our family:

» feels like they're arrived where they want to be.
» a tad too much pressure on the mortgage, tad too little sleep at night, but basically the midriff is expanding a little ahead of the bank account but both are doing quite nicely.
» and other people in the family are starting to remember their names.

Of course: the **new silks.**

Now from here on, as in life, we know its all down hill and its getting too close to my part of the family anyway, so I invite you now to look with me at our family in other ways.

Imagine a family gathering…

» Standing over the barbecue outside, possibly smoking – and probably plotting – would be members of the criminal Bar.
» Reading the *Fin Review* in the lounge we have the commercial Bar.
» Gathered round the table, waiting for lunch, we have the common law bar.
» In the library, poring over the cryptic crossword and consulting the 20-volume edition of the *Oxford English Dictionary* will be the public law barristers. Helping to set the table, volunteering to peel the potatoes, and generally being supportive, will be the pro bono and human rights barristers. All those goody two-shoes members of the family.

In another room, arms folded, deep in conversation, are the various long suffering **parents**, trying to keep the family afloat, hold it all together and out of trouble, scraping together the money necessary to afford a good quality of life, putting their lives on hold to work for the betterment of the family as a whole. Colleagues, I give you: **the Bar Council**.

Then there are the **in-laws**. The in laws are often from interstate. Specifically, north. Probably, Sydney. They just come barging in, as in-laws sometimes do. Well brought up as we are, we offer them a cup of tea, and we explain to them that, in this family, while watching the correct code of football you don't stand up and scream at the umpire, nor thump Uncle Harry who is supporting the opposite team. The last straw being that these in-laws just will *not* take their *own* empty cup out to the kitchen but have to have *a junior* to do it. But like all patient relatives, we smile for the sake of the extended family relationships as we wave them away.

I come now to a most significant part of our family. If I were to call them grandparents, I would receive complaints from those of them clearly not old enough for that description.

I speak of course, of the **judges**. Part of the family but somewhat estranged. I wouldn't dare call them divorcees. Maybe the closest is **godfathers** – no, not THAT kind of godfather – the religious kind of **godfathers and godmothers**.

Our godparents are there to guide, inspire, and show us the truth, the way and the light. Impose a little discipline from time to time. Giving gentle reminders of what idiots their godchildren can be. Occasionally, we find godparents a little scary – they're always perched up higher than us, they dress a little strangely, and they rarely let us finish our sentences.

They are especially godlike when they gather in groups: groups of three being moderately imposing, groups of five or – the good Lord protect us – seven, being rather overwhelming. It is especially exciting when we have to travel interstate to Canberra for special family visits with the godparents – a "gathering" of godparents whose task is to provide us with truly religious experiences.

But like all godparents, we treasure them. And they, in turn I am sure, treasure us.

Like all families, we squabble. We have our scandals and our triumphs. We never have enough quality time together. But we come together once a year, to share food and listen to speakers and feel a sense of common cause and celebration. Like all families, we are basically pleased to have a shared history and a shared future.

As the diversity of our Bar, and our judiciary, increases, so this family should look forward to better reflecting the community in which we live, and facilitating the advancement of all our members on merit alone, without favoritism and without discrimination. And we might look forward to trying to better tolerate our in-laws.

With the guidance, if your Honours please, of our godparents.

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

AROUND TOWN

Defeated but not downhearted: the NSW Bar team

Taking the Stick to Barristers from the North

Triumphant Turnaround for Vic Bar Hockey. ROB O'NEILL AND RICHARD BREAR

The Victorian Bar hockey team had a dominant season in 2012, turning the tables on both the New South Wales Bar (in Sydney) and the Law Institute of Victoria for the first time in nine years.

The team was led by new captain/coach/organiser Stuart Wood SC, who replaced Federal Magistrate Burchardt after many years as leader. We first faced the LIV in the 'Scales of Justice Cup' at the Hawthorn/Malvern Hockey Centre. The team was Wood SC (C), Nick Tweedie, Andrew Robinson, Rob O'Neill, Stephen Sharpley (GK), Barnaby Chessell, Ross Gordon, Mark and James Batrouney (sons of Jennifer Batrouney SC), Richard Clancy, Craig Samson and Andrew Howell. Support from the sidelines came from Richard Brear, Jennifer and her husband Steve, and the Wood family.

The Bar was fighting history, having won the cup only five times since it began in 1984, but led off the scoring. The LIV fought back but was never able to equalise as goals rained at both ends. Gordon (2 goals) and Howell (2 goals) finished off fine work from the Batrouneys in midfield, while Wood and Clancy were steady and creative in defense. The final score was Bar 5, LIV 4. The game was well umpired by our regular officials Tony Dayton and Mark Fisher.

The victors: **BACK ROW (L-R):** Chris Gregg (NSW), Ross Gordon, Nicholas Griffin, Geoff Grant (NSW), Keith Kendall, Rob O'Neill, Stuart Wood SC, Andrew Robinson, Michael Dever **FRONT ROW (L-R):** Richard Brear, Simon Morse (NSW)

Both teams were extremely grateful for the sponsorship of Kaleidoscope Legal Recruitment. Paul Burgess from Kaleidoscope played for the LIV and also organised welcome after-match refreshments.

Two days later the team ventured north to face the New South Wales team, which had thrashed us on its visit to Melbourne the previous year. Making the trip to the terrific new venue, the Cintra hockey pitch in Concord, were Wood SC, Gordon, Brear, Robinson, O'Neill, Michael Dever, and debutant Keith Kendall. The travellers were bolstered by some non-barrister friends of the NSW team and took to the field with a full quota of 11.

Kendall, who claimed not to have played since schooldays some years before, was a revelation, controlling the ball at inside and feeding the forwards including Gordon, who was again among the goals. Brear took the goalie's pads and kept a clean sheet; Wood was again reliable directing play from the backline, and O'Neill, Dever and Robinson all played well through midfield. It has to be conceded that the ring-ins also all played a role! Perhaps over-confident (not an unknown quality for New South Wales barristers), the northerners were never in the game. The Vics once again scored early, and this time continued to score at regular intervals; the final result was a 7-0 thumping.

> "Perhaps over-confident (not an unknown quality for New South Wales barristers), the northerners were never in the game."

The scoreboard tells the story

Despite the shellacking, New South Wales was gracious in defeat and hosted us to a terrific dinner at Dolcissimo in Haberfield. Many thanks to the team's captain/organiser Andrew Scotting who arranged the dinner as well as a good ground and a well-organised game. We look forward to seeing the New South Wales team back in Melbourne next year.

News AND Views

FROM THE Chair's Table

FIONA MCLEOD SC CHAIR OF THE BAR COUNCIL

As this edition of *Victorian Bar News* goes to press the new Bar Council will have been up and running for more than six months. It has been a remarkable time for me and for the new Bar Council with hardly a moment to catch our breath. It is a great honour to serve the Bar in this capacity.

First I must thank the retiring Bar Council members and in particular Chairman Melanie Sloss SC for her efforts last year. It would have been physically impossible for her to have devoted more time and energy to the task of leading the Bar and I thank her for her extraordinary contribution. I also thank retiring Bar Council members Jack Fajgenbaum QC, Matthew Walsh, Kate Anderson, Kim Southey, Andrew Downie and our retiring Honorary Secretary Bree Knoester. The new Bar Council was elected in mid November and we were soon into the new term with the appointment of new silks in late November and retirements and new appointments to the judiciary. In a little over six months we have recognised the retirement of long serving and distinguished judges – Bernard Bongiorno AO and David Habersberger and welcomed new appointments including Justices Stephen Gaegler and Patrick Keane to the High Court, Chief Justice James Allsop to the Federal Court, Justices John Digby, James Elliott, Tim Ginnane and Associate Justice Mark Derham to the Supreme Court, Justice Jennifer Coate to the Family Court (and as a Royal Commissioner), Justice Judy Small to the Federal Circuit Court, Judges Ian Gray, John Jordan, Chris Ryan, Paul Cosgrave and Peter Couzens to the County Court (and President of the Children's Court) and Peter Lauritsen as the new Chief Magistrate.

As the new-year began it was very quickly apparent that changes to Victoria Legal Aid funding guidelines, introduced in January, were seriously impacting upon our members and criminal trials in this State[1] creating pressures for those practising in the criminal, family and children's courts particularly. Victoria Legal Aid has responded to these restrictions by attempting to shift funds from one area of demand to another. While this is understandable, the debate that has raged through the press suggesting the quality of legal representation is the real issue is entirely misplaced. Victoria has a proud tradition of fairness and justice in our courtrooms.

This is best supported by a strong independent Bar properly instructed by competent solicitors. It has been said that other States cope without instructors, and that courts can cope with unrepresented parties appearing before them, but at what cost in the long term? Cases involving serious criminal conduct, accusations of family violence and the protection of children are complex. Clients are facing the extreme pressure of a trial and the risk of loss of liberty or family disintegration, on top of all of the other challenges faced by clients before the courts.

The challenges faced by those working in these practice areas are unlikely to improve in the current climate and this poses both a challenge and an opportunity for the Bar as an institution. If we are expected to routinely appear without the support of instructors, contrary to our own ethical rules, how do we maintain the key strengths of the Bar – our independence; our adherence to the 'cab rank rule; and our mastery of advocacy and trial strategy?

These questions and more were pondered during the Bar annual conference held in March. Associate Professor Rufus Black presented a session *The Modern Bar under the Microscope* urging us to explore ways to build work for the Bar including reasserting our expertise in advice work in complex matters; strengthening direct relationships with corporate and government clients; being receptive to feedback and opportunities for coaching; and following economic trends to promote Victoria as a jurisdiction of choice for issuing civil litigation.

One particular recommendation concerned building upon our reputation for strong adherence to the rule of law and a high quality profession to expand our contribution to international arbitration work. I am pleased to say that we are in the advanced stages of planning for the establishment of an Arbitration and Mediation Centre in Melbourne, a centre that will provide opportunities to attract lucrative international arbitration work and promote our members skills in this field. With recent promising developments in the Australian jurisprudence on this topic[2] we should be well placed to promote Australia as a source and destination for this important work.

Civil and commercial work in the State remains strong, with litigation bouncing back from a temporary slump in issuing after the GFC and a strong capacity in both the State and Federal Court commercial lists. In order to build upon the opportunities presented by economic growth, the Bar needs to develop a long term vision for the legal market and support the continued investment in commercial legal services that are likely to bring legal work to the Bar.

And with the launch of the Bar's own Reconciliation Action Plan we have recommitted ourselves to supporting the participation of Aboriginal and Torres Strait Islander lawyers at our Bar and welcome the bipartisan move to give effect to Indigenous constitutional recognition.

1 R v Chaouk [2013] VSC 48 (15 February 2013) Lasry J.; M K v Victoria Legal Aid [2013] VSC 49 (18 February 2013) T Forrest J.

2 TLC Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5

PHOTOS COURTESY OF PAUL WEST

The Challenge of Improving Access to Justice

The Hon Mark Dreyfus QC MP, Attorney-General

In February this year I had the honour of becoming Attorney-General of Australia. In the months since taking on that role I have greatly enjoyed re-engaging with the challenges and opportunities of law reform and legal policy development, a number of which I had first-hand experience of as a solicitor and then as a member of the Victorian Bar.

The Attorney-General's portfolio is very broad, but one of the key policy challenges that I have been engaging with, and that I recently discussed at a conference in Melbourne, is the challenge of improving access to justice.

'Access to justice' is a concept that is broader than simply the ability of individuals to enforce their legal rights in our courts. Access to justice is a concept that also relates to how the institutions of State, of which the formal justice system is only one part, operate to ensure that all Australians live under the protection that our laws are meant to provide. It is my view that while people must always have the opportunity to fight for their rights in court, justice in a society under the rule of law should not be something individuals must constantly be fighting for. Rather, justice should be the norm, integral to our way of life.

Under this expansive definition, 'access to justice' is also about ensuring that all Australians – and in some cases the institutions that constitute our civil society, such as non-government organisations engaged in public life – have the opportunity to participate in society with a high quality of social, civic and economic engagement.

This means that while the Government has been improving access to justice by increasing funding to the courts and to providers of legal services such as legal aid, community legal centres and Aboriginal and Torres Strait Islander Legal Services, more than just funding increases are required. In particular, improving access to justice requires an innovative, systemic approach that emphasises fairness and equity, and that facilitates the resolution of disputes that do arise in a practical and constructive manner, and where possible, without recourse to litigation.

I strongly believe that providing access to justice in this broadest sense, to all members of our society, is essential to strengthening Australia as an egalitarian, participatory democracy under the rule of law. To some extent this premise is captured in the deceptively simple vernacular, so often paid lip service in this country, that 'everyone deserves a fair go'.

Of course, this is an ideal. But ideals are important in setting policy objectives, and over the last five years the Australian Government has been working to strengthen access to justice through a range of important actions and initiatives.

For example, while the separation of powers established in the Australian Constitution clearly separates the executive, administrative and judicial arms of government, there can be no doubt that the executive of the Australian Government has a critical role to play in setting standards of justice within our community.

The governmental policies that shattered a generation of Aboriginal families, whatever the intentions of those who implemented them, inflicted a tragic and lasting injustice on thousands of Australians. The apology to the Stolen Generation, delivered by Prime Minister Kevin Rudd in February 2008, shortly after Labor came to office, was a profoundly healing act of justice that was far too long in coming. The delivery of the apology was a poignant event for me too, not just because of its historic significance, but because one of the members of the stolen generation, Lorna Cubillo (who I, together with Jack Rush QC and Melinda Richards, had represented in a case bearing her name), was present on the floor of the House of Representatives to hear the apology offered by the Prime Minister.

And on 21 March of this year, Prime Minister Julia Gillard delivered another powerful act of justice for those affected by forced adoption, apologising on behalf of our nation to those who were forced to give up their children,

> "... improving access to justice requires an innovative, systemic approach that emphasises fairness and equity, and that facilitates the resolution of disputes that do arise in a practical and constructive manner, and where possible, without recourse to litigation."

and to the children themselves. While we cannot change what has happened in the past, or take away the pain of years, decades and in some tragic cases, lifetimes of parents and children forcibly separated from each other, in making this apology we have taken a significant step toward justice for those who have been wronged.

Another vitally important action that the Government has initiated to bring justice to so many in our community who have been denied justice until now is the establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse. This Royal Commission will hear from hundreds of witnesses who have suffered terrible injustices as victims of child sexual abuse. There is justice for the victims of these shocking crimes in at last being given the opportunity to be heard, to be believed, to be acknowledged. But the Royal Commission will go far beyond just listening: It will investigate where systems have failed to protect children, and make recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions in the future. In this way, the Royal Commission will help to build a more just society. A society in which our children, the most vulnerable members of our society, are far less vulnerable to the appalling injustice of abuse.

As Attorney-General I will continue to work to improve access to justice in Australia through a range of measures that aim to make justice an integral part of our society and culture.

NEWS AND VIEWS

New Jury Directions

Chief Judge Rozenes, County Court of Victoria

The *Jury Directions Act* 2013 (Vic) commences on 1 July 2013. This Act will fundamentally change the way that counsel and trial judges approach jury directions in criminal trials.

In particular, Part 3 of the Act creates a new process for determining what directions should be given in a trial, based on the request of counsel.

Part 3 will require significant cultural change from both trial judges and counsel. Part 3 requires counsel and the trial judge to discuss certain issues after the close of evidence, and before closing addresses. Such discussions are already occurring in some cases, however, the Act will formalise this process and require these discussions in each jury trial.

Instead of waiting for the trial judge to give directions to the jury and then advising the judge of any exceptions, counsel will need to think about what directions should or should not be given much earlier.

Defence counsel will need to inform the trial judge whether elements of the offence charged and any defences that are open on the facts, are, or are not, in issue. Once the issues have been defined, both defence counsel and the prosecution must request any directions they want the trial judge to give on those matters in issue, or evidence that relates to those matters. In reality, this process is likely to take the form of a discussion with the trial judge.

The Act recognises that counsel are well placed to determine what directions are in the interests of their client, and that it is one of the duties of counsel to assist the trial judge in determining what matters are in issue in the trial.

Just because a direction is available, does not mean that it should be given. Some directions may in fact backfire, and draw attention to evidence that may not be advantageous to the client. Other directions may not materially assist the jury, for example, if they concern evidence that is insignificant.

The Act also recognises that it is, ultimately, the role of the trial judge to determine what matters are in issue and what directions are required. Counsel should therefore come prepared to answer questions from the trial judge about why they want, or do not want, particular directions.

The trial judge must give directions on requested matters unless there are 'good reasons' not to do so. 'Good reasons' include where the direction would concern a matter that has not been raised or relied on by the accused, or where the direction would involve the jury considering the matter in a way that is different from the way the accused presented his or her case. Counsel will need to bear this in mind when preparing and conducting the defence case.

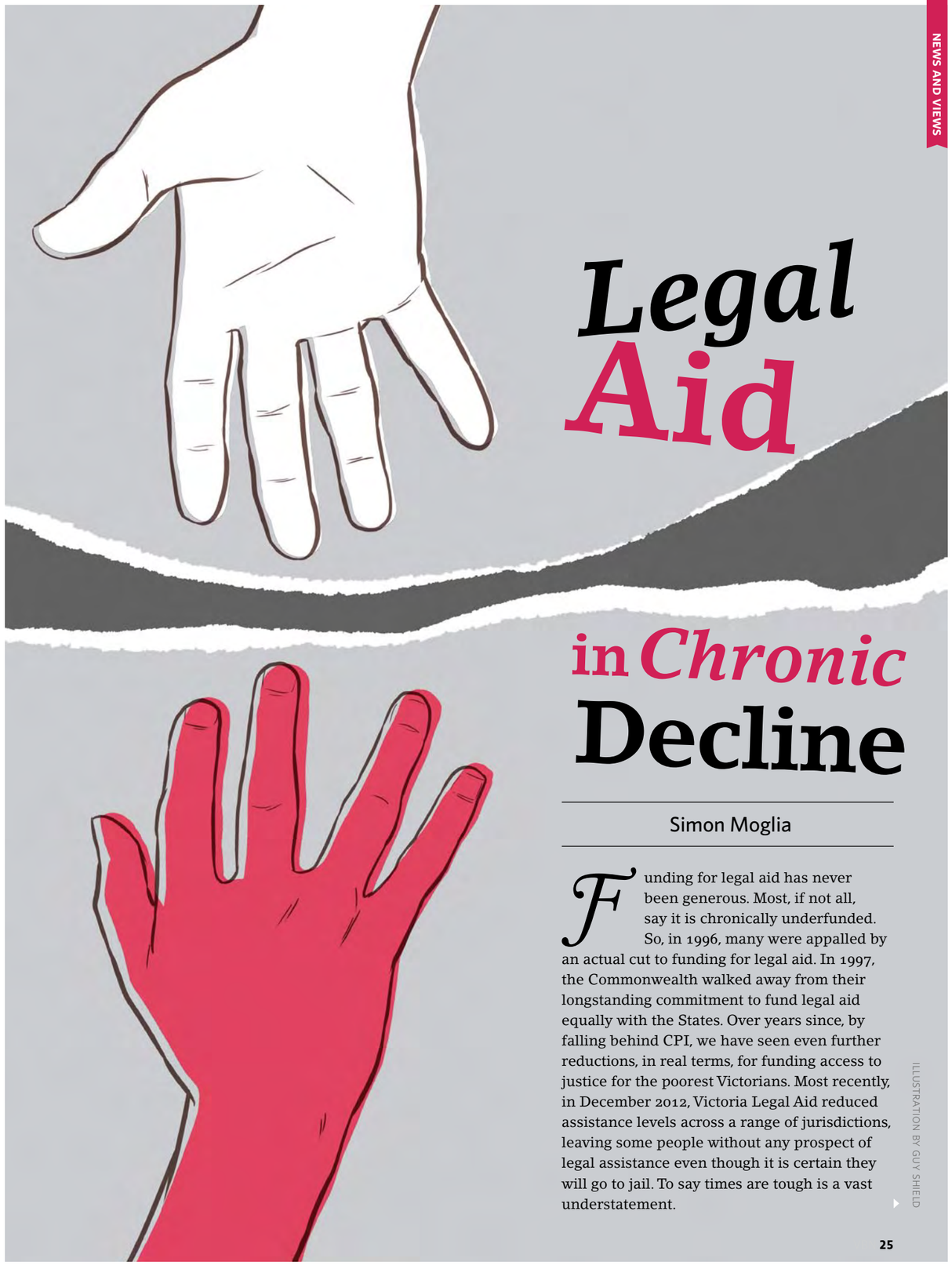
Trial judges will not be required to give a direction that counsel has not requested, or has requested not be given, unless a direction is necessary to avoid a substantial miscarriage of justice. This residual obligation will only be exercised in exceptional cases. Counsel should not rely on trial judges giving directions that counsel have not requested. If the trial judge is considering giving such a direction, the trial judge must first raise this with counsel. Counsel should be ready to answer questions about these issues.

These provisions are designed to ensure that juries are only given directions that are relevant to the issues in dispute. This will help jurors by minimising unnecessary or confusing directions, and should assist to streamline directions. If a matter is appealed, this process will also assist the appeal court to determine whether directions were required in a case, and their adequacy.

It also provides counsel with the opportunity to shape each case and to highlight its strengths. But most of all – be prepared.

The Act was developed in consultation with the courts and the legal profession. These are important reforms which have the full support of the courts. I look forward to the successful implementation of this Act to achieve simpler, clearer and more effective directions.

For further information see www.legislation.vic.gov.au under Victoria Law Today (after 1 July 2013) and Jury Directions: A New Approach, which is available at www.justice.vic.gov.au under 'Publications'.



Legal Aid in *Chronic* Decline

Simon Moglia

Funding for legal aid has never been generous. Most, if not all, say it is chronically underfunded. So, in 1996, many were appalled by an actual cut to funding for legal aid. In 1997, the Commonwealth walked away from their longstanding commitment to fund legal aid equally with the States. Over years since, by falling behind CPI, we have seen even further reductions, in real terms, for funding access to justice for the poorest Victorians. Most recently, in December 2012, Victoria Legal Aid reduced assistance levels across a range of jurisdictions, leaving some people without any prospect of legal assistance even though it is certain they will go to jail. To say times are tough is a vast understatement.

ILLUSTRATION BY GUY SHIELD

> “Most legal problems were experienced by the most vulnerable and disadvantaged people in the community, including the disabled, unemployed, single parents, indigenous Australians and those on welfare.”

Why does it matter?

In accordance with joint commitments to social inclusion, the Commonwealth and States traditionally shared the burden of legal aid funding equally. It was seen as a fundamentally federal responsibility to ensure a free, democratic and just society.

Economically, it is not hard to see the preventative benefits of providing people access to justice through advice and representation. It saves people from the rigors (if not trauma) of litigation or at least minimises the various costs of lengthy proceedings between unrepresented litigants – particularly by having competent practitioners conducting the case. In a 2012 report by Judith Stubbs and Associates, it was shown that for every dollar spent on community legal centres, around $18 worth of benefit was returned to the community.

In terms of doing justice individually indigenous people, for example, are over 14 times more likely to be incarcerated than other members of the community. This alone justifies considerable support for Aboriginal and Torres Strait Islander Legal Services – a key member of the ‘legal assistance sector.’ ATSILS have calculated their real term funding loss since 1996 at around 40%. This does not take into account unmet and increased need due to population increases and demographic changes, or changes to criminal law that particularly affects indigenous people.

In 2012, the Law and Justice Foundation of NSW reported on the Legal Australia-Wide Survey into unmet legal need. It found that each year an estimated 8.5 million people nationally (aged over 15 years) experience a legal problem. Of those, 31% of problems were handled without legal advice and 18% of those who are faced with legal problems did nothing. 55% of the problems had a substantial impact on everyday life, leading to income loss or financial strain, stress-related illness, physical ill health and relationship breakdowns. This has flow-on effects for families, support services and workplace productivity. Most legal problems were experienced by the most vulnerable and disadvantaged people in the community, including the disabled, unemployed, single parents, indigenous Australians and those on welfare.

The problems often occurred in clusters, usually in three different combinations: (1) Consumer, crime, government and housing; (2) Credit/debt, family and money; and (3) Employment, health, personal injury and human rights. Regardless of how problems arise, the findings demonstrate that people are often confronted with multiple legal problems at the same time. Significantly, the majority of legal problems were concentrated among a small minority – 9% of respondents accounted for 65% of the problems. A large number of people simply ignore legal problems due to factors such as poor legal knowledge, other personal constraints or possible systemic constraints. In some jurisdictions people can sit below the Henderson Poverty Line (named after the 1973 inquiry into poverty in Australia and indexed quarterly since), but still not qualify for legal aid.

The 2012 Australian Council on Social Services Australian Community Sector Survey found that legal service providers were the second highest service type to report difficulties in meeting demand, after housing services. 73% of legal service providers could not meet demand for services. Most reported underfunding, restricted services to clients, and increasing waiting lists. 82% of respondents reported rationing of services. In 11,693 of instances (or 14%), people were turned away from the service.

Further, it must be remembered that many claims by government of increases to legal aid, refer in large part to funding of non-litigation services – community education, publications and the like. The support for ‘front-line’ client services for people in real disputes has quietly fallen further behind the levels of support suggested by public announcements.

These surveys and the experience of all who work in the sector provide a stark contrast between the current reality and the fair and just society to which we undoubtedly aspire. For many, they are farther from it than we might have imagined.

What does it mean for the Victorian Bar?

In late 2012, Victoria Legal Aid, who administers the bulk of funding in the sector for Victorians, announced significant changes to its grants guidelines. Notably, they produced cuts to assistance in driving matters, summary crime, instructing in criminal trials, representation for parents in child protections applications, among others. Many of these cuts directly affect the number of briefed matters coming to the Bar.

In summary crime, no fees will be paid for counsel in a driving matter – even if the likely result is jail – unless the accused is already registered with disability services or an area mental health service. The unprecedentedly high threshold in the new guidelines sets a new low in access to justice terms. In cases other than driving matters, a term of imprisonment must be “likely” before assistance will be provided for counsel to appear. Notwithstanding recent reforms to community corrections and the renewed emphasis on using this sort of order to meet the goals of sentencing, the legal assistance necessary to obtain such an outcome is being undermined.

In a 2008 PricewaterhouseCoopers report for the Victorian Bar, criminal barristers were shown to be working for fees considerably lower than other similarly qualified professionals. Over 3 years, the number of junior barristers for whom criminal work accounted for 90% of their practice had declined by 59%. Whilst statistics since then show an increase in numbers in the lowest income brackets, there is a corresponding decrease in higher brackets – suggesting ‘juniorisation’ of the criminal bar.

Such trends reveal that troubling structural changes are afoot. The loss of work at the junior criminal Bar directly affects the capacity of the Bar to provide sufficiently experienced and skilled advocates, and later, quality judicial officers, in higher courts, particularly in trials. Any short-term savings are likely to have severely deleterious effects on access to justice in the medium to long term. If in fact, the junior bar is not being depleted, but those in higher brackets are not being retained, the same troubling result occurs.

In response to cuts to instructors in criminal trials, the early months of 2013 saw widespread applications for the stay of trials until appropriate resources were made available to the accused. Two rulings in particular, by Justices Lasry and T Forrest made the links clear between adequate funding for trials and the ability of the court to deliver justice (see *R v Chaouk* [2013] VSC 48 and *MK v*

> “The Court of Appeal has considered the *Chaouk* stay and refused to intervene, commenting that in light of the critical importance of an instructing solicitor in the trial of a serious indictable offence it was hard to see how the trial judge could have come to any other conclusion.”

VLA [2013] VSC 49). The Court of Appeal has considered the *Chaouk* stay and refused to intervene, commenting that in light of the critical importance of an instructing solicitor in the trial of a serious indictable offence it was hard to see how the trial judge could have come to any other conclusion (*R v Chaouk* [2013] VSCA 99 at [31]).

These cases by no means account for all attempts being made by our members to bring to light injustices produced by inadequate legal aid resources. A number of trials in the County Court have also been stayed temporarily or adjourned. The courts are also counting the cost of considering these applications – on average taking two days of valuable trial court time

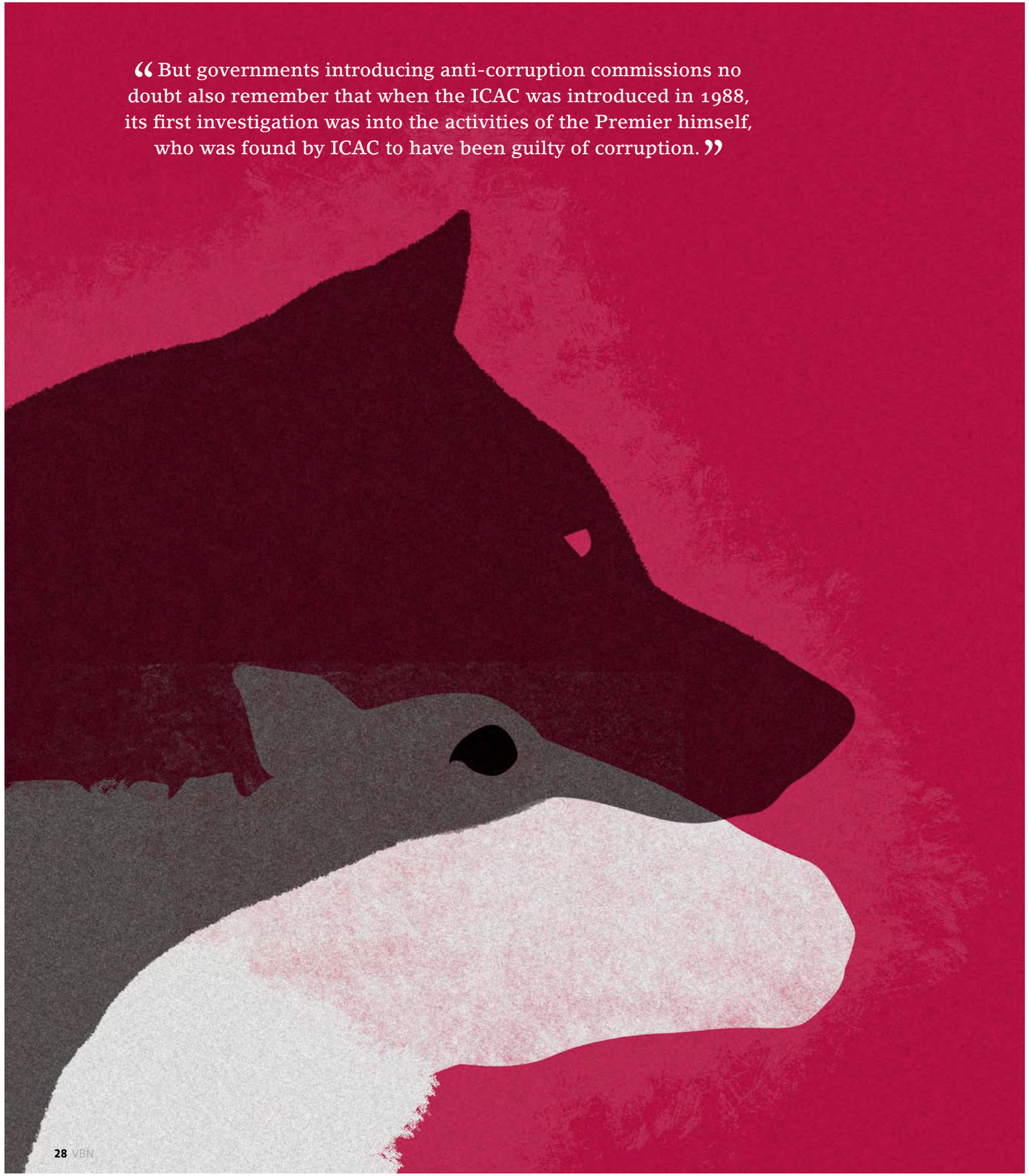
In 2012, the Commonwealth Attorney-General announced a review of the National Partnership Agreement on Legal Assistance Services – the five-yearly agreement between the Commonwealth and the States and Territories, outlining the roles and responsibilities of respective governments and their agencies in delivering these services. The agreement provides Commonwealth funding to legal aid and drives national reform across the sector. Through the LCA, the Victorian Bar raised issues about the chronic underfunding of the sector, the demands on legal assistance providers, issues with data collection and the complexities faced by providers. At the time of writing, the outcomes of the review were yet to be announced. But there was significant skepticism about the political will required to implement real change.

Members do not need to be reminded that results in litigation have a much wider effect than those for the immediate parties. Rulings and judgments guide the advice given in other cases and indeed the behavior of parties before any disputes might otherwise arise. So, providing proper resources for legal aid funding in litigation is a major contributor to the management and avoidance of disputes in the long run. The chronic refusal to fund the work of the Bar and other lawyers in this respect undermines the fairness and manageability of community relations generally.

POSTSCRIPT

On the eve of the May state budget, VLA partially relaxed its criminal trial instructor guidelines in response to the Court of Appeal’s decision in Chaouk. The change only applies to those cases where the presence of an instructor is necessary. It is temporary – to be reviewed subject to consultation by September. It also comes at a cost – the money will come from other areas of current legal assistance. No other guidelines – summary crime, driving offences, Children’s Court criminal and family division – have been relaxed. The increase of $3.4m in VLA funding, announced in the state budget, will barely cover the projected $3.1m debt for this financial year. Rather, the budget papers confirm that compared to 2012, there will be a reduction of 4000 grants of aid (about 10%) and 1000 duty lawyer services. The crisis continues.—SM

NEWS AND VIEWS



“But governments introducing anti-corruption commissions no doubt also remember that when the ICAC was introduced in 1988, its first investigation was into the activities of the Premier himself, who was found by ICAC to have been guilty of corruption.”

ILLUSTRATION BY GUY SHIELD

A Sheep in Wolf's Clothing?

A look at the Independent Broad-based Anti-corruption Commission (and other commissions of inquiry)

THE HON STEPHEN CHARLES QC

I came to the Bar in October 1961. It was my very good fortune in September 1962 to be briefed as second junior to John Starke QC in the King's Bridge Royal Commission, which lasted over 10 months. There were 20 or so barristers at the Bar table, including the cream of the Inner Bar, silks such as Oliver Gillard, Noel Burbank, John Young, Tony Murray, Xavier Connor and Peter Murphy, as well as Starke. I was there only to index the transcript. The Commission was an extraordinary learning experience for an embryo barrister, and one for which I have always been very grateful.

Nearly every Royal Commission I have heard of since has been similarly flooded with lawyers, briefed for long periods, for example the regular inquiries into bushfires and the building industry, the West Gate Bridge Inquiry and the Wheat Board Inquiry, and nowadays inquiries (parliamentary or otherwise) into various forms of sexual abuse. All those potentially affected by such inquiries will want legal assistance and will usually be granted the right to be represented.

To this list one must now add the host of corruption commissions and other permanent commissions of inquiry which have been set up by both Federal and State governments in large numbers. Most states and the Commonwealth now have standing crime commissions and a variety of other forms of inquiry which have powers similar to those exercised by Royal Commissions and which when summoning a person to give evidence are either required to allow that person legal representation or will as a matter of practice grant such a right upon request. The extent of that right and the manner of its exercise may vary dramatically from case to case.

The Bar therefore has every reason to welcome the establishment in Victoria of the Independent Broad-based Anti-corruption Commission (IBAC) (with two of our leading silks as Commissioner and Inspector); and any barrister, no matter what area of practice the person intends to pursue, would be well advised to become fully familiar with the myriad rules and practices that operate in hearings before such bodies. There are two books by Victorians on the subject; L.A. Hallett, *Royal Commissions and Boards of Inquiry*, now a little dated, was published in 1982; and Dr Stephen Donaghue SC has written his excellent *Royal Commissions and Permanent Commissions of Inquiry* (2001), which is required reading for the many difficult areas to be found in practice before such bodies. Melbourne University Law School's graduate course also includes a subject, The Law of Royal Commissions and Other Public Inquiries.

The inquiry which has been principally in the public view recently has been that of the NSW Independent Commission Against Corruption (ICAC), known as Operation Jasper. The ICAC was introduced in 1988 by the Greiner Liberal Government. It is a body with great powers and it has been very successful in lifting ethical standards in NSW. In its inquiries ICAC is careful to accord natural justice to those investigated, and inquiries made recently both to the Law Society and the Bar in NSW produced no complaint of ICAC having acted

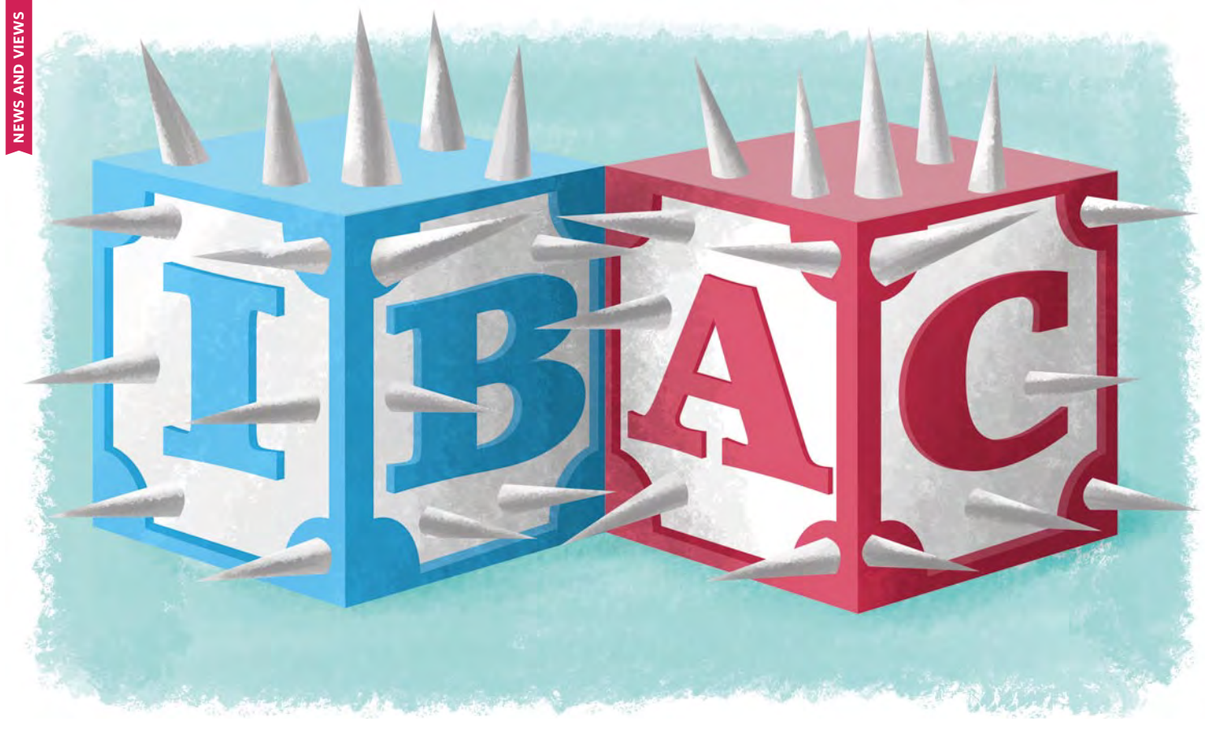


ILLUSTRATION BY GUY SHIELD

unfairly or having overstepped acceptable limits in its investigations or public hearings.

ICAC's powers of investigation are almost unlimited. The definition of "corrupt conduct" in the *ICAC Act 1988* (NSW) (ss 7-9) includes (inter alia) any activity that could adversely affect directly or indirectly the exercise of official functions by a public official and also includes a wide variety of particular offences, subject only to certain limitations in s 9. The ICAC's jurisdiction and principal functions are set out in s 13. The ICAC is entitled to investigate

> *any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:*
>
> *(i) corrupt conduct, or*
>
> *(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
>
> *(iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur.*

This section, together with the definition of corrupt conduct, plainly entitles the ICAC to investigate an allegation amounting to misconduct in public office by a public official, which would include a Minister. Section 12A also provides that:

> *In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systematic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.*

Since the definition of corruption is all-embracing and the ICAC's entitlement to investigate upon suspicion of corruption is for practical purposes unlimited, it follows that it is very difficult for an investigated party to obstruct or delay an investigation by launching court proceedings for an injunction on the ground that ICAC is exceeding its jurisdiction. But governments introducing anti-corruption commissions no doubt also remember that when the ICAC was introduced in 1988, its first investigation was into the activities of the Premier himself, who was found by ICAC to have been guilty of corruption. Mr Greiner immediately resigned. The verdict was later overturned by the NSW Court of Appeal in *Greiner v ICAC* (1992) 28 NSWLR 125 where the facts are set out in detail, but by then Mr Greiner had departed from the political scene. The Court of Appeal's majority decision has itself been criticised by administrative lawyers (see for example the articles by Professor Margaret Allars cited in 24 *Federal Law Review* 235, at 249).

Details of the Operation Jasper investigation are readily obtainable from the ICAC website. The scope of the public inquiry, which commenced on 12 November 2012, is set out in a document, in effect the terms of reference of the inquiry, last amended on that date. The opening address of counsel assisting the ICAC (Geoffrey Watson SC) on 12 November is available in full on the website, as is much of the evidence

that has been called. The inquiry was described in opening as the most complex and important investigation undertaken by ICAC, inquiring into various activities of the NSW Minister for Primary Industries and Minister for Mineral Resources, the Hon Ian Macdonald MLC, which had the effect of opening a mining area in the Bylong valley for coal exploration, including whether his decision to do so was influenced by the Hon Edward Obeid MLC or members of his family.

Counsel's opening makes it perfectly clear that at the outset of the investigation the ICAC merely had suspicions that some unidentified corruption may have occurred. It was alleged that the Obeid family had deliberately organised their business affairs so as to disguise their involvement, including through multiple layers of discretionary trusts and $2 shelf companies, the names of which were repeatedly changed. ICAC had investigated these matters for many months, during which more than 100 witnesses had been interviewed, search warrants had been executed, computer hard drives seized and downloaded, and tens of thousands of documents seized and assessed for relevance. Counsel conceded that on one view the Minister's decisions might be explained solely by bad governing but continued that the public inquiry would investigate whether the decisions might also be explained by corruption. He continued that "If it is corruption then it is corruption on a scale probably unexceeded since the days of the rum corps." The allegation was that the decisions taken or influenced by Minister Macdonald may have enabled Mr Obeid and his family to acquire profits in the order of $100 million.

It must be stressed that these matters stand simply as allegations until findings are made by the ICAC Commissioner, the Hon David Ipp AO QC. But the suspicions which first caused ICAC to investigate surely provide the paradigm example of a situation calling for investigation by an anti-corruption commission.

Before the 2010 Victorian election, the then Opposition promised that if elected it would establish a broad-based anti-corruption commission modelled closely on the NSW ICAC, which was intended to be a 'one-stop shop', "fighting corruption across the entire public sector" and working "cooperatively with the Auditor-General and the Ombudsman to provide a seamless coverage of the range of integrity issues". In implementing that electoral promise the Victorian government has now enacted six Acts of Parliament to introduce the IBAC. The IBAC legislation has already been vigorously criticised by persons such as the Hon Tim Smith QC as a 'toothless tiger', in his Working Paper No. 1 (August 2012) of Democratic Audit of Australia. Similarly, the Victorian Ombudsman, George Brouwer, both in his letter to the Premier dated 16 November 2012 and in his fuller *Report to Parliament* of December 2012, Mr Brouwer complained that the scheme is "very poorly designed", and:

> *The bills contain a number of concerning elements which, if enacted, will constrain and compromise the functions of an independent Ombudsman for Victoria and will significantly undermine the effectiveness of the integrity scheme which your government intends to implement. Indeed, I consider that enacting the bills will be a significant backward step for public sector accountability.*

In this article I have space to deal only with the circumstances in which the IBAC can commence an investigation. At first glance the IBAC might indeed be thought modelled on the ICAC – it contains powers in the investigation of corruption which have a number of similarities to those of ICAC.

> "Misconduct in public office is an indictable offence at common law, and is therefore plainly not covered by the definition of "relevant offence." This is a surprising omission; misconduct in public office, one would have thought, is at the heart of conduct of a Minister or public official which would be likely to attract the attention of an anti-corruption body."

But closer examination shows the differences and the problems faced by the IBAC Commissioner when deciding whether or not to embark on a particular investigation.

In the *IBAC Act2011* (Vic), "corrupt conduct" is stated by s 4(1) to mean conduct:

> *(a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or*
>
> *(b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body...*

Sub-sections (c), (d) and (e) contain like provisions dealing with breaching public trust, the misuse of information or material, and conspiracy. Section 4(1) concludes with the following words which apply to each of the preceding sub-clauses (a) to (e):

being conduct that would, if the facts were found beyond reasonable doubt at a trial, constitute a relevant offence."

In the definition section (s 3), "relevant offence" is said to mean –

(a) "an indictable offence against an Act; or
(b) any of the following common law offences committed in Victoria –
(i) attempt to pervert the course of justice;
(ii) bribery of a public official;
(iii) perverting the course of justice.

The carrying out of investigations is then dealt with in s 60 in Division 4 of the *IBAC Act 2011* (Vic) and provides:

(1) Subject to sub-section (2), the IBAC may conduct an investigation in accordance with its corrupt conduct investigative functions –

(a) on a complaint made to it under s.51; or
(b) on a notification to it under s.57(1); or
(c) on its own motion.

(2) The IBAC must not conduct an investigation under sub-section 1 unless it is reasonably satisfied that the conduct is serious corrupt conduct. (emphasis added.)

The definition of "corrupt conduct", in marked contradistinction with the wording used in the *ICAC Act,* is a very narrow one. Misconduct in public office is an indictable offence at common law, and is therefore plainly not covered by the definition of "relevant offence." This is a surprising omission; misconduct in public office, one would have thought, is at the heart of conduct of a Minister or public official which would be likely to attract the attention of an anti-corruption body.

The limit of the ability of IBAC to conduct an investigation in accordance with its corrupt conduct investigative functions is then found in s 60. Since IBAC must not conduct an investigation unless reasonably satisfied that the conduct is serious corrupt conduct, one might have expected an attempt at a definition of the word "serious". Although it might well be thought that any conduct that could be described as corrupt is serious, the problem remains and it will no doubt have to be dealt with by a court.

> "In addition to the very constrained definition of corrupt conduct, these sections give those investigated the ability, as soon as it becomes known that an investigation is taking place, to seek an injunction from the Supreme Court to halt the investigation."

These sections are curiously worded and their full purport will not be known until they are construed by a court. In addition to the very constrained definition of corrupt conduct, these sections give those investigated the ability, as soon as it becomes known that an investigation is taking place, to seek an injunction from the Supreme Court to halt the investigation. The definitions in ss 3 and 4 may well require the IBAC, if challenged, to articulate those facts which if proved beyond reasonable doubt would constitute a relevant offence, one of the limited number of offences as defined in s 3. Unless the IBAC can articulate facts it wishes to investigate which would constitute such an offence, how can it be said to be investigating corrupt conduct, still less serious corrupt conduct?

These barriers to investigation will seriously reduce the ability of IBAC to inquire into suspected corruption. Long experience has shown (for example in the multiple challenges to the investigations of Frank Costigan QC in the Painters and Dockers Commission in the 1980s) that well-funded suspects will seize any opportunity to challenge and delay an inquiry of this kind. The resulting delay permits vital evidence to be hidden or destroyed. At the outset of an investigation, the IBAC (like the ICAC in Operation Jasper) will often have no more than a suspicion of unidentifiable corruption, the proper statement of which will not be available until its investigators have uncovered it. The IBAC Acts show that the Victorian government was not willing to trust the IBAC Commissioner to exercise the discretion to commence investigations in a realistic and responsible manner, unlike the NSW ICAC Commissioner's broad discretion under s 12A of the ICAC Act.

Unless the courts are able to construe the IBAC Act in a manner different from the one suggested above, the really galling consequence is that, if circumstances such as those investigated by the NSW ICAC in Operation Jasper occurred in Victoria, the IBAC would probably not be able to embark on an investigation of them, and could be halted by injunction if it attempted to commence preliminary inquiries.

If the IBAC is indeed, as the government promised, to be modelled on the NSW ICAC, then the IBAC legislation requires dramatic re-working and amendment, first by a new definition of corrupt conduct, secondly by giving the IBAC Commissioner far greater power to commence investigation, and thirdly by placing appropriate trust in the IBAC Commissioner this government has appointed not to investigate trivial or frivolous complaints, but to direct attention, as far as practicable, to serious or systemic corruption. And this is but one of the areas of the IBAC legislation requiring amendment for an effective integrity system for public sector accountability.

The Argument in Favour of Retaining "SC"

Her Honour Judge Hampel

In 2000, senior counsel were appointed in Victoria for the first time, replacing Queens Counsel. Queens Counsel had been appointed by the Governor. By convention, Cabinet acted on the recommendation of the Chief Justice of the Supreme Court. Senior counsel are appointed by the Chief Justice, following consultation with the judiciary and the legal profession. The NSW Bar Association established the rank of senior counsel in 1993, which it bestows upon its members after exhaustive consultation with the profession and judiciary. In NSW, the office of senior counsel replaced the office of Queens Counsel, which had been made by the Governor on the recommendation of the Attorney-General and usually the President of the NSW Bar Association. The change of title and method of appointment has not diminished the high

> "The change of title and method of appointment has not diminished the high status or desirability of the role of silk in either State."

ILLUSTRATION BY GUY SHIELD

status or desirability of the role of silk in either State.

Senior counsel appointed in NSW and Victoria have maintained the rich tradition of silk. Anecdotally, it appears that the number of applications for the office of senior counsel have not diminished because the title has changed from Queens Counsel; nor has the high calibre of applicants declined. To be senior counsel is to be recognised in a way that provides considerable professional advancement due to the status it gives; silks are recognised as leaders of the profession, whether they are called Queens Counsel or Senior Counsel.

Some 13 years since senior counsel were first appointed in Victoria and 20 years since they were first appointed in NSW, there has been a generational shift. Now, many senior counsel are seen as the leaders of choice and as the best and brightest lawyers in Australia. Former Commonwealth Solicitor-General Stephen Gageler SC was appointed as a Justice of the High Court, as was the Hon Justice Bell AC, who had been appointed senior counsel in 1997. In 2010, Pamela Tate SC was appointed Solicitor-General of Victoria and Stephen McLeish SC replaced her in 2003 when she was appointed to the Court of Appeal. The current chair of our bar is Fiona McLeod SC and past chairmen include Peter Riordan SC, the Hon Justice McMillan SC, Melanie Sloss SC and Mark Moshinsky SC. The more recent appointments to the Supreme Court, Federal Court and Family Court from the Bar have all been senior counsel.

The office of silk is relevant to those who hold it and also to advocates who aspire to be appointed silk in future. A new barrister signing the roll this year may hope to be appointed senior counsel in 15 or 20 years from now. What identity and symbolism do we want this ultimate accolade to have?

Senior counsel is current, progressive and Australian. A modern restatement of the role of Queens Counsel. That title is a thing of the past in both NSW and Victoria. The Queensland Attorney-General has said reintroduction of Queens Counsel will give Queensland silks a competitive advantage in Asia. It is sad to think that in 21st Century Australia people are worried that unless we use the same titles as the British, we will not have competitive equality or advantage. Not being Queens Counsel (or even barristers) does not seem to have disadvantaged attorneys in the United States of America or the People's Republic of China in Asia.

Even the most sacred traditions sometimes need to be revisited. The Succession to the Crown Bill is under consideration in the United Kingdom. It aims to remove the gender bias in the laws of succession to the British throne. In 2009, the United Kingdom replaced the House of Lords with the Supreme Court. Imagine if we had changed the Australian High Court to the Australian House of Lords in a bid for competitive prestige? Would not such a move have been stultifying, short-sighted and culturally cringing?

There are no longer appeals to the Privy Council from Australian courts and we do not regard UK Supreme Court decisions as superior to those of the Australian High Court, simply because of their origin. If the legal profession chooses to freeze in a moment in time, it will fall behind the times. If we had clung slavishly to all traditions, women would not be admitted to Universities, people would not ride bicycles and operations would occur without anaesthesia. The office of Senior Counsel pays tribute to the tradition of Her Majesty's Counsel whilst being an Australian mark of distinction.

I chose to change from Queens Counsel to senior counsel when the modern rank was introduced. I am honoured to have this rank. I believe that ignorance or confusion about the meaning of senior counsel can be dealt with by explanation rather than reversion to old titles. Let us continue to build the global reputation of Australian senior counsel rather than aim for them to blend in better with British silk.

> "To be senior counsel is to be recognised in a way that provides considerable professional advancement due to the status it gives; silks are recognised as leaders of the profession, whether they are called Queens Counsel or Senior Counsel."

ILLUSTRATION BY GUY SHIELD

ON WITH HER HEAD:

"Queen's Counsel" Must Be Reinstated

Michael D Wyles SC

The decision of the Queensland Attorney-General Jarrod Bleijie to reinstate the title Queen's Counsel in that State is far sighted and a boon for the Queensland Bar. Mr Bleijie displays a keen understanding of the utility of the Queen's Counsel title, and the overwhelming value which that title carries in the market for legal services, both here and overseas:

> *QC is also more widely known and understood by the public as a mark of professional distinction at the Bar... it is important that Queensland silks are competitive internationally... Asian countries employ QCs from as far as the United Kingdom ...*[1]

Reinstatement of the title has little to do with ideology and everything to do with facilitating the Queensland Bar obtaining a greater share of the ever tightening market for legal services, particularly litigation services. The Australian Bar should have been first to Asia. We were not. We now have to follow the English Bar into Asia where we will be competing with the title "QC" which has a 400-year pedigree.

Even within Australia, 'senior counsel' are at a disadvantage. The proposition can be tested at any suburban shopping centre, football match or golf club: "What do you do mate?" "I'm an SC." "What's that?" As opposed to: "What do you do mate?" "Oh, I'm a QC." "Really? You must be pretty smart!"

The origins of the office of Queen's Counsel and more latterly senior counsel reveal its essential role in the development of the common law of Australia, and the pursuit of the rule of law as the foundation-stone of our Australian democracy. Within the profession we fully appreciate that those whom the Chief Justice appoints senior counsel in and for the State of Victoria[2] possess the advocacy skills, legal experience, learning and personal qualities worthy of the mark of professional distinction. Indeed the recognition within the profession of the possession of these qualities is confirmed by the fact that the Chief Justice makes the appointment. This is essential to the efficacy of the appointment.

But the rank of 'senior counsel' is not an internationally recognised quality mark. It is only necessary to turn to the letterheads of the majority of middle to upper tier law firms in Australia to see that proposition made good. There you will find a multitude of solicitors, possessing few if any advocacy skills, described as SC, or 'Special Counsel'. Indeed the title 'senior counsel' fails almost wholly to convey to the public that those so appointed possess the experience, learning and personal qualities worthy of the mark "QC".

In stark contrast:

> *... the rank of Q.C. is a good indication, even if not a guarantee, to a client with an important and difficult case that an advocate ... can be trusted to handle such a case... The rank of Q.C. is an internationally recognised quality mark which plays an important role in ensuring the competitiveness of English advocates in litigation outside the UK and in international arbitrations.*

So wrote a committee of the English Bar chaired by Sir Sidney Kentridge.

Reinstatement of the title is a matter of serving the community, which is entitled to feel secure in the stability which the institutions delivering and reinforcing the rule of law bring. This is particularly so in times where too many politicians have come to eschew statesmanship in favour of the immediate gratification of popularity. The office of QC (and from time to time KC) was an institution integral to the system of adversarial justice which, has served our Australian community well. The emasculation of the title Queen's Counsel to the form 'senior counsel' has never been explained and is not understood by the Australian community. The community knows the title Queen's Counsel and is comfortable with it. The community is entitled to have the title restored as part of the fabric of a society in which the rule of law prevails.

Whilst the English Bar continues to enjoy international recognition of that professional distinction which appointment as Queen's Counsel brings with it, members

of the Victorian Bar were denied the issue of letters patent by the then Victorian Attorney-General in 2000. Acting against the wishes of the profession the Attorney-General unilaterally chose to replace the title 'Queen's Counsel' with 'senior counsel' because he thought it was appropriate to do so. That action was not desired by the public, and was neither logical nor rational. As a reflection of the then Attorney's personal views, it can be respected but not concurred in.

At its best the shorthand explanation of the title senior counsel is that it "used to be QC, now it is SC". This invites the immediate response – "why, are they not as good?" The mark 'SC', in the mind of the public we serve, does not bring with it the association of excellence in advocacy, or expectation of erudition in law which the mark 'QC' immediately stimulates. This is not to say that individual performances cannot overcome the immediate and understandable perception that the SC is in every sense, not a QC. But even if this perception is overcome, it will only be in individual cases. At best, imbuing the mark 'SC'with the immediate associations of excellence and professional distinction which the rank 'QC' carries in the community, is many generations away. The wheel is having to be recreated, and for no logical or rational reason. In the interim the services provided by 'senior counsel' have become commoditised and we have been denied the opportunity to compete to bring work to the Victorian Courts, together with the associated benefits which flow to the wider community of Victoria.

As the ranks of Queen's Counsel swell in Queensland, the disadvantage suffered by 'senior counsel' in and for the State of Victoria will be further compounded. That disadvantage, having no foundation in law, nor in ideology, should be removed.

If it is the case that senior counsel are not presently permitted by O 14.08[3] to use the form 'QC', the Attorney-General could put in place a procedure whereby those appointed senior counsel by the Chief Justice, be eligible to be appointed Queen's Counsel by the Governor-in-Council.

Such reinstatement, is sought by some two thirds of those presently holding the office of senior counsel in and for the State of Victoria to whom I have written on this issue. It is a reinstatement of form which confirms the essential role of the Chief Justice as the final arbiter on who has earned the professional distinction and can only enhance the standing of the Victorian Bar, and in turn the standing of the Supreme Court.

1 Press release 12 December 2012.

2 *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic) O 14.10.

3 *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic).

A message from the Chair

The issue of QC/SC has generated some interest in recent times with strong views being expressed publicly concerning change to the system in Victoria. The articles in these pages reflect some of those views.

It is timely to remember that the designation of senior counsel, either QC or SC, is intended to serve the public interest, providing public identification of barristers whose standing and excellence in advocacy justify an expectation of the highest level of service by those engaging them, the judiciary and the public.

Until 2003, the appointment of 'silk' was made by the Victorian Governor on advice from the Chief Justice to the Attorney-General, requiring the issuing of letters patent for the designation. Until 2000, the appointees were referred to as Queens Counsel (QC) until a change by the then Attorney General to replace QC with Senior Counsel (SC). In 2004, a new process was implemented with the Chief Justice as appointor.

In April 2011, the Chief Justice signalled that the significant workload associated with the appointment process was unsustainable. The Victorian Bar canvassed models for appointment nationally and internationally and a discussion paper outlining a proposed model was released in December 2011, followed by a significant and extensive consultation process which involved members individually and through Bar committee structures, the broader profession, the courts and other significant stakeholders.

The model outlined in the December 2011 Discussion Paper was supported by the Chief Justice and the Council of Judges of the Supreme Court of Victoria, and was piloted in 2012.

A clear majority of members and successive Bar Councils have strongly favoured retaining an appointment process that centrally involves the Chief Justice as the appointor. We are extremely grateful for and wholly endorse the continuing involvement of the Chief Justice in this role with the continuation of the pilot process for the appointment of senior counsel implemented last year, with appropriate support from the Bar.

No change will be contemplated without consultation with the Chief Justice and the Attorney General as any change would necessarily involve revisiting the role of the Chief Justice as appointor.

My priority, and that of the Bar Council, is to assist the Chief Justice with the continuation this year of the pilot process. The process has worked well, with senior counsel in and for the State of Victoria continuing to earn the respect of the Courts and clients in this State, interstate and internationally.

A STUDY IN *Contradictions*

Le Stage International du Barreau de Paris. AMY BRENNAN

An examination of France's legal system highlights some of the many contradictions of French society. The most highly respected members of society in France are not doctors and lawyers. Rather, the best and brightest postgraduates in France go to L'ENA (*L'Ecole nationale d'administration*). L'ENA is a graduate institution, which educates the vast majority of France's senior civil service. Public servants, alongside academics, sit at the very top of the society tree.

It may be fair enough that lawyers are not that well respected – lawyer bashing is a popular sport in this country too – but surely judges are well respected at least? Not so. Since the days of Napoleon's success over the French royalty and their raft of loyal judges, judges are regarded warily. They are not appointed by the State. They too are the product of a graduate education institution. As such, they begin their career very young and they are not particularly well paid, even as the years draw on. They are certainly not revered.

Judges are not considered law-makers in France. The Government makes the laws. Judges are not even widely

> “Since the days of Napoleon’s success over the French royalty and their raft of loyal judges, judges are regarded warily... They are certainly not revered.”

considered to be the ones who interpret the law. They pronounce upon the law by handing down decisions but their decisions rarely extend beyond one page. If the law requires interpretation, the public and lawyers alike turn to the writings of law professors, such is the eminence of academics.

With all of this in mind, you might be surprised to find out that the French, nonetheless, are very proud of their legal system. In a survey conducted in 1999/2000, just under 50% of the public polled stated that they had “quite a lot” or ”a great deal” of confidence in their justice system[1].

A good demonstration of the pride that the French take in their legal system is the Stage International du Barreau de Paris. Every year, in October and November, the body equivalent to the Paris Law Society, in conjunction with the Paris equivalent of Leo Cussen (if Leo Cussen were compulsory to all lawyers wishing to practice in Melbourne), runs an eight week ‘traineeship’ for international lawyers. The only three pre-requisites for participation are being a qualified lawyer, being under 40 years of age and speaking French.

The traineeship consists of an initial four weeks of classes at L’Ecole du Formation du Barreau de Paris, followed by four weeks of work experience in a Parisian law firm (France does not have a split legal profession). In late 2012, I was fortunate to be one of the participants among 52 in total. Of the 52 participants, there were 32 women and 20 men from 35 different countries. Only seven of the participants came from English speaking countries. Although for most of the others, English was their primary second language, it was especially pleasing that the common language between us remained French throughout our time together.

This coming together of people from all around the developed, and less well developed, world provided a fascinating opportunity for exchange. Some of the participants provided incredible insights into difficulties dealing with corruption within their political and legal systems. My colleagues from Argentina, Romania and the Democratic Republic of Congo come to mind. Others, particularly those from countries like Tunisia and Mauritius, where there is a significant Islamic population, talked of the strong influence that religion has on their legal system. Lawyers who came from Greece and Italy talked of the challenges they face conducting large litigation matters in context of governmental instability leading to changes in the law overnight. My experiences reminded me that there is so much for us to be thankful for in this country.

In addition to providing an opportunity to learn about the legal systems of each of the participants, the traineeship gave me a comprehensive introduction to the proud French civil system. The four weeks of classes ran a little bit like a mini Bar Readers’ Course. The main classes covered the basics of the set up and workings of the French courts within the various jurisdictions, the French separation of powers, the civil system, ethics, civil procedure and French legal history with a bit of politics thrown in. The remainder of the classes provided a brief introduction into a number of different areas of the law.

The teachers were generally of an exceptional quality. Our international arbitration class was held at the International Chamber of Commerce and was conducted by a member of its Secretariat to the International Court of Arbitration. Our class on French legal structures was taken by the Managing Partner of Clifford Chance in Europe.

As for the second four weeks, we were each allocated a law firm according to our preferences. I practice predominantly as a criminal defence barrister so I elected to be placed in a criminal law firm. I was extremely fortunate to find myself placed at Le Borgne – Saint-Palais Associés. Apart from it being superbly well located in the heart of Saint Germain, the head partner, Jean Yves Le-Borgne, is one of Paris’ most celebrated criminal lawyers. In 2010-2011, he held the role equivalent to the Law Society Vice-President in Paris. He is commonly regarded as one of Paris’ legal profession’s best orators with a most charming, operatic voice. His partner, Christian Saint-Palais is also an excellent criminal lawyer and proved to be a wonderful mentor to me.

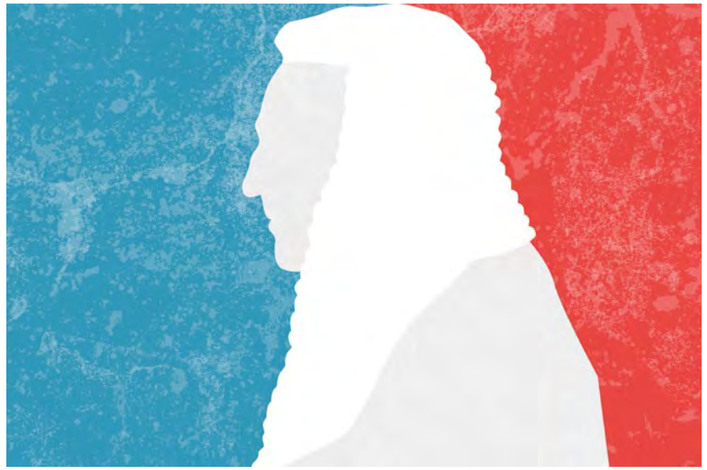
Although France does not have a split profession, there are a great many senior lawyers who specialise in advocacy and act almost as ‘in-house counsel’ within their own firms. It is also not uncommon for firms without specialist advocates to ‘brief’ senior lawyers from other firms to do the appearance work for litigious matters.

Another surprising contradiction is that in some respects, the French civil system provides greater scope for formidable advocacy than the Australian adversarial system. The existence and scope for cross-examination is more limited, although a practice of allowing far more significant cross-examination is developing, particularly in the criminal and commercial courts and in international arbitration. When making opening addresses, legal argument and particularly final addresses in France, lawyers seem to have far greater scope to deliver exquisitely crafted monologues, incorporating just the right touch of theatre. This is mainly because, during these types of addresses, advocates in France hold the floor and it is almost impermissible for a judge to interrupt the flow. Questions are reserved to the end.

The knowledge that one won’t be interrupted with words common to our benches such as “Ms Brennan, get to the point,” allows for the use of alliteration, repetition and word play (a full time hobby for most literary inclined French people) in a way that can give breathtaking results.

It is true that this feature of the system can also lead to interminably boring addresses that are unable to be cut short. In turn, this can lead to very long running cases. Countering this effect are the sitting times of the courts. The French are well known for their reluctance to give up the 35 hour working week, yet a 35 hour week is a very far cry from the hours worked by those in the legal profession in Paris. It is true that a lawyer’s day doesn’t often begin before 10 to 10.30am and that many of the courts don’t begin sitting until 1 or 2pm, but the courts don’t cease sitting until they’ve “completed the list” or at least concluded with the allocated witnesses for that day. This regularly leads to courts sitting until 7 or 8pm and can result in the court sitting until as late as 2 or 3am.

These sitting hours are particularly family un-friendly. You might be forgiven for thinking that this was simply in keeping with France’s traditionally patriarchal society. Elements of this traditional orientation definitely still resonate. When the (equivalent) head of the international relations section of the Law Institute took one of our classes, he told us that a significant percentage of female lawyers in Paris practiced in family and social law (social law incorporates employment and social security law). He analysed this result by stating that this is because these are the areas of the law that most interest females. I raised my hand and explained to him that in Victoria, when we look at the large numbers of female barristers working in family law and the Children’s Court, we tend to analyse the results by questioning whether this isn’t because these are the areas of the law in which they can work



> “In France, lawyers seem to have far greater scope to deliver exquisitely crafted monologues, incorporating just the right touch of theatre. This is mainly because, during these types of addresses, advocates in France hold the floor and it is almost impermissible for a judge to interrupt the flow.”

without feeling discriminated against by their male peers. His response was that in his view “It’s necessary to call a cat a cat.” That he would say this to a room of international lawyers, 32 of whom were women, astounded me.

Despite all of this, 64% of judges in France are female. This is acknowledged by the French as being the result of the fact that the graduate institution responsible for training judges is a selected entry institution. In their late twenties, when most candidates seek entry, female candidates outperform their male counterparts by a significant margin. Whether this predominance of women at the top level of the legal system in France is helping to broaden the representative nature of the judiciary is altogether another question. Of those postgraduate students who successfully become judges, they are overwhelmingly young white women from very wealthy Parisian families.

In amongst the many contrasts and contradictions revealed within the French system and across the world, the traineeship highlighted some startling similarities. Almost unanimously, the participants and French lawyers complained that access to justice comes at too high a price for most ordinary citizens. For the French at least, this complaint resonates despite their system being far less costly than that in Australia. Another unanimous complaint was that the wheels of justice move too slowly. Perhaps the most remarkable of the universal complaints was that legal aid (or its equivalent) is drastically lacking in funding. Hopefully, in seeing our own problems reflected, we all left Paris somehow strengthened in our resolve for change. I, for one, have at the very least resolved never again to tell a bad lawyer joke. I can now see that they are dismal when told in any language.

1 World Values Survey 1999-2000. In the same survey in 1995-1997, just in excess of 30% of Australians held the same level of confidence in our justice system.

ILLUSTRATION BY GUY SHIELD

NEWS AND VIEWS

Why Say Yes?

Victorian Bar News recently spoke with three outstanding former leaders of our Bar about their recent appointments to positions other than judicial office. We asked them about the nature of their appointments, why they said "yes" to the appointment and what they hope to achieve in their new role. GEORGINA COSTELLO

The Hon Justice Middleton

The Hon Justice Middleton of the Federal Court has been appointed as a part-time Commissioner to the Australian Law Reform Commission

What is your role?
The Australian Law Reform Commission (ALRC) conducts inquiries – also known as references – into areas of law at the request of the Federal Attorney-General. My role as a part-time Commissioner is to be involved in references in a supervisory way and make suggestions based upon my own knowledge and experience.

For example, at the moment I am involved in the Copyright reference, which was started before I joined the ALRC. In this reference, the ALRC was asked to consider the operation of the *Copyright Act 1968* (Cth) in the digital environment, and consider concepts such as fair dealing, reasonableness and fair use.

I also contribute suggestions as to what areas the ALRC should investigate, as the ALRC makes recommendations to the Attorney-General concerning what review should place of Australia's laws. I hope also to become actively involved in considering other references to be made to the ALRC.

Why did you say "yes" to the role?
I have long respected the work of the ALRC. I enjoy researching and considering law reform issues. The ALRC has made a great contribution to jurisprudence in this country, which is exemplified by the number of references made to its work by judicial decision makers, academics and legislators. Indeed, in past judgments I have made reference to ALRC reports. I have had the highest regard for the ALRC and the excellence of its reports for many years, and I was very pleased to be offered the position.

What do you hope to achieve in this role?
My appointment is for three years. I would like to actively contribute to the forthcoming references and I would like to see them through to completion. It would be satisfying to have input into developing the law apart from in my judicial role, where I can merely consider the law on a case by case basis. I hope that the references I am about to contribute to will help inform the development of legislation and jurisprudence, and assist the work of the courts and the legislators.

Robin Brett QC

Robin Brett QC has been appointed as the Inaugural Inspector of the Victorian Inspectorate

What is your role?
My principal task is to monitor the use of coercive powers by Victoria's integrity bodies. These bodies include the Independent Broad-based Anti-corruption Commission (IBAC), the Ombudsman, the Office of the Chief Examiner and the Auditor General.

I can investigate allegations of corruption made against Victoria's integrity bodies and make recommendations to those bodies about what they should do, as well as making recommendations to the Victorian Office of Public Prosecutions. Ultimately, "I guard the guards".

For example, I can receive complaints about the use of coercive powers by Victoria's integrity bodies. I also monitor how these bodies use their power to summon people to provide information or answer questions compulsorily in circumstances where the person cannot refuse to answer questions based on a claim of privilege against self-incrimination. I note that a person's answers cannot be used to prosecute them for anything other than perjury, but the information they provide can be used to prosecute another person. I also prepare annual reports and special reports about my work.

I lead a small office of six, with the ability to expand in future as needed. My appointment is for five years and I can only be removed by Parliament.

Why did you say "yes" to the role?
I had been at the Bar for over 30 years, since 1981 and I had never done this sort of work before. The attraction of doing something completely different was strong. I have always liked learning about new things and this work is entirely new as the role has not existed before.

What do you hope to achieve in this role?
My primary objective is to play a part in making the new integrity system work. I aim to make it work without paying attention to the criticisms of the system. I am well aware of the power I have to make reports about the manner in which the new system is operating and I intend to use those powers to the extent that may be necessary.


Stephen O'Bryan SC

Stephen O'Bryan SC

Stephen O'Bryan SC has been appointment as Commissioner of the Independent Broad-based Anti-corruption Commission (IBAC)

What is your role?
IBAC is Victoria's first anti-corruption body with responsibility for identifying and preventing serious corrupt conduct across the whole public sector.

As Commissioner of IBAC, I am an independent officer of the Parliament of Victoria responsible for the strategic leadership of IBAC to achieve its principal objectives and functions under relevant legislation.

In summary, the primary purpose of IBAC is to strengthen the integrity of the Victorian public sector, and to enhance community confidence in public sector accountability. We do this by identifying, investigating and exposing serious corrupt conduct and police misconduct; preventing corrupt conduct and police misconduct, educating the public sector and the community about the effects of corrupt conduct and police misconduct and improving the capacity of the public sector to prevent corrupt conduct and police misconduct.

Why did you say "yes" to this role?
I am honoured to have been appointed IBAC's first permanent Commissioner for the next five years. I hope that my experience in the fields of administrative and regulatory law, and my experience involving statutory interpretation, means that I can deal with issues and make decisions on things which readily draw on my work at the Bar.

It is an exciting time to be heading IBAC, which now effectively sits at the apex of Victoria's integrity system. For the first time in our state's history, there is an independent body with the ability to coordinate all integrity bodies across the whole public sector.

The fine democracy that Victoria enjoys can only be enhanced by a well-functioning integrity system, and it is a privilege to contribute within this new system as IBAC's Commissioner.

What do you hope to achieve in your work as IBAC's first commissioner?
My vision is that Victoria will prove to be an environment where corrupt behaviour in public office is not tolerated, and corruption risks are exposed and addressed. Also that IBAC itself eventually becomes recognised in Australia as a leading apex integrity agency from a best practice point of view.

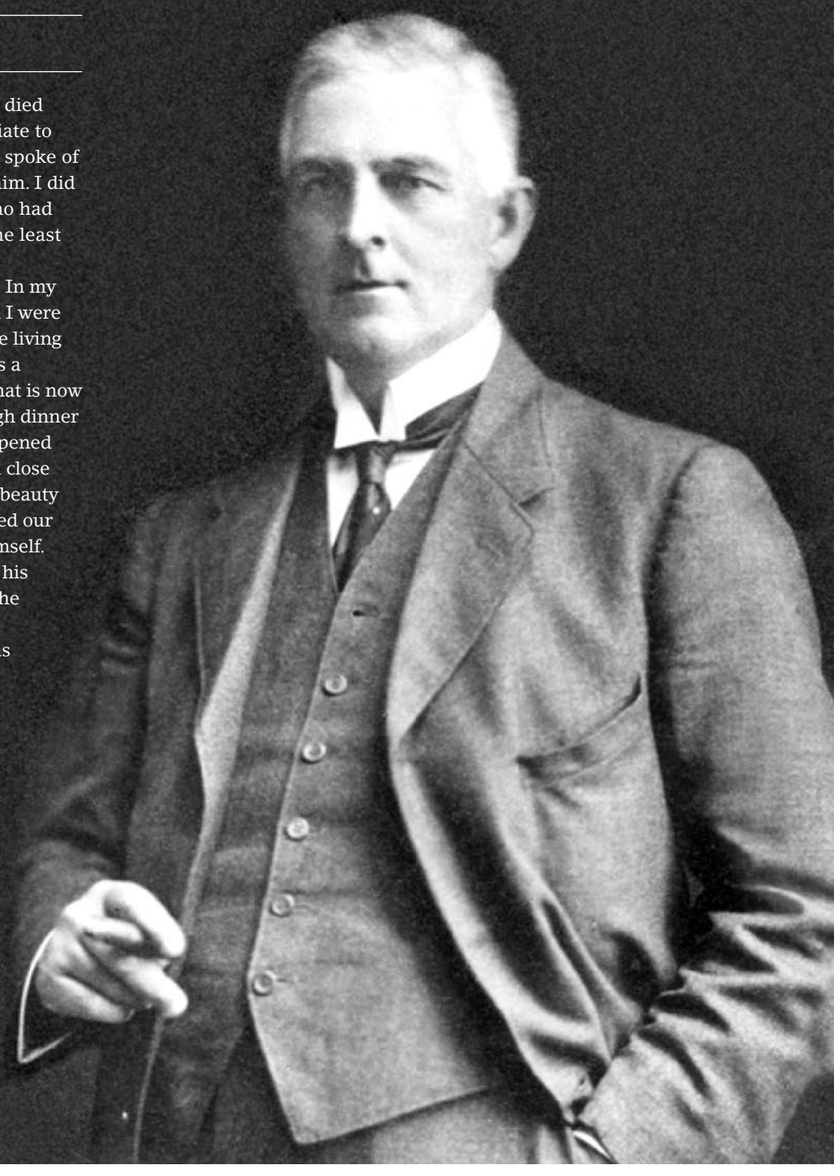
IBAC will undertake activities intended to build both organisation and individuals' resistance to corruption, but corruption prevention really is everybody's business.

I am looking forward to working collaboratively with our partner agencies across the integrity system and other public bodies to give Victorians confidence that public money is not being misused, and that public officials are carrying out their duties lawfully for all Victorians.

Much has been said publicly about suggested deficiencies in IBAC's general public sector jurisdiction, which is narrower in certain respects than that of equivalent bodies in other States. Whilst ultimately this is a matter for government, if in practice shortcomings in this regard are identified, I will not hesitate to recommend any necessary statutory amendment to Parliament.

That's Sir Hayden Starke

J D Merralls



I never met Sir Hayden Starke. He died two years before I became Associate to Sir Owen Dixon. But Dixon often spoke of him and I felt that I had known him. I did know his son, Sir John Starke, who had some of his characteristics, not the least being a forceful personality.

I did not meet Sir Hayden but I saw him once. In my first year or so at the University my parents and I were invited to dine with friends who at the time were living at "Myoora" in Irving Road, Toorak. Our host was a prominent solicitor at whose firm I was to be what is now called a summer clerk. We were mid-way through dinner when the double doors at the end of the room opened and a tall solidly built straight-backed man with close cropped white hair entered, a lady of grace and beauty on his arm. "That's Sir Hayden Starke", whispered our host who was normally in awe of no-one but himself. A glimpse of Sir Hayden was enough to explain his tone of voice. The impression of the bearing of the old couple was indelible.

Similar words regularly occur in descriptions of Starke. In *The Measure of the Years* R.G. Menzies spoke of "his massive legal ability and formidable personality", adding that "he would not temper the wind to the shorn lamb". Elsewhere are references to his "blunt, gruff personality", "rugged individualism", "formidable personality", "dominant presence" and "marked independence of character" and descriptions of him as a "robust and formidable figure". On his death, almost fifty-five years ago, Sir Owen Dixon spoke of "his strong intelligence, clear mind and great legal knowledge" and the "strength of his mind and character".

Some biographical details. Starke was born in February 1871 at the goldmining town of Creswick, at the height of the rush to be rich.

His father had graduated in medicine from St. Andrew's University. His baptismal names were Hayden Erskine, Erskine being a family name not connected with the famous advocate Thomas Erskine. When Hayden Starke was six Dr Starke died of typhoid contracted on the goldfields, leaving his widow with four children and without proper means of support. She took employment as a post-mistress in country towns and eventually at Clifton Hill. The young Hayden attended various government schools and, for the last six months of his schooling, Scotch College in East Melbourne, as a scholar, to sharpen his knowledge of Latin in preparation for the law course. Family circumstances would not permit his enrolling as a regular student at the University and so he took articles at the solicitors' firm of Weigall and Dobson. He attended University lectures as an articled clerk and was active in students' affairs as the secretary of the Law Students' Society. He was also a keen rower. In 1891 he was awarded the Supreme Court Judges' Prize for articled clerks.

In that year the two branches of the legal profession were formally amalgamated by statute, though the solicitors' profession and practice at the Bar in fact remained separate. The articled clerks' course was intended for the professional training of solicitors and until fusion it was not possible for an articled clerk to proceed to the Bar. Starke was among the first to take advantage of the ability to do so given by fusion and in 1892, at the age of twenty-one, he commenced practice as a barrister.

He began practice at the time of the collapse of the Victorian economy. There was little work for a young barrister and it was poorly paid. Starke walked between Clifton Hill and chambers to save a tram fare. But through industry and force of personality he built a practice and by the turn of the century he was a leader of the junior Bar. He practised in most jurisdictions in court and also wrote many opinions. His opinions were invariably short and hand-written in the folds of the large sheets of brief paper that were then common. He often appeared as leading counsel, though he never took silk. He refused an offer by Deakin when Prime Minister to become his legal adviser on the ground that the position did not carry a right of private practice.

He was twice invited to apply for silk, in 1912 by Chief Justice Sir John Madden, and in 1918 by Chief Justice Sir William Irvine. Both invitations were declined. The reason given for the first refusal was that Starke wished to retain the flexibility that junior status allowed – he was not bound by the two counsel rule or the concomitant two-thirds rule which together restricted court appearances by KCs – and for the second, that he might have gained some professional advantage by not having been at the war.

Early days on the High Court

In 1920, on the death of Sir Edmund Barton, an original member of the Court, Starke was appointed to the High Court. He was the first Justice appointed from the junior Bar and only the third who had not participated in the Constitutional Conventions or had not been involved in politics. He had a huge practice in the High Court. In its first three years he appeared in seventeen cases, in fifteen as single counsel, between 1908 and 1912 he appeared in more than fifty cases alone, and by the time of his appointment he had appeared in at least 210 cases.

He was also appointed a deputy judge of the Commonwealth Arbitration Court but he resigned his commission after a short time because of temperamental differences with the President of the Court, Mr Justice Higgins.

> "Sir Owen Dixon spoke of "his strong intelligence, clear mind and great legal knowledge" and the "strength of his mind and character"."

Other personal matters should be mentioned. By 1901, Starke's career had reached a point where he could buy a house in Toorak Road, Malvern, as a family home. In 1909 he married Margaret Mary, daughter of John Gavan Duffy, a leading solicitor and politician whose family had been prominent in both spheres in colonial Victoria. There were two children of the marriage, Monica, who became a teacher and later wrote a history of the Alexandra Club, and John, barrister and judge. Starke had been raised as a Presbyterian but his wife was of an Irish Catholic family and it was understood that the children were to be of the Roman Catholic faith.

Monica was a devout Catholic. John, who attended Melbourne Grammar and Trinity College but received Catholic instruction, was a lifelong agnostic. As a token of gratitude to his mother and sister Starke paid for them to visit the United Kingdom later in the year of his marriage. They were passengers on the "Waratah" which disappeared without trace between Durban and Cape Town. Starke was the only individual who was represented by counsel in London at the board of marine inquiry into the disappearance.

He resigned from the High Court after thirty years, in January 1950, and died on 14 May 1958. He never took extended leave while a judge and, except for a brief Pacific cruise, never left Australia. He was appointed KCMG in 1939 but was not made a Privy Counsellor.

Though Starke had appeared often before the High Court in a wide range of matters he had not been engaged in any of the cases in which the important doctrines of the mutual immunity of Commonwealth and State instrumentalities and reserved State powers were adopted. Those doctrines were founded upon United States models in which case law had an important part. In 1910, Professor William Harrison Moore, of Melbourne University, wrote that in

“Rich, Evatt and McTiernan often joined in Dixon’s judgments, in Starke’s opinion without proper consideration of the issues by themselves. “The parrots”, he called them. “The parrots will follow Dixon.” He felt sidelined.”

America the doctrine of the immunity of instrumentalities had become axiomatic and that the modern cases had served “merely to make its application and to point to the limits of its authority”, one of those limits being that a distinction had been adopted between functions which were essentially governmental and trading or other private enterprises carried on by the government. Six months after Starke’s joining the Court a twenty-five year old barrister, RG Menzies, appearing for a trade union against State instrumentalities conducting what were essentially trading activities, sought to rely on that distinction.

He was interrupted by Starke, the junior member of the bench, who described the distinction as nonsense and invited him to advance a broader case which attacked the American doctrines and depended on the simple proposition that the Constitution, as part of an Imperial Act of Parliament, should be interpreted as a statute ordinarily is. The invitation was taken up by the rest of the Court and was gratefully accepted.

Hence the famous *Engineers’ Case*, which changed the course of the interpretation of the Constitution and hastened the pace at which the Commonwealth assumed ascendancy over the States in the distribution of functions under it. The main judgment was that of the Chief Justice Sir Adrian Knox and Justices Isaacs, Rich and Starke, none of whom had been party to the early decisions. The judgment was written by Isaacs. It is not well constructed and its language in some parts is extravagant and rhetorical.

Higgins delivered a separate, concurring judgment in language more restrained. Sir Owen Dixon told me that he had seen Isaacs’ original draft with annotations marked by Starke which indicated the price of his concurrence and which contributed to some of the apparent inconsistencies in the reasoning. However that may be, Starke was always careful to confine the decision in the *Engineers’ Case* to the proposition I suspect he contributed, that the doctrine of “implied prohibition” finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning. On Starke’s death Dixon pointedly said:

> *The decade at the beginning of which he took office was one of great and rapid constitutional development. The course of decision in this Court appeared to many to take a new direction. No one who at that time was familiar with the Court could fail to understand that the strong judicial character, clear vision and notable legal equipment of Sir Hayden Starke had played a decisive part in establishing constitutional doctrines which up to that time had not received the support of a majority of the Judges.*

The decade of the twenties was the least distinguished period in the High Court’s history. The original Justices, Griffith, Barton and O’Connor had gone. The new Chief Justice, Knox, whose father had been a founder and the managing director of the Colonial Sugar Refining Company, was an able advocate but, in Sir Owen Dixon’s words, he was capable of almost anything yet he was not capable of taking a really serious intellectual interest. The intellectual leader of the Court was Isaacs but his temperament was such that he often led only himself. Higgins kept his own counsel though his emotional leaning was towards Isaacs’ views if not to him personally. Gavan Duffy took an active part during the argument of cases but was a non-participant in judgment. Powers was out of his depth (the Court’s proceedings were ultra vires, “beyond Powers”, as Dixon would have it). Rich was able but indolent. Starke, surprisingly, participated in many joint judgments. Important cases were decided but the Court’s jurisprudence was not enhanced.

Division in the Court

A change began with the appointment of Dixon on the death of Higgins early in 1929. The Court began to move beyond provincial backwaters into the mainstream of international common law jurisprudence. But a further change, which affected the conduct of the Court throughout the thirties and even beyond, occurred at the end of 1930 when the Scullin government – in the absence of Scullin and his Attorney-General Brennan – appointed two young Labor Party politicians to fill the places left by the departure of Knox and the resignation of Powers. Isaacs succeeded Knox as Chief Justice and, on his appointment as Governor-General eight months later, was succeeded by Gavan Duffy, then aged seventy-eight. Thus for five years the Court was led by an old man who lacked both interest in its administration and the will to deal with the friction between members of the Court that the appointment of Evatt and McTiernan provoked. Starke’s wife was a daughter of Gavan Duffy’s half brother but the two were never close and Starke’s sense of propriety was strained by the Chief Justice’s virtual withdrawal from the activities of the Court. In 1935 Gavan Duffy sat in only eight of 80 Full Court cases.

Some of the Justices considered resignation on the appointment of Evatt and McTiernan but they agreed to remain and to attempt to work with them as best they could. This was not difficult with McTiernan who was a mild-mannered equable man whose main deficiency as a judge, apart from lack of extensive professional experience, was an absence of willingness to accept a proper share of the work. Evatt was different. Able, ambitious and capable of great application, he was already showing signs of the instability that beset him in his later career. He too preferred to write judgments only in cases that interested him and to join with another, usually Dixon, in those that did not.

For Starke, duty’s slave, the circumstances of their appointment were bad enough, but their attitude to judicial work offended him. His adherence to a strict code of honour yielded little to human frailty. These feelings were manifested in hostility towards the newcomers as well as to Gavan Duffy and Rich, both on and off the bench. He participated less often in joint judgments and adopted the practice of refusing to show copies of his judgments to Evatt and McTiernan before they were delivered. This led to his writing more of his own judgments. These were invariably concise and directed to the issues of the case rather than to the opinion of posterity. Because of their brevity they are now cited less often than the quality of the underlying thought deserves.

If it were hoped that the tension between the Justices would relax with the appointment of an active Chief Justice that hope was to be dashed. For this there were four reasons. First, the man appointed, Sir John Latham, had been Starke’s pupil at the Bar. Second, his appointment was the product of a series of political manoeuvres to procure the eventual replacement of Lyons as Prime Minister by Menzies. Menzies was to take Latham’s electorate of Kooyong and, after a discreet interval, Latham was to be appointed to the Court. Gavan Duffy was to be persuaded to retire. Conduct of that kind was anathema to Starke. Third, Latham, an austere nineteenth century rationalist, known as “the schoolmaster”, did not possess the personal skills to control fractious colleagues.

Fourth, the Court had come to be dominated by Dixon, the non-pareil whose reputation as a jurist was already recognised abroad.

Rich, Evatt and McTiernan often joined in Dixon’s judgments, in Starke’s opinion without proper consideration of the issues by themselves. “The parrots”, he called them. “The parrots will follow Dixon.” He felt sidelined. His personal relations with all but Dixon broke down so badly that he veven to communicate off the bench except by curt, often offensive, notes. Many of these notes, in Starke’s large bold hand, are amongst the Latham papers in the National Library, some written vertically as well as horizontally on the small court notepaper. Not even Dixon was spared. In letters to Latham Starke suggested that Dixon was canvassing support from less energetic members of the Court. He wrote:

> *... it is gravely detrimental to the prestige of the HC and its independence that whenever a grave difference of opinion is disclosed the ‘parrots’ always reach the same conclusion as D. I blame him a good deal for he angles for their support and shepherds them into the proper cage as he thinks.*

Dixon rejected this suggestion telling Starke that he could not prevent others from adopting his judgments. In fact at times he helped Rich in writing a judgment that was contrary to his own.

The Court sat in all the State capitals. Starke refused to travel to what he called “the outstations” if he could avoid it: “... it becomes more and more onerous to the Judges as they advance in years. No provision has ever been [made] in the outer States for their comfort. They are like and are treated as Carpet Baggers roaming the country.” When Latham sought to persuade him to travel to Perth in 1940 he replied, “I resent your dirty insinuation that I stayed on in Sydney to make a bob out of the government, and also your silly schoolmaster attitude toward me. I think an apology is overdue and in future ... keep your criticisms of me to yourself unless I ask for them.”

A diligent jurist

Throughout this period Starke produced many distinguished judgments. It must not be thought that his antipathy towards his colleagues diverted him from his duty as a judge. I have taken, as a sample, volume 60 of the Commonwealth Law Reports, in which some of the cases decided in 1938 are reported. Starke sat in twenty-two of those cases and delivered his own reasons in each of them. They are clearly expressed, conventional, judgments of high quality. In twenty-one cases he was with the decision of the majority. Only once did he dissent.

If his sturdy individualism appeared in his work at this time it was likely to be in a libertarian cause. In several cases involving contempt of court he was both sceptical of the effect of newspaper articles alleged to be calculated to interfere with the administration of justice in appeals pending in the Court and lenient in his suggested penalty when others were severe. “I regard this allegation as frivolous”, he said in one case, “there is no fear of the article in any way interfering with the due determination of the appeal or of any prejudice to the mover such as would justify the Court interfering by summary and arbitrary process of contempt.” And “The Court should ... leave to public opinion the reprobation of attacks or comments derogatory to or scandalising it; or in serious cases leave to the proper authorities the vindication of the Court by the ordinary process of law ...”

The High Court operated throughout the 1930’s with only six Justices,

> “If his sturdy individualism appeared in his work at this time it was likely to be in a libertarian cause.”

the vacancy arising from Isaacs’ appointment as Governor-General and his replacement from within the Court not having been filled, as an economy measure adopted by the government in the Depression. The situation became worse when Latham took leave in 1940 to become Minister Plenipotentiary in Japan and from 1942 until 1944 while Dixon held a similar position in Washington. Only five Justices remained.

The Court was not restored to seven until May 1946. As well as its normal civil and criminal work the Court had cases challenging the constitutional validity of wartime national security measures and those involving attempts to avoid the stringency of those measures. In one respect matters improved. Evatt’s resignation to return to politics in September 1940 removed a burr from the saddle. His successor, the New South Welshman Dudley Williams, was a far more congenial colleague. Exigencies of the war induced greater harmony though personal differences did remain.

Starke had been junior counsel for the plaintiff in the First World War case of *Farey v Burvett* in which the validity of Commonwealth regulations fixing the price of bread had been upheld by a majority of the Court. Isaacs delivered a florid judgment to the effect that in time of war the limits of the Commonwealth’s power to make laws for the naval and military defence of the Commonwealth were “bounded only by the requirements of self-preservation”. The plaintiff’s case, probably prepared by Starke, included contentions that the only difference which the existence of war made was that it brought into prominence the existence of the defence power but that power remained the same whether there was peace or war: the defence power must be directed to the prosecution of war, either by preparing for war in the future or carrying on a war when it exists. This language is echoed in Starke’s judgment in 1942 when speaking of the Court’s decision in the first *Uniform Tax* case:

> *[I]f all legal standards be abandoned and the Court surrender to the principle that the defence power extends to anything that can be conceived, imagined or thought of as aiding the safety and defence of the Commonwealth, then [the difficulties of ascertaining the nature and character of an Act] will be multiplied and the Court launched upon inquiries that cannot be described as judicial.*

And, in another case, “We have lived so long in an atmosphere of make-believe in connection with the regulation of industry that it is hard to return to realities.” In yet another, he referred to “irritating orders and restrictions upon freedom of action which [are] arbitrary and capricious, [serve] no useful purpose, and [have] no connection whatever with defence”. These sentiments were voiced repeatedly in dissenting judgments upon the validity of war-time measures.

In the other group of cases, involving attempts to avoid national security regulations, Starke rejected disingenuous argument: “An ingenious argument has been presented to the Court, but that is all that can be said in its favour. It fails…”

As well as his judicial work during the war Starke undertook a civilian role in administering the release of the funds of persons who were interned as enemy aliens. In this position he is said to have shown understanding and sensitivity to the plight of many whose only offence was not to have renounced their original nationality when they settled here. This war-time work harkened back to an episode in 1918, when it was proposed to tighten a rule of his Club barring enemy aliens. The Club’s history records that the proposer “moved the new rule with pleasure and asserted that it ‘gave him a lively sense of satisfaction at the prospect of getting entirely rid of the very objectionable companions we have from time to time had to put up with in the club”. Starke alone questioned the propriety of the proposed rule, dismissing it as “stampede legislation”.

After the war it was business as usual. Starke sat in what the press likes to call two “landmark” cases. The first concerned the attempt by the Chifley government to establish TAA as a monopoly airline within Australia. The Court, comprising five Justices, held the legislation invalid. The main interest in Starke’s judgment is that he accepted a line of reasoning of Dixon in dissent in a series of cases, known as the transport cases, in the 1930s to the effect that an Act “which is entirely restrictive of any freedom of action on the part of traders and which operates to prevent them engaging their commodities in any trade, inter- or intra-State, is … necessarily obnoxious to s. 92”. The adoption of this reasoning led in the 1950s to the rejection of many of the propositions found in the 1930s cases and to the acceptance for forty years of a new approach to section 92.

The other case was *Bank of NSW v The Commonwealth* – the Bank Nationalisation Case – in which many of the provisions of the 1947 Banking Act were held invalid because they did not provide just terms for the acquisition of banking assets. Argument occupied almost three months. Evatt, then Attorney-General for the Commonwealth, led counsel for the defendant. Starke delivered a carefully reasoned, elegantly constructed, judgment of thirty pages as one of a majority of five. Commentators are often dazzled by Dixon’s sixty-five page judgment and are moved to cite it as the basis of the decision. But the 77 year old Starke’s, in my opinion, properly stands beside it. Latham and McTiernan dissented.

An odd incident occurred shortly before the hearing. The Solicitor-General for the Commonwealth visited Starke at home and suggested that because Lady Starke had a small holding of shares in one of the banks her husband should not sit in the case. Starke angrily directed him to tell his master that if he wished to make an application he should do so in open court. Evatt did so and the application was rejected. The episode recalled an event in Starke’s career at the Bar. The irascible Hodges, a judge of the Supreme Court, was rude to Starke in Court to a degree that Starke considered insulting. Before lunch they found themselves beside one another at the urinal of their Club. Hodges apologised for his conduct but was met with the retort, “How like you Hodges. You insult a man in court and seek to apologise in a urinal.”

The Banking case was Starke’s last major case but not his last case on the bench. He stayed on until the end of January 1950 and Rich until May that year. They were succeeded by the gentle, scholarly Wilfred Fullagar of the Supreme Court of Victoria and the brilliant Sydney KC Frank Kitto, who many believe had been the real architect of the banks’ victory. In 1952 Dixon succeeded Latham as Chief Justice. And so, for twelve years, all lived happily ever after.

It is sometimes said that Starke and Rich hung on until the election of a Liberal Government because of their sympathy with its outlook and policies. In Starke’s case a desire to deprive his old enemy Evatt of power to appoint his successor was probably the dominant factor.

Starke lived quietly in retirement, his health failing towards the end of his life. He was proud of the success of his son John at the common law

Bar and there was a rapprochement between them after a turbulent relationship since John’s childhood. Starke died in May 1958. No portrait of him was painted and no place bears his name. His work survives only in the law reports and that is what he would have wished, though he would have been scornful of the suggestion that it had any surviving value.

The second half of his life demonstrates that while robust independence may maketh the barrister the collegiate life of a Banco Court calls for other qualities as well. Did his difficult personality diminish his work or harm the institution to which he belonged? It is often hard to detach the man from the circumstances of his life and even those who knew Starke best saw him differently. I sent a draft of my piece about him for the Australian Dictionary of Biography to his daughter Monica and son John. John returned it with a short note saying that I had caught the old man well. Monica sent a three page reply with corrections and suggestions, asking with dismay how I could have got his life and character so wrong.

I can offer only my parents’ host’s reply, “That’s Sir Hayden Starke.”

NEWS AND VIEWS

At a Glance

The 2013 Victorian Bar Continuing Professional Development Conference. SHARON MOORE

The Bar's 3rd annual CPD conference was held on Friday 15 and Saturday 16 March 2013 and provided a great opportunity for members to hear a variety of speakers, socialise away from work and, of course, obtain all ten CPD points right before the 31 March cut-off date!

The theme of the conference was 'The 2020 Barrister – performance, improvements and progress'. The conference commenced on Friday afternoon with key note addresses by the Victorian and Federal Attorney-Generals as well as a panel of judges discussing ways to improve advocacy. On Friday evening, Sir Murray Rivers QC, retired Victorian Supreme Court judge (aka Brian Dawe), graced us with his presence in the hallowed Long Room at the MCC. We were the perfect audience for his hilarious after dinner speech. Whilst the dinner wasn't worth any CPD points, for many, it was the highlight of the conference.

Saturday morning's program was also full of interesting sessions including an expert panel addressing threats and opportunities for barristers in a digital world and a keynote address by Professor Black. Following the lunch break there were various electives before the conference concluded with a talk by Dan Mori.

A session I found of interest was Professor Black who presented challenging and encouraging facts and figures about the Bar's current and projected performance, particularly in light of the structural changes and pressures in the post GFC legal world. There was some good news: as nearly 80% of all work undertaken by members of the Victorian Bar comprises court appearances, or is court-related, the Bar is a very focussed provider of legal professional services. However, the Australian legal market is shrinking. Professor Black challenged those attending to look for strategic opportunities, collectively and individually, in order to prosper commercially in an increasingly competitive legal market. He also urged barristers vigorously to defend the 'high end' advice work, traditionally associated with the Bar, so that barristers maintain the perception (and reality) of true expertise, particularly as a point of differentiation with solicitors. Other suggested opportunities included expanding and improving alternative dispute resolution, building direct relationships with major corporate and government clients and the possibility of expanding more into the growth area of international arbitration.

Despite Professor Black's figures indicating that 70% of Victorian barristers were satisfied with the level of stress or pressure associated with their job, Dr Craig Hassed's talk on 'mindfulness for wellbeing and sustainable performance' attracted one of the largest audiences for the elective sessions. A General Practitioner, Senior Lecturer at Monash University's Department of General Practice and author of many books, Dr Hassed explained that we "weren't born worrying – it is a habit we got into" and that a "wandering mind is an unhappy mind" and comes at an emotional cost. After presenting clinical and scientific research on the benefits of mindfulness – or mental training – he ran attendees through a simple mindfulness technique to reduce stress and improve performance. It is hard to say whether it was a reflection of the benefits of the technique or the hour of the day, but some of the barristers were observed asleep only minutes later…

The success of the conference was due to the hard work of Courtney Bow and Sally Bodman from the Bar's office together with the CPD Committee lead by Michael Pearce SC.


The hilarious Sir Murray Rivers QC was a highlight of the dinner


Enjoying dinner in the surrounds of The Long Room

Barbara Phelan, Fiona McLeod SC, Maya Rozner and Carmella Ben-Simon enjoying the pre-dinner drinks


Stephen Palmer, Mark Hebblewhite and Roger Young


John Wallace


David Brustman SC amused by Sir Murray Rivers QC


Peter Atkinson, Sam Andrianakis and Alexander Patton

On Fearless Defence in the Face of Public Outrage

Dan Mori at the Bar's third Annual CPD Conference BRIAN WALTERS SC

At the closing session of the Victorian Bar's 3rd annual CPD conference conference, former US marine lawyer Dan Mori paid tribute to the Victorian Bar's important support in his defence of David Hicks. He said the Bar's professional encouragement gave him confidence to speak out publicly in support of his client.

Mori came to international attention in 2003 when he was assigned to defend David Hicks, one of two Australian prisoners in Guantanamo Bay. Just nine years into his career as a lawyer, Mori had almost no paid support, while the prosecution was fully resourced.

Mori commenced his address by referring to US founding father John Adams, who accepted the brief to defend the British soldiers accused of the Boston massacre in 1770, despite other lawyers refusing to take the case in the face of public outrage. Despite the inflamed feelings around the trial, Adams conducted a successful defence, and his ringing final address is still quoted today:

> *Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.*

As Mori said, throughout the history of our profession there have frequently come times when lawyers have to step up.

Mori was confronted with constant changes in the procedure his client confronted. Early in the process, Mori expected David Hicks to be arraigned the following week – but this was put off, week by week, the procedure and the allegations changing, for what eventually stretched to over eight months.

Unable to obtain any satisfactory court hearing for his client, Mori spoke out publicly about the perversion of process to which his client was being subjected. This was not expected, and the administration could not accuse him of being unpatriotic. He spoke in a measured way of fundamentals of the rule of law, including a fair trial and due process – lessons learned from John Adams, amongst others. However, those responsible for prosecuting had moved so far from legal norms that they branded these concepts as radical.

One of the things that kept Dan Mori going through the years of work he did for David Hicks was the hypocrisy of the treatment of his client. The kind of process to which he was subjected was deemed not good enough for a US citizen, and not good enough for a British citizen, but it was good enough for an Australian. He regarded the charges against David Hicks as 'manufactured' and the treatment harsh.

Dan Mori said that although there were some consequences for his robust defence of David Hicks, there were no black vans coming to pick him off the street. He said it was worth remembering that in some developing countries lawyers risk death and torture for the defence of their clients.

Last year Dan Mori left the marines, where he had reached the rank of Lieutenant Colonel, and moved to Melbourne where he has taken up a position with Shine Lawyers. We have been fortunate to observe his contribution to the long tradition of fearless advocacy for a client.

The Hon Robert Clark MP, Fiona McLeod SC and Michelle Quigley SC

Ted Woodward SC and Kylie Weston-Scheuber

Helen Symon SC imparts some wisdom

Hobnobbing at High Table

New Barristers' Lunch at Victorian Bar CPD Conference HELEN SYMON SC

This year's Victorian Bar CPD Conference featured a new addition: an informal New Barristers' Lunch. This was hosted by Bar Chair, Fiona McLeod SC, and each of Michael Shand QC, Helen Symon SC, Jenny Batrouney SC, Michelle Quigley SC and Ted Woodward SC joined a table of junior members of the Bar. State Attorney-General, the Hon Robert Clark MP, also joined the group before heading into the main conference to deliver his keynote address.

The more senior barristers were asked to share with their tables five things they wished they had known when they were starting out. Fiona McLeod formally welcomed attendees and got things off to a spirited start with her own tip. She shared her wish that she had known from the outset to trust herself and her judgment, particularly in the face of what she referred to as the "tosser" element one sometimes encounters when starting out at the Bar. That set the scene for lively discussion, both from the senior hosts and the juniors.

A mixed group of juniors was invited, ranging from people starting the Bar Readers' Course the following week to a few juniors of up to 5 years' call. Participants also came from a mix of practice backgrounds. The lunch was an enjoyable opportunity for some to renew connections and for most to make some new ones.

The event was modelled on the UK Inns of Court dinners; but with a view from the Hilton Hotel over the Fitzroy Gardens and the MCG it had a distinctly Melbourne flavour. A great blending of youth and experience.

A Word, or Two, to the Wise

Attorney-General Mark Dreyfus QC speaks at the Victorian Bar CPD Conference

TOM DANOS, DEPUTY CHAIR VICTORIAN BAR'S PRO BONO COMMITTEE

On Saturday 16 March 2013, at the Victorian Bar's Third Annual Conference, at the Hilton Hotel, at 9.00am, before an audience of 150 eager barristers, the Hon Mark Dreyfus QC MP, in his capacity as Attorney-General for the Commonwealth of Australia, was invited to address on "Pro Bono – An Ethical Obligation or a sign of Market Failure?"

The Attorney introduced his address by noting:

> *I do, however, want to explore ways we can further promote pro bono work, and to discuss with you the things that the government is doing, and thinking about doing, in this area.*

And shortly thereafter followed with:

> *This is not to say that pro bono work should be used as a substitute for government funded legal services. Rather, pro bono legal services form one essential element of a mix of services that the government and the legal profession provide to enhance access to justice within the Australian community. (emphasis added)*

Pro bono work is a 'growth' industry in this State. To illustrate this one need only look at the pro bono awards, which recognise the work that barristers have undertaken. Nominations for awards are received in six different categories; a testament to the volume and diversity of the Bar's pro bono contribution. In addition to these award-winning contributions are the less prominent but equally commendable efforts of those participating, each day, in the 'duty barristers' scheme'. None of this existed a mere five years ago. At least some of this unpaid effort stands in for what might once have been legally aided briefs.

A potentially important development in this area was revealed by the Attorney's observation that:

> *My Department is currently overseeing the Review of the National Partnership Agreement on Legal Assistance Services, which seeks to evaluate the efficiency, effectiveness and cost-effectiveness of the four legal assistance programs supported by the Australian Government – legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services.*

It appears this review could have a significant impact on the provision of 'legal aid services' throughout the Commonwealth, with the potential for further 'growth' in the pro bono market. The extent of the review, and whether interested parties had been approached or invited to contribute, was not touched on in the Attorney's remarks. However, in a comment made after the speech, the Attorney advised that the review has involved extensive consultation with stakeholders by the reviewing consultants, Allens Consulting Group. One hopes this assurance proves reliable, that all relevant stakeholders are to be contacted, and that their views will be given due consideration.

The Attorney also noted that "governments clearly have a role to play in encouraging pro bono work, particularly by providing incentives for those engaged in it". To date, the 'carrot' style incentives to which the Attorney referred have been limited to solicitors, whose pro bono contribution may be acknowledged when tendering for paid government work. It would be of considerable interest if a similar 'incentive' scheme for the Bar, consistent with the obligations of counsel, could be designed and implemented.

The Attorney was bountiful in his praise of counsel who had appeared in pro bono matters, singling out two well-recognised pro bono counsel, the late Ron Castan QC and Bryan Keon-Cohen QC. Clearly the Attorney was extremely supportive of the work the Bar did in the area of pro bono and was keen to see it developed and extended. As we all are, up to a point.

The Hon Mark Dreyfus QC

> "To date, the 'carrot' style incentives to which the Attorney referred have been limited to solicitors, whose pro bono contribution may be acknowledged when tendering for paid government work."

Launch of the Victorian Bar Reconciliation Action Plan

The Bar helps address inequalities faced by indigenous communities.

SALLY BODMAN

On Tuesday 29 January 2013 the Victorian Bar formally launched a Reconciliation Action Plan (RAP) at an event in the foyer of Owen Dixon Chambers West.

In October 2012 the Victorian Bar Council became the first Australian Bar to adopt a RAP to address the difficulties and inequalities faced by the Indigenous community in building a career at the Bar, in achieving equality before the law and in having full access to justice.

Indigenous equality is increasingly a focus of corporate Australia and the legal fraternity is no exception. The Law Council of Australia, the Law Institute of Victoria and several law firms have also developed plans to ensure that good intentions are translated into tangible results.

The RAP was developed by a working group of the Indigenous Lawyers' Committee over an 18 month period under the leadership of Dan Star and codifies existing and planned initiatives as well as providing a roadmap for their expansion, development and wider adoption over five years. Reconciliation Australia was consulted throughout and gave their approval to the final document. The Bar's indigenous barristers also provided significant input into the process. Initiatives include mentoring and peer support programs and a work experience program for Indigenous secondary school students, and a series of policy financial supports designed to assist Indigenous barristers to achieve success in their chosen career.

There are also initiatives for improved legal services for members of the Indigenous community as clients of barristers.

The launch event commenced with a Welcome to Country by Wurundjeri Elder, Georgina Nicholson.

Bar Council Chair Fiona McLeod SC welcomed a large crowd of Victorian Bar members and members and supporters of the Indigenous legal community, saying:

The Victorian Bar has been at the forefront of Indigenous rights for decades. In the mid-70s some of our members helped establish the legal aid services in central Australia. Victorian barristers have represented Indigenous clients in many pro bono cases and in landmark legal cases. More recently over the past decade barristers at the Victorian Bar have found practical ways to address underrepresentation of Indigenous people among the ranks of barristers. But we recognise there is much more to be done. After Mick Dodson in 1981, we did not see a second Indigenous barrister sign the Bar Roll until 2006. This RAP is a mark of our commitment to being part of a solution and to being active in addressing it.

Dan Star, Chair of the Bar's Indigenous Lawyers' Committee (ILC), introduced well-known and highly respected Gunditjmara Elder, Jim Berg. Jim was the first Koori employee of the Victorian Aboriginal Legal Service (VALS) which had been established by the late Ron Castan AM QC, Ron Merkel QC, Gareth Evans QC and the late Professor Louis Waller. In 1985 Jim established the Koorie Heritage Trust Inc together with Castan and Merkel. Jim has been CEO and Chairman of both VALS and the Koorie Heritage Trust. He spoke about the journey to protect, preserve and promote the living culture of Aboriginal people and of the help and support they had received from members of the Victorian Bar in the struggle to achieve equal access to justice for Indigenous Australians.

Dan Star spoke of the Bar's ongoing commitment to reconciliation. Linda Lovett and Robin Ann Robinson, two of the Bar's five currently practising Indigenous barristers, spoke of their inspiration to practise law and the support they had received from the Bar in developing their careers as barristers.

Following the formalities, the Jindi Worobak Dance Troupe performed an interpretation of the Creation of Wurundjeri.

Jim Berg was one of the founders of the Koorie Heritage Trust Inc in 1985

Daniel Star, Chair of the Bar's Indigenous Lawyers Committee spoke of the Bar's commitment to reconciliation

Members of the Jindi Worobak Dance Troupe

Sport, Drugs and Doping Control

BEN IHLE AND ELIZABETH BRIMER

Drugs in sport is a hot topic. The public debate rages and intrigue abounds in relation to performance enhancing substances: who knew, who ought to have known and what can be done about it? The Australian Crime Commission's report *Organised Crime and Drugs in Sport* (February 2013) revealed connections between our sports stars and organised crime leading some to decry that presently we are enduring the blackest days in Australian Sport. Given that sport, in one form or another, is a national past-time, one can only speculate as to the effect of such a comment on our faith in sports stars, and national morale as a whole.

Recent, and less recent, history has demonstrated that sporting heroes can and will fall in the most spectacular fashion when they are revealed as doping cheats. Ben Johnson's disqualification in Seoul, Lance Armstrong's seven stripped Tours de France jerseys and the BALCO affair, which saw more than one Olympic medallist behind bars, are infamous examples. At home there are recent scandals and investigations concerning high profile AFL and Rugby League teams, which investigations are ongoing.

The ideals of fairness of the fight, true merits based outcomes and an equal playing field are the foundations of the fairy tale appeal that sport has, time and again, delivered to its adoring public. Deliberate cheating undermines these foundations.

No matter how wide the appreciation of sport; no matter how broadly spread the distress caused by a revelation of cheating in sport, one inalienable fact remains; the foundation of sporting regulation is contractual. Competitors, support staff and others agree, either expressly or impliedly, to be bound by the rules of the game. Are the drastic consequences of falling foul of the anti-doping regime, so dramatically demonstrated in the cases mentioned above, confined to elite athletes competing at the highest level in their sports?

The answer is, of course, "no". Chances are that if you, or someone you know has ever been involved in competing in sport at any reasonable level, they will have been contractually bound by the World Anti-Doping Code (the Code). There could be a simple 'one-liner' on a registration form for entry into a particular competition which, when signed, binds that person to the sport's code of conduct. This in turn may pick up the sport's anti-doping policy, the national body's rules, or may simply, by reference, incorporate the Code and the World Anti-Doping Agency's prohibited list of substances (the Prohibited List), which is amended from time to time.

So, what is the Code? The Code is a document that harmonises anti-doping regulations in sport across the world. What does it prohibit? The Code prohibits the presence, in an athlete's sample, of certain substances and their metabolites, substances with similar chemical structure or biological effect to those named substances and substances not approved for human therapeutic use. It also prohibits the use or attempted use of a prohibited substance, possession or trafficking and provides for a number of other anti-doping rule violations.

ILLUSTRATION BY GUY SHIELD

"Are the drastic consequences of falling foul of the anti-doping regime, so dramatically demonstrated in the cases mentioned above, confined to elite athletes competing at the highest level in their sports? The answer is, of course, "no"."

Take, for example, a person signing up to become a member of the Victorian Athletic League ('VAL'). When signing the registration form, whether in the youth category (under 21), standard registration, or over 25 years, the applicant declares:

> *I acknowledge that upon registering with the Victorian Athletic League and upon entering any competition conducted under its auspices, I am subject to, and shall abide by, the Rules and Regulations and Code of Conduct for Athletes of the Victorian Athletic League. I shall also abide by the drug regulations of the IAAF and Athletics Australia...*

The drug regulations of the IAAF mirror provisions contained in the Code.

Did that person, who signed the VAL registration form realise that anti-doping rule violations do not require any mental element to be established before they can be excluded from competition for a period of two years for a first offence, or life for a second? Did that person realise they can possess a prohibited substance without ever having received it? Did they realise that the onus is on them to prove no fault or negligence, or no significant fault or negligence to reduce a period of ineligibility? And even then, such reduction will only come about in cases considered to be "truly exceptional".

Further, clause 1.06 of the National Anti-Doping scheme (NAD Scheme), which is contained in the *Australian Sports Anti-Doping Regulations* 2006 permits the Australian Sports Anti-Doping Authority (ASADA) to test certain classes of athletes including, those tested by agreement with a sporting body. If a person who signed the VAL registration form competed in an event, was tested by ASADA and a prohibited substance found in that person's sample, their name would likely be entered on the Register of Findings, a register which records the names of athletes who have committed anti-doping rule violations under the NAD Scheme. ASADA must give notice of the entry on the Register to relevant sporting bodies.

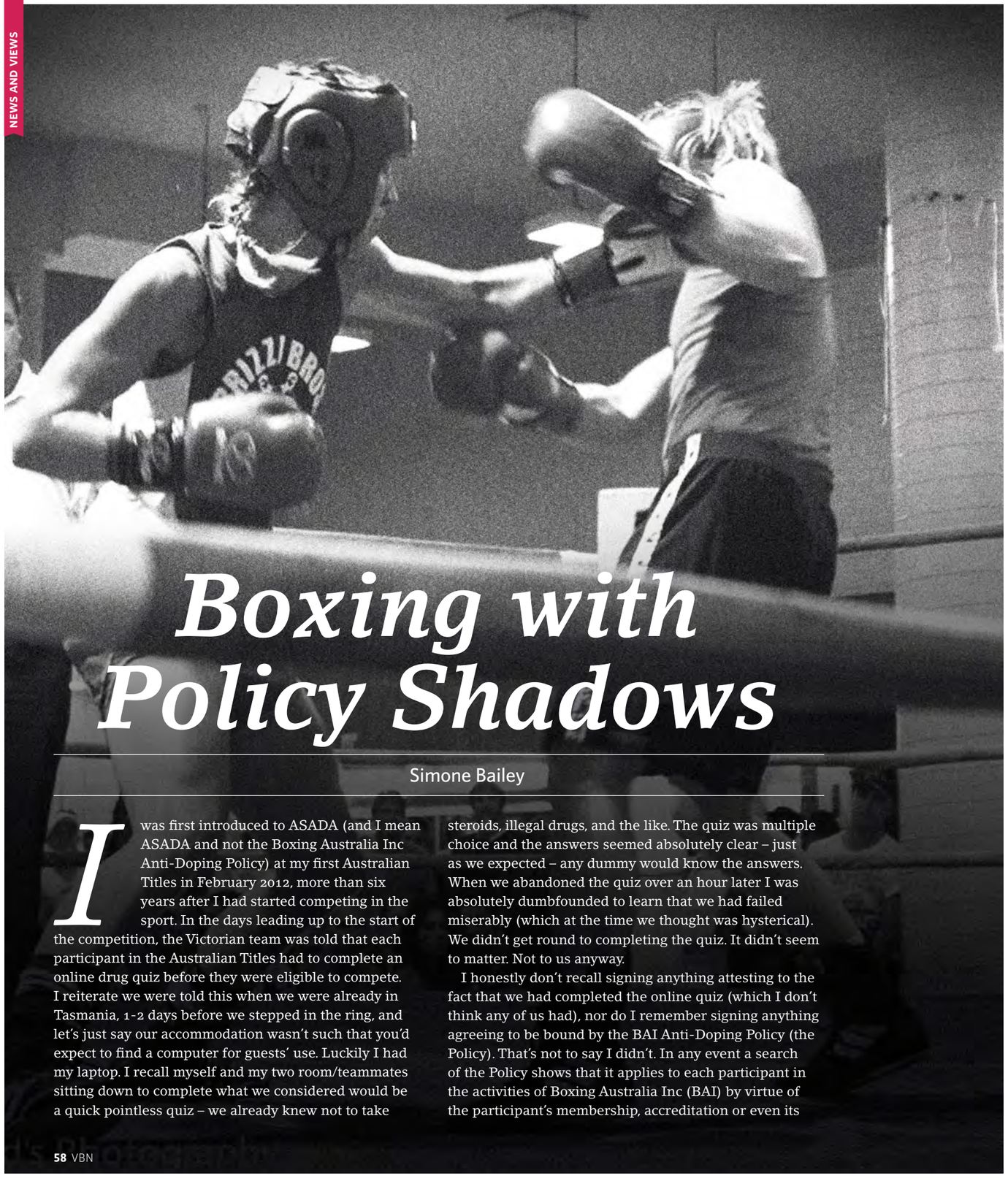
Consider the following possible consequences. Assume that person who signed the VAL registration form is a full time sports teacher in a school and participated in that competition as a personal challenge. Their employment may well be at risk given a finding of presence of a prohibited substance.

The intent of the Code is the protection of the integrity of sport and its foundations. The Code makes it clear that responsibility for what is in an athlete's system is solely the responsibility of the athlete. However, there are cases where, some may think, the 'time' bears little resemblance to the 'crime', and where the application of the strict and extended terms of the Code, with respect to well-intended athletes, challenges common sense and notions of fairness.

Take, for example, the recent case of a player in the Victorian Football League, who, via his iPhone, placed an order on a website. In the off-season the player enjoyed the good life and feared reprisals in the preseason should he return to the club and appear to be carrying a few extra pounds. He did a search online for fat-burning tablets, found a website with a special and placed an order. He did no research on the tablets, nor the website he was ordering from. He had no idea what the substance contained, but thought that he would check with the club doctor when it arrived before taking it. He never received what he ordered. It was intercepted by Australian Customs, who informed ASADA and he was charged with possessing a prohibited substance.

Under the AFL Anti-Doping Code (used by the VFL and which relevantly replicates the WADA Code) "possession" has the extended definition, which provides, amongst other things, "*the purchase (including by any electronic or other means) of a prohibited substance … constitutes possession by the person who makes the purchase.*" Accordingly, he had committed the anti-doping rule violation of possession of a prohibited substance and was sanctioned by the imposition of a period of ineligibility. In this athlete's circumstances, the imposition of the ban from competing effectively meant that he lost two seasons playing with his club. It also resulted in the already narrow window of possibility that he would be drafted by an AFL club being well and truly closed to him.

The Code is robust, if not draconian. Its drafters propound that such vigilance is the only way to ensure that sport remains fair and drug free. Their perspective has much to commend it. Vigilance is, however, required of all participants in sport who sign a form, as the anti-doping regime is not limited in application to those famous names at elite level such as Johnson and Armstrong.



Boxing with Policy Shadows

Simone Bailey

I was first introduced to ASADA (and I mean ASADA and not the Boxing Australia Inc Anti-Doping Policy) at my first Australian Titles in February 2012, more than six years after I had started competing in the sport. In the days leading up to the start of the competition, the Victorian team was told that each participant in the Australian Titles had to complete an online drug quiz before they were eligible to compete. I reiterate we were told this when we were already in Tasmania, 1-2 days before we stepped in the ring, and let's just say our accommodation wasn't such that you'd expect to find a computer for guests' use. Luckily I had my laptop. I recall myself and my two room/teammates sitting down to complete what we considered would be a quick pointless quiz – we already knew not to take steroids, illegal drugs, and the like. The quiz was multiple choice and the answers seemed absolutely clear – just as we expected – any dummy would know the answers. When we abandoned the quiz over an hour later I was absolutely dumbfounded to learn that we had failed miserably (which at the time we thought was hysterical). We didn't get round to completing the quiz. It didn't seem to matter. Not to us anyway.

I honestly don't recall signing anything attesting to the fact that we had completed the online quiz (which I don't think any of us had), nor do I remember signing anything agreeing to be bound by the BAI Anti-Doping Policy (the Policy). That's not to say I didn't. In any event a search of the Policy shows that it applies to each participant in the activities of Boxing Australia Inc (BAI) by virtue of the participant's membership, accreditation or even its participation in BAI or their activities or events (see article 3) such as the Australian championship.

I didn't get drug tested that year. The 'elite female' who beat me in the semi-final did though, and as it happens her sample came back with a positive finding. According to a teammate of hers (hearsay, I know), she sipped from a polystyrene foam cup containing a water like substance given to her by her coach during her warm up. She didn't ask to check the ingredient list. From what I hear, she didn't even ask her coach what the drink was – she allegedly just thought it was some sort of Gatorade style drink. It wasn't.

The drink contained a stimulant. The boxer was later suspended, and stripped of her win. No one ever told me though. I only stumbled across a 'news alert' months later whilst wading through the ASADA website researching for an unrelated legal matter. Nor did BAItell me about the 51kg elite female champion and Olympic Games hopeful who also tested positive from a sample taken at those same Titles. As it turns out, the fluid retention tablet the boxer had taken before boarding the plane to Tasmania contained a prohibited substance. She was also stripped of her title, suspended for a period of two years, and missed the opportunity to represent Australia in the Olympics. Perhaps BAIor someone should have told us. Then maybe we might have understood the drug policy better, we might even have read it.

Time went by and I was asked to compete for Australia. Before heading overseas, the team was made to watch (endure as most of the team saw it) a 20 minute ASADA educational video, followed by a five minute question and answer session. To be honest, I don't recall what was in the video. I certainly don't remember the video telling me that I could be suspended from competing for two years for simply *ordering* a product which contained a prohibited substance even if I hadn't consumed it, nor do I remember the video telling me that even if I had made all possible enquiries, and had written evidence from the supplier of the product that it contained no prohibited substance, that I could still be suspended for two years if by some chance the product still secretly contained a prohibited substance.

I signed a form saying that I had watched the ASADA video, but I don't actually remember signing any other forms before I left Australia wearing the Australian team tracksuit for the first time. However my research for this article has shown me that, as it turns out, I did. Apparently I acknowledged that I had read, understood and executed (where necessary) the following documents: the AIBA Technical & Competition Rules, the AIBA Anti-doping Rules, Boxing Australia Inc Member Protection Bylaw, Boxing Australia Inc Code of Conduct, and the Athlete SWOT Analysis.

I read the documents listed above for the first time today. And for those of you who are wondering, a SWOT analysis is not some forensic procedure but a written listing of your strengths and weaknesses, and the opportunities and threats you face. I also found that out today.

To be entirely honest, it was only once I represented someone who had been charged with breaching his sport's drug policy that I actually started to understand the scope of drug policies and the serious and strict liability consequences that result from violations. It was only then that it first occurred to me that I should have read the ingredients list of the protein powder I picked up at Rebel Sports. But by this stage I also realised that even if I made every reasonable enquiry, the product could still possibly (albeit not probably) contain something prohibited which could see me eliminated from competing in the sport I love for a matter of years. So now I don't use a protein powder. Just safer that way I suppose…

"It was only once I represented someone who had been charged with breaching his sport's drug policy that I actually started to understand the scope of drug policies and the serious and strict liability consequences that result from violations. It was only then that it first occurred to me that I should have read the ingredients list of the protein powder I picked up at Rebel Sports."

Of course, as a legal practitioner, I should have known better – I should have read the policy. I should have read the rules, by which I was bound. But I didn't. Even if I had, without researching the not readily available case law from disciplinary tribunals, I still don't think I would have understood the far-reaching scope of the policy. That of course begs the question— where does that leave the non-lawyer athletes?

Simone Bailey, is a barrister and boxer. She is currently ranked 2nd in Australia for 57kg elite female category, a four time State Champion and representative for Australia in international competitions.

NEWS AND VIEWS

The Collingwood Cup

Sharon Moore

Tony Lewis has barracked for the Richmond Football Club since he was four years old. He was assigned the team by his two sisters – at a time when they were well and truly welded to the bottom of the ladder! But it was a 'Collingwood Cup' that Tony recently presented to the Victorian Bar.

The sterling silver cup's story began in 1808 when it was made by Charles Hollinshed of London. In 1984 it was purchased by Melbourne solicitors Les Webb and Phil Slade and presented to Tony, who was their client, to commemorate his victory in the High Court in *Lewis v Ogden* [1984] 153 CLR 682. The cup was purchased from left over funds received through a costs order paid by the Crown. How Tony came to be a client, in the High Court and the recipient of a costs order from the Crown is explained below.

In the course of presenting his closing address to the jury in a criminal trial before Judge Ogden, Tony made remarks concerning the role of a judge in a criminal trial and, in particular, drew a distinction between the judge's comments on questions of law and questions of fact. Tony invited the jurors to exercise care with the questions of fact because, as he explained, Judge Ogden had shown a strong disposition to favour the prosecution. Tony's words were caught by the transcript, that "you would be pretty annoyed if, in the middle of a grand final, one of the umpires suddenly started coming out in a Collingwood jumper and started giving decisions one way."

Judge Ogden (who it transpired was a Collingwood supporter!) charged Tony with contempt of court for wilfully insulting a judge, convicted him and fined him $500. In proceedings for relief in the Supreme Court of Victoria, Justice King quashed the fine on the ground that Judge Ogden had failed to provide an adequate opportunity to Tony to adduce evidence or advance argument on the issue of penalty. Tony and his legal team sought special leave to appeal to the High Court in relation to the conviction. Tony was represented in the High Court by no less than the late, great, Brian Shaw QC, and juniors Mark Weinberg (as he then was) and Robert Richter. While they were successful in the High Court – the success did not come cheaply. Tony recalls that in 1984 Brian Shaw's fees were $7000 and that "you could buy a respectable sports car in those days for that amount". It was, in fact, the Victorian Bar who paid for Counsels' fees – the outcome of the case being considered of significance to all members.

Tony, who last year retired after more than 40 years at the Bar, recently presented the cup to the Bar to show his appreciation for the "vigorous support" he received. He said that he was very humbled by the support the Bar provided to him and particularly appreciated the Bar Council's financial support.

Tony Lewis (right) presents the Collingwood Cup to the Bar's representative, Ross Nankivell

THE COLLINGWOOD CUP

THIS CUP WAS PRESENTED TO TONY LEWIS BY LES WEBB AND PHIL SLADE TO COMMEMORATE HIS VICTORY IN LEWIS V OGDEN IN THE HIGH COURT OF AUSTRALIA ON THE 15TH OF MAY 1984.

THE APPEAL WAS WON WITH THE HELP OF BRIAN SHAW Q.C., MARK WEINBERG and ROBERT RICHTER OF COUNSEL, SLADE and WEBB SOLICITORS, AND WAS SUPPORTED BY THE VICTORIAN BAR. [1984] 153 CLR 682

PHOTOS COURTESY OF TIRA LEWIS

Ethics Committee

BULLETINS

Ethics Committee Bulletin No 2 of 2012

REQUESTS FOR DISPENSATION FROM THE OPERATION OF RULES

1. It has become apparent to the members of the Ethics Committee that many applications to the Committee for dispensation from the operation of certain practice rules pursuant to Rule 7, and most frequently from Rule 171, fail to provide adequate detail of the special circumstances or justification for dispensation being granted.
2. Rule 171 states:
   171 A barrister must not, except with the written permission of the Ethics Committee, accept any instructions or brief in a direct access matter:
   (a) to appear in the High Court of Australia, Federal Court of Australia, Family Court of Australia, Supreme Court of Victoria, County Court of Victoria (except in criminal matters where the barrister is instructed by Victoria Legal Aid), or in any civil proceeding in the Magistrates' Courts of Victoria or the Federal Magistrates Court;
   (b) once proceedings are instituted (if acting for a plaintiff) and served (if acting for a defendant) in any of the courts set out in sub-paragraph (a) hereof.
3. Rule 7 of the Victorian Bar Rules of Conduct provides that in special circumstances the Bar Council or the Ethics Committee may grant a dispensation from the operation of certain rules by declaring that a barrister is not bound to observe a certain rule or rules or may do so in a modified form. Relief from the prohibition imposed by rule 171 or any rule cannot be granted absent special circumstances.
4. In making an application for dispensation from Rule 171, counsel must also give consideration to Rule 120 which prohibits barristers acting as or performing the work of a solicitor; Rule 126 which requires barristers to be briefed by solicitors and the exceptions to Rule 126 in rule 127.
5. Frequently the only reason proffered by counsel for seeking dispensation is the assertion that the client cannot afford to engage a solicitor. The Committee's view is that this does not constitute a special circumstance as contemplated by Rule 7.
6. "Special circumstances" must be just that, "special". They must be exceptional in quality or degree, unusual and out of the ordinary.
7. In particular, lack of financial resources is not unusual. Neither is the failure to seek representation until the eleventh hour. Nor is it a special circumstance that the client loses faith in the solicitor and only wants to deal with counsel. Ordinarily, an established relationship between counsel and client would not constitute the requisite special circumstances.

RICHARD W MCGARVIE SC
CHAIRMAN, ETHICS COMMITTEE

Ethics Committee Bulletin No 3 of 2012

ACCEPTANCE OF TWO BRIEFS TO APPEAR ON THE SAME DAY IN THE SUPREME COURT OF VICTORIA

Counsel are reminded that they "ought not to accept more than one brief to appear on a particular day, unless:
(a) the barrister can properly advance and protect the client's interests to the best of the barrister's skill and diligence in each matter; and
(b) the barrister will not cause any embarrassment or delay to the court or to the barrister's opponent."
See Good Conduct Guide [5.21] at page 77.

A Supreme Court judge has drawn to the attention of the Ethics Committee a recent instance of great discourtesy to the Court and opponent where a barrister who had been double briefed became unavailable to appear before his Honour at all on a particular day, after first having had his opponent stand the matter down to 2.15pm, because the counsel concerned was required to appear elsewhere. The matter before his Honour accordingly had to be adjourned to a new date, giving rise to obvious potential costs consequences for the parties and the absent barrister. The judge advises that there is a view among judges of the Supreme Court that such instances are becoming more common. With the recognised exception of Commercial List directions days on which the Court has long accommodated counsel who have more than one brief, or where the Court's indulgence is granted to accommodate unexpected contingencies, such as serious illness or funerals, counsel must ensure they are available to appear at the earliest time that is convenient to the Court to proceed with the matter. The same considerations apply in all courts, not just the Supreme Court.

RICHARD W MCGARVIE SC
CHAIRMAN, ETHICS COMMITTEE

Ethics Committee Bulletin No 4 of 2012

DIRECT ACCESS BRIEFS – UPDATED

This Bulletin supersedes Bulletin No. 2 of 2011.

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

RULES OF CONDUCT

1. The Direct Access Rules are found at Part VI of the Rules of Conduct – Rules 165 to 177.
2. Subject to the Rules of Conduct, Rule 165 permits a barrister to accept instructions or a brief (without the intervention of a solicitor) from:
   (a) a member of an approved body acting on its own or on behalf of a client;
   (b) a lay client in a matter in which the client is directly concerned; or
   (c) the Victoria Legal Aid in criminal matters.
3. The application of Rule 165 is limited by the Rules, in particular, Rule 171 which prohibits a barrister from accepting any instructions or a brief in a direct access matter (except with the written permission of the Ethics Committee):
   (a) to appear in the High Court of Australia, Federal Court of Australia, Industrial Relations Court of Australia, Family Court of Australia, Supreme Court of Victoria, County Court of Victoria (except in criminal matters where the barrister is instructed by Victoria Legal Aid), or in any civil proceeding in the Magistrates' Courts of Victoria;
   (b) once proceedings are instituted (if acting for a plaintiff) and served (if acting for a defendant) in any of the courts set out in sub-paragraph (a) hereof.
4. Rule 170 allows a barrister to appear in a direct access matter in the Magistrates' Court in a criminal proceeding.
5. The effect of the Direct Access Rules is to permit barristers to appear in the Magistrates' Court in a criminal proceeding and at Tribunals (including VCAT) without the intervention of a solicitor. This permission is, however, subject to Rule 168 which provides that: A barrister:
   (a) must not accept any brief or instructions in a direct access matter if he or she considers it is in the interests of the client that a solicitor be instructed.
   (b) must decline to act in a direct access matter in which at any stage he or she considers it in the interests of the client that a solicitor be instructed.
6. Furthermore, Rules 173 to 177 place a number of procedural restrictions and record-keeping requirements on barristers when acting in a direct access matter.

VICTORIAN BAR PRO BONO SCHEME

7. The Ethics Committee has granted dispensation from the operation of rules 171, 172, 174 and 176 of the Practice Rules in order that a barrister may advise and appear in a professional capacity under the auspices of the Victorian Bar Pro Bono Scheme (VBPBS), which is administered by the Public Interest Law Clearing House (PILCH), provided that the matter satisfies the criteria of VBPBS.

   This dispensation is reviewed on a regular basis.

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

FEDERAL COURT AND THE FEDERAL MAGISTRATES COURT

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

   The Rules of Practice of the Victorian Bar apply to these pro-bono schemes. Thus, it is the obligation of the barrister to make an assessment of what is in the interests of the client under Rule 168 as well as comply with the other Direct Access Rules. If the barrister considers that it is in the interests of the client that a solicitor be instructed in the matter, the relevant court official must be notified and the court will inform the client to contact the Public Interest Law Clearing House (PILCH) for pro bono assistance. If the client meets the guidelines and is eligible for assistance, PILCH will attempt to refer the matter on a pro bono basis to a solicitor.

DUTY BARRISTERS' SCHEMES

9. In 2007 the Victorian Bar established a Duty Barristers' Scheme (the "Scheme") in the Magistrates' Court. The Ethics Committee has granted dispensation from the operation of rules 171, 172, 174 and 176 of the Practice Rules in order that they may advise and appear in a professional capacity in a civil matter in the Magistrates' Court of Victoria under the auspices of the Scheme provided that the matter satisfies the criteria of the Scheme. Those criteria include a provision that the matter must be that in which, in the Duty Barrister's opinion, the client will not be prejudiced if a solicitor is not acting.
10. In 2008, the Duty Barristers' Scheme was extended to the Supreme Court under strict criteria. The Ethics Committee has granted dispensation from the operation of rules 171, 172, 174 and 176 of the Practice Rules to those members of counsel who, from time to time, are participating in the Scheme as extended with the approval of Bar Council to the Supreme Court, in order that they may advise and appear in a professional capacity in a matter in the Practice Court of the Supreme Court of Victoria, in mediations led by an Associate Judge or other Officer of the Supreme Court, and in the Court of Appeal, under the auspices of the Scheme provided that the matter satisfies the criteria of the Scheme.

    Both these dispensations are reviewed on a regular basis.

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

RICHARD W MCGARVIE SC
CHAIRMAN, ETHICS COMMITTEE

Ethics Committee Bulletin No 1 of 2013

CHANGES TO VICTORIA LEGAL AID FUNDING, FEBRUARY 2013

1. Effective from 7 January 2013, changes to Victoria Legal Aid's Criminal Law Guidelines now cap instructing solicitors' fees in indictable crime trials to two half days with a small number of exceptions.
2. At the beginning of 2013 the Supreme Court of Victoria stayed two criminal proceedings on the grounds that the accused might not obtain a fair trial as a consequence of the limited assistance of an instructing solicitor to counsel.
3. The Ethics Committee has received a number of enquiries as to the effect of these decisions. In response the Ethics Committee reminds Counsel that:
   (a) The need for an application for a stay of a criminal proceeding is a legal issue and not an ethical issue, and is a matter for the forensic judgment of counsel and instructions from the client.
   (b) Rules 96(e) and 98(a)(i) entitle counsel to refuse to accept or retain a brief and to return a brief in circumstances where the barrister's request that appropriate attendances by an instructing solicitor will be arranged for the purposes of:
      (i) ensuring that the barrister is provided with adequate instructions to permit the barrister to properly carry out the work periods required by the brief;
      (ii) ensuring that the client adequately understands the barrister's advice;
      (iii) avoiding any delay in the conduct of any hearing or compromise negotiations; and
      (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused,has been refused.
   (c) In considering his or her position in relation to Rules 96(e) and 98(a) counsel should have regard to Rule 101 [return of briefs in serious criminal cases] and Rule 105. In particular, counsel should have regard to the requirement that a barrister who wishes to return a brief must do so in enough time to give another legal practitioner a proper opportunity to take over the case.
4. Counsel should also have regard to any legislative requirement for leave of the court to withdraw.
5. The application of these Rules will depend on the circumstances of each case. Members of the Ethics Committee are available to respond to specific queries from counsel.

RICHARD W MCGARVIE SC
CHAIRMAN, ETHICS COMMITTEE

Ethics Committee Bulletin No 2 of 2013

COMMUNICATIONS BETWEEN COUNSEL

1. Counsel should be mindful in their dealings with opposing counsel.
2. The Ethics Committee understands the need for direct and frank exchanges with opposing counsel. However, recently the Ethics Committee has had drawn to its attention examples of counsel adopting behaviour which is inappropriate for a professional exchange with opposing counsel.
3. In dealing with opposing counsel, counsel should at all times conduct themselves appropriately for a professional exchange.
4. Counsel should refrain from using offensive language which may, depending on the circumstances, constitute unethical conduct. Further, the use of such language in some contexts may be considered to constitute threatening or bullying behaviour.

HELEN SYMON SC
CHAIR, ETHICS COMMITTEE

Back of the Lift

Adjourned Sine Die

High Court of Australia
The Hon Justice Heydon AC MICHAEL GRONOW

Supreme Court of Victoria, Court of Appeal
The Hon Justice Bongiorno AO QC MICHAEL WHEELAHAN SC

Supreme Court of Victoria
The Hon Justice Habersberger ANTHONY NEAL SC

Silence All Stand

High Court of Australia
The Hon Justice Keane MICHAEL COLBRAN QC

Federal Court of Australia
The Hon Chief Justice Allsop AO ROBERT HEATH

Family Court of Australia
The Hon Justice Walters KEITH NICHOLSON
The Hon Justice Tree VBN
The Hon Justice Coate FIONA ELLIS

Supreme Court of Victoria, Court of Appeal
The Hon Justice Whelan ADRIAN RYAN SC
The Hon Justice Priest SARA HINCHEY
The Hon Justice Coghlan VBN

Supreme Court of Victoria
The Hon Justice Digby ANTHONY STRAHAN
The Hon Associate Justice Derham DAVID BAILEY

County Court of Victoria
His Honour Judge Gray TIMOTHY BOURKE
His Honour Judge Jordan TIM SECCULL

Magistrates' Court of Victoria
Chief Magistrate Lauritsen TIMOTHY BOURKE
(WITH FIONA MCLEOD SC AND PAT CASEY)

Obituaries

Professor Emeritus Harold Ford AM
THE HON JUSTICE DODDS-STREETON
Evan James Smith VBN
Gerald Andrew Hardy VBN
Graeme Hilaire Cantwell MAX PERRY
Graeme Douglas Johnstone
HIS HONOUR MAGISTRATE ALSOP
John Aubrey Gibson GUY GILBERT
John Raymond Perry MAX PERRY
Richard Taranto HER HONOUR MAGISTRATE FLEMING
Lindis Krejus VBN

*Entries for Back of the Lift are current up to 22 March 2013

Back of the Lift

Adjourned Sine Die

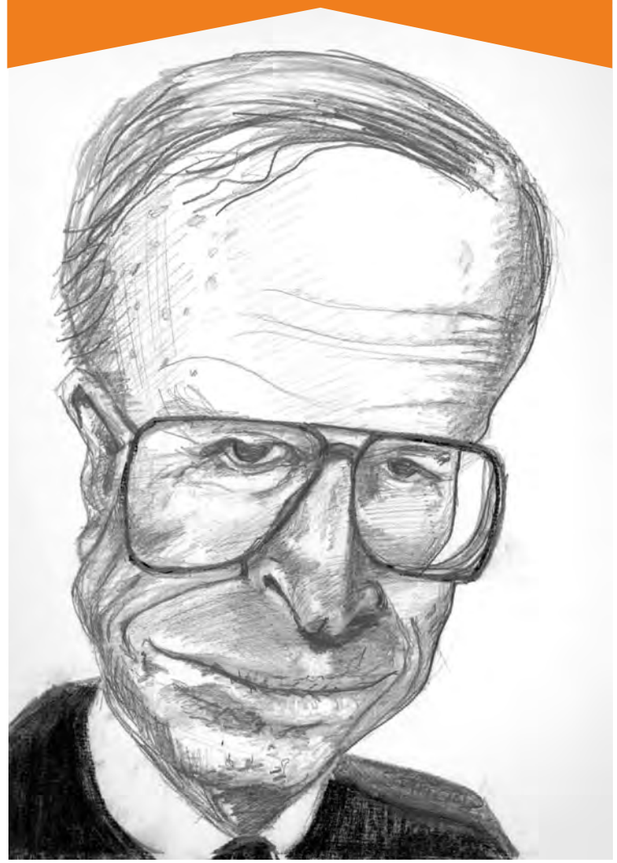


ILLUSTRATION BY SAM STAFFORD

High Court of Australia

The Hon Justice Heydon AC

With the retirement of Justice Dyson Heydon, the High Court of Australia has lost one of its most erudite members, and one of those rare judges whose judgments are a genuine pleasure to read. His Honour's former career as an academic and Dean of Law, as well as his literary, classical and historical learning, inform his judgments and his prose style, whether in majority or in dissent. Like some of his predecessors on the High Court, his Honour has a profound admiration for the common law:

> "With the retirement of Justice Dyson Heydon, the High Court of Australia has lost one of its most erudite members, and one of those rare judges whose judgments are a genuine pleasure to read."

The Charter may reflect much of what is best and most enlightened in the human spirit. But there are some virtues that cannot be claimed for it.

One is originality. For a great many of the rights it describes already exist at common law or under statute. In that form, the rights are worked out in a detailed, coherent and mutually consistent way. Thus the very general rights to liberty and security in s21 may be compared with the incomparably more specific and detailed rules of criminal procedure which exist under the general law. Those rules are tough law. Infringement can lead to criminal punishment, damages in tort and evidentiary inadmissibility. They were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience...

Another virtue which the Charter lacks is adherence to key values associated with the rule of law – and the protection of human rights is commonly, though not universally, thought to be closely connected to the rule of law. One value associated with the rule of law from which the Charter departs is certainty, particularly in s7(2). Application of the Charter is very unlikely to make legislation more certain than it would have been without it. A further value associated with the rule of law from which the Charter departs is non-retrospectivity. (Momcilovic v R (2011) 245 CLR 1, at [380]-[382])

His Honour is a distinguished and prolific legal author. His works include *The Restraint of Trade Doctrine* (now in its third edition), *Trade Practices Law* and several Australian editions of *Cross on Evidence*. His Honour is also an author of the fourth edition of *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, and the 7th edition of *Jacobs' Law of Trusts in Australia*.

His Honour was born in Ottawa, Canada on 1 March 1943, the son of the Australian diplomat, public servant and author Sir Peter Heydon. He was educated at Sydney Church of England Grammar School and the Universities of Sydney and Oxford, which latter university he attended as a Rhodes Scholar. He achieved First Class Honours and the University Medal in History at Sydney, and the Vinerian Scholarship at Oxford. He became a Fellow of Keble College Oxford in 1967, Professor of Law at Sydney in 1973, and Dean of Law there in 1978. His Honour commenced full time practice at the New South Wales Bar in 1979, specialising in trade practices, equity and commercial law. He was a member of the NSW Bar Council from 1982 to 1986 and took Silk in 1987. He was appointed a judge of the NSW Court of Appeal in February 2000, and of the High Court of Australia on 11 February 2003. He is married and has four children.

His Honour's judicial style has remained pithy and direct. He recently said the following of parties who had opposed a costs order in favour of a successful appellant:

> *The respondents' position is typical of the mindless and rancorous technicality which characterises litigation about industrial law. It is entirely without merit. That is particularly so in view of the extraordinary weakness of the respondents' substantive case on the appeal. (Board of Bendigo Regional Institute of TAFE v Barclay (No 2) (2012) 86 ALJR 1253, at [9]).*

Those of us who enjoy legally stimulating and well written judgments will regret his Honour's departure from the High Court. The Victorian Bar wishes him well in his retirement from judicial activity.

(the author gratefully acknowledges the note by IM Jackson SC (2003) 77 ALJ 697 for providing some of the biographical details referred to above)

MICHAEL GRONOW

Supreme Court of Victoria, Court of Appeal

The Hon Justice Bongiorno AO QC

Bar Roll No 850

On 31 December 2012 the Hon Justice Bongiorno retired from the Supreme Court of Victoria and as a judge of the Court of Appeal. His Honour served with distinction as a judge of the Court for more than 12 years, including for more than three years as a judge of the Court of Appeal.

Justice Bongiorno graduated from the University of Melbourne in 1966, and then served articles with William Hunt. His Honour was called to the Bar in 1968 and read with Tom Neesham (later his Honour Judge Neesham). His Honour took silk in 1985.

At the Bar, Justice Bongiorno had a wide-ranging practice. His Honour was one of the last great generalists, and his considerable natural talent enabled him to cross jurisdictions

with ease. As junior counsel, his Honour acted as counsel assisting in the Victorian Poker Machines Inquiry conducted by Murray Wilcox QC. As a silk, his Honour conducted cases in all courts ranging from complex professional negligence cases, to defamation, crime and commercial law.

From 1991 to 1994 his Honour was Director of Public Prosecutions. As Director, his Honour championed the independence of that office, and discharged his duties with distinction. His Honour appeared in a number of appeals by the Director to the High Court, including *R v Glennon* (1992) 173 CLR 592, in which the Director was successful by a 4:3 majority in submitting that a stay of criminal proceedings on the ground of pre-trial publicity should be overturned.

Upon his return to the Bar in 1994 his Honour again enjoyed a most successful practice, in trial and appellate work. His Honour appeared in leading common law cases in the High Court, including *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

His Honour was a great contributor to life at the Bar. He had six readers. He served on the Bar Council for seven years, on the Bar Ethics Committee for five years (including as Chairman), as a Bar representative on the Supreme Court Board of Examiners for 10 years, and on numerous other Bar and Bar/Law Institute Committees. He was a champion of legal aid and access to justice.

Justice Bongiorno was appointed to the Trial Division of the Supreme Court on 18 December 2000. For many years his Honour was the Judge-in-Charge of the Major Torts List, in which his Honour managed common law cases in the Court, including defamation and professional negligence cases. His Honour's depth of experience equipped him to sit on difficult cases, including the trial of *R v Benbrika*, in which 12 accused were tried for Commonwealth terrorism related offences in a trial that took place over eight months in 2008. On 11 August 2009 Justice Bongiorno was appointed to the Court of Appeal, where his Honour sat until his retirement.

ILLUSTRATION BY SAM STAFFORD

Justice Bongiorno's last sitting was on Friday 21 December 2012. On that occasion Chief Justice Warren, paid tribute to his Honour's outstanding service on the Court, on the Court of Appeal, and in the law.

> "His Honour was one of the last great generalists, and his considerable natural talent enabled him to cross jurisdictions with ease."

Outside the law, his Honour served on the Committee of Co.As.It (the Italian Assistance Association) for more than 30 years, including 13 years as President. He was made a Commander of the Order of Merit of the Republic of Italy in 1999 and was awarded the Australian Centenary Medal.

His Honour is a proud father of four children, and a grandfather. His son Daniel practises at our Bar.

The Bar wishes Justice Bongiorno a long and happy retirement.

MICHAEL WHEELAHAN SC

ILLUSTRATION BY SAM STAFFORD

Supreme Court *of* Victoria

The Hon Justice Habersberger

Bar Roll No 1033

Justice David Habersberger retired as a judge of the Supreme Court of Victoria on 20 March 2013 having been appointed to the bench in July 2001.

His Honour signed the Roll of Counsel in 1973 having completed a first class honours degree in law. Before that he served articles of clerkship with Blake Riggal and was an Associate to Sir Garfield Barwick.

His Honour read with the Hon Stephen Charles QC. He quickly established a successful practice and appeared in a number of High Court cases including *Commonwealth v Tasmania (1983) 158 CLR 1* (the Tasmanian Dam case), a significant constitutional case.

His Honour took silk after 14 years and his illustrious career as a junior was replicated as silk. His silk's practice involved an unusually high component of "mega-litigation". The protracted St Andrews Hospital and HFC Financial Services matters were a mere dress rehearsal for his Honour's real magnum opus: conducting the Inquiry into the collapse of the Pyramid Building Society. After an Inquiry lasting over four years his Honour produced a 1700 page report. The report was of meticulous quality, notwithstanding that the final year of the Inquiry was unfunded – a remarkable act of public service.

Out of court his Honour was also a prolific contributor to the Bar. His Honour served on the Bar Council and associated committees for 15 years, and was Chairman of the Bar Council in the appointment year spanning 1994-1995.

His Honour's work as a judge has been no less distinguished and often just as taxing with many very complex commercial disputes finding their way to his Honour. The various hearings in the *BHP Billiton v Steuler* dispute spanned four and a half years. Despite the rigours of the cases before him, His Honour enjoyed a well-deserved reputation for courtesy and patience. His Honour's judgments bear the trademarks of his Honour's practice of the law generally: informed by diligence and driven by reason.

His Honour readily acknowledges the enormous support and encouragement of his family throughout his professional career. Some 44 years of what his Honour himself described as "marital serendipity" with his wife Pam has obviously been a wonderful and sustaining union, one blessed by their son James and enriched in more recent times by the arrival of two grandchildren.

It should not be thought that his Honour is without vices or deficiencies. He is known to be a supporter of the St Kilda football club, which arguably qualifies on both counts. Reputedly he also introduced both wine and women to Queen's College (I hasten to add, in his capacity as President of the College's General Committee). Whilst his Honour and Pam greatly enjoy walking holidays in foreign climes, his mastery of foreign languages is still developing. His amiable and patient disposition was tested when an Italian train carriage continued to spew out warm air despite his purposefully sliding the vent to "caldo". Apparently he was also impressed by the ubiquitous chain of Italian cafes called "Cafe Freddo".

It is to be hoped a life full of commitment now segues to a fulfilling retirement. His Honour's humanity and legal ability combined to ensure he was a great asset to the legal profession. The legal profession and the Victorian community will be the poorer for his retirement. The Bar wishes his Honour well.

ANTHONY NEAL SC

Silence All Stand

High Court *of* Australia

The Hon Justice Keane

On 5 March 2013 Patrick Anthony Keane QC was sworn in as the 50th Justice of the High Court.

The speeches at the welcoming ceremony recognised his Honour's dominating intellect and unbridled capacity for hard work but recognised also the good humour and humility that made him a revered member of the Queensland Bar and subsequently a popular and admired judge.

Born in 1952 and raised in Wilston, Brisbane, Keane has spoken of the sacrifices made by his parents to allow him the best opportunities in early life.

His academic talent and leadership qualities were soon evident as he became both School Captain and Dux of St Joseph's College, Gregory Terrace.

His Honour graduated from the University of Queensland in 1976 with degrees in Arts and Law, with First Class Honours, and the University Medal in Law and other major academic prizes.

After a short time in practice as a solicitor at Feez Ruthning, his Honour spent 10 months at Magdelen College, Oxford University on the Sir Henry Abel Scholarship. He was awarded the Vinerian Scholarship for the best-performing student in the examination for the Degree of Bachelor of Civil Law and the prestigious JHC Morris Prize.

Returning promptly to Australia his Honour was admitted as a Barrister of the Supreme Court of Queensland in December 1977 and swiftly developed a heavy practice appearing mainly in commercial and constitutional cases. Soon becoming known as a first-rate traditional legal technician, and an unremitting opponent, he was appointed Queens Counsel in 1988 and Queensland Solicitor-General in 1992.

A succession of judicial offices followed, from his appointment as a Judge of Appeal of the Supreme Court of Queensland in 2005, to appointment as the Chief Justice of the Federal Court in 2010, and finally, to the High Court.

Justice Keane was hailed by the Queensland Bar's President as "a shining light" of the Bar and as a great judge who "although always exacting, retained the courtesy, unpretentiousness, willingness to listen and good nature that made [him] such a popular member of [the] Bar".

His Honour's exceptional career of service, including thoughtful and scholarly contributions to debate on a wide range of legal issues, was recognised by the University of Queensland with the award of the degree of Honorary Doctor of Laws.

The ceremonial sittings of the Queensland Court of Appeal and the Federal Court in March 2010 and in the Federal and High Court in March 2013 demonstrated the mutual respect and affection between his Honour and the judicial colleagues and the staff of each Court on which his Honour has served.

His Honour is also well known as a devotee of many Melbourne restaurants and we hope his frequent visits here will continue unabated.

MICHAEL COLBRAN QC

Federal Court *of* Australia

The Hon Chief Justice Allsop AO

On 20 November 2012, the Commonwealth Attorney-General announced the appointment of the Hon Justice James Allsop as the fourth Chief Justice of the Federal Court of Australia. His Honour was the Associate to the first Chief Justice of the Federal Court of Australia, the Hon Nigel Bowen.

Chief Justice Allsop taught history at Sydney Grammar School in 1974 and he continued working as a teacher over the following few years at Marist College at Kogarah. His Honour began parttime studies in law at the University of New South Wales in that period. In 1977, his Honour returned to fulltime study at the University of Sydney. His Honour graduated from the University of Sydney in 1980 with a Bachelor of Laws with First Class Honours and received the University Medal. This background as a history scholar and teacher is evident in his Honour's judgments in the New South Wales Court of Appeal and the Federal Court of Australia.

Chief Justice Allsop was called to the Bar in July 1981 and took Silk in 1994. His Honour had a distinguished career at the NSW Bar, practising mainly in commercial law, including insurance and shipping. As a barrister, his Honour was a model of courtesy and patience.

On 21 May 2001, before a packed Court 21A, his Honour was sworn in as a Justice of the Federal Court of Australia. At this time, his Honour was the first former Federal Court Associate to be appointed to the Federal Court of Australia. His Honour was appointed President of the New South Wales Court of Appeal in June 2008. In that role, his Honour served with distinction, politeness and efficiency.

His Honour's judgments are great sources of learning and guidance. They reflect patient legal scholarship, considerable industry and the principled manner in which his Honour set about resolving disputes. There are many judgments offering helpful guidance to practitioners now operating against the background of the *Civil Procedure Act 2010* (Vic) and like legislation in other jurisdictions. See for example *White v Overland* [2001] FCA 1333 at [4] and *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 [676]-[679].

In addition to his distinguished career at the Bar, Chief Justice Allsop devoted his time generously to the cause of legal education. From 1981, he taught parttime at the University of Sydney as a lecturer in property, equity, bankruptcy, insolvency, corporate finance and maritime law. From 2005 until 2009, he was member of the Board of the World Maritime University in Malmö in Sweden.

The Victorian Bar congratulates his Honour and wishes him well in his new role.

ROBERT HEATH

Family Court *of* Australia

The Hon Justice Walters

Bar Roll No 3393

On 27 November 2012 his Honour Justice John Walters was appointed as a judge of the Family Court of Western Australia and on 6 December 2012 he was appointed as a justice of the Family Court of Australia, replacing Justice Caroline Martin following her untimely death from cancer.

His Honour was born in Perth in 1951. He was educated along with (in his mother's words) his "high achieving older brother" at Scotch College and obtained his law degree at the University of Western Australia.

Upon completion of his law degree he was admitted to practice and worked as a solicitor in Perth prior to travelling to Israel where he lived for nearly 6 years. Whilst in Israel he undertook compulsory military service and upon completion studied for, and obtained, admission as a legal practitioner having successfully completed a Viva, being an oral examination in Hebrew. His Honour returned from Israel to Perth in 1981.

Upon his Honour's return to Perth he joined Lavan Solomon, later to be known as Phillips Fox, working alongside the then Family Law partner and the now Chief Justice of the Family Court of Australia, Diana Bryant. His Honour was later admitted to the partnership.

His Honour joined the Western Australian Bar in 1985 where he initially undertook work in both family law and criminal law with a particular interest in prosecutions. He was later to concentrate exclusively in the family law jurisdiction where he developed a reputation and a considerable practice as both a skilled trial advocate and a learned appellate advocate, appearing in many of the major relocation cases in the 1980s and 1990s.

In October 2000 his Honour signed the Victorian Bar Roll as a member of the Overseas and Interstate Practising Counsel list and in 2001 he relocated to Melbourne joining the list of Practising Counsel on 1 July 2001.

On 29 October 2001 his Honour was appointed to the Federal Magistrates Court where, whilst initially hearing matters across the full range of the court's jurisdiction, he sat solely in the court's family law jurisdiction from 2007. Whilst sitting as a Federal Magistrate his Honour was the Circuit Federal Magistrate in Shepparton where the court sat for four single weeks each year and he developed a particular fondness for the Goulbourn Valley region.

Whilst his Honour came to regard Melbourne as home, in line with his interest in relocation matters he has now gone full circle, moving back to Perth, where he commenced sitting on 4 February 2013.

KEITH NICHOLSON

Family Court *of* Australia

The Hon Justice Tree

Bar Roll No 3972

Justice Peter Tree was appointed a judge of the Family Court of Australia with effect from 14 January 2013. His Honour is based at the Townsville Registry.

Justice Tree grew up on a rural property in Thornlands, outside Brisbane. He studied law at the University of Queensland, graduating with honours in 1988. He was admitted as a barrister of the Supreme Court of Queensland in 1989. His Honour moved to Tasmania, where he was admitted as a barrister in 1991. There, his Honour developed a diverse general litigation practice. In addition to maintaining a broad practice in most areas of civil litigation, his Honour also took briefs in family law and crime. Not only did his Honour take on a wide range of work, his client base was also diverse. As well as acting for the State and for large corporations, he acted for many clients on a pro bono basis.

His Honour took silk on 25 June 2004. While continuing to practise in Tasmania, he started to practise elsewhere in Australia. His Honour signed the Victorian Bar Roll on 26 October 2006, and at the time of his appointment was maintaining chambers in Melbourne, Hobart and Cairns.

Justice Tree acted in many high-profile cases. In 2006, he acted for Bob Brown in seeking an injunction to restrain logging in old growth forest at Wielangta in Tasmania. In 2009, he successfully defended the then Tasmanian Police Commissioner who was charged with disclosing official secrets to the then Premier.

His Honour also acted in several landmark High Court cases. At just 29 years of age, he was lead

counsel for the respondent in *Bryan v Maloney*, successfully contending that a relationship of proximity existed between the builder of a residential premises and a subsequent owner. His Honour also appeared in *ABC v O'Neill* and *Maurice Blackburn Cashman v Brown*.

As a barrister, his Honour was actively involved in many aspects of the legal profession. From 2007 to 2011, he served as President of the Tasmanian Bar. During that time he was also Director of the Law Council of Australia. He served as Chair of the Tasmanian Sentencing Advisory Council from 2010, and was a member of the Ethics Advisory Panel of the Law Society of Tasmania.

His Honour also lectured at the University of Tasmania Law School and was the Director of the Professional Legal Training Program (Tasmania) from 1998 to 2002.

VBN

Family Court *of* Australia / Royal Commission into Institutional Responses to Child Sexual Abuse

The Hon Justice Coate

On 11 January 2013, the Governor-General in Council appointed her Honour Judge Jennifer Ann Coate of the County Court of Victoria to be a judge of the Family Court of Australia. Her Honour was sworn in on 31 January 2013 and immediately seconded as a Commissioner to the Royal Commission into Institutional Responses to Child Sexual Abuse.

Her Honour was educated at Lyndale High School, Dandenong, and thereafter undertook her training as a teacher at Frankston Teachers' College. After working as a teacher in 1977 and 1978 at the Collingwood Education Centre, her Honour commenced an Arts Degree followed by a Law degree at Monash University. In 1984 her Honour completed articles with Peter McMullin and by 1988 they became partners in the firm McMullin, Coate & Co. As a practitioner, her Honour appeared predominantly in the Family Court.

In 1992, after having worked for Victoria Legal Aid for a year, her Honour was appointed as a magistrate. After transferring to the Children's Court and serving as a senior magistrate for a number of years her Honour was appointed a County Court judge and President of the Children's Court (2000-2006). During this time, her Honour liaised with the Family Court on the interface between Child Protection and Family Law.

In 2007 her Honour was appointed State Coroner. In the five years during which she held this appointment, her Honour was the guiding force behind the *Coroners Act 2008*; establishing the Coroners Court of Victoria and the Coronial Council. As State Coroner, her Honour presided over significant inquiries involving the deaths of teenagers and vulnerable persons who had been either in the presence of police or under the care of the state.

In February 2009, Victoria suffered enormous human loss in the Black Saturday bush fires. In the immediate wake of the fires and as embers continued to burn, her Honour visited the area and commenced the coronial investigation with her trademark empathy and thoroughness.

Her Honour's colleagues, staff and those who have appeared in her court know, and have benefitted from, her ability to apply her sharp intellect with her strong understanding of human nature.

Outside of the law, her Honour is a keeper of bees and practises tae kwon doe. In a coastal hothouse, her Honour intends to graft and grow a tree that bears a variety of different fruits. Such pursuit is reflective of her Honour's professional and personal character.

FIONA ELLIS

Supreme Court *of* Victoria, Court *of* Appeal

The Hon Justice Whelan

Bar Roll No 1675

The Hon Justice Simon Whelan was appointed to the Court of Appeal on 16 October 2012. Prior to that, his Honour served as a judge of the trial division from 17 March 2004. In the trial division his Honour showed great versatility, sitting in both the civil and criminal jurisdictions. In the former, his Honour sat frequently in the Commercial and Equity Division and had a special interest and expertise in insolvency matters. In the latter, his Honour presided over a number of high profile trials that attracted significant public attention and media interest.

His Honour was educated at the University of Melbourne and came to the Bar in 1981, having completed his articles and spent a couple of years as a solicitor at Paveys under Peter Bobeff. In a sign of things to come, his Honour's early years at the Bar were spent as an all-rounder. He did commercial cases, as well as some crime and common law, and got a healthy education in the "crash and bash" jurisdiction. As his Honour became more senior he focused on general commercial law, and insolvency in particular. In the 1990s and early 2000s his Honour appeared in a number of matters arising out of spectacular corporate catastrophes including HIH, Ansett and the Pyramid Building Society.

Away from court, his Honour is well-known for his sense of humour, both at a professional level, on the radio and around chambers. The good humour was also often on display in chambers. A former wide-eyed reader recalls a discussion about jury advocacy and his Honour's self effacing analysis of his own first jury trial: his Honour revealed the commission of a number of errors which happily had no influence on the outcome because he'd been expertly led by John Nixon. "He's now a County Court judge isn't he?" responded the eager reader. "Yes, and he was then too", came the reply.

As well as having a very busy life on the bench and at the Bar, his Honour has found time over the years to teach at the University of Melbourne, stoically to support the hapless St Kilda Football Club, and to be an exemplary father to Alexandra, Madelaine and Hugh and husband to Clare. In recent times his Honour has also shown himself to be a true Renaissance Man by taking up the study of Italian.

The Bar wishes his Honour continued success in his distinguished career.

ADRIAN RYAN SC

Supreme Court *of* Victoria, Court *of* Appeal

The Hon Justice Priest

Bar Roll No 1540

On 1 November 2012, Justice Phillip Priest was appointed to the Court of Appeal.

His Honour signed the Bar Roll on 13 March 1980. He practised as a barrister for more than 32 years – of those, nearly 14 years as one of Her Majesty's Counsel.

Justice Priest was schooled at Sacred Heart, Preston, Marist Brothers Preston, Parade College in Bundoora and at Geoghegan College in Broadmeadows. After leaving school, his Honour worked as a teller with the National Bank. He commenced long articles and qualified for admission to practise after completing the Council of Legal Education course at the RMIT. He later received an LLM from the University of Melbourne.

Following his admission, Justice Priest came straight to the Bar where he read with Peter Murley. His Honour was in the very first class of the Bar Readers' Course in March 1980. His Honour was just reaching the end of his nine months reading period when he appeared in his first reported case: a criminal appeal *R v Bozikis* [1981] VR 587, led by one of the leaders of the Criminal Law Bar, Bill Lennon QC.

In his first 10 years at the Bar, Justice Priest did a substantial number of prosecutions, many of which were on circuit. He then moved into defence work. His Honour was recognised as a skilful and persuasive advocate, particularly in the Court of Appeal where he was highly regarded for his meticulous preparation and the breadth and depth of the experience which he brought to the appellate review.

His Honour also made an extraordinary contribution to the Bar. He served 4 years on the Bar Council and many more years on innumerable other Bar committees, notably the Ethics Committee (of which was Deputy Chair), the Readers' Course Committee, the Law Reform Committee, and the Chairmen of Lists Committee among others. Additionally, his Honour was an active member of the Criminal Bar Association. His Honour brought compassion, insight, and a passion for justice to each committee on which he served.

His Honour also mentored and supported many junior members of the Bar. His Honour believed strongly that a silk should be briefed with a junior and involved his juniors closely in his work. But it was not just those juniors working with his Honour who received assistance. His Honour was notoriously generous with advice, and junior members of the Bar literally queued up to seek his guidance. His Honour had one reader – Thamsanqa Nqayi – an African Human Rights lawyer.

Although best known for his criminal appellate work, his Honour was a formidable jury advocate. He had a reputation for meticulous preparation, unshakeable calm and focus under fire. His Honour also appeared in a number of civil claims, including cases against the State of Victoria involving torts by police (*Watkins v The State of Victoria & Ors* (2010) 27 VR 543; *State of Victoria v McIver* (2005) 11 VR 458.) as well as racing matters and matters before the AFL Tribunal.

Perhaps the best example of his Honour's passion for justice was when, after watching an expose on *Australian Story*, he volunteered for and took on *pro bono*, an appeal in the Supreme Court of Western Australia in which erroneous convictions were quashed (*Martinez & Ors v State of WA* (2007) 172 A Crim R 389). There were other cases where his Honour won acquittals, *despite* his clients' efforts. Years ago, in a case before his Honour Judge Ogden, his Honour's client was to make an unsworn statement. It was a 'safe-cutting' case. When the time came there was silence from the dock. After a considerable pause, his Honour's client said: "It was raining" – another pause – "I was bemused". Not another word fell from the accused, although his Honour is reported to have muttered something to himself. Despite the client's best efforts, the man was acquitted.

In his life and practise at the Bar, Justice Priest showed independence, courage, tenacity, compassion and generosity. He personified the collegiality and informal mentoring that is so important to the Bar. An outstanding barrister and colleague, the Bar wishes his Honour well in his new role.

SARA HINCHEY

BACK OF THE LIFT

Supreme Court of Victoria, Court of Appeal

The Hon Justice Coghlan

Bar Roll No 1366

Few criminal barristers could aspire to reach the multiple lofty heights scaled by the Victorian Court of Appeal's newest addition, Justice Paul Coghlan. On 11 December 2012, his Honour was appointed a Judge of Appeal of the Supreme Court of Victoria, upon the retirement of Justice Bongiorno AO QC. His Honour had served as a judge of the court since 7 August 2007 where since 2010 he had held the role of principal judge of the Criminal Division of the Supreme Court.

In announcing his appointment, Attorney-General Robert Clark said that his Honour's "vast practical trial experience, from both the Bar table and the bench, will be of considerable assistance to the Court of Appeal at a time when the court will be continuing with the implementation of the Ashley-Venne criminal appeal reforms, as well as overseeing the introduction of impending jury direction and other reforms."

His Honour graduated with a Bachelor of Laws from the University of Melbourne and served his articles with the firm Maurice Ryan and Francis Greene. He was admitted to practice on 1 March 1969 and after nearly nine years as a solicitor signed the Bar Roll on 9 February 1978.

His Honour's practice at the Bar specialised in crime, including the prosecution of many significant cases. During his time at the Bar his Honour was a generous contributor, serving on the Executive Committee of the Criminal Bar Association, the Bar Library Committee and the Readers' Course Committee. His Honour's commitment to Advocacy Training involved his regular participation in Advocacy Skills Workshops in Papua New Guinea, Vanuatu and Fiji.

In 1990 his Honour succeeded Judge Dee as Associate Director of Public Prosecutions for the Commonwealth. He returned briefly to the Bar before being appointed Senior Crown Prosecutor (major cases) for the Victorian Office of Public Prosecutions on 1 July 1994. His Honour took silk in 1995, the same year he was appointed Chief Crown Prosecutor.

His Honour became Director of Public Prosecutions in 2001 and served in that role until his appointment to the Supreme Court bench in 2007. His Honour's time as Director was notable for his commitment to meeting and speaking with victims and the families of victims of serious crime, as well as his personal appearances in the Court of Appeal and the High Court for the most complex and demanding appeals handled by the Office.

His Honour's wife Anne Coghlan is Deputy President of the Human Rights Division of the Victorian Civil and Administrative Tribunal and his daughter Georgina Coghlan is a member of our Bar. His three year old granddaughter has already made appearances in his Honour's chambers.

VBN

Supreme Court *of* Victoria

The Hon Justice Digby

Bar Roll No 1474

On 20 November 2013 G. John Digby QC was appointed to the Supreme Court of Victoria. He left behind a vast room in Owen Dixon Chambers West, and a larger reservoir of goodwill following his many years of dedicated service to his clients and the Bar.

His Honour was educated at Scotch College and the University of Melbourne. He did articles with McNab & McNab. He was admitted to practice on 2 April 1979. Soon after, his Honour commenced reading with John Larkins, later John Larkins QC. On 10 April 1979, his Honour signed the Bar Roll.

In his early years at the Bar, his Honour took what came. Many great battles were fought in the Magistrates' and County courts in bucolic (or at least suburban) locations. But the small cases did not last long. In the early 1980s, his Honour was briefed as a junior in a number of large commercial cases and arbitrations. So began a long and mutually rewarding association between his Honour, teams of eager solicitors, fraught clients and a near endless supply of lever arch folders. All received the thorough, measured and careful attention which characterised his Honour's approach.

In November 1993, his Honour took silk. His Honour was well suited to the rigors of life as a silk and his practice flourished. He was regularly briefed in the largest and most demanding cases. Complex construction disputes – occasionally misdescribed as widget cases – became a speciality. Arbitration, both domestic and international, was a focus. His Honour was lead counsel in many of the largest arbitrations, both locally and elsewhere and despite this very demanding practice, his Honour also taught international arbitration as a postgraduate subject at the University of Melbourne for many years.

In addition, his Honour was a huge contributor to the Bar and its governance. His Honour was a member of the Bar Council from 2005 to 2009 and served as Chairman between 2008 and 2009. His Honour also sat on the Board of BCL, and was instrumental in the work that ultimately led to the purchase of Owen Dixon Chambers West. His Honour also worked tirelessly for the Commercial Bar Association. He was the President of the Commercial Bar Association between 2009 and 2012, and during his presidency, with the assistance of a number of loyal lieutenants, the prestige and significance of the Commercial Bar Association grew substantially.

His Honour had six readers: Silvana Wilson; Jody Williams; Joe Forrest; Toby Shnookal; David McAndrew and Les Schwartz. But it was not just readers who benefited from an association with his Honour. The nature of his Honour's practice meant there was plenty of work for juniors, and his Honour's habit was to work closely with them. Although the hours were relentless – one hoped for a break in the email traffic between 1am and 6am, but his Honour did not always oblige – the support was unstinting. One of his Honour's great qualities, well recognised by those who briefed him, was his ability to lead a large team, and get the best out of the people working with him.

Another of his Honour's great qualities was generosity. As grateful juniors came to know, if one received an invitation to lunch from his Honour, it was unwise to plan conferences in the afternoon. Some say his Honour was the natural heir to Justice Middleton on this front. Like Justice Middleton, his Honour had the remarkable ability to carry the huge pressures of his practice lightly and always remained good company, even in the toughest cases.

Mention should also be made of his Honour's great love of sailing. Reputedly a habit his Honour picked up from the late Neil McPhee QC, his Honour is an avid sailor and has participated in the Sydney to Hobart yacht race and annual Bar sailing day, with equal enthusiasm. Most of his Honour's January is spent on his yacht, which in typical fashion, his Honour equips as a sort of floating, well-catered chambers.

With his Honour's appointment, the Bar loses a great barrister and one of its true leaders and mentors of recent years. But it recognises that the work ethic and judgment that served his Honour so well at the Bar will also make him a great judge. The Bar wishes his Honour every success in the new role.

ANTHONY STRAHAN

Supreme Court *of* Victoria

The Hon Associate Justice Derham

Bar Roll No 1532

Mark Derham QC was appointed as an Associate Justice of the Supreme Court of Victoria on 11th December 2012, after a career at the Bar studded with distinction.

His Honour was educated at Ivanhoe Grammar School, Scotch College and Ormond College, and graduated from the University of Melbourne LLB with honours in 1973. His Honour served articles with Madden Elder Butler and Graham and was admitted to practice on 1 April 1974. From there his Honour became Associate to Sir Douglas Menzies of the High Court until the sudden death of Sir Douglas in December 1974. Following that, his Honour joined the inaugural course for legislative drafting conducted by the Commonwealth drafting office in Canberra. His Honour and Sue Bromley were nominated as top students in the course and were appointed to the Office of Parliamentary Counsel. His Honour remained in that office for 4½ years before enrolling in the Victorian Bar's first Readers' Course in March 1980.

At the Bar his Honour's conspicuous talent saw him quickly progress from Magistrates' Court and County Court work to the higher courts. His Honour developed a reputation for meticulous attention to detail and accomplished cross-examination as well as a dedicated love of the law. His Honour took silk on 29 November 1994 and became a leading practitioner in commercial and corporations matters. In recent years his Honour was senior counsel for ASIC in leading cases, including the landmark decision in *ASIC v Healey* concerning directors' duties. Until his appointment, his Honour represented the liquidators of Great Southern Finance Ltd in the Group proceedings in the Supreme Court.

His Honour was also a great servant of the Bar. He was a member of the Bar Council and became Chairman of the Bar in 2000. Later, his Honour served on the board of Barristers' Chambers Limited and was at the time of his appointment its Chairman.

As a colleague, his Honour was held in great affection. Although a demanding leader, juniors thought it a privilege to appear with his Honour. As the longstanding senior member of chambers on the fifth floor of Joan Rosanove Chambers, his Honour will be greatly missed.

As is not unknown among barristers, his Honour also enjoyed a good lunch with colleagues, and is well recognised in at least a couple of legal haunts. His passion is spaghettini with prawns. Among the lunch circle was the late and fondly remembered Associate Justice Ewan Evans, with whom his Honour once shared chambers.

His Honour's name is redolent with the legal history of Melbourne. The name Derham is celebrated in the former firm of Derham and Derham (which was merged and re-merged to eventually become the international firm Herbert Smith Freehills). His Honour's late father was Sir David Derham notable lawyer and academic, Dean of Monash Law School and later Vice-Chancellor of the University of Melbourne.

It is rumoured that as a callow law student, his Honour had a wild side that was abetted and encouraged by Les Glick (now SC). Regrettably history does not record specific peccadilloes from this era. Whatever the true position, in the years since his Honour's service to his clients and to the administration of the Bar has been of the highest order. No doubt the qualities that saw his Honour perform so admirably as counsel will ensure that his time on the bench is notable for its fairness, justice, accuracy and erudition. The Bar wishes his Honour every continuing success.

DAVID BAILEY

County Court *of* Victoria

His Honour Judge Gray

Bar Roll No 1748

On 4 December 2012 his Honour Judge Ian Gray was appointed as a judge of the County Court of Victoria. At the same time he was also appointed as the State Coroner for Victoria.

Since 2001 his Honour has been the Chief Magistrate for Victoria. Prior to that appointment his Honour was Chief Magistrate for the Northern Territory for 5½ years. His Honour has been an outstanding Chief Magistrate in both jurisdictions. Of his Honour's 37 years of service to the law, so far, 19 have been as a judicial officer and 17 as the head of a jurisdiction.

His Honour was educated at Wesley College and later Monash University where he graduated with a Bachelor of Arts/Law in 1972. Having graduated, his Honour 'ran away to sea'. His Honour went to Darwin in 1973 and worked as a junior deck hand and cook on a prawn trawler in the Gulf of Carpentaria. Spanish omelette is reported to have been his signature dish.

On his return, his Honour commenced his articles in 1974 under Phillip Gleeson of Gleeson & Co. Admitted to practice in 1975, his Honour went on to practise at Schilling Missen & Impey. Having worked as a solicitor for some seven years, his Honour was called to the Bar in 1982 and read with Chris Connor.

His Honour had two stints at the Bar, interrupted by his appointment as a Magistrate in the Northern Territory between and 1990 and 1998. Whilst at the Bar his Honour had a successful criminal practice and upon his return from the Territory practised extensively in native title law, OH & S matters, personal injuries and administrative and industrial law.

His Honour is a strong defender of the integrity and independence of the courts and has been outspoken where he sees injustice. This was never more evident than in 1996 when the Northern Territory introduced mandatory sentencing for property crimes. His Honour, then the Chief Magistrate of the Northern Territory, said *"There are times when heads of courts are duty bound to speak out when they see the potential for serious injustice as a result of a change in the law"*.

At the Bar his Honour was interested in mediation, an interest which was further developed whilst Chief Magistrate of Victoria. His Honour was a co-mediator in the first stage of the long running Aboriginal land dispute in the Halls Creek area on behalf of the Western Australian Government. In June 2001 his Honour was appointed to head the Land and Property Unit of the United Nations Transitional Administration in East Timor.

As Chief Magistrate his Honour worked closely with the Bar and was often integral to achieving joint initiatives of the Bar and courts to improve access to justice. For example, his Honour, with her Honour Magistrate Fleming, was behind the establishment of the Bar Duty Barristers' Scheme.

Away from his judicial duties his Honour still enjoys his sailing, follows the Melbourne Football Club and enjoys quality dark chocolate.

The Bar wishes his Honour continued success in his new role.

TIMOTHY BOURKE

> "His Honour is a strong defender of the integrity and independence of the courts."

County Court *of* Victoria

His Honour Judge Jordan

Bar Roll No 1078

John Jordan was appointed to the County Court on 1 February 2013, following more than 39 years at the Bar, 12 of those years as silk.

His Honour was educated at Parade College and at the University of Melbourne, graduating in 1971 LLB with Honours. His Honour served Articles at Purves & Purves, and was admitted to practice in March 1972. He signed the Bar Roll in November 1973 after reading with Joseph Kaufman.

During early years of professional life, his Honour studied part time at Monash University, and had the distinction, in 1975, of being the first person to graduate Master of Laws by coursework from a Victorian university. His Honour then returned to the University of Melbourne, graduating with a Bachelor of Arts in 1977.

Life at the Bar initially took his Honour to the Magistrates' Court and later to the Supreme and County Courts, firstly in criminal cases and later for common law. He had a substantial practice on the Ballarat Circuit for many years both as junior and silk. His Honour was frequently opposed to combatants including Jeff Moore QC, Mal Titshall QC, his now-brother Judge Saccardo, and Paul Scanlon QC. Titshall once described his Honour as "the best jury advocate on circuit". Judge Saccardo described his Honour as a "brilliant jury advocate and master tactician". His Honour had two readers, Greg Doran and Angus MacNab.

His Honour also made a very substantial contribution to the administration of justice in other ways. In 1972-1973 while doing National Service (Army) his Honour established the Army Legal Aid system (Victoria). His Honour also served as an Infantry Platoon Commander and then transferred to the Legal Corps at Victoria Barracks, rising to the rank of Captain. In 1973, his Honour and Denis Gibson also co-founded what is now known as the Flemington & Kensington Community Legal Centre. His Honour volunteered there for nearly 10 years. More recently, his Honour volunteered regularly at the Western Suburbs Legal Service. From 2001 to 2006 his Honour also served on the Committee of the Common Law Bar Association.

A tribute to his Honour would be remiss if it did not mention his great sporting prowess. His Honour has been described as an "outstanding, high-level, amateur sportsman – as a player, committee member and coach". His Honour played with the Collingwood Reserves and won the goal kicking competition in 1971. In a career spanning 12 years and 300 senior games with several clubs, his Honour kicked over 1000 goals. His Honour played with the Old Paradians when they achieved the "A" Grade premiership in1968 and with North Old Collegians when they won the "A" Grade premiership in 1982. He was Captain/Coach of North Old Collegians in 1980, elevating the team to 5th in the "A" Grade. Old Paradians named his Honour in its "Team of the Century". His Honour's football career later continued in the "SuperRules" Competition, joining the likes of the great Kevin Murray. Cricket is another sporting love and for many years his Honour played at a very accomplished level, including for the Bar XI in their famous victory against the Law Institute in 1985.

The Bar expects that the combination of his Honour's great skill as a barrister and his commitment to the administration of justice, not to mention his sporting prowess, will serve his Honour well on the County Court. The Bar congratulates his Honour and wishes him every success in his new role.

TIM SECCULL

Magistrates' Court *of* Victoria

His Honour Chief Magistrate Lauritsen

On 29 November 2012 his Honour Magistrate Peter Lauritsen was appointed as the Chief Magistrate for Victoria.

As the son of an Officer in the Australian Army, his Honour was educated not just in Australia, but also in England and Germany. His Honour attended the Windsor Boys School in the Ruhr Valley in central East Germany, which had been famously flooded in 1943 by the Dambusters RAF raid. On the family's return to Australia, his Honour completed his secondary education at Parade College in East Melbourne and Bundoora (which were never the subject of RAF attention). Always devoted to his studies, his Honour later graduated from the University of Melbourne with a double degree of Arts/Law.

After graduating, his Honour was in the first intake of the Leo Cussen Practical Training Course with instructors such as Austin Asche QC, and George Hampel (later QC, Supreme Court judge and professor).

His honour was admitted in 1975 and commenced practise with Brian Cash in Little Collins Street. That this represented some loss to the Bar was evident when a lack of counsel meant his Honour's first appearance was at a County Court criminal trial before a jury. Despite being thrown in the deep end, his Honour's client was acquitted.

As a young solicitor with a good knowledge of the law, his Honour moved to Cain & Lamers in Preston, where his legal skills and understanding of human nature were welcome in a busy northern suburbs practice.

His Honour practised for some 12 years and in 1987 was then appointed to the Magistracy in the Northern Territory. Without a County or District Court in the NT, the Magistrates Court had a broad jurisdiction. His Honour sat in the criminal and civil jurisdictions, and additionally as Coroner and Mining Warden, as well as on many Tribunals. Needless to say his Honour saw a lot of the Territory and heard cases in many aboriginal communities. It was during his Honour's time in the Territory that his reputation as an extremely hard working, compassionate, deep thinking and perceptive man was cemented.

In 1989 his Honour was appointed as a Victorian Magistrate and returned to Melbourne. His Honour enjoyed settling back into Melbourne life and particularly his time at the busy Broadmeadows Magistrates' Court. His Honour was appointed as Deputy Chief Magistrate in July 2003. Since his return His Honour has also undertaken tireless work on the Civil Rules Committee and as early as 2004 won accolades for his work on the Bar Dispute Resolution Committee.

Outside of the Magistracy his Honour enjoys his family, supports the Melbourne Football Club, follows the cricket and for the past 40 years has walked regularly with Pat Casey of the Bar. Pat describes his Honour as "the straightest dude in town".

In more than 24 years in judicial office, his Honour has shown all the attributes necessary for an excellent member of the judiciary. He has demonstrated a passion for justice and a no nonsense attitude to dealing with cases in a timely and cost effective manner, always with unwavering fairness. The Bar warmly welcomes his Honour's appointment, and trusts that the man affectionately known as "Buddy Holly", for his black rimmed glasses and hair, will continue to serve Victorians with great distinction.

TIMOTHY BOURKE (WITH FIONA MCLEOD SC AND PAT CASEY)

BACK OF THE LIFT

Obituaries

Professor Emeritus Harold Ford AM

Bar Roll No 490

With the death of Harold Ford, the Australian legal community has lost a remarkable legal teacher, scholar, law reformer and author, who was the undisputed founding father of modern Australian corporations law. His contribution to commercial law over six decades is unequalled and his influence impossible to overstate. Harold Arthur John Ford was born in Coburg in 1920 and grew up during the Great Depression, when his family experienced considerable financial adversity. He attended the University High School, and subsequently embarked on his stellar legal career not as a cosseted university student, but as a 16 year old part-timer in the articled clerks' course in which, following leave on naval service during World War II, he won the Supreme Court Prize.

Harold's first academic appointment was in 1949, as Senior Lecturer at the Law School University of Melbourne, which (save for a few brief intervals) remained his academic home.

Between 1949 and 1960, Harold taught a wide repertoire of subjects. For some of this time, he worked under the transforming influence of Sir Zelman Cowen and later recalled the kindly encouragement he received from Sir Owen Dixon, who was a member of his appointment committee.

During 1954-1955, Harold completed a doctor of juridical science degree at Harvard and his dissertation on unincorporated associations was subsequently published. Thereafter, he never lost his interest in American law and affairs; and up to very recently avidly followed developments in the Supreme Court and forthcoming election.

In 1960, Harold was appointed Robert Garran Professor of Law at ANU but in 1962 returned to take up the Chair of Commercial Law at the University of Melbourne, which he held with great distinction until his retirement in 1984.

In 1962, Harold married Gwenda, a secretary in the Law School, whom he had shyly admired for some time. It was a long and very happy marriage, and over the years, the couple raised three children, Rebecca, Margaret and John.

When Harold took up his Chair, company law was something of a 'Cinderella' subject. Its critical analysis and teaching were undeveloped. There was no Australian text, and lawyers relied on Professor Gower's English work.

In 1974, Harold Ford met the Australian profession's need with the first edition of what (through 14 editions over four decades) ultimately became *Ford's Principles of Corporations Law*. An essential text for all legal practitioners, it is now continued by his co-authors, Professor Ian Ramsay and Dr Robert Austin.

In his pioneering work, Professor Ford surpassed Gower in conceptual organisation. He offered crystalline, accurate propositions, in comprehensive yet succinct coverage so beloved of practitioners. This was combined, remarkably, with a deep and coherent exposition of underlying principles.

Professor Ford also produced (with WA Lee) a leading text on trusts, as equity was his twin, preeminent interest. He also published prolifically in other areas, such as wills and succession, securities and death duties, sometimes with eminent co-authors including Marcia Neave, Robert Baxt, Ian Hardingham and Graeme Samuel.

Harold's mastery of the subjects was enriched by an intellectual attribute rare even amongst the most senior lawyers. His reasoning was not constrained by specialisation and narrow experience. He could discourse across the boundaries of subject labels, cross-referencing, cross-questioning and cross-informing, from the vantage of his vast learning, prodigious memory and a special quality of mind.

Harold's skilful approach made complex commercial law intelligible and engaging. He usually began with the historical problems and mischiefs it was intended to meet. He did not talk down or oversimplify, but closed the immense knowledge gap between himself and his students, enlivening his lectures with diverting puns and spontaneous wit.

There is much more that can only be touched on. As a Dean of the University of Melbourne Law School in 1964 and from 1967 to 1973, Professor Ford was highly successful, advanced and innovative, introducing, under fair and benevolent leadership, a number of important and forward looking measures. He was active on innumerable law reform committees and related bodies, the development of Asian law teaching and the establishment of the Leo Cussen Institute, of which he was the foundation chair.

After his formal retirement, he was for some time a consultant at a large law firm working in insolvency, which he also taught in a postgraduate course.

Following a short illness, Harold died peacefully on 27 September 2012, a month short of his 92nd birthday.

Harold's life touched and enriched so many and he will be remembered as an inspiring teacher, gifted scholar, generous mentor, senior colleague and Law School Dean.

The above is an edited extract of a eulogy delivered by Professor Ford's former student and colleague, the Hon Justice Dodds-Streeton.

Evan James Smith

Bar Roll No 1707

Evan James Smith died on 18 October 2012 in Sydney. Evan was 56, having been born on 27 October 1955. Evan was a member of the Victorian Bar from 1982 to 1993.

Evan was admitted to practice in Victoria on 2 June 1980 and practised as a solicitor with F. Miller Robinson and then with Royal Insurance Australia Limited until he came to the Bar. He signed the Roll on 20 May 1982 and read with David Morrow (later a Judge of the County Court).

Evan was on Foley's List and practised in Workers' Compensation and personal injuries. He practised at the Victorian Bar until 31 May 1993. He had one Reader, Jeanette Smith.

On 6 November 1987 Evan was admitted to practice in New South Wales. After leaving the Victorian Bar in 1993, Evan practised as a prosecutor with the New South Wales Work Cover Authority; then went to the New South Wales Bar on 15 September 1998, practising there until June 2012.

VBN

Gerald Andrew Hardy

Bar Roll No 2108

Gerald Andrew Hardy died on 7 November 2012. He was 71, having been born on 1 June 1941. Gerald studied law at the University of Melbourne, graduating in 1964 with an Honours Degree. Gerald served in the Royal Australian Air Force Reserve in the Special Duties Branch and attained the rank of Flight Lieutenant. Gerald appeared to prosecute and defend in Courts Martial and at Courts of Inquiry. Gerald served articles with Bryan Morrissey at Field, Morrissey & Co in Dandenong. He was admitted to practice on 1 March 1966 and remained with the firm as an employee solicitor for a little over a year. Gerald then practised for more than 20 years as Principal of GA Hardy & Co in Dandenong, acting for a number of large builders. Gerald signed the Bar Roll on 20 November 1986 and read with Henry Jolson OAM QC. He was accredited as a mediator on 26 July 1995 and nationally accredited on 8 May 2008. He was an active contributor on the Bar Dispute Resolution Committee for 13 years from 1996 to 2009. Gerald had two readers: Brendan McIntyre (now Principal Solicitor at the Victorian Government Solicitor's Office) and Andrew Cassidy. Gerald practised at the Bar for more than 25 years, transferring to the Retired List as of 15 October 2012. Gerald's son, Sean, is a member of our Bar of more than 20 years standing.

VBN

Graeme Hilaire Cantwell

Bar Roll No 2688

I have been asked to write a few words regarding Graeme Cantwell.

Graeme was a delightfully dangerous, albeit eccentric, rogue of a man who had a lifetime's experience with the Commonwealth Director of Public Prosecutions and an acknowledged expertise in most areas of federal criminal law.

He was my fourth pupil and brought new heights of cynicism to our chambers, together with an unrivalled knowledge of the antecedents of most of the magistracy.

Graeme is survived by his wife Jill, daughter Hilary and son John and fondly remembered by all who knew him in practice.

I certainly learned more law in his reading period with me than he learned via any reciprocal process – probably not the avowed purpose of the mentor/pupil relationship!

Graeme was also an inveterate bric-a-brac collector and most days in chambers after court began with the words "guess what I found at the market on Saturday?" Alas, my instincts were only occasionally able to satisfy his curiosity...

Even as I write this article I am gazing at a brass plate from the now defunct Melbourne Tramways system which informs me what the penalty is for spitting on a public conveyance.

Only Cantwell could have found it or presented it to me as a memento of his time in chambers!

I shall miss him.

MAX PERRY

Graeme Douglas Johnstone

Bar Roll No 1034

Graeme Douglas Johnstone, former State Coroner for the State of Victoria, died in November 2012. He was 67 years old.

Graeme's childhood was spent in Geelong and he was educated at Geelong College. In his final year at school, he was a house prefect, a Cadet CUO and a member of the school swimming team and the school rifle shooting team that won the coveted Clowes Cup.

He studied law at Monash University and graduated in 1968. After a year as an Articled Clerk with Moule Hamilton and Derham he moved to the bush to work with Bill Muntz in the well-known firm of Muntz and Muntz in Dimboola, where he represented the firm's clients in the local Magistrates' Courts. Bill Muntz remembers him as "a very conscientious solicitor who was prepared to listen to people". Graeme carried that particular skill with him throughout his life.

He signed the Bar Roll on 22 February 1973 and read with Adrian Smithers. During Graeme's life as a barrister, he did general advocacy work in a number of jurisdictions. He was particularly proud of his time spent at the Small Claims Tribunal and the Residential Tenancies Tribunal, which involved working directly with people.

Graeme was appointed as a Magistrate in July 1986, much of his time being spent at the Broadmeadows Magistrates' Court where he worked with his life long friends Bob Kumar and Peter Lauritsen. In 1998, he was appointed State Coroner. He retained that role until 2007, when he returned to the Magistrates' Court.

Upon commencing at the Coroners Court, Graeme took up the challenge of continuing and expanding the investigatory aspect of the Victorian coronial jurisdiction. He understood and highlighted the importance of the preventative aspects of the work he did.

Bushfires (particularly the Linton bushfire); car crashes; transport industry dangers; workplace accidents; fatal deficiencies in household electrical heaters; aircraft accidents; hospital deaths; bad road design and level crossings were just a selection of the areas of preventable deaths that he addressed.

Graeme's dedication to his work led to an international profile. Admired by legal, industry and public health officials alike, his work was recognised in 2004 when the Royal Society for the Encouragement of Arts, Manufactures and Commerce (Victoria Chapter) awarded Graeme the Hartnett Medal. The citation for that award covered some four pages and included multiple examples of where his work had lead to reforms in the area of community health and safety.

Despite his massive work commitment, Graeme had time to enjoy hobbies and interests outside the work environment. He was a member of the Geelong Pistol Club and the Hand Tool Preservation Association of Australia. He had a wide range of interests, including classic cars.

The last year of his life was beset with sadness with the illness and subsequent death, in August, of his beloved wife, Shirley. Graeme's feelings for Shirley were summed up in a modest but meaningful comment by Shirley's daughter, Jenni. "He just adored Mum. They were a really good match".

Graeme is survived by his three step-daughters and their families and his first wife, Carol.

HIS HONOUR MAGISTRATE ALSOP

John Aubrey Gibson AM

Bar Roll No 1648

John Gibson was a tower of a man, in stature, and in his contribution to asylum seekers, both in Australia and around the world.

John died on 28 September 2012. He was 62. He is sadly missed by all those who were the beneficiaries of his warmth, good humour, and zest for life.

His considerable contribution to humanity was recognised by the posthumous award of an AM in the 2013 Australia Day Honours. In June 2012 the United Nations High Commissioner for Refugees, Antonio Guterres, took the unusual step of providing him with a personal letter of appreciation. Melbourne University Law School has honoured him by establishing an annual *John Gibson Prize in Refugee Law*. In 2010 John received an award from the Migration Institute of Australia for distinguished service to Australian Immigration.

John came to the Bar in 1981, reading with Philip Mandie (later QC and judge of the Court of Appeal). In his early days he developed a wide practice, predominantly in civil litigation. He took chambers in Equity Chambers, where many lasting friendships were made.

His abiding sense of social justice saw him, with others, form the Victorian Foundation for the Survivors of Torture. In 1986 he became the inaugural chairman of the Committee of Management. Thereafter he remained an active participant in many aspects of this seminal organisation.

Consistent with his increasing interest in refugee issues, John served as a part time member of the Refugee Review Tribunal, at its inception, from 1993 to 1997. On returning to the Bar full time he established International Refugee Consulting, which, as the name suggests, led him to places far and wide, advising governments and non-government organisations in all aspects of refugee determination.

His practice at the Bar changed significantly, as he began to focus more and more on judicial review of migration and refugee decisions. This brought him regularly before the Federal Magistrates' Court, the Federal Court, and also the High Court. Apart from Melbourne, his practice took him all over Australia. He was truly a leader in his field. As such, he developed a widely read service entitled *Judicial Review of Refugee and Migration Decisions*.

In 2003 John joined the Board of the Refugee Council of Australia, later becoming its President. In this role he was a champion for the cause of asylum seekers.

John provided great service to the Bar. He was active in the Human Rights Committee, assisted with submissions to government, gave evidence at Senate Committees, and participated in training and mentoring of younger members. He gave his time to all, selflessly, often appearing pro bono.

Fittingly, John was inducted as a Legend of the Bar shortly before he died.

GUY GILBERT

John Raymond Perry

Bar Roll No 672

I have been asked to write a few words about my cousin John Raymond Perry.

Ray was educated at Caulfield Grammar School and served his articles of clerkship at W B & O McCutcheon (now incorporated into DLA Phillips Fox). He was a prominent sportsman in his younger days, playing several games for Richmond (although ultimately switching his allegiance to Collingwood!), as well as boxing at Melbourne University.

He was admitted to practice on 1 March 1962 and read with Hubert Frederico (later a judge of the Family Court of Australia). He was appointed a Prosecutor for the Queen on 20 May 1969 and served in that office for eight years before moving to Queensland for a couple of years, then returning to practise in Melbourne, mainly in criminal prosecutions. He retired from practice in May 2002, transferring to the List of Retired Counsel. He was a member of the Bar for more than 50 years.

Ray was a fearless and remarkably gifted trial advocate with a pronounced sense of mischief, which meant that any trial in which he was engaged would not be without interest! Remarks made to me about him often commenced with the words "Let me tell you what he's just done to me ..." He had a profound knowledge of the personalities of the Bar and bench – occasionally expressed in dangerous terms – and was a natural (and lethal) jury advocate. As a Prosecutor for the Queen he prosecuted many major trials, including the Painter and Docker murders and the Leith Ratten murder case. Ray prosecuted over 150 homicide trials in his career.

Ray kindly arranged my pupillage with his great friend, the late F C James. He did not actually bother to inform my master of the arrangement until my arrival in chambers, which lead to several interesting phone calls between the two of them!

His return to the Bar was welcomed and he rapidly re-established himself as a leading criminal advocate. His wife Margaret took his notes during this time and her help and support undoubtedly extended his career. To this day I suspect she knows more criminal law than many members of junior counsel, including myself.

Ray and I did not oppose each other in trials because of the chaos which would have resulted on transcript – a fact for which I remain profoundly grateful; I would not have survived the encounter. I do however remember opposing him in the County Court appellate list for two days in a matter in which Margaret attempted to mediate, and which his Honour Judge Howse eventually capped by telling us both that he didn't care what family relationship we had and to behave ourselves. That advice was immediately ignored.

Ray's love of fast automobiles and fishing, and his ability to combine the two pursuits on circuit, is legendary. He was always able to find an excuse to return to Queensland on holiday where his love of boating and fishing could be fully indulged.

Ray passed away after a mercifully short time in care on the 14th of February 2013, aged 79.

Ray is survived by his wife Margaret and children Anita and Chris, as well as his four grandchildren. He will be sorely missed by all who knew and loved him.

MAX PERRY

Richard Timothy Taranto

Bar Roll No 2367

Richard Taranto who died on 27 November 2012 was a young man who achieved much in a short but richly lived life. His work, his dignity and all that he achieved are a testament to a man of exceptional quality.

Richard was educated at Xavier College and at the University of Melbourne graduating with an LLB in 1985. After undertaking the Leo Cussen Practical Training Course, he was admitted to practice on 5 November 1986.

He was Associate to the Hon Justice Ryan of the Federal Court of Australia for two and a half years. His Honour was very saddened to hear of Richard's death and described him as an exceptional man and remembered fondly their time together on circuit in Brisbane hearing cases for months on end.

Richard's friend from Grade 3, Professor David Hipgrave, described Richard as the measure of a man.

In 1989 Richard signed the Bar Roll and so began his brilliant career at the Victorian Bar. The March Readers were a tight group, rich in diversity and experience and a little bold in their humour and gregarious in their tastes. Richard stood tall among this unruly crew, I am sure they will not mind my saying it, he set a gentlemanly standard that was very much admired.

Richard read with Judge Tim Ginnane, who when delivering the eulogy at Richard's funeral described him as intelligent, determined and destined for success. Richard had a quiet determination combined with a searing intellect and acted with integrity in everything that he did. Richard loved the Bar and loved the friends who he described as family and, to his friends, he was family.

Mark Gibson of our Bar had lunch with Richard the day before his debilitating heart attack in 1998 and

cherishes their last conversation. According to Mark, Richard was the sort of barrister who would have been silk or appointed to the bench. The barristers of the 10th floor, Owen Dixon Chambers West would agree that Richard would probably now be a silk or a judge if things had turned out differently. Susan Borg of our Bar describes him as the most gentlemanly man she has ever had the good fortune to know and she describes him as family.

Richard came from a big family and his parents Stella and Elio were full of pride in their third son as were his brothers and sister and their children.

Richard developed a thriving practice in commercial law and given his industry, he was the "go to" man if you had a curly legal question. Richard would always take the time to assist any colleague and his patience and good nature was legendary.

There was more to Richard than his career at the Bar. Richard's passions extended to sailing and the symphony. Cut from the same cloth as Adonis he was a sought after grinder in the Ocean races and the Top of the Bay. He was a member of the Royal Brighton Yacht Club and of the Queenscliff Cruising Yacht Club.

Richard was engaged to be married to Sharon whom he described as the love of his life, when he was struck down in 1998 by a heart attack. He suffered an acquired brain injury. He remained a member of the Bar on the List of Retired Counsel up to his death.

Richard was dignified, hard working and emotionally intelligent, a giant physically and intellectually with a heart that was big, just not strong enough. He is sadly missed by all who loved him, including his Goddaughter, Gracie.

HER HONOUR MAGISTRATE FLEMING

Lindis Krejus

Bar Roll No 1487

Lindis Krejus was born on 3 December 1955 and died on 15 November 2012, aged 56. Lindis attended Mandeville Hall, Toorak and graduated LLB from the University of Melbourne in 1978. She served articles with her cousin James Ryan before signing the Bar Roll on 24 May 1979. Lindis read with John Dwyer (later QC). Lindis also served as a Legal Officer in the RAAF Reserves, attaining the rank of Squadron Leader.

Lindis had a reputation at the Bar as a tough fighter but those who got to know her well soon realised that this reputation was merely a reflection of the care which she held for her clients. Lindis ended up marrying one of her clients – Brian Verlin, and together they had a wonderful marriage and much loved son Patrick.

In 2005, after 26 years of practice, Lindis left the Bar disillusioned with the experience of some of her clients, although she never lost her love for the law – teaching at the University of Melbourne and at RMIT. After leaving the Bar, Lindis pursued her great passion in cooking by setting up Selbonne Cooking School.

Lindis was a woman of great beauty – both outward and inward. She will be remembered as a wonderfully kind and generous woman. She loved hospitality and constantly opened up her home and invited people in – showering them with food, warmth and friendship. Even strangers were the beneficiaries of her hospitality. One Sunday at her local church she spied a couple with young children standing lonely to one side and immediately approached them, engaged them in conversation and invited them to her home only to discover that her guest was the Consul General of the United States of America.

Lindis had a deep Christian faith which gave her strength, comfort and support throughout her life. She wrote on the top of every page of her court books the religious inscription "A M D G " (For the Greater Glory of God). She was buoyed by her faith. Even when facing the trials and tribulations of a terminal illness, she faced her fate with much courage and dignity.

Lindis will be dearly missed by Brian, Patrick, her sister Kim, her extended family and her many friends at the Victorian Bar and in the wider community.

The above is an edited extract of a eulogy delivered by the Hon Justice Robson on 23 November 2012

Gonged!

The Hon Justice Allsop AO, who was appointed an Officer of the Order of Australia, for distinguished service to the judiciary and the law, as a judge, through reforms to equity and access, and through contributions to the administration of maritime law and legal education.

John Aubrey Gibson AM, deceased, who was appointed a Member of the Order of Australia, for significant service to international relations as an advocate for human rights.

The Hon Paul Marshall Guest QC OAM, was awarded a Medal of the Order of Australia, for service to the community, and to the sport of rowing.

VBN

SEPTEMBER 2012

Victorian Bar Readers' Course

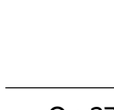
BACK ROW (L-R): Marcel White, James Hooper, David Oldfield, Markorius Habib, Sam Andrianakis, Alexander Patton, Kimberley Moran, Sarah Varney, Ian Munt, Tom Smyth
CENTRE ROW (L-R): Penny Harris, Brad Barr, Sasha Dyrenfurth, Andrew Di Pasquale, Jennifer Collins, Erin Hill, Richard Stokes-Hore, Grace Morgan, Richard Scheelings, Carolyn Symons, Wendy Pollock (staff), Kathie Nickson (staff)
SEATED ROW (L-R): Eleanor Coates, Leana Papaelia, Fatimah Taeburi (Overseas reader from the Solomon Islands), Solomon Kalu (Overseas reader from the Solomon Islands), Andrea Mapp, Nawaar Hassan, Caryn van Proctor
FRONT ROW (L-R): Adrian Bates, Kevin Jones, Sergio Freire, Andrew Imrie, Samuel Tovey, Matthew Cookson, Sarala Fitzgerald

SENIOR COUNSEL 2012

On 27 November 2012, the Chief Justice of Victoria, the Hon Chief Justice Warren AC, appointed the following barristers and solicitors as senior counsel in and for the State of Victoria, in order of seniority.

Trevor Stanley MONTI SC

Date of Admission: 2 April 1973
Signed Bar Roll: 11 March 1976
Read with: Barney Cooney
Readers: Gary Forrester, Douglas Love and Richard Morrow
Areas of Practice: Common law, Personal Injuries, Medical Negligence, Transport Accident, Public Liability, Sports Law, Equine Law, Defamation and Superannuation. Also specialising in the trial of Ned Kelly with a view to obtaining a retrial and where it is his intention to represent Mr Kelly.



Suzanne (Sue) Bridget McNICOL SC

Date of Admission: 2 April 1979
Signed Bar Roll: 22 May 2003
Read with: The Hon Justice Elliott
Readers: –
Areas of Practice: In general, Administrative Law, Commercial Law and Criminal Law. In particular, Privilege, Discovery, Civil and Criminal Procedure, Evidence, Confidentiality, Privacy, Contempt of Court, Class Actions, Public Interest Immunity, Search Warrants, Subpoenas, Freedom of Information, Taxation, Trade Practices and Traffic Law.

Peter George SEST SC

Date of Admission: 2 April 1984
Signed Bar Roll: 31 May 1990
Read with: David Levin QC
Readers: Yildana Hardjadibrata and Nicholas Kotros
Areas of Practice: Revenue Law, Administrative Law and Commercial Law

Aileen Mary RYAN SC

Date of Admission: 2 April 1984
Signed Bar Roll: 26 November 1992
Read with: Leslie Glick SC
Readers: Simone Bingham
Areas of Practice: General commercial practice including professional indemnity insurance, general insurance, contract, partnership disputes, property law, leases, land valuation, compulsory land acquisition claims, discrimination, disciplinary tribunals, trusts, testator's family maintenance and equitable claims.

She has appeared in a number of reported cases involving solicitors' and barristers' negligence. In addition, she has appeared and advised in several valuation cases on behalf of Councils and the Valuer-General. She practises mainly in the Supreme Court, County Court and VCAT. She has also been Deputy Member of the Board of Examiners since 2008.

Christopher William BEALE SC

Date of Admission: 3 April 1986
Signed Bar Roll: 24 November 1988
Read with: His Honour Judge Punshon
Readers: Anthony Beck-Godoy, Jane Warren and Nick Goodfellow
Areas of Practice: Crime

George Anthony GEORGIOU SC

Date of Admission: 3 April 1986
Signed Bar Roll: 31 May 1990
Read with: Shane Collins
Readers: Shiva Pillai, Patricia Villella, Caroline Ratcliffe-Jones, Rohan Barton, Michelle Mykytowycz, Temple Saville and Christopher Farrington
Areas of Practice: Criminal law

Mark Andrew ROBINS SC

Date of Admission: 30 March 1987
Signed Bar Roll: 29 November 1990
Read with: Leslie Glick SC
Readers: Siobhan Ryan, Alexandra Golding and Andrew Morrison
Areas of Practice: General Commercial Law including Banking and Finance, Building and Construction, Corporations and Securities, Equity/Trusts, Insurance, Disciplinary Tribunals, Professional Negligence, Property Law and Trade Practices

BACK ROW (L-R): Adrian Finanzio SC, Andrew Clements SC, Philip Corbett SC, Christopher Beale SC, Toby Shnookal SC
MIDDLE ROWS (L-R): Carolyn Sparke SC, Kevin Lyons SC, Aileen Ryan SC, Michael Roberts SC, George Georgiou SC, Peter Sest SC, Bernard Quinn SC, Trevor Monti SC **FRONT ROW (L-R):** Nicholas Pane SC, Nicholas Hopkins SC, Will Alstergren SC, Mark Robins SC, Neill Murdoch SC, Sue McNicol SC **ABSENT:** Saul Holt SC

Benjamin Andrew (Toby) SHNOOKAL SC

Date of Admission: 6 June 1988
Signed Bar Roll: 31 May 1990
Read with: The Hon Justice Digby
Readers: Benjamin Reid, Donald Charrett and James Shaw
Areas of Practice: Engineering and Construction Law

Philip David CORBETT SC

Date of Admission: 31 March 1989
Signed Bar Roll: 27 May 1993
Read with: Rodney Garratt QC
Readers: Edward Michael Kingston, Meredith Schilling, Adam Segal, Jamie Richardson, Aphrodite Kouloubaritsis, Martin Guthrie, Lucy Kirwan and Harry Forrester
Areas of Practice: Commercial and Equity

Michael Grant ROBERTS SC

Date of Admission: 30 March 1989
Signed Bar Roll: 27 November 1992
Read with: C.W.R. Harrison SC
Readers: Kyle Naish and Liam Connolly
Areas of Practice: Building and Construction Law, Insurance Law, Professional Indemnity, IT and IP disputes, Land Acquisition and Compensation and Trade Practices

Alistair Neill MURDOCH SC

Date of Admission: 30 March 1989
Signed Bar Roll: 30 November 1995
Read with: The Hon Justice David Beach
Readers: Vanessa Nicholson, David Seeman and Joel Harris
Areas of Practice: Common Law, Insurance and Professional Negligence

Nicholas PANE SC

Date of Admission: 13 March 1989
Signed Bar Roll: 27 May 1993
Read with: Jack Hammond QC
Readers: Toby Cogley and Kathryn (Kate) Bundrock
Areas of Practice: Building and Construction and General Commercial

Nicholas David HOPKINS SC

Date of Admission: 30 March 1989
Signed Bar Roll: 25 May 1995
Read with: Peter Bick QC
Readers: Nicholas Doukas, Kieren Naish, Robert Craig, Patrick Noonan, Mark McKillop, Matthew Albert and Carolyn Symons
Areas of Practice: Commercial, Trade Practices, Corporations, Building and Construction and Arbitration

Carolyn Hayley SPARKE SC

Date of Admission: 31 July 1989
Signed Bar Roll: 30 May 1991
Read with: Noel Magee QC
Readers: Sarah Turner, Leonie Englefield, Kevin Naethan (Vanuatu) and Karen Le Faucheur
Areas of Practice: Specialising in Wills and Probate, Testators Family Maintenance, Equity, Trusts, Property, Superannuation, Corporations and general commercial work

Kevin Joseph Aloysius LYONS SC

Date of Admission: 1 April 1990
Signed Bar Roll: 25 May 1995
Read with: The Hon Justice Hargrave
Readers: Karen Alexander, Timothy Scotter, Neil McAteer, Holly van den Heuvel, Thomas Warner and Naomi Hodgson
Areas of Practice: Commercial Law

Edvard William (Will) ALSTERGREN SC

Date of Admission: 2 September 1991
Signed Bar Roll: 28 November 1991
Read with: Simon Wilson QC
Readers: Michael Rivette, David Turner, Roona Nida (nee Fazal), Tom Loughman, Daniel Pollak, Jonathan Gottschall, Daniel Bidar, Miranda Ball and Chris Twidale
Areas of Practice: Large and complex Commercial Trials and Appeals including Administrative Law (Judicial Review), Alternative Dispute Resolution/Mediation, Banking and Finance, Bankruptcy/Insolvency, Building and Construction, Commercial Law, Corporations and Securities, Defamation, Media & Entertainment, Energy and Resources, Equity/Trusts, Insurance, Intellectual Property, Licensing and Disciplinary Tribunals, Planning and Local Government, Professional Negligence, Property Law, Taxation, Telecommunications/IT/Computers, Torts, Trade Practices and Defence Force Inquiries and Commissions

Andrew David CLEMENTS SC

Date of Admission: 4 December 1995
Signed Bar Roll: 28 May 1998
Read with: John Noonan SC
Readers: Caroline Mills
Areas of Practice: Personal Injuries, Product Liability, Torts generally, Professional Disciplinary Tribunals

Adrian John FINANZIO SC

Date of Admission: 6 May 1996
Signed Bar Roll: 28 May 1998
Read with: John FM Larkins
Readers: Nicola Collingwood, Andrew Walker, David Deller, Rupert Watters, Jane Sharp, Tiphanie Acreman and Tom Vasilopoulos
Areas of Practice: Environment, Planning, Local Government, Energy and Resources, Administrative Law (Merits and Judicial Review), Licensing and Disciplinary Tribunals, Torts and Inquests

Bernard Francis QUINN SC

Admission date: 1997
Signed Bar Roll: 27 May 1999
Read with: Jonathan Beach QC
Readers: Tamara Quinn (nee Leane), Jonathan Kirkwood, Banjo McLachlan, Edward (Eddy) Gisonda, Helen Tiplady, Sam Gifford and Premala Thiagarajan
Areas of practice: General commercial, Corporations, Torts, Trade Practices, Product Liability and representative proceedings

Saul Conrad HOLT SC

Dates of admission: 1998 (NZ); 2006 (Qld)
Current position: Chief Counsel, Victoria Legal Aid – appointed in 2012
Areas of practice: Criminal Law, Administrative Law, Appellate Law and Human Rights

David Levin QC

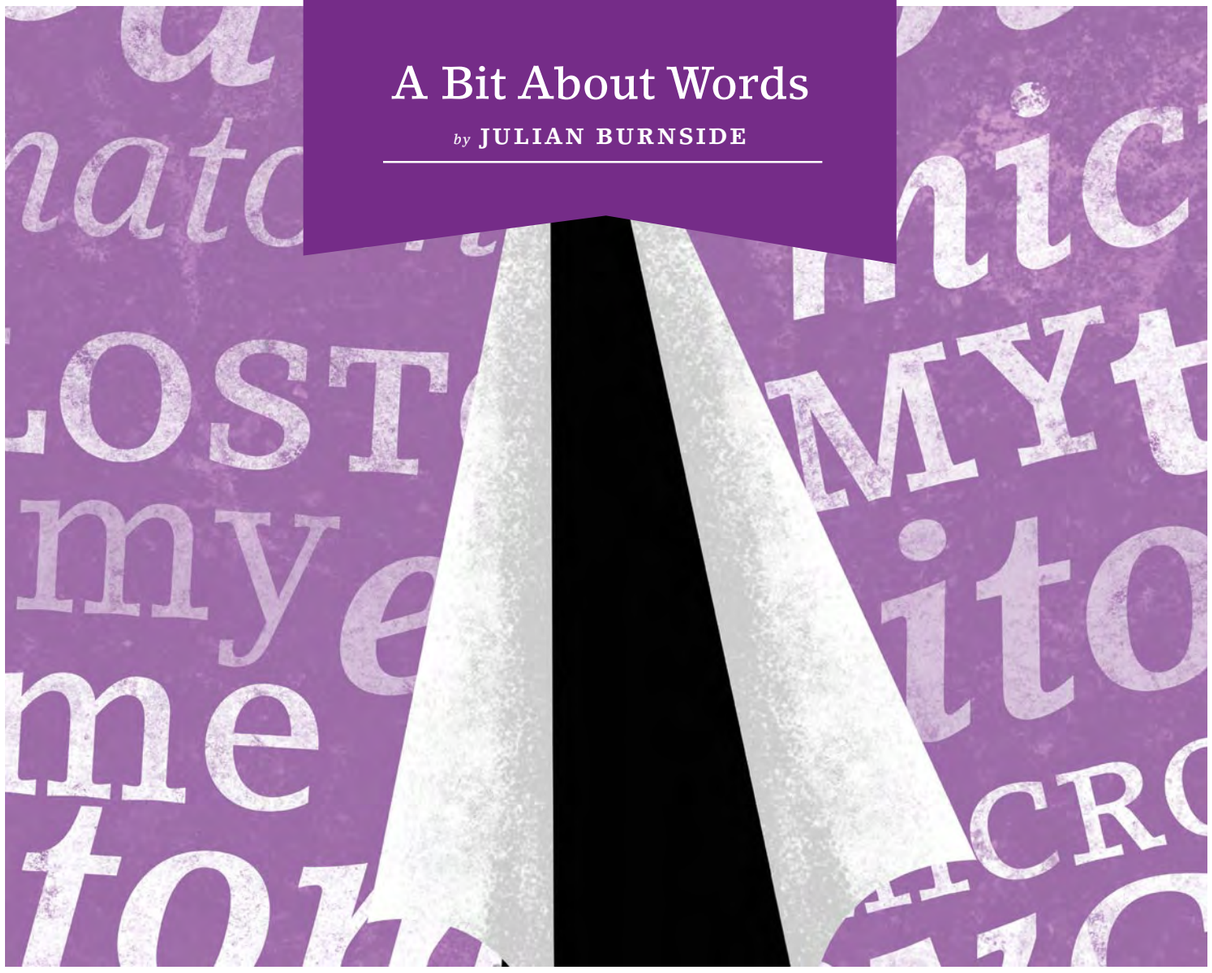
Bar Roll No 1356

David Levin QC graduated from Cambridge in 1971 with a BA in Economics and Law before being called to the English Bar. After meeting and marrying Norma, an Australian, he moved to Australia in 1977. Before leaving England, David wrote to various people at the Australian Bars and recalls getting an encouraging reply letter from Ken Hayne (as he then was). After arriving on Australian soil he sought advice from a solicitor who promptly recommended he go to the Victorian Bar. A week later, David found himself reading with John Larkins, who he found to be a "most delightful teacher". David went on to sign the Bar Roll in November 1977 and to take silk in 1997.

David has been a man ahead of the times in two areas – cycling and computers. He started cycling to work in 1977 well before it was the 'thing to do' for city workers. Despite soon discovering how hot the Melbourne weather could get, how hilly Bourke St was and that the only shower at the Bar was on the 13th floor in the superintendent's flat, David was not deterred. He continues to cycle to chambers each day, travelling about 250 kms each week as well as participating in group rides in Australia and overseas. David's passion for cycling didn't stop at the pedal – he served six years as a Board member for Bicycle Victoria and also started 'Wigs on Wheels' – the Victorian Bench and Bar Bicycle Users Group. Along with the members of Wigs on Wheels David has worked hard to get better facilities for the Bar's resident cyclists including 60 bike racks (which is still not enough) and more showers.

In 1995 David started and wrote the Bar's first website. The archives reveal that in the Spring 1995 edition of the *Victorian Bar News* David wrote an article exhorting the virtues of the "electronic superhighway" to members, explaining that "email in years to come may well replace the fax" and that "before too long we can expect that information on court listings will be available, allowing a barrister at home…to find out in which court and at what time his or her case is to be heard the following day"! David also started the Victorian Bar Computer Users Group and was President of the Victorian Society for Computers and the Law Inc.

David no longer has to haul briefs into chambers in his bike panniers – all he needs is a USB, the Cloud and Dropbox.



A Bit About Words

by JULIAN BURNSIDE

Cutting Through

In an earlier essay I drew attention to several strange gaps in the Oxford English Dictionary. And I do mean the 20 volume work, with over 600,000 entries. Strange that there could be any gaps in it. But one of the gaps is *philtrum*. It is the vertical groove from the nose to the upper lip. It is part of the natural topology of shaving, or applying lipstick. *Philtrum* does not appear as a headword in the OED or in Johnson. However you will find it in Nathaniel Bailey's English Dictionary (1742) and in the 2nd edition of the Random House Dictionary of the English Language. Other American dictionaries recognise it.

It does however appear in the OED, but only indirectly. In the entry for dysmorphic, a quotation is given from the 1997 Journal of Medical Genetics "Her face appeared mildly dysmorphic with a large forehead, short *philtrum*, and bushy eyebrows." Clearly a reference to the thing we are discussing.

But it gets another look in. The entry for *philtre* (also spelled *philter*) includes a passing reference to *philtrum*, although it does not make much sense. *Philtre* is defined as "A potion or drug (rarely, a charm of other kind) supposed to be capable of exciting sexual love", with supporting quotations from 1587 to 1858. But a second meaning is given, supported by two quotations:

> *1653 R. Sanders Physiogn. 278 A mole on the philtrum or hollow of the upper lip, under the nostrils.*

> *1706 Phillips, Philter or Philtrum... Among some Anatomists, it is taken for the Hollow that divides the upper Lip.*

ILLUSTRATION BY GUY SHIELD

This meaning is said to be obsolete, but that can't be right because Bailey recognises it, and it has been used increasingly since the early 1900s in reference to the facial feature, not in reference to love potions.

But more than this striking gap in the OED's coverage is the quotation from Phillips. How odd to rely on anatomists for reference to the *philtrum*: the philtrum can be seen plainly on the face without any further examination; but anatomists see things by cutting them.

Anatomy means cutting up, dissection. Its root is Greek *tom* meaning cut. An *atom* is something which cannot be cut into smaller parts (that's what people thought at any rate when the atom was named). The OED puts it well. It defines atom this way: "A hypothetical body, so infinitely small as to be incapable of further division; and thus held to be one of the ultimate particles of matter, by the concourse of which, according to Leucippus and Democritus, the universe was formed." It was used this way from the 15th century, well before the inner complexities of the atom had been discovered. (JJ Thompson discovered the electron as a component of the atom in 1897; Rutherford found the proton in about 1909, and the neutron was not discovered until 1932, by James Chadwick.) Since then, these apparently fundamental, indivisible components of the supposedly indivisible atom have themselves been found to be a fantastic mix of other bits and pieces: quarks, hadrons, gluons, bosons and so-ons.

So the atom is not an atom at all, strictly, but the name has stuck. The root is found in many places:

Anatomy: literally, cutting through.

colostomy: cutting an artificial opening into the colon through the abdominal wall.

dichotomy: division of a whole into two parts.

lobotomy: incision into (especially) the frontal lobe of the brain, in the treatment of mental illness.

And in surgery, countless other *-ectomies* in which things are cut out. Most familiar is the *appendicectomy*: cutting out the appendix or, as the OED magnificently has it "Excision of the vermiform appendix of the cæcum" (Note that it is a syllable longer than *appendectomy*, which is an Americanism not favoured by the Australian medical profession). The familiar *CAT scan* is Computer Aided Tomography: that is, 'cutting' the body by taking computer-processed X-rays to produce tomographic images or 'slices' of particular parts of the body.

Similarly, from the same root we have:

epitome: an abridgment of a work, extraction of its principal features.

microtome: in medicine, an instrument for cutting extremely thin sections for microscopic work.

tome: a volume of a (written) work. The original idea was that the whole work was cut into several tomes. And just in case you need it, a *hecatontome* is a collection of a hundred tomes. Oddly, a *monotome* is a work comprising a single volume. Although the word has been around since the 19th century, it is rarely used, perhaps because it makes no sense. If it is a *tome*, it should be a slice of a larger work.

Until I began researching this essay I had not been terribly excited about the absence of philtrum from the OED, but I have become quite worked up about it. On any view it is passing strange that the word which describes a visible thing common to all 7 billion people on earth, which is neither embarrassing nor indecent, should be denied its place in the Oxford sun. Its absence is, as Mark Antony said "the most unkindest cut of all". (He was not talking about circumcision.)

The unkindness is magnified when you have regard to the number of utterly useless words which bask complacently in the OED. For example, words which have the *hecato-* prefix to describe a hundred utterly pointless things. *hecatologue*: a code of a hundred rules; *hecatomb*: on offering of a hundred oxen (terribly useful these days); *hecatomped*: an area one hundred feet square; *hecatonstylon*: a building having one hundred pylons; *hecatontarchy*: government by a hundred rulers; and *hecatophyllous*: having leaves consisting each of a hundred leaflets.

And let's not *oblive* (= *forget*) those other space-wasting words which have the prefix *sesqui-*to signify one and a half of something. How often have you had to resist the temptation to use *sesquialter*: proportionate to another object as 1½ is to 1; or *sesquiduple* to express the meaning 'two and a half'; or *sesquipedal*: a foot and a half long (44.1 cm); or *sesquiplane*: a biplane having one wing of surface area not more than half that of the other; but I suppose we will have to keep *sesquiplicate* if only because its definition is so wonderfully obscure: "Bearing or involving the ratio of the square roots of the cubes of the terms of a certain ratio". (Actually, the definition of *syzygy* when used as an expression in mathematics is better: "A group of rational integral functions so related that, on their being severally multiplied by other rational integral functions, the sum of the products vanishes identically; also, the relation between such functions".)

Philtrum has to go into the OED. If space is a problem, I think there is a case to be argued for dumping some of these space-wasting words, but if removing any of them to make way for *philtrum* seems like too great a sacrifice, we might just ditch *heptaglottologie*, that is, a treatise concerning seven languages.

Counsel's Baggage

THE HON PETER HEEREY AM QC[1]

Along with wig and gown, a soft silk bag to carry briefs has long been part of a barrister's distinctive paraphernalia. The bag will be either red or blue, with the barrister's initials woven in large letters.

The colour is not just a matter of the owner's aesthetic preference. Any barrister can buy him or herself a blue bag, but a red bag is given as a gift by a Silk to a junior for outstanding work on a case in which they were both retained.

The custom originated in England. Up until the early 19th century King's Counsel received an allowance from the Crown of £40 per annum, together with pens and paper and also an annual allowance of bags, the latter being distributed among juniors who had made such progress as not to be able to carry their briefs conveniently in their hands."[2]

In 1830, presumably in an early instance of swingeing budget cuts, the Crown stopped the allowance, pens, papers and bags. But the practice of giving the bags to juniors continued. According to one source,[3] the pre-1830 bags were purple but, for reasons lost in the mists of time, red was adopted. Junior counsel used blue bags, which served the same purpose, but with this important exception. Blue bags could not be brought into the courtroom itself, except in the Chancery courts.[4]

Lord Justice Mackinnon, in his book *On Circuit*, records a verse given to him by Artemus Jones (presumably the famous litigant of *Hulton v Jones*[5]) which includes the following:

Then flaunt the scarlet sack! Let briefs
Swell out its ruddy folds in sheafs
Let courage spur the litigan
And keep the bloody bag from want.
To any wise solicitor
It much commends a junior
To note, from this, some Silk has thought
He was not quite a fool in court.

The practice has survived in Victoria and also, perhaps to a lesser extent, in other States.

A particularly notable variation of the custom is the handing on of a red bag by a recipient, now a Silk, to an impressive junior. Stephen O'Meara SC has been kind enough to provide the writer with details of the provenance of his own red bag, given to him by David Beach SC, now Justice Beach of the Supreme Court. David had received the bag from Bernard Bongiorno AO, QC, recently retired from the Court of Appeal. His donor was Barry Beach QC, later Justice Beach who in turn had received the bag from William Crockett QC, later Justice Crockett. He had been given the bag by E O Moodie-Heddle QC, later a judge of the County Court. Moodie-Heddle received the bag from Richard Eggleston QC, later a judge of the Commonwealth Court of Conciliation and Arbitration and his donor, originator of the bag, was Sir Douglas Menzies KC, later a Justice of the High Court.

The practice is commended to present day Silks who must surely from time to time recognise in a junior the famous 'red bag moment'. While the present piece purports to be a modest work of history and professional sociology, and not an advertisement subject to the *Competition and Consumer Act 2010* (Cth) Schedule 2, Chapter 2 Section 18,[6] Silks minded to follow the custom can obtain a red bag from Ludlows, 530 Lonsdale Street (or other such provender of arcane accouterments), for $295.

1 With thanks to Cliff Pannam QC, Michael Wheelahan SC and Stephen O'Meara SC

2 The Blue Bag, *Australian Law Journal*, 15 August 1932, p 114

3 ibid

4 *New York Times*, 12 December 1880

5 [1910] AC 20

6 Otherwise still known as s 52

Stephen O'Meara SC's red bag – the originator was Sir Douglas Menzies KC

Gallimaufry

by JOHN COLDREY

I have always regarded humility in public life as a pleasing characteristic – particularly in others. Some people are born humble: others have humbleness thrust upon them.

I am a living example of the latter.

I would like to present evidence for this proposition. Of course I do so with considerable diffidence.

When, to the surprise of some and the shock of others, I was appointed Director of Public Prosecutions, the Government provided me with a beautiful new Ford Fairlane (Ghia). The first time I filled it with petrol (using a Government card), the service station attendant remarked generously: "You chauffers certainly keep these cars in sparkling condition!"

Some time later I was visiting an Old Peoples' Home (sorry, Retirement Village) when I was accosted by a venerable inmate who queried: "Haven't I seen your face somewhere before?"

"Quite possibly," I replied, with just a modicum of preening. After all, the noble visage had appeared intermittently on the television news. The old bloke nodded thoughtfully.

"Yes, didn't you work on the boning line at William Angliss'?"

As part of my role I was ensconced in a grandiose office in the Old Mint building. A visitor inquiring as to my whereabouts was told by the gatekeeper: "We don't have a Director of Public Prosecutions here, but we do have the Director of Public Prostitution."

Fortunately the Chief Commissioner of Police (then Mick Miller) had the presence of mind to say: "He'll do."

The final episode from my time as DPP, and which remains etched in my mind, involved former Family Court Judge, Sally Brown.

Sally and I have been mates for many years. It has been a comforting alliance of the vertically challenged. When she was Chief Magistrate, we arranged to have lunch at a city restaurant. As we entered the head waiter swept up to Sally and assured her how honoured the restaurant was to be favoured with her patronage. (That was the gist of it.) I stood by – silent but impressed. The head waiter then briefly turned his attention to me. Ever the optimist, I had brought my own bottle of wine. He informed me perfunctorily that the restaurant was licensed and he confiscated the bottle promising to return it later.

"We don't have a Director of Public Prosecutions here, but we do have the Director of Public Prostitution." Fortunately the Chief Commissioner of Police (then Mick Miller) had the presence of mind to say: "He'll do".

As we were eating our meal, the proprietor of the establishment descended upon our table and expressed the exquisite delight occasioned by Sally Brown's presence. (That was the gist of it.) I sat by – silent but impressed. At no time did his attention drift to me.

On leaving the restaurant I was saying farewell to Sally when I noticed several young women staring in our direction. Although not bearing a public profile of Frank Vincent-like proportions (I had to get his name in), I was sufficiently vain to wonder if they had recognised me. As I followed them up the street I heard one of them remark to the other: "Did you see who that was?" Her companion replied: "Yes, that was the Chief Magistrate, Sally Brown."

Suitably deflated I returned to my office only to become further depressed by the realisation that I had left the bottle of wine at the restaurant. Being on a PAYE salary I immediately set out to retrieve the bottle. When I recovered possession, it was still in its original paper bag. The only difference was that it now bore a message written in biro. With increasing curiosity I put on my glasses to decipher the words. It read: "Left by the man with Sally Brown".

Life at the Supreme Court was a little kinder.

Barristers whose case preparation had extended to reading the Daily Law List, at least knew who I was. And counsel disagreed with my tentative expressions of legal principle "with respect", and frequently "with the greatest respect". Additionally, one had the inestimable benefit of the Court of Appeal whose members never shrank from the task of eliminating any signs of "first instance" hubris.

I also experienced moments akin to slapstick. Like the day the court adjourned and I rose from my ergonomic chair while graciously acknowledging the ritual bowing of counsel, only to find that the door leading to the court ante-room had become locked. I was reduced to facing counsel and instructing solicitors

desperately attempting to suppress their primordial glee while I uttered such lame comments as: "This must be a strategy of the Chief Justice to make us work longer hours."

On another occasion, when I was actually sitting in the Court of Appeal (making up the numbers), my judicial throne commenced to collapse in a series of dull thuds. For one dreadful instant I had a vision of a medieval impaling on its central steel pole. Fortunately, Chief Justice Phillips adjourned the court just before I disappeared completely from the view of learned counsel. To the general amusement (of others) he suggested that, as a safety measure, I should procure a hubcap and insert it in my trousers. (I hasten to add that such levity in no way reflected on the quality of counsels' arguments.)

During my time at the court I was constantly concerned that, one day, a dyslexic reporter would refer to "a decision of Justice Clodrey" – and the secret would finally be out!

This was no fanciful fear. Justice Bill Gillard was once recorded in a newspaper article as Justice Dullard. I recall this because at the time I owed him some money and, in an attempt at humour, I asked him in what name he would like the cheque to be written. It is fair to say that, on this occasion, His Honour's level of amusement accorded with that often attributed to Queen Victoria.

Anyway, I rest my case. Now if you'll excuse me, it's time to go and check on my eligibility to inherit the earth.

Verbatim

Have you heard something odd in court? Been on the receiving end of a judicial bon mot? Muttered a quip of your own? Send in the transcript extract to *vbneditors@vicbar.com.au*, or drop it into one of the editors' pigeonholes.

Supreme Court of Victoria

Hudspeth v Scholastic Cleaning & Consultancy Services & Ors
Before Justice Dixon,
28 November 2012
JOHN RICHARDS SC *(cross-examination of witness who denied being called by the plaintiff to inspect vandalism in a toilet): ...* So it might be the case in fact you did come and look at the mess but don't now recall doing so?
WITNESS: No, I would remember going to see something like that. I had been to the toilet before to see just a very strange incident but I do-
RICHARDS SC: Just to see what, I beg your pardon?
WITNESS: You don't want to know.
RICHARDS SC: You had seen messes before, had you?
WITNESS: Not that type of mess, it was something unusual that [the plaintiff] showed me.
RICHARDS SC: What was that?
WITNESS: Something in the toilet.
RICHARDS SC: What was that?
WITNESS: Something that should be in the toilet but should not have been in there. It was a big turd but it was unusually big so I had been there before so I remember being shown things in the toilet, yes.
RICHARDS SC: We don't have to go into that.
HIS HONOUR: You are not proposing to tender that, I take it, Mr Richards?

Supreme Court of Victoria

500 Burwood Highway Pty Ltd v Australian Unity Ltd & Ors
Before Justice Vickery, 4 October 2012
STEWART ANDERSON SC *(opposed to Delany SC and cross-examining a quantity surveyor):* And what type of project, in general terms, was that?
WITNESS: It was a – a retirement living facility... except it didn't have the aged – that it was more of an over 55s retirement village.
ANDERSON SC: Yes, Mr Delany would be interested in that, I'm sure.
HIS HONOUR: I think by the time this case finishes, we'll all be interested in retirement villages.
ANDERSON SC: I think that's right, Your Honour. I think that's...
HIS HONOUR: From different perspectives.
ANDERSON SC: Yes, we'll be able to afford it by then, Your Honour.

Federal Court of Australia

Gun Capital Management Ltd v Solamind Pty Ltd & Ors
Before Justice North, 6 July 2012
TIM NORTH SC *(cross-examination of the plaintiff's sole director, who claimed several millions from the defendants):* But you're not seeking recompense at all?
WITNESS: Well, no. I'm a very easy-going guy. I don't chase people for money and people don't chase me for money.
HIS HONOUR: I thought that was what this case is about?... We could all pack up and go home if you don't.
NORTH SC: Is that an offer, sir?

Red Bag, Blue Bag

How and When Should a Member of Counsel Speak with the Media?

Red Bag

The advice of the celebrated amalgam advocate, the late Frank Galbally, was "Keep your faith in Jesus, and walk towards the cameras."

But how to follow that dictum and still comply with the Bar's Good Conduct Guide, paragraph 8.58 of which says that a barrister involved in current proceedings:

> *must not personally publish or take any steps towards the publication of any material concerning a proceeding which is:*
> *(a) inaccurate;*
> *(b) discloses confidential information; or*
> *(c) appears to or does express the opinion of the barrister as to the merits of the proceeding or any issue arising in the proceeding.*

Striding towards the throng an appropriate persona must be adopted. Recent graduates of the Readers' Course will of course have been greatly assisted by the seminar on method acting conducted by Geoffrey Rush (or was it Bert Newton?).

Does putting on a stern imitation of Malcolm Fraser convey a sense of hopelessness and facing imminent disaster with sang-froid? Or that delight is being heroically supressed?

What about a cheerful grin, perhaps a little skip? TV journalists speaking to camera have perfected a kind of restrained ballet with open hands at waist level, but if barristers do that, aren't they saying "Believe me, and incidentally aren't I cute?" There is also the need to hand over books and papers to free up the hands – to a junior, instructing solicitor, client or even an innocent bystander. If actually asked to comment, there is an infinite range of facial contortions available, and of course "I couldn't possibly comment".

Note that the rule only applies while there is involvement in current proceedings. So, case over and brief returned, it's open slather. With some fast footwork, an adverse judgment handed down at ten in the morning can be countered on the six o'clock news.

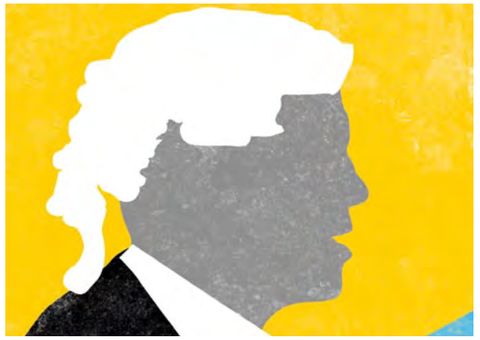
There is also paragraph 8.60, which suggests avoiding "giving 'door of the court' interviews to waiting journalists." Now 'door of the court' is a concept which may extend to steps down from the door, but certainly not to the footpath, which is public property. Nor to a nearby café. A gloss on the rule is that gossip with journos is permissible, subject to them paying with their unlimited expense accounts and nobody drinking skinny soy lattes. Fair trade coffee is optional however. While it is true that the journos will cheerfully, well fairly cheerfully, go to jail rather than reveal their sources, the truth of the matter is that you would rather like to be revealed.

Blue Bag

As junior counsel this question hardly ever arises. Thankfully. Of course, there is a Rule about it. Several in fact. None are useful for self-promotion.

That should be enough to tell even the most vainglorious barrister to beware. But sometimes even

ILLUSTRATION BY GUY SHIELD



smart people are drawn, like Narcissus, to be doomed by their vanity.

Nevertheless, if pulled into a media scrum by the fearlessness of your leader, the most important thing to remember is to make sure they spell your leader's name correctly. This will boost your leader's ego as well as making it easier for the relevant officer to draw necessary contempt charges or ethics committee complaints. If it were somehow possible to pixelate your face in advance, that would be helpful.

Humble juniors may be assailed by media hacks outside of Court and urged to cough up names and juicy details. But such attempts to catch you may be easily thwarted by a theatrical flourish of the robe (or cape, worn voluntarily for such a purpose, if appearing in the Magistrates' Court).

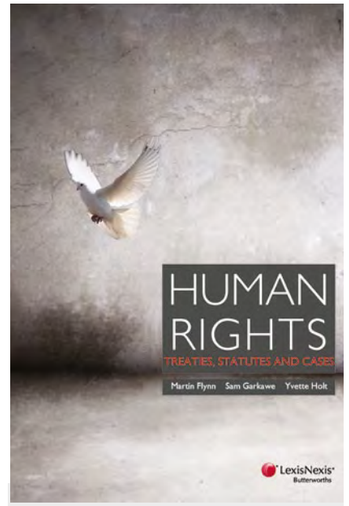
What's trickier is the subtle question breathed over a drink with a journalist 'friend'. It's then your guard will be down and you'll be compelled to divulge all your secrets and probably dark (hitherto unrevealed) truths of the Bar itself, such as that wigs are made in a cellar in ODW from the cured intestines of baby seals (stretched by blind slave children); that fees are determined by artfully throwing a gumboot down a corridor marked with graded monetary points; and that silks were traditionally (no longer, thank goodness) appointed by a coven of Supreme Court Library cleaners who would sacrifice readers on piles of burning VRs and drink the blood of pigeons roosting in the dome in order to give themselves powers of divination.

So as to the 'when,' the answer ought be never. As to the 'how,' careful consideration is required. We are not of a profession lacking pomp, so I suggest the 'how' should match our predilection for grandiosity. To this end, always appear robed in front of a bank of calf-bound tomes (strap the bookshelf to crawling actors, so you can walk and talk for the cameras). Try to give interviews whilst running (robed), or in the bath (robed). Write only by hand, and in 12-foot high letters along the clean walls of the County Court building.

Book Reviews

A Helpful and Accessible Work on Human Rights

Kurt Esser, Principal, Esser Legal



Human Rights: Treaties, Statutes and Cases **by Flynn, Garkawe & Holt (LexisNexis Butterworths, 2011)**

The title of this work is a precise and accurate account of its contents, in the sense that it is principally a collection of sources rather than commentary.

The authors have very carefully gathered together into one very elegant volume, all the important international treaties and statutes that touch on human rights law in Australia. The materials date back to the Magna Carta and extend, for example, to the latest amendments to the *Australian Human Rights Commission Act 1986* (Cth). As well, the authors have made an excellent selection of the important High Court cases that deal with human rights law in Australia.

The result is a highly useful and comprehensive compendium of source materials which readers will find particularly accessible.

The selection of source material has been methodical, comprehensive and scholarly. The methodology of the work is to go from the international and general to the specific and local, then, in the final chapter, to compare Australian law with other jurisdictions.

The first two chapters are devoted to the United Nations and important UN treaties such as the *Convention Relating to the Status of Refugees*, the *Vienna Convention on the Law of Treaties*, and the *Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment*. Chapter three deals with treaties of more general application such as the *Universal Declaration of Human Rights*, the *Declaration on the Elimination of Violence against Women* and the *Declaration on the Rights of Indigenous Peoples*. Chapter four contains a generous selection of statutes that include the English *Habeas Corpus Act 1679, Bill of Rights 1688, Act of Settlement 1700*. In addition there is a well-edited summary of the Australian Constitution plus all the Commonwealth legislation that deals with human rights. At the end of the chapter there is a comparative table which sets out Commonwealth, State and Territory anti-discriminatory legislation, subject by subject, which practitioners, public servants, students and particularly members of the public will find extremely useful and time-saving. Dealing with anti-discrimination laws in the states and territories this way obviated the need to reproduce all the relevant legislation in full. The authors wisely chose, however, to include both the *Human Rights Act* 2004 (ACT) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) in full. Chapter five reproduces the leading High Court cases dealing with human rights, while chapter six compares Australian human rights law with a smattering of other jurisdictions, such as the United States and the United Kingdom.

As one would expect, the vast majority of the book is comprised of sources rather than commentary. Helpfully, all source material is sign-posted by the use of a bold vertical line down the margin of each page, which clearly delineates original sources from commentary and notes.

> "The authors have very carefully gathered together into one very elegant volume, all the important international treaties and statutes that touch on human rights law in Australia."

In general, notes and commentary which all appear at the end of quoted material, have been kept to a minimum, which tends to both streamline and simplify the work of the reader. Because of the brevity of the notes, this reviewer was tantalised to explore the authors' suggestions rather than be overwhelmed by copious references to other commentary.

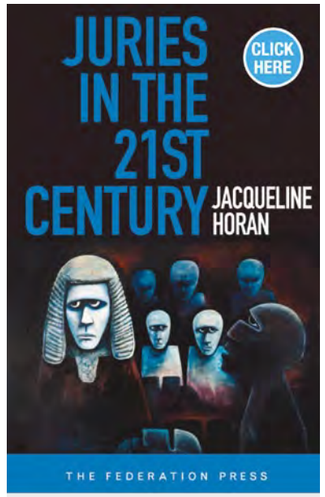
The work does not pretend to be a detailed or comprehensive exposition of human rights law, for a practitioner, for example, in the area of refugees, or the law relating to deportation. While it will serve as an excellent source of learning about the evolution of the protection of human rights in Australia, it does not purport to deal with the more practical issues human rights lawyers may confront. Does a privative clause in the *Migration Act 1958* (Cth) deprive a court of jurisdiction to review a refusal of protection? Will that person be entitled to complementary protection? Although the work has limited application in practical problem-solving in this area, it is obviously pitched for the more general reader.

The work is a very helpful and accessible addition in the area of Australian human rights law.

It will lead a useful life on the book-shelf of practitioners, public servants, students and others whose important job it is to advise people, whose human rights may be infringed, particularly those vulnerable people who suffer from a disability.

A Timely Publication

Reproduced, with permission, is the foreword to the book by Chief Justice Bathurst of the Supreme Court of New South Wales.



***Juries in the 21st Century* by Dr Jacqui Horan**

The original *Guinness Book of Records* came about as a result of an unresolved dispute at a shooting party in County Wexford, Ireland in 1951.

Sir Hugh Beaver, who was then the managing director of Guinness Brewery, wanted to know which was the fastest game bird in Europe.

Despite heated arguments and a search of the host's extensive library, the answer could not be found. And so Beaver, realising that similar disputes must be happening in pubs and clubs around the world, set about creating a definitive collection of the world's superlative facts.

The first edition of the *Guinness Book of Records* was published in 1955, and within six months it was a number one bestseller in the UK.[1]

The innovation of written language and the invention of the printing press are two of the most significant watershed moments in the history of our relationship with information. However, that timeline is also peppered with smaller moments that nonetheless reflect fundamental changes in our assumptions about, and expectations of, information. The publication and rapid popularity of the *Guinness Book of Records* is one such smaller moment. It was by no means the first attempt to collate types of information into a single volume. To take just one example, dictionaries in various forms have been around for millennia. Nevertheless, the popularity of the *Guinness Book of Records* from 1955 reflects a shift towards a cultural interest in and expectation that an increasing number of classes of information – in this case, world superlatives – are knowable, useful, and above all, accessible.

The advent of the internet is a watershed moment in the history of information closer in scale to the introduction of written language or movable type. It has changed our relationship with information radically and irrevocably. Nevertheless, its influence shares characteristics with the introduction of the 1955 *Guinness Book of Records*: it has exponentially grown the public's expectation that more and more classes of information will be knowable, useful and easily accessible. As Dr Horan explains, our expanding expectations have significant implications for the modern jury.

Applications like search engines, GPS enabled maps and social networks make us expect and feel entitled to information immediately, in direct response to our inquiries. In addition to feeling entitled to information, we expect it to be intelligently tailored to our needs. Search engines filter results according to past searches, surfing histories and geographic location. Social networks identify our friends and work associates before we've searched for them. Maps provide directions, estimate travel times, and give real time traffic updates and public transportation timetables. We are thus expected to do less work to retrieve relevant information, and have far less patience for questions that go unanswered. This shifting relationship with information is also reflected in our education system, which increasingly emphasises the ability to identify necessary information and then obtain and analyse it, over the ability to simply retain and regurgitate information.

However, this way of being is, in Dr Horan's words, 'fundamentally at odds' with a central concept of the jury system: that jury members confine themselves to the evidence and law presented in court. Legal directions delivered orally, and often at length, evidence presented orally and not in chronological order, and prohibitions on independent research create an environment more at odds with the learning and information expectations of jurors than ever before. Thus, the 21st century jury faces unique challenges, ripe for exploration and analysis.

I come now to say something about this particular publication, which attempts to do just that.

'Timely' is a word often applied to newly published legal research; however, in this case 'timely' is inadequate to express the value of this work and the unique challenges that were faced in bringing it to fruition. A better word is needed.

To begin with, juries are a notoriously difficult area of study. They are, by their very nature, secretive and sacrosanct. They are also nearly impossible to replicate 'in the lab' for the purpose of observation. A work which comprehensively profiles the contemporary Australian jury and its environment can therefore be described as 'accomplished'. But this is merely the start.

Dr Horan then sought out a second, even more fraught, area of study: social and technological change in the 21st century. Committing printed words to paper in a time of such rapid change, in order to commentate on that change no less, would in many other hands have been a fool's errand. The word 'foolhardy' may have applied. However, Dr Horan manages to tackle the impact of technological innovation and social media on the jury system in a manner that will remain relevant through the years of change to come.

I fear I have no choice, therefore, but to resort to superlatives in describing this work. This book is the most timely, accomplished and not-at-all-foolhardy contribution to the study of juries in Australia this century. Perhaps Guinness will take notice.

1 Guinness World Records, "About", www.guinnessworldrecord.com.


Prof Carolyn Evans (Dean of the Melbourne Law School), The Hon Justice Weinberg, the author, Dr Jacqui Horan, The Hon Justice Whelan and Prof George Hampel AM QC at the launch of the book

COVER COURTESY THE FEDERATION PRESS

Brother Baba Budan

Food & Drink

OUT OF SESSIONS DINING

Louise Martin

Even with the flexibility that lap-tops and the internet bring, there are times when you are likely to find yourself in chambers late in the evening or on the weekend. With that in mind, *Victorian Bar News* has compiled a list of selected cafes and restaurants close to the legal precinct that are open after ordinary business hours are over.


Mamak

Evening meals

1. Mamak 366 Lonsdale Street, Melbourne. Open seven days from 11.30am to 2.30pm and 5.30pm to 10.00pm (and on Friday and Saturday until 2am). Named best new restaurant of 2013 in *The Age Good Food Under $30* guide, Mamak is a Melbourne version of the much-lauded Sydney institution specialising in roti bread. While a queue often stretches out its door, don't be deterred: it moves quickly and at its end is the delicious pan-fried folded flat bread that is a hallmark of Malaysian cuisine. If you are a roti lover, this is a wondrous place.

2. Purple Peanut 20/620 Collins Street, Melbourne. Open Monday to Saturday from 10am to 8.30pm. This quirky and unassuming café sells a wide range of high-quality sushi, although its brown rice fillings might be an affront to some purists. Particularly good for dinner are the hot dishes, which include a range of curries and casseroles. During lunchtime, take-away becomes almost mandatory as gaining a seat at this tiny café is just about impossible. Happily, this problem doesn't exist for evening customers.

3. Paco's Tacos 500 Bourke Street, Melbourne. Open Monday to Tuesday from 12pm to 2.30pm and Wednesday to Friday from 12pm until late. In the legal precinct's heart, overlooking the Supreme Court, is Paco's Tacos, a buzzing Mexican cantina. The menu's main focus is $6 tacos. Highlights are a semolina crusted fish taco with pickled cabbage, a spice-crumbed prawn taco with salsa verde, and a chorizo taco with spicy corn salsa.

PHOTO COURTESY OF JENNIFER JONES

Paco's Tacos

There is also barbecued corn and the less authentic option of nachos. A buzzing place, Paco's makes more sense for an after-work drink than a calm place in which to grab a quick evening bite. However, the staff is happy for you to take away your order and accept phone orders.

4. +39 Pizzeria 362 Little Bourke Street, Melbourne. Open Monday to Sunday from 11am to 10pm. Named after the international dialling code for Italy, +39 is an all-too-rare decent pizza place within the CBD. There are also many pasta dishes that would make a good weeknight dinner. Dine-in or takeaway, + 39 won't deliver but will accept phone orders.

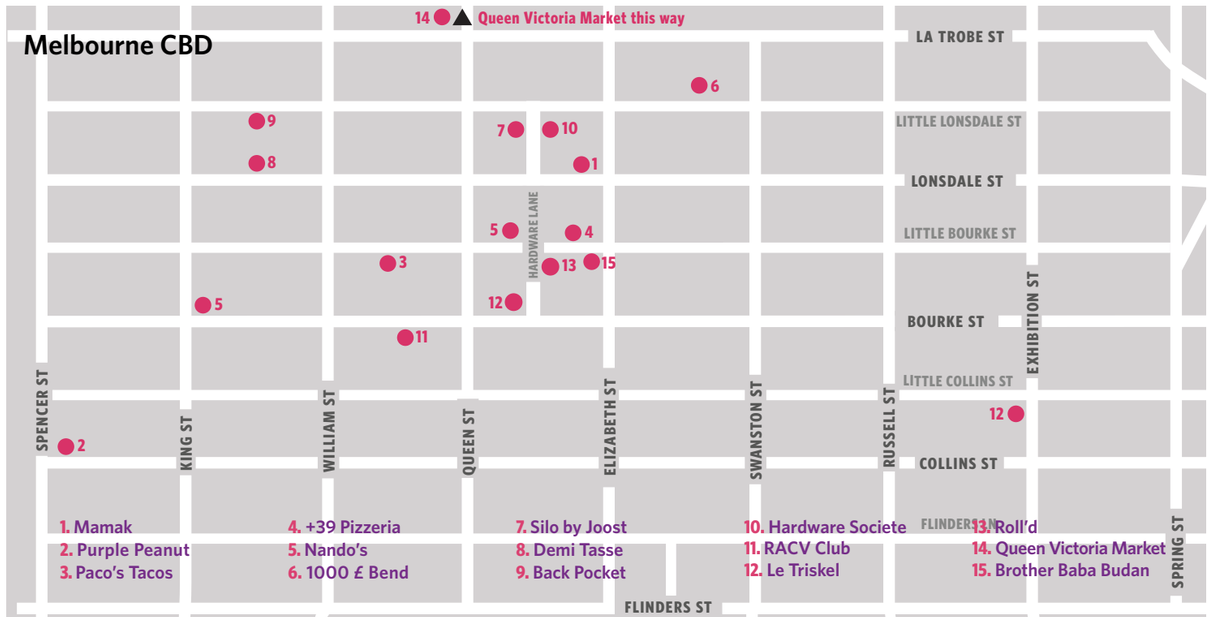
5. Nando's 400 Little Bourke Street and 600 Bourke Street, Melbourne. Both open Monday to Sunday from 11am to 10pm. Nando's is a stalwart option that seems to be a common after-hours go-to place for many barristers. The Portuguese-style protein hit on offer can be reasonably healthy if sufficient self-restraint can be exercised to avoid also ordering the chips. Chicken tenderloins with a side of coleslaw was suggested as a good option by one senior commercial barrister. Wraps and burgers are other alternatives. Add a grilled corn cob and you may have a balanced meal.

6. 1000 £ Bend 361 Little Lonsdale Street, Melbourne. Open Monday to Wednesday from 8am to 11pm; Thursday to Friday from 8am to 1am; Saturday from 10am to 1am and Sunday from 10am to 11pm. 1000 £ Bend is a surprisingly cavernous warehouse-style space, whose opening hours are likely to rival, if not defeat, those of even the most hard-working barrister. The café's menu includes a diverse range of dishes with multiple culinary origins.

Breakfast, lunch or coffee on a Saturday

7. Silo by Joost 123 Hardware Street, Melbourne, 3000. Open Monday to Saturday from 6.30am to 3.30pm. Joost Bakker came to prominence after launching waste-free pop-up restaurants in Melbourne, Sydney and Perth. Silo is a permanent embodiment of his waste-free vision. In keeping with the overall sustainable ethos, Silo's simple lunch menu relies on seasonal, ethically produced produce. While its menu started out as being vegetarian, this is no longer the case; roast mutton was on offer at a recent visit. There are also plenty of interesting sandwiches to have in or take-away. Serving sizes lean towards conservative more than generous – not necessarily a negative, and the quality compensates for the lack of largesse.

8. Demi Tasse Shop 8, 550 Lonsdale Street, Melbourne. Open Monday to Friday from 7am to 5pm and Saturday from 10am to 2pm. As is well known to many, Demi Tasse is a tiny café at the foot of Joan Rosanove Chambers that sells



a range of high-quality hot and cold meals and great coffee. What might be less well known is that it is also open on a Saturday.

9. Back Pocket 3/535 Little Lonsdale Street, Melbourne. Open Monday to Wednesday from 6am to 6pm; Thursday to Friday from 6am until late; and Saturday from 8.30am to 2.30pm. A geographically proximate option for Saturday lunch or coffee, Back Pocket sells standard café fare and coffee that is a good alternative, particularly when time is short.

Breakfast, lunch or coffee on a Saturday and a Sunday

10. Hardware Societe 120 Hardware Street, Melbourne. Open Monday to Friday from 7.30am to 3pm and Saturday and Sunday from 8.30am to 2pm. On weekends, Hardware Societe only serves brunches and, reflecting the quality of its dishes, it's a slightly more expensive brunch than most. But the pride taken in its food is manifest at every turn – from the coffees that come with a small doughnut nestled in the spoon to the banana bread that proves to be two small loaves with salted caramel filling. Hardware Societe is a well-deserved treat likely to make you feel much better about being in the city on a weekend.

11. RACV Club 501 Bourke Street Melbourne. The bistro is open from Monday to Sunday from 6.30am to 10.30pm and the coffee lounge from 7am to 11pm. If you're a member, the RACV club is an excellent venue for after-hours meals. On Sundays, it is worth a visit for the good-value carvery lunch. A quicker meal, or just a drink, can be had in the club's coffee lounge.

12. Le Triskel 32 Hardware Lane, Melbourne. Open Monday to Thursday from 7am to 6pm; Friday from 7am to 9.30pm; Saturday from 8am to 5pm and Sunday from 8.30am to 5pm. Located in Hardware Lane, Le Triskel isn't too far from most barristers' chambers. But with its French magazines and music, it may feel like a world away. Le Triskel's speciality is its range of Breton-style buckwheat crepes known as gallettes. Holding only savoury fillings, they contain a hearty range of flavour combinations that make for a satisfying lunch. There is also a smaller range of sweet crepes on offer.

13. Roll'd 15 Hardware Lane, Melbourne. Open Monday to Wednesday from 8am to 9pm and Thursday to Friday from 8am until late and Saturday and Sunday from 10am to 5pm. While there is a Roll'd in Goldsborough Lane, it's the Hardware Lane venue that offers the extended trading hours. The fare here is a hip café chain style spin on Vietnamese hawker-style food, including rice paper rolls, Vietnamese-French baguettes, salads and pho.

14. Queen Victoria Market 513 Elizabeth Street, Melbourne. On weekends, the Queen Victoria Market is open on a Saturday from 6am to 3pm and on a Sunday from 9am to 4pm. For a DIY option, a trip to the Queen Victoria Market can yield you an interesting picnic-style weekend lunch. You can buy breads, dips and salads from many of the stalls or pay a visit to some of the top-quality gourmet providers in the deli hall for a warm takeaway meal. Bratwurst or borek anyone?

15. Brother Baba Budan 359 Little Bourke Street, Melbourne. Open Monday to Saturday from 7am to 5pm and Sunday 9am to 5pm. Brother Baba Budan provides one of Melbourne's best coffees from its dainty Little Bourke Street premises. For the time-pressed, its pastries from Brioche by Philip would make a quick and butter-filled make-do lunch.

Delivery

Misschu Tuckshop 297 Exhibition Street, Melbourne. Open Monday to Saturday from 11am to 10pm. Misschu Tuckshop's Exhibition Street branch offers delivery of its famed rice paper rolls throughout the Melbourne CBD via its fleet of electric bicycles. Orders can be made through its website or over the telephone. In addition to the rice paper rolls, there are also Peking duck pancakes, steamed dumplings, spring rolls and salads on the menu. For a more substantial meal, a number of dishes come with rice and steamed greens, such as the seared Atlantic salmon.

Menulog.com.au

Menulog is a website that offers a centralised way of ordering food to be delivered to your chambers. Through the website, you can order from a large number of restaurants located in the CBD and surrounding areas.

Thanks to the many barristers who provided suggestions of after-hours places to eat for this article and my husband who assisted me in visiting them.

Tracking Down the Trucks

Schweinhaxe

I had a choice. Vue De Monde, with its panoramic views, or food trucks located in mystery places. Food trucks!

Food trucks that seek to offer 'gourmet' food are now commonplace in Melbourne. The concept started out in New York. They are not like the food caravans parked outside nightclubs and footy grounds. These trucks seek to offer a better quality of food to a more discerning audience and are often owned and run by real 'foodies' – ex-chefs and the like. They have no fixed location. They post their intended locations on a daily basis via social media (eg Twitter and Facebook) and make you engage with them by tracking them down. You can readily do so by entering search terms such as "Melbourne Food Trucks" into Google. This makes it fun.

After a few quick searches, I found the location and opening hours of two food trucks, Taco Truck and Mr Burger. I decided to tackle them both on the same night. A mistake perhaps? To enliven the experience, and broaden the source of critic, I took the kids and the grandparents.

9/10 TACO TRUCK

Taco Truck was located in West Brunswick opposite Brunswick Park. It was not parked near a shopping strip or nightclub or anything else for that matter.

It offered three types of tacos – fish, chicken and potato, served in a crisp tortilla. These may be ordered as individual tacos ($6) or as a taco plate ($15). The taco plate is served with a choice of two tacos and a guacamole dip with corn chips. We ordered two taco plates so that we could taste them all.

While we waited the lights in the truck went off. As a result we could not see much as there was minimal street lighting. The lights eventually came back on. The best option for our consumption of the tacos was a seat at a bus stop. I expected that there might be some shortcomings!

The fish taco was served with coleslaw, lime and homemade mayonnaise. The fish was succulent, fresh and perfectly cooked. The kids knocked off the chicken taco that was served with a corn salsa, baby spinach and a chipotle chili mayo. The grandfather ate a potato taco that had jalapeno ricotta, coleslaw and a salsa verde. He told the kids that it was a bit different to the food he ate as a boy when he grew up in Brunswick!

6/10 BEATBOX TRUCK

The next stop was due east to Mr Burger in Northcote opposite Batman Park. However, on the way, the kids yelled out "There's another one!" Sure enough, there was another food truck in the style of a 1980's beatbox. Very cool – after all 'retro' is in!

It offered two burgers – one beef ($11) and one mushroom ($10) – fries, coke and spring water. That was it. We ordered the meat burger, named a "Raph Burger", and some fries. The burger was a 170gm grass-fed meat pattie with cos lettuce, tomato, cheese, onion and a "stereo" sauce. It tasted too beefy and the meat was a little rare in parts. No issue if consumed in the late hours after a few ales but not too good at 6.45pm on a Tuesday night. The fries were shoestring-like, very salty and, as a result, very tasty. Again, no place to sit so all of this was consumed in the car. Pretty ordinary!

6.5/10 MR BURGER

Mr Burger was parked opposite a dark park with no other activity nearby. It offered three burgers – two meat burgers ($9 and $10) and one falafel burger ($9), fries and a limited range of soft drinks. We ordered a "Mr Burger" ($9). It came with a beef pattie, cheese, lettuce, tomato, onion, pickle, mustard, mayo and tomato sauce. Very traditional and not much 'gourmet' here. I was expecting something like, at the very least, Wagyu beef. The burger was salty, oily and saucy and again, as a result, delicious. Again, we ate on a bench seat in semi darkness surrounded by the day's garbage.

OVERALL

At the conclusion of this culinary journey I just wanted to do some exercise and have a long shower. Instead we opted for coffees, ice cream and macaroons at Brunetti's new location in Lygon Street. Much more civilised and had the desired effect of washing away the food trucks. A bit like good schnapps! Food trucks? Stick to one food truck a month and seek the more 'gourmet' options such as Taco Truck or others such as Gumbo Kitchen and White Guy Cooks Thai Mobile Food Truck. Guten Appetite!

ILLUSTRATION BY GUY SHIELD

Wine Review

By SCHWEINHAXETTE

Vermintino & Sardines

It was very hot Thursday night during the Melbourne Food and Wine Festival. This was during the post 30 degrees celsius heat wave that baked Melbourne. I was at the Victoria Market at an event promoted as "Vermentino and Sardines", showcasing about a dozen Vermentino wines from producers in McLaren Vale, the King Valley and other regions in South Australia and Victoria.

Vermentino is a white grape variety. It is primarily produced in Italy in coastal areas such as on the islands of Sardinia and Corsica and along the coast of Liguria (ie the Italian Riviera). I like to refer to it as the "sea grape"! It's the perfect partner to seafood – both fish and crustaceans – crispy fried white whitebait or pan-fried whiting fillets with capers and a splash of lemon immediately spring to mind. It's a wine to be drunk young and not cellared. Buy it and drink it. Crisp, fresh and clean, and generally un-oaked, it is the perfect wine to refresh one's palate on a hot day or balmy evening.

Vermentino usually has a relatively low alcohol content (between 11% and 12.5%). This makes it perfect with food and a refreshing drink during a Melbourne summer.

I lined up for my sardines. The sardines were cooked using a wood fired oven over coals. The person turning them was none other than chef Riccardo Momesso. He is soon to open Valentino in Hawksburn. The sardines were served in a small cardboard bucket with bread and a homemade tomato based sauce. Delicious! However, the plastic fork I received reminded me that I was not in Cagliari on the island of Sardinia but in a food court at the Victoria Market. A pity! However, only a minor momentary lull to the Mediterranean vibe.

I tasted many of the Vermentino wines on tasting:

2012 Mitolo McLaren Vale Jester Vermentino

Made from the vineyard's Vermentino fruit. Pale colour. A massive hit of fruit on the palate. A bit too much fruit. May develop more subtle flavours over the next few years. A clean finish. This wine would suit a seafood dish such as coriander, lime and chilli steamed white fish fillets.

7.5/10

6/10

2012 BellaRiva King Valley Pinot Grigio Vermentino

A De Bortoli wine made with its Pinot Grigio and Vermentino fruit grown in the King Valley. Slightly sweet but still crisp, with not a long finish. That said, a wine to be drunk well chilled and in the moment.

8.5/10

2012 Oliver's Taranga McLaren Vale Vermentino

Fresh, zesty with the typical Vermentino lick of lemon, and subtle overtones of honey. This Vermentino had more texture and palate weight than the others, and complexity.

Dusting *off the* Archives

1963

What was the Bar like 50 years ago? Here are some facts from our archives.

Chairman of the Bar Council: Mr MV McInerney QC.

Number on the practising list: 297 members (389 on all lists).

29 people signed the Bar Roll, only one of whom remains in practice at the Victorian Bar in 2013.

Miss Anne Curtis was the only female to sign the Bar Roll (and the eighth woman ever to sign the Roll).

Bar subscriptions were set at:
Queen's Counsel – £15.15.0
Juniors of more than 3 years standing – £12.12.0
Juniors of not more than 3 years standing – £3.3.0

Mr Arthur Nicholls retired as a Barristers' Clerk after more than 50 years of service to the Bar.

The Australian Bar Association celebrated its first birthday.

Sir James Tait QC was awarded a knighthood (the first practising barrister in Victoria to receive the honour) for services to the legal profession.

Two Bar Dinners were held "due to the desire to do full honour to all members of the Bar who had been appointed to judicial office or who had otherwise been honoured by Her Majesty the Queen".

The Bar Council and the Committee of the Victorian Branch of the International Commission of Jurists entertained at luncheon Mr Purshottam Trikamdis (some time private secretary of the late Mahatma Gandhi).

Overheard in the foyer of Owen Dixon Chambers East...

Barrister's 2 year old (pointing at red sculpture): What is that Mummy?
Barrister: It is a sculpture
Toddler: Yes, but what is it Mummy?
Barrister: Well, it's art...
Toddler: Yes, but what *is it* Mummy?
Barrister: Good question darling. Lots of people are wondering what on earth it is. They have been for years! What do you think it is?
Toddler: A dinosaur!

THE BAR *Quiz*

Are you having a slow day in chambers? Are you trying to avoid drafting that overdue statement of claim? Fancy yourself at quizzes? Whatever your motivation, grab a pen and test your knowledge of the Victorian Bar by completing this quiz.

1. Who was the first person to sign the Bar Roll?
2. The (nearest) percentage of eligible voters who voted in the 2012 Victorian Bar Council election was:
   a. 24
   b. 50
   c. 34
   d. 61
3. In what year, and by whom, was Owen Dixon Chambers East opened?
4. In what year did the first woman sign the Victorian Bar Roll?
5. Who was the artist commissioned to build the red sculpture in the foyer of Owen Dixon Chambers East?
6. What was the name of the first chambers?
7. What year was the first woman elected to the Bar Council?
8. Who designed the Essoign's logo?
9. Who is the current Chair of the Bar's Library Committee?
10. In what year was the first *Victorian Bar News* published?
11. What was on the site of Owen Dixon Chambers East before it was built?
12. What is the name of the BCL commissionaire who sits at the front desk of Owen Dixon Chambers East?
13. Who is an essoniator?
14. How many lists of barristers are there at the Victorian Bar?
15. Name the Victorian Bar's only triple Olympian.

FOR QUIZ ANSWERS SEE PAGE 103

Ask Mr Tipstaff

By ROSS BREAM, TIPSTAFF

Advice for the common barrister (as well as occasional tips on the last dog race at The Meadows).

Dear Ross,
(May I call you Rosco?) I think I am in love with my instructing solicitor. He is not pretty to look at, it's true. He sniffs all the time and smokes menthol cigarettes. He never responds to requests for documents or instructions and it is possible he may, in fact, be one of the walking dead. I think his jacket was slept on by a long-haired dog. But. But, glory of glories! He pays on time! What should I do?
Barry McFluff

Dear Bazz,
Nope, I don't give a damn what you bloody call me mate. Sheesh. You're in a real pickle. I get it. My first wife was a real stinker. But, you know, that's what Twisties are for (up the shnoz, know what I mean?). I reckon when you're on to a good thing stick to it mate. Like glue. My advice to you is simple. Stock up on the Alpine Fresh and engage in charming chit-chat until your tongue gets dry. That's how we did it in the army.

Dear Rossmoine,
I do hope I have understood your nom to be the correct plume. It is difficult for me as I seldom manage to hear the names of goodly Court officers. Please forgive me. My question is, when applying for silk, what should I do to ensure a judge will be a favourable referee?
Dennis DeDwat (SC – soon I hope!)

Dear Den,
Blimey mate. This is really tricky. The truth is I can't remember any judge talking about you. And I've been with lots. Way back when. The trick is, I reckon, when a judge says, "Now, Mr DeDwat, when might you suppose your oral argument will be concluded," you should take a moment to realise it's Friday and 11.55am and at that point you smile, right, and tell them, "Much gratitude to your Honour for your Honour's astute observation, I happen to know it is your Tipstaff's monthly RSL meeting this Friday and that is just by-the-by, but I did know it, because I am the sort of barrister what gets things, right, your Honour, and I reckon I'd be done in a jiff. About 5. Heck, let's say half a jiff." Then, Den, me old mate, I reckon you'd be in with a pretty good chance.

Dear Ross Bream, Tipstaff,
The other day I was carrying my brief papers in a leopard skinned suitcase (it is made from real leopard) up to court. My instructor only had two archive boxes to carry but still he would not assist. When I got there I told my instructing solicitor I might have to leave early, as I needed to book my vacation sailing around the Croatian islands. He seemed most perturbed by my saying this. I told him he was an obstinate brute and delivered my fee slip immediately. You agree with me don't you?
Madame Bovary SC

Dear Mads,
Of course I agree with you. (What was the question? I don't care.) The thing about instructing solicitors is you should never trust them to carry your bags. They're just as likely to run off with them and feed them to their children. Vicious people. Animals more like. And they live in holes and get rashes. Be wary.

Dear Mr Tipstaff,
I like to sing. I like to dance. I am a judge of the Supreme Court. It is a very serious job. There is no singing or dancing on offer as part of my professional duties as far as I can ascertain. Any suggestions?
The Hon Justice "X". Supreme Court of Victoria.

Dear "X",
Come on "X", we all know who you are. And really, what are you talking about? Directions on a Friday, you're always singing and dancing! Least that's what I reckon I'd call it.

Dear Mr Tipstaff,
How do I get lipstick off my jabot?
Gertrude Steinerschool

Dear Gerty,
This used to happen all the time when I was getting marching plans ready in the army. My hints are (1) try to avoid using your jabot as a napkin after a cocktail. (2) keep smooching gorillas in drag to an absolute minimum and (3) try soaking it, and all of your other white clothes, in Campari. This way everything will appear a slight pinkish hue and the observer will think it is all in their own mind. This sort of psychological chicanery is really underused in my view.

THE BAR QUIZ ANSWERS: 1 J B Box – John Burnett Box (later a County Court judge) on 21 September 1900 **2** b 50 **3** 1961, Sir Robert Menzies **4** 1923 (Joan Rosanove) **5** Paul Selwood **6** Selborne Chambers **7** 1982 (Rachelle Lewitan) **8** Judge Crossley **9** Samantha Marks SC **10** 1971 **11** Fire Brigade **12** John Rutter **13** One who essoins / essoigns. A person who excuses court absence **14** 14 **15** Paul Guest – Rome 1960; Tokyo 1964; Mexico 1968.

And the winners of the VBN152 caption competition are...

"Richmond Football Club has for the last 12 months secretly tested a radical new boot, as worn by the 2012 Chairman of the Bar Council, Melanie Sloss. At a ceremony today to mark the launch of the new shoe, Vice Chairman of the Bar Council, Will Alstergren announced that the new boot will be worn by Richmond players in the 2013 home and away season, and will be marketed as 'Superboot'."

Michael Wheelahan SC, Stephen O'Meara SC and Michael Rush

And the runner up is: J D Merralls

"Say anything more about the sheila's sock and the bloke in the mirror will give you one."

CONGRATULATIONS!

Wheelahan, O'Meara and Rush will receive a lunch voucher at the Essoign Club to the value of $100. Merralls will receive a runner up voucher of $50 – (judging by value per head, Merralls comes out the winner!).

LUDLOWS

Wessex Bib Style Jabot

$82.50 or 2 for $140

Mezzanine Level, 530 Lonsdale St Melbourne
Tel **03 9670 2000** Fax **03 9602 2266**
Email **info@ludlows.com.au**

www.ludlows.com.au

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.

Recognised by the Dow Jones Sustainability Index as the World's Most Sustainable Automotive Company for the last eight years, there is more to owning a BMW or a MINI than just pure exhilaration. Just as there is more to the BMW and MINI Corporate Programmes than simply making it easier to own some of the world's safest, most advanced driving machines. The programmes enhance the entire ownership experience. 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

Terms & Conditions apply and can be viewed at bmw.com.au/corporate and mini.com.au/corporate. *Selected models only.