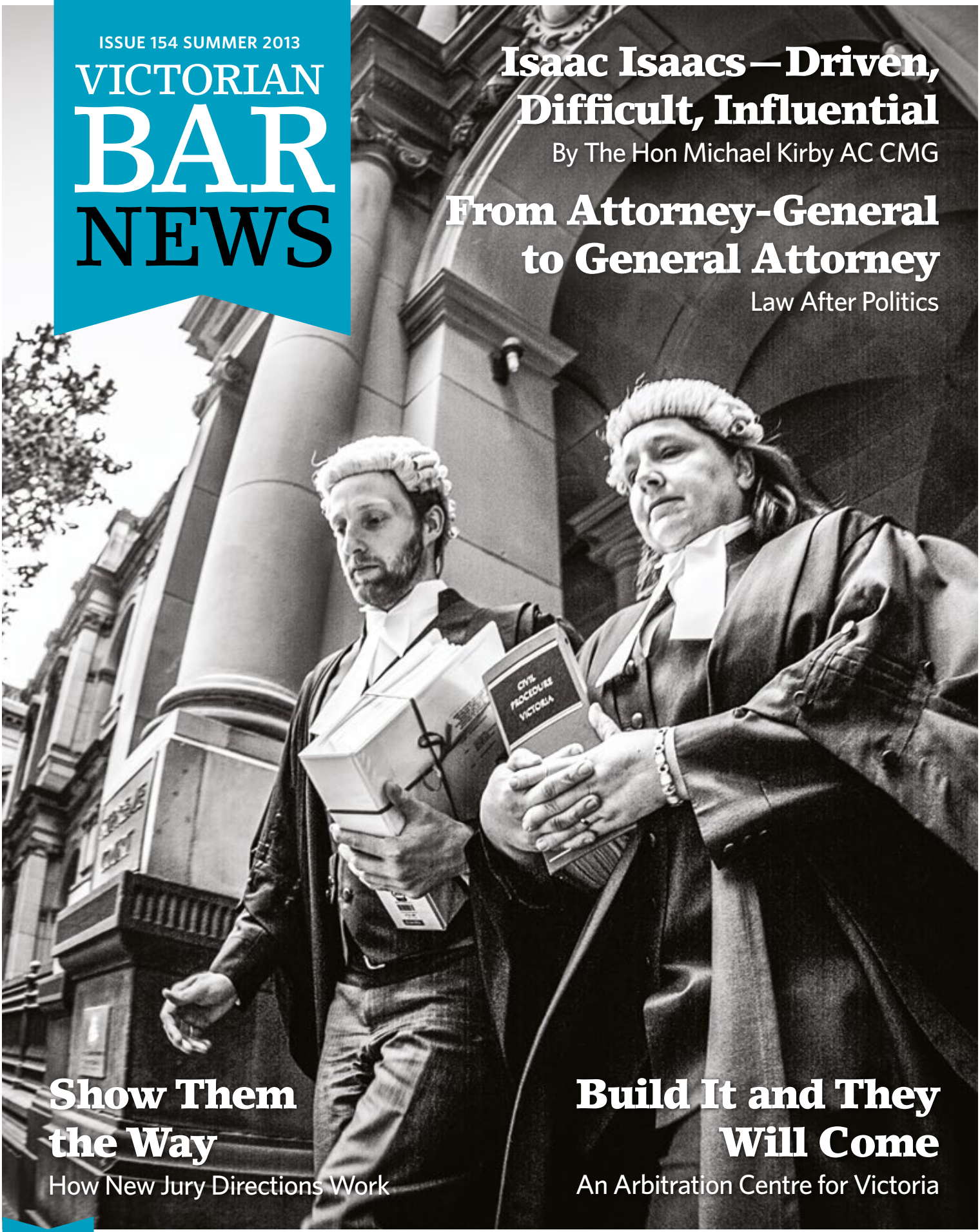
ISSUE 154 SUMMER 2013

VICTORIAN BAR NEWS



Isaac Isaacs—Driven, Difficult, Influential

By The Hon Michael Kirby AC CMG

From Attorney-General to General Attorney

Law After Politics

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How New Jury Directions Work

Build It and They Will Come

An Arbitration Centre for Victoria

Happy Birthday—Women Barristers Association turns 20

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Editors: Georgina Costello and Justin Tomlinson

Victorian Bar News Editorial Committee: Robert Heath and Anthony Strahan (Deputy Editors), Lindy Barrett, Maree Norton and Catherine Pierce.

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Georgina Costello and Justin Tomlinson

PHOTO BY PETER BONGIORNO

Through the Looking Glass

The Editors

In an essay first published in 1946 called "Why I write", George Orwell said,

"... one can write nothing readable unless one constantly struggles to efface one's personality. Good prose is like a window pane."

Victorian Bar News compiles a collection of prose from the multitude of readable writers in this place. As editors, we do not wish to impose our personalities. Instead, we reflect back to you some of the ideas, achievements and important moments of Victorian barristers past and present. Our work as barristers can be glorious, and it can be difficult. We hope in these pages to give you a view into the chambers of your colleagues past and present.

Victorian Bar News cannot print today's news, or this minute's thoughts. It is not a blog. But in the age of declining print journalism we have a rare opportunity to print something that is pitched just for the Bar, in ink, without worrying about circulation. By printing images of you in words and pictures, we take a mirror to our members and record our collective progress for posterity. In the obituaries section, members of our bar have written pieces that capture some of the glory and pain of our past members, some of whom had distinguished political and public lives. Read and weep and chuckle and be warned and comforted that one day your obituary will be here in these pages.

We would hate to squander this opportunity to circulate the Bar's news on the trivial or stale, but the witty is welcome. Send us your essays, your pictures of change, your missives, so that we can continue to print them. We hope you see yourself or someone like you in these pages. If not, please write something for us.

Barristers matter to public life in Australia and beyond. Barristers' work affects people's lives, concerns people's children, homes, land and business, develops the common law, keeps some people out of jail, puts others in, causes law reform and translates justice and injustice into clients' language. Part of the way barristers lead and inspire other barristers is by example. This edition presents many images and descriptions of the lives and works of our community of barristers, including the stories of those who arrive to and depart from our Bar, are appointed to the bench, retire as judges, make silk, sign the Bar roll, win accolades, win and lose political office, change the world, inspire others, and pass away.

This Summer 2013 issue is filled to the brim with articles on a range of topics that should sate the reader's appetite until the Winter Bar News is

despatched to your pigeonholes. Special mention could be made of the Hon Michael Kirby's piece on Isaac Isaacs, Neil Brown QC's fascinating article about lawyers who convert to politics (and some who come back), Diana Price's reflections on the 20th anniversary of the Women Barristers' Association, Paul Hayes' thoughtful description of the Bar's portrait of great public figure and lawyer, Sir Ninian Stephen and the Chief Justice's summary of civil reforms at the Supreme Court. Additionally, in our photographic competition for this edition, we asked you to send us photographs of "barristers at work". Thank you for your pictures; they expose the daily details of our lives, the beauty of our Courts and chambers, the progress of our bar and our common experiences and comforting familiar things.

The truth is, special mention could be made of all of the content in this issue. We commend it to you and welcome your responses to it. We also wish to thank the Bar News committee: Robert Heath, Anthony Strahan, Lindy Barrett, Maree Norton and Catherine Pierce, who together with Denise Bennett and Sally Bodman from the Bar office, have ensured this issue has gestated to maturity. We also thank Sharon Moore, outgoing Editor on VBN 153, for her support and encouragement. Her enormous contribution to this journal has been an example to us and enriched the Bar at large. Finally, we and the Bar owe our greatest thanks to you for your contributions. There is nothing quite like the Victorian Bar and this publication would not be what it is (and will be) without you.

THE EDITORS

Erratum

In our last issue (VBN 153, pg 83), we incorrectly identified a photo of Saul Holt SC with Bernard Quinn SC. We thank the good humour of Bernard and Saul in both volunteering to take on the other's identity once informed of the error.

In relation to "That's Sir Hayden Starke" (VBN 153, pg 47) James Merralls correctly states that "I did not capitalise 'banco court' in the second last paragraph". He also pointed out a printing error in the middle of pg 45. The sentence beginning "His personal relations with all but Dixon broke down so badly..." ought continue as, "that he refused to exchange judgments or even communicate off the bench..." We apologise for the error and are grateful, as always, for an author's careful reading.

Letters TO THE Editors

Time for change: President (not Chairman) of the Victorian Bar

Dear Editors,

I suggest that it is time the Victorian Bar changed the description of its head from "Chairman" to "President".

Every other State and Territory Bar Association and Bar Council in Australia, without exception, has a President. The description of "Chairman" is an anachronism and not a good one. When was the last time you heard of a school Principal referred to as the Headmaster? Would you consider a school headed by a Headmaster to be a progressive institution or one mired in the past?

Whilst there are difficulties associated with describing a female as "Chairman", I encourage you to consider that the title we give the head of our Bar goes beyond the issue of gender. He or she:

- is spokesperson for the Bar;
- is a leader in public debate on matters pertaining to the rule of law and the administration of justice;
- interacts with a wide range of stakeholders on behalf of the Bar, for example, the Courts, the Commonwealth and State governments and the media;
- ensures constitutional objectives of the Bar are fulfilled;
- promotes the Bar; and
- is the "face" of the Bar.

The role is not just about chairing meetings.

I suggest the term "President" brings neutrality to the position and aligns the title with the role.

The Victorian Bar Constitution provides for a "Chairman". Any name change will require constitutional change. That requires a 75% majority voting in favour.

Kim Knights
Owen Dixon Chambers West

A Starke Reminder

Dear Editors,

I should have mentioned two other matters [in "That's Sir Hayden Starke" (VBN 153)]. Starke was always considerate towards younger members of the profession. Two of his associates, Percy Feltham and Alistair Adam, both Supreme Court prize winners, spoke warmly to me about him and mentioned many acts of kindness. He advised Feltham, who was of short height, that he was not tall enough to succeed at the Bar. His height did not prevent Feltham, who had a keen mind and was an excellent speaker, from enjoying a long and successful career as a Country Party MLC. I think he may have regretted taking Starke's advice.

Later, when E F Healy was dismissed as editor of the CLR (66 CLR 252) and could not find work at the Bar, Starke engaged him as his associate.

Yours sincerely
J D Meralls

The Bar News is grateful for the many notes of encouragement received in response to VBN 153. It is due to space considerations and not false modesty that each such letter is not published in these pages.

AROUND Town

Women Barristers Association Celebrates 20 Years

Anniversary Dinner 5 June 2013 SUZANNE KIRTON, IMMEDIATE PAST CONVENOR

The Women Barristers Association celebrated its 20th anniversary with a gala dinner at the Essoign Club on 5 June 2013.

The Club was packed to overflowing, with current and past WBA members and special guests being welcomed by WBA's current Convenor, Diana Price. The guest list included the Victorian Attorney-General Robert Clark, the President of the LIV Reynah Tang, AWL President Kate Ashmor and Bar Council Chair Fiona McLeod SC. Apologies were received, including from the Governor-General Quentin Bryce and VWL President Verity Shepherdson.

Nearly all of the WBA convenors of the last 20 years were present, including the inaugural convenor, Judge Rachelle Lewitan, and a photo was taken to commemorate their presence.

Our patron, the Hon Chief Justice Warren provided a warm and heartfelt opening, congratulating all the women present on the achievements made over the past 20 years and noting the work still to be done. It is a real privilege for WBA to have had such an accessible and long standing patron, who can give us both the benefit of her many years of experience and wisdom and also her positive support for the future.

We were then treated to entertainment from comedian Nelly Thomas. She gently poked fun at all lawyers while showing us the value of women everywhere. She was brilliant in pointing out some harsh truths while making the audience laugh uproariously and not offending anyone in the room, all at the same time!

The highlight for many was the reading of a moving letter sent by then Prime Minister, Julia Gillard, apologising for not being able to attend, but providing us with her personal memories of her life as a solicitor, the difficulties of being a woman in public life and exhorting us to continue excelling in our chosen profession.

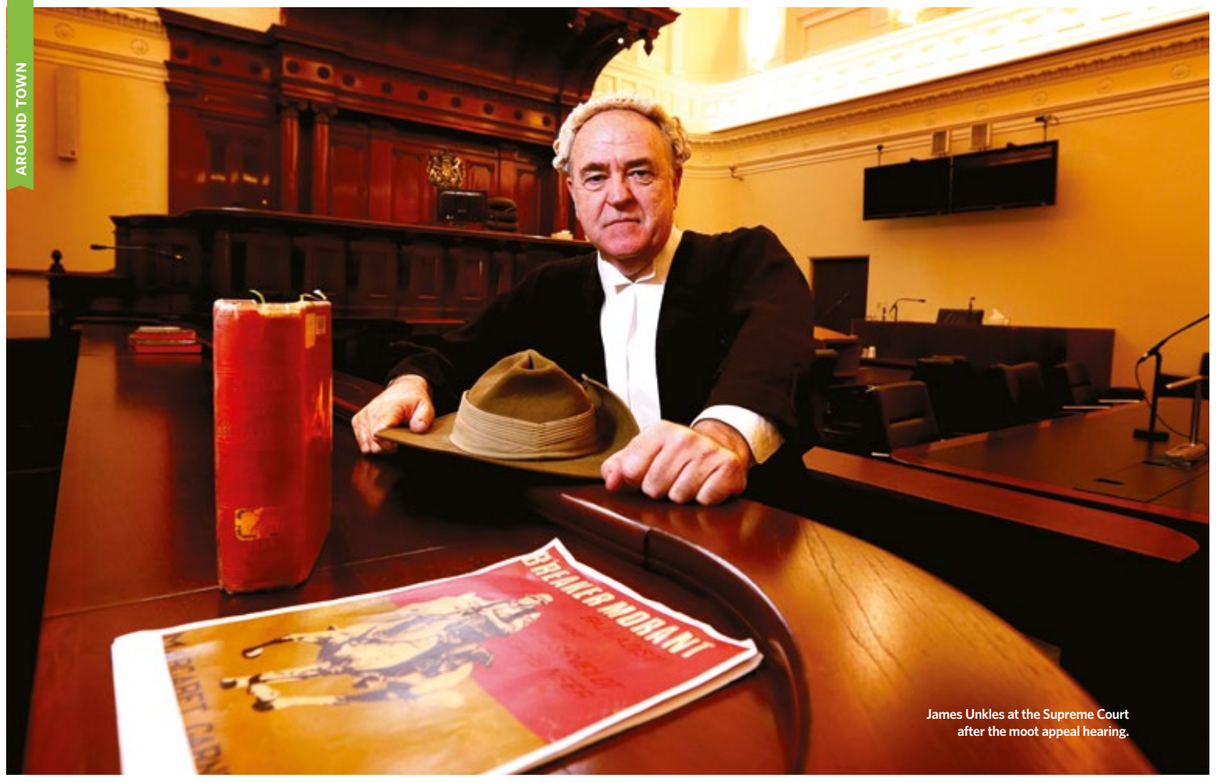
The celebration continued late in to the night with the great innovation of "roving desserts" which allowed everyone to move around the Club, to mingle and converse. Eventually the Assistant Convenors, Emma Peppler and Megan Fitzgerald, concluded the night with the appropriate thank-yous and presentations.

Many thanks to our sponsors, Greens List, Holmes List, Foley's List, Dever's List and to Slate Bar and Restaurant, which donated a lucky door prize. We could not have done it without you!

For more on the Women Barristers Association, see page 33.

From left to right: Kim Knights, Diana Price, Simone Jacobson, Fiona McLeod SC, Judge Rachelle Lewitan, Joye Elleray, Fran O'Brien SC, Caroline Kirton SC, Helen Symon SC, Suzanne Kirton, Judge Susan Cohen, Judge Frances Millane, Justice Pamela Tate and Samantha Marks SC. Absent: Judge Felicity Hampel and Jeanette Richards May.

PHOTO COURTESY OF TESS KELLY



James Unkles at the Supreme Court after the moot appeal hearing.

PHOTO COURTESY OF PETER BONGIORNO

Justice for 'Breaker' Morant

A matter of Australian values. JAMES UNKLES[1]

The war between the British and two Dutch South African republics, (the Anglo Boer War) began on 11 October 1899 and lasted until 31 May 1902, when a peace treaty was signed. The conflict that raged across the South African veldt was a war between the Boer population and the might of the British Empire, keen to secure for itself the wealth of colonialism, gold and a strategic geographic location on the African continent.

Britain was determined to win the war and the Commander-in-Chief of the British Army, Lord Kitchener, instigated brutal strategies to break Boer resistance. He introduced a scorched-earth policy of burning farms and crops, confiscated and destroyed livestock, and imprisoned non-combatants, women and children in concentration camps to remove them from the field, thus preventing logistical support and psychological comfort to Boer fighters.

The brutal treatment of prisoners is synonymous with the history of human conflict and this war was no exception. Incidents of brutality, including summary executions, occurred on both sides of the conflict. Kitchener used summary executions to exact reprisals against Boers that resulted in an incident that still reverberates to this day: the trial and sentencing of three Australian volunteers, Lieutenants Morant, Handcock and Witton, for shooting 12 Boer prisoners.

The men claimed they had acted in good faith in following the orders of their British superiors. Morant and Handcock were executed on 27th of February 1902 and Witton's death sentence was commuted to life imprisonment. Witton was released in 1904 following a campaign by the Australian Government, British MPs, including Winston Churchill

Breaker Morant

From left to right: Solicitor/advocate James Unkles, Dan Mori, Andrew Kirkham QC, Sandy Street SC, Gary Hevey RFD, Gerry Nash QC, Peter Billings, Markorious Habib (kneeling), solicitors David Mason and Glenn Hanafin.

PHOTO COURTESY OF PETER BONGIORNO

and Witton's lawyer, Isaac Isaacs KC. A petition authored by Isaacs was signed by 80,000 Australians!

The descendants of these men and others insist that these men were scapegoated for the crimes of their British superiors. It is also alleged that Kitchener conspired to deny the men fair trials according to the laws of 1902 and deliberately kept the proceedings from the Australian Government to avoid any interference in the sentencing process. While the men admitted to shooting Boer prisoners, they had a right to be tried strictly in accordance with the laws of 1902, and to exercise their right of appeal.

In 2009, I completed an analysis of the courts martial and sentences. I uncovered new evidence of orders to take no prisoners, the use of the customary law of reprisal to exact revenge against Boer fighters and serious and fatal procedural errors made in the trials and sentencing of these men.

I believe that Morant, Handcock and Witton were not tried in accordance with military law of 1902 and suffered great injustice as a result. The convictions were unsafe and illegal as appeal was denied and due process seriously compromised.

In October 2009, I forwarded a petition to the Queen. I also appeared before the House of Representatives Petitions Committee on 15 March 2010. The Committee described the grounds of appeal as "strong and compelling"; however the British Government denied the petition and refused to order an independent review.

The evidence was put before a 'moot' hearing in the Victorian Supreme Court on 20 July 2013. Although it carried no judicial standing, the hearing was conducted professionally by senior counsel who acted for the Crown and the accused. The case was heard by Andrew Kirkham QC and Gary Hevey. They found unequivocally that the men had not had proper trials and had suffered a substantial and fatal miscarriage of justice. The hearing can be viewed online *at http://www.breakermorant.com/*

Human Rights advocate, Geoffrey Robertson QC recently commented on the case.

> *They were treated monstrously. Certainly by today's standards they were not given any of the human rights that international treaties require men facing the death penalty to be given. But even by the standards of 1902 they were treated improperly, unlawfully. The case of Morant and Hancock, the two men who were executed, is a disgrace. Hancock and Morant were improperly tried, wrongly convicted and certainly wrongly sentenced.*

The passing of time and the fact that Morant, Handcock and Witton are deceased do not diminish errors made in the administration of justice. Injustices in times of war are inexcusable. It takes vigilance to right wrongs, to honour those unfairly treated and to demonstrate respect for the rule of law. How we respond to this matter is a test of our values and treatment of these Australian veterans. The descendants of Morant, Handcock and Witton, and those who respect both the rule of law and the laws of war, await justice.

This matter needs to be judicially examined and justice delivered posthumously so that the descendants of these men can rest knowing that the injustice done has been addressed and this case of Australian military and legal history resolved.

1 James Unkles is a lawyer, military reserve legal officer and Petitioner for the descendants. His views are his own and are not presented on behalf of the ADF, Australian Government or Victorian Bar. He manages a website on Breaker Morant, *www.breakermorant.com*

Actors in the *12 Angry Men* production live on stage deliberating.

PHOTO COURTESY OF PETER GLENANE

12 Angry Men

Melbourne Fringe Festival, September 2013

The Producer: Jacqui Pitt[1]

On a frosty May day in Melbourne, I received a phone call from Max Paterson, who said, "I have an idea…".

In April our very first show, *The Law Revue*, had packed out the Capitol Theatre. What started out as a dream to stage a show performed and produced by fellow lawyers had taken on a life of its own, selling over 1,650 tickets, raising $10,000 for the Tristan Jepson Memorial Foundation and, most importantly, showcasing the immense talent and creativity of its cast and crew of lawyers. In the weeks that followed it became clear to Max and me that the energy, creative passion and goodwill couldn't end there.

Paterson's idea was to form BottledSnail Productions and Melbourne's legal profession acquired its very own theatre production company.

Weeks later, BottledSnail began its second major production, staging Reginald Rose's classic courtroom drama, *12 Angry Men* with a cast drawn entirely from the men and women of the Victorian Bar. It was staged in the Supreme Court of Victoria, where justice is done and juries deliberate daily. The play was modernised and Melburnian, with no lines about "baseball tickets" and "el-tracks" in the script. The play remains as timely, thought provoking and troubling as when it was first staged.

And so the team set to work—while director Paterson and assistant director Joshua Glanc began working on the adaptation of the script, producer Bruce Hardy set about the challenging task of staging the show. Over 50 barristers auditioned. Like most good projects, I suspect none of us (cast included) quite knew the magnitude of what we were attempting at that point—that we'd be running to the Supreme Court each night after work to delicately place lights and microphones in historic Court 2 or, in the case of assistant producers David Barda and Siobhan Toohey, fielding queries about the security permissions required to use a switch knife as a prop just metres from a judge!

The directors, cast and crew breathed new life into a 60-year old work, famous for its exposition of latent prejudice, myopia and courage. To sit amongst the audience and watch members of the Bar make this unique and creative contribution to the cause of justice was enthralling. We at BottledSnail hope this is only the beginning!

> "I strongly encourage members of the Bar to audition for future BottledSnail productions. Prior experience is not necessary, as I can testify"—David Kim, Actor

The Actor: David Kim

Having had no real theatrical experience (other than accidentally walking onto a film set once), I had no idea what to expect when I was cast as Juror No 5 in BottledSnail's production of *12 Angry Men.*

The cast—all drawn from the Bar—was a mixture of criminal, commercial, administrative and family law practitioners. Before the play, I knew but one member of the cast. Given that the Bar now has over 2,000 members that may not be surprising. I now consider all cast members as friends.

The strong collegiality of the Bar showed throughout the experience. Given that we all had practices to run, it was not until the last few weeks that every cast member was able to attend rehearsals. Being used to working under pressure, we helped each other to remember our lines, and provided encouragement and support. Some members took extra time out to help others. Many a lunchtime was spent reading lines at various members' chambers—a special thank you to those who helped me with my lines.

While the cast madly worked on mastering the script (with invaluable direction from the masterfully skilled Director and Assistant Director), the production team worked at least as hard in the background. It was not until the dress rehearsal the day before the opening night that I appreciated the sheer magnitude of the work that the production team had undertaken, not least of which was to prepare the stage each night in Court 2, and then clear it after the show so that it could return to a functioning courtroom the next morning. The team helped to ensure that it really was in every respect a professional production.

Once we started performing, the response from the audience was fantastic and far beyond my expectations. We even had a few standing ovations on opening night. I remember one night after our performance talking to a couple of non-lawyers who saw the play. They commented on how the experience gave them a new interest in finding out more about the courts and our legal system. One person was keen on sitting in on some trials that week.

I strongly encourage members of the Bar to audition for future BottledSnail productions. Prior experience is not necessary, as I can testify. There is great diversity at the Bar, allowing each of us to bring our own unique experiences and talents. The pool of talent is extraordinary.

Other than the thrill of taking part in a successful theatrical experience, the thing that I have valued most out of the experience is the friendships I have made with the cast and crew. For a brief moment it also took me out of the daily stress of being a barrister. And who doesn't want to receive the cheers of adoring fans? If only clients were as appreciative.

The Audience Member: Maree Norton

In September this year, 12 members of our Bar—men and women good and true—performed in BottledSnail Productions' *12 Angry Men* as part of the Melbourne Fringe Festival.

The production, a gritty and modern Australian take on the classic play by Reginald Rose and Sherman Sergel, was intimately staged in Court 2 of the Supreme Court. The Bar table served as the setting for the jury's deliberations, with audience members seated in the otherwise darkened courtroom.

Readers will probably be familiar with the plot, which centres on the interactions of a jury in a murder trial. At first count 11 jurors are in favour of a verdict of guilty; one—Juror 8 (Simon Marks SC)—is against. Over the course of the play, cracks begin to appear in the certitude of the plurality of jurors. That which was obvious becomes less so; prejudices are revealed.

The play invites its audience to enter the private domain of the jury, and treats the subject matter with care. It deals both with what we fear about juries (bias, pre-judgment, apathy) and with those features which have ensured that juries continue to play a crucial role in the justice system (the common sense and experience of regular people, the merit in shared decision making).

The production team did an excellent job reinvigorating the script, which was fresh and relevant. The undercurrents of racism, the fear of outsiders, were present day in feel. Juror 11 (Loula Athanasopoulos), a "new Australian", was regarded as an outsider and yet seemed better placed than others to understand what makes this country great. The bigoted "them and us" style speech by Juror 10 (Ashley Halphen) was appropriately uncomfortable, and served as a powerful turning point in the story, as the other jury members (even those who had been in the same camp as Juror 10) turned their backs on his ranting.

Moments of levity served to cut the otherwise tense atmosphere of the jury room; when all else failed, Juror 2 (Andrew Buckland) was on the ready, offering Soothers around to his fellow jurors.

The standard of the acting was excellent—no small feat given that the cast members (some of whom had little or no acting experience) volunteered their time. In a more familiar role, Justice Curtain made a brief cameo at the beginning to charge the jury.

Those involved in the production should be commended for their contribution to the cultural life of the Bar, and of the city more generally. The play provided an interesting window on to the mysteries of the jury room, in a setting where members of the Bar are more accustomed to being *part* of the drama rather than mere observers thereof.

1 Jacqui Pitt is President and Secretary, BottledSnail Productions Inc

Lawyers Weekly Women *in* Law Awards

MAREE NORTON

The winners of this year's *Lawyers Weekly* Women in Law Awards were announced at a dinner held at the Sofitel on 18 October 2013.

Only in their second year, the Awards recognise the achievements of female lawyers in 12 categories across the profession, including law students, solicitors, in-house counsel and members of the Bar.

The Victorian Bar was well represented in both the senior and junior counsel categories. Caroline Kenny SC was one of four nominees for the Senior Barrister Award, while Cath Devine, Diana Price, Elizabeth Ruddle and Jessie Taylor were four of the five members of junior counsel nominated for the Sheahan Lock Partners Junior Barrister Award.

Lawyers Weekly noted Caroline Kenny SC's standing, both as the only female silk among the more than 200 members of Greens List and as one of Victoria's leading trial advocates in superior courts, whose past briefs include one from the UK Secretary of State on immigration matters in 2012.

Among the junior counsel field, *Lawyers Weekly* recognised Cath Devine as a family law specialist who was described by Bruce Walmsley SC as "a leader of the junior Bar in the jurisdiction". Despite having only signed the Roll of Counsel in late 2010, Diana Price was one of only 12 junior counsel invited to join the Trial Counsel Development program, and is presently the Convenor of the Victorian Women Barristers Association. Elizabeth Ruddle is notable for dividing her practice equally between civil and criminal jurisdictions and was praised by the Hon Justice Kaye for being "able to maintain a high level of competence in a long criminal trial" recently before his Honour. Jessie Taylor is a prominent refugee advocate, and has been invited to address a range of legal bodies on that topic.

Dr Ruth Higgins and John Sheahan from Sheahan Lock Partners.

PHOTOS COURTESY OF ALIKI DIMITRAKOPOULOS

The Hon Justice King and Chrissa Loukas SC.

Chrissa Loukas SC, Fiona McLeod SC, Caroline Kenny SC.

Notwithstanding the excellent calibre of the Victorian Bar nominees, it was Sydney's night, with both counsel awards going to members of the New South Wales Bar. The Senior Barrister Award went to Sydney silk Chrissa Loukas SC, whose career achievements include appearing before the International Criminal Tribunal. Dr Ruth Higgins took home the Sheahan Lock Partners Junior Barrister Award for her impressive practice in areas including constitutional, media and equity law.

Presenters and recipients of awards took the opportunity to champion women lawyers. Bar Chair Fiona McLeod SC, who received the Barrister Award at last year's ceremony, presented the 2013 Lasting Legacy Award to Sharon Cook (Managing Partner, Henry Davis York). As Fiona took to the stage she announced that she was—practically simultaneously—appearing on Stateline, asking why the Attorney-General, the Hon Robert Clark MP, had not appointed more women to Victorian courts. Sharon Cook expressed her hope that in the future there would be no need to celebrate, separately, female success within the legal profession; rather, its recognition would be the norm. Chrissa Loukas SC thanked the "fabulous, feminist men" in the room and, borrowing the words of former US Secretary of State Madeleine Albright, referred to there being a "special place in hell reserved for women who don't support other women".

Though the serious business of correcting the under recognition of women in the legal profession was a theme of the evening, it was overwhelmingly a night filled with celebration and good humour. When announcing the winner of the Sheahan Lock Partners Junior Barrister Award, John Sheahan told the story of an international flight on which he found himself sitting next to the late Dame Roma Mitchell. Somewhere over Russia Dame Roma accidentally woke John from his slumber as she attempted to get up from her seat to walk to the toilet. She apologised to John for waking him, and he was quick to reply with words to the effect of "Dame Edna, just don't worry about it". An understandable mistake—both Dames were known for donning a wig and gown.

From left to right: Caroline Kenny SC (finalist), Bruce Walmsley SC, Cath Devine (finalist), Barbara Phelan, the Hon Justice King, Fiona McLeod SC, Elizabeth Ruddle (finalist), Jessie Taylor (finalist), Emma Peppler, Diana Price (finalist), Maree Norton.

AROUND TOWN

VICTORIAN BAR Pro Bono AWARDS

On 14 May 2013, as part of the Law Week celebrations, the Bar's annual Pro Bono Awards were announced. Award recipients included barristers who had worked on matters for asylum seekers, native title claimants and workers with disabilities.

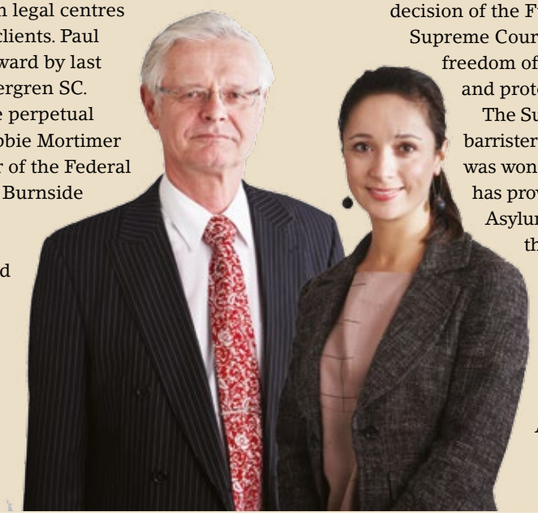
The Hon Justice Crennan of the High Court presented the Pro Bono Awards in a ceremony held in the Supreme Court Library. One of the awards—for barristers between seven and 15 years' call who are not silks—is named in Justice Crennan's honour.

Paul Bingham received the perpetual 2013 Victorian Bar Pro Bono Trophy for outstanding individual achievement in pro bono advocacy over a long time. The award recognised Paul's particular commitment to advocacy for low income and vulnerable consumers. His pro bono work extends to participating in the Victorian Bar and Federal Court pro bono schemes, work for community legal centres and mental health legal centres and for many individual clients. Paul was presented with his award by last year's recipient, Will Alstergren SC. Previous recipients of the perpetual trophy have included Debbie Mortimer SC (now Justice Mortimer of the Federal Court) in 2011 and Julian Burnside QC in 2010.

The Daniel Pollack Readers Award is awarded to barristers who have completed the readers' course within past 12 months. This year's winner is Leana Papaelia. Before signing the Roll of counsel in 2012, Leana practised as a solicitor at (the now named) King & Wood Mallesons and in the Victorian Equal Opportunity and Human Rights Commission. Leana's work in one tenancy matter deserves particular note. In that matter, Leana was briefed on behalf of a single mother with two children who had been evicted from public housing and was facing homelessness on her release from prison. Leana's work led to the Office of Housing discontinuing its eviction proceedings and to securing public housing for her client.

Barristers between one and six years' call are eligible for the Ron Castan QC Award. This year the award was won by Nick Wood. Only a few weeks after Nick signed the Roll in 2011, he began pro bono work with a native title matter in the Northern Territory. Nick's other pro bono work has related to the 'Occupy Melbourne' proceedings, and an appeal to the High Court by the South Australian Attorney-General against the decision of the Full Court of the South Australian Supreme Court concerning the implied freedom of political communication and protester rights.

The Susan Crennan QC Award for junior barristers between seven and 15 years' call was won by Nola Karapanagiotidis. Nola has provided pro bono support to the Asylum Seeker Resource Centre for the past 10 years. It is estimated that over the last 10 years Nola has appeared on a pro bono basis for the ASRC in over 100 cases in the Federal Circuit Court, Federal Court, Full Court and the High Court. Nola attends the ASRC Wednesday night clinic on a regular basis and she acts as mentor to young lawyers, barristers and law students.



Pro Bono Recipients Paul Bingham and Leana Papaelia.

PHOTO COURTESY OF PETER BONGIORNO

Top Left: Michael Stanton accepts the perpetual trophy on behalf of Paul Bingham; Top Right: Nick Wood, recipient of the Ron Castan QC Award; Bottom Left: Viola Nadj and Romesh Kumar; Bottom Right: The Hon Peter Gray and Ron Merkel QC.

PHOTOS COURTESY OF JUSTIN HILL

This year the Ron Merkel QC Award went to John Desmond and Richard Edney. The Ron Merkel QC Award recognises pro bono work by barristers of over 15 years' call or who are silks. John and Richard were nominated jointly for their work representing Peter Dupas in his appeal to the Victorian Court of Appeal against a murder conviction. The case heralded a significant development in the application of s137 of the *Evidence Act 2008*.

The Public Interest and Justice Innovation Award recognises pro bono work which has a strong public interest element or has involved a procedural or substantive innovation in the law likely to enhance access to justice. This year's recipients are Herman Borenstein SC, Kristine Hanscombe SC and Lachlan Armstrong. This year's award acknowledges the outstanding work done by Herman, Kristine and Lachlan over a long period in landmark proceedings promoting access to justice for people with disability in Australia: *Nojin v Commonwealth* 2012 FCAFC 192.

VICTORIAN BAR
Pro Bono AWARDS

PHOTOS COURTESY OF JUSTIN HILL

Above: Lachlan Armstrong, Kristine Hanscombe SC, Nola Karapanagiotidis and Nick Wood.

The cases had an impact on approximately 20,000 Australian workers with disabilities. The Business Services Wage Assessment tool (BSWAT) was first introduced in 2004 by the Commonwealth Government as a method of assessing the level of wages to be paid to people with disabilities. The proceedings were commenced in the Federal Court in 2011 by two applicants who argued that the BSWAT was specifically designed to produce unfairly low wage outcomes for workers with disability (some of whom earn as little as 44 cents per hour) relative to the award rate. The cases involve a matter of considerable public interest, as they deal with how society values and respects the work of people who are intellectually impaired. Herman, Kristine and Lachlan have collectively worked on these proceedings for thousands of hours since 2004. The High Court of Australia refused the Commonwealth's application for leave to appeal the Full Federal Court ruling that the BSWAT discriminated against people with intellectual disability.

Pro Bono Work Cannot Replace Legal Aid Funding

JANE DIXON SC

Through my position as Chair of the Pro Bono Committee of the Victorian Bar and through my role with Liberty Victoria I am acutely aware of the crisis that currently exists for Victorians who cannot afford legal representation.

Inequality of arms is particularly egregious when a person's liberty is at stake. But there are inevitable ramifications for litigants who cannot access properly funded legal aid in family law matters, intervention orders and civil litigation.

Our Chair, Fiona McLeod SC has been vocal in advocating for a review of the adequacy of legal aid federally and at state level. The *Legal Aid Matters* campaign launched by the Law Institute and the Bar provided a novel opportunity for community engagement on this vexed issue. Remy van de Wiel QC and the Criminal Bar Association have done their utmost to bring attention to the current crisis. David Neal SC is a seasoned campaigner and has written persuasive opinion pieces for newspapers and spoken many times about the importance of properly funded legal aid as a foundation of a fair and just society.

But I continue to be informed of cases of real or potential injustice arising in our courts. Just this week a Judge of the County Court sought a duty barrister to assist a father of three at risk of imprisonment who had been refused legal aid for a County Court appeal. Meanwhile a solicitor told me of her time consuming battles to obtain legal aid funding for an indigenous client facing proceedings in the County Court where opposing counsel was one of our top silks.

Worse still, the need for vigorous legal representation for people in custody has assumed greater focus with the vast overcrowding presently existing in prisons and watch-houses throughout Victoria. These problems are likely to worsen now that suspended sentences have been phased out in the higher courts. The Bar continues to give generously of its time through a multitude of pro bono initiatives. But it is trite to say, pro bono is not, and can never be a substitute for properly funded legal aid.

Once Were Warriors

Bar v Solicitors Football MATT FISHER

On 30 June 2013, the Frank Galbally Cup football match was played between barristers and solicitors. The match is played annually in honour of the late Frank Galbally with the aim of raising money for Reclink Australia—a charity that improves the lives of the disadvantaged in our community.

Immediately following our very narrow defeat in 2012, there was a motivation to put a team together that could avenge the heartbreaking loss. Unfortunately, that motivation dwindled over time. Putting the band back together for another gig became increasingly more difficult with the passage of time.

The day before the big match, the Bar had 18 confirmed players. By the time the ball was bounced, fewer than a dozen barristers took to the field. Some withdrew at the last minute and some did not make it to the ground. With the help of a few 'ring ins' (thanks to Andrew Dickinson's Irish mates) and the generosity of the solicitors who 'donated' some players, we managed to put a team on the paddock. This display of sportsmanship was much appreciated and ensured that the match was played in fine spirit by all.

Despite a slow start, we never gave up. Our courage and determination never left us even when our fitness waned and our bodies were damaged. These qualities assumed greater significance because of the circumstances in which we battled. There was little opportunity to rotate and rest players and the only time we were not behind on the scoreboard was at the opening bounce. In the end, we lost by a few goals to a team that was younger and fitter.

In the last few years, the Bar has managed to put a pretty handy team together. We have always welcomed anyone who wishes to play regardless of fitness, pace, size and experience. We always will. While we had the nucleus of a good team this year, we lacked the numbers and the depth of previous years. The fact that the game was played during the school holidays did not help, with at least half a dozen regular contributors unavailable to play.

Once again, Gavin Crosisca was magnificent as our coach. As usual, he was positive despite our limited numbers and depth. Best on ground for the Bar was Kane Loxley. Had it not been for Kane and players like Chris Farrington and Matt Green who fought hard all day, our loss would have been greater. I thank all those who proudly pulled on the jumper and went into battle for the Bar that afternoon.

Two members of the Bar who also contributed on the day deserve mention. Mark Gibson voluntevered as an umpire and, once again, he demonstrated impeccable fairness and judgement, not to mention fitness. Jeremy Whelen again took on the task of managing the Bar team on the day and his input and initiative were invaluable. We appreciate the assistance of both men.

The game was played in wonderful spirit as it always is. The real winner is Reclink. Over $30,000 was raised to assist them in their great work.

As I sat in the sheds after the match, engulfed in the steam that billowed from the lukewarm showers, I wondered what went wrong. All we really needed was more players. Some with a bit of backyard footy experience would have also helped. And, as I heard someone remark that they had a great time and enjoyed playing, something dawned on me: not once did I hear anyone complain about playing in such difficult circumstances and in a match that we were obviously going to lose from about the 90 second mark of the first quarter.

That speaks volumes for all those involved. Professionally, we take on matters that are difficult from the outset. But we persevere and fight to the end. That is precisely what we did that afternoon. Sometimes we triumph over the adversity. While there was no victory this time, we fought to the end and the Bar team, to a man, should be proud of that.

The Bar's Team

Photo Competition

1st PLACE

Matthew Townsend: Barristers at Work

WHAT THE JUDGES SAID: "Matthew's image is both technically and visually superb, conveying the long hours and importance of our legal practitioners. The use of an ultra-wide "fish-eye" lens to capture the image, while often hackneyed, is extremely well-suited to this competition, capturing the grand Supreme Court library very well indeed."

Winners Announced!

As Judged by Michaels Camera Video and Digital Photography and Marketing teams

Thanks to all of the contributions to this competition. Well done to all of the entrants and thank you to Michaels Camera House for donating the time to judge the entries and the generous prizes (including a Leica D-Lux 6 and fine art printing vouchers).

AROUND TOWN

Photo Competition

2nd PLACE

Kathleen Foley

WHAT THE JUDGES SAID: "Two ladies of justice loom large in this image, a very clever composition including William Eicholtz's Lady of Justice almost mirroring a real-life legal practitioner. A great idea superbly executed."

Runners Up

3rd PLACE

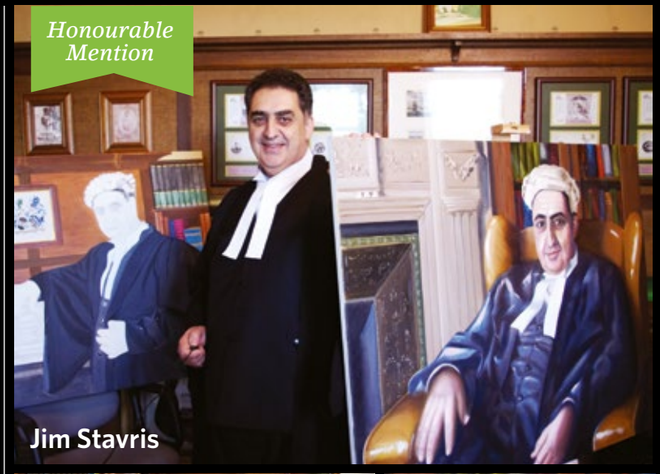
Natalie Vogel

What the judges said: "One can only imagine the little bits of ephemera collected by legal practitioners over their careers and Natalie's image captures some of that very successfully, in addition to the outlook over the legal precinct."

Honourable Mention

Lachlan Armstrong

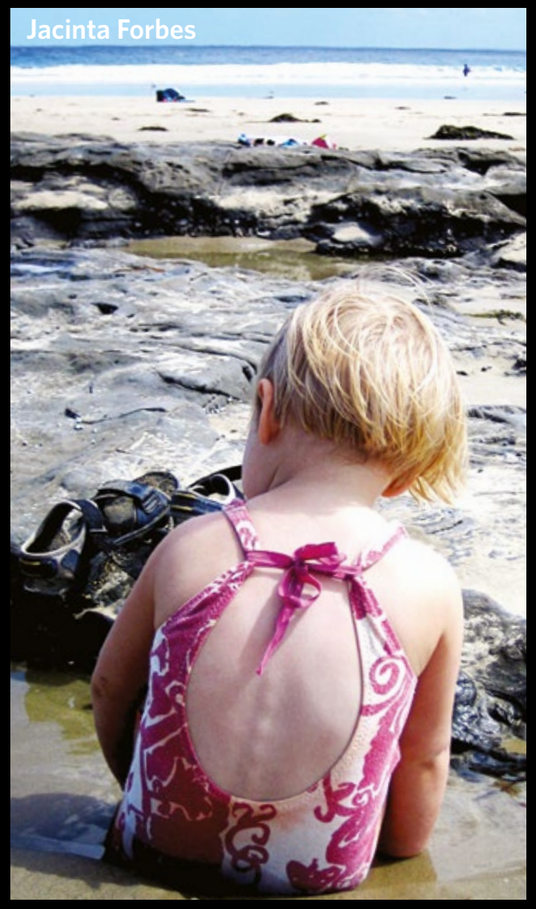
Honourable Mention



Jim Stavris

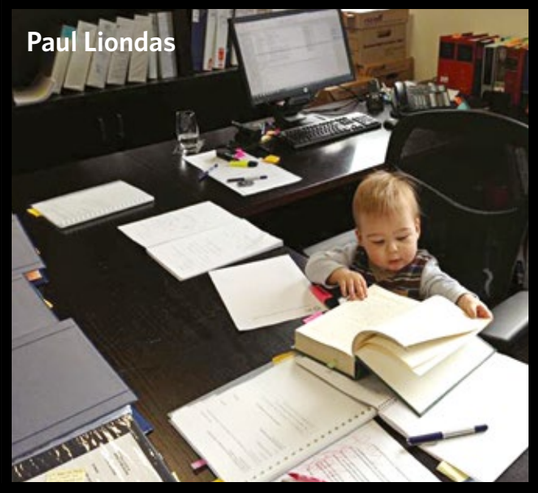
Photo Competition

Neville Kenyon



Jacinta Forbes

Michael Pearce SC



Paul Liondas

FROM THE

Chair's Table

FIONA MCLEOD SC

By the time of publication, a new Bar Council will have been elected and my time as Chair will have drawn to a close. It has been an extraordinary privilege to serve the Bar as Chair, to work closely with barristers serving on the Bar Council and its Bar committees and to engage with the courts and Attorneys-General. The work of the Bar is heavily dependent on the generous contribution of many members who volunteer thousands of hours of work. This represents the great spirit of service emblematic of the independent Bars and is a recurring theme of practice at our Bar.

This year, the Bar Council adopted an ambitious new strategic plan. The central vision of our new plan is *'A strong and independent Bar'*. The Bar's plan supports the work of the courts, promotes the right of all to access quality legal representation and champions the rule of law. The Bar will continue to provide support and services to enable our members to maintain the highest standards and excellence in practice.

The aspirations of strength and independence are familiar to all of us. The Bar's plan promotes independent, ethical, cost effective and expert advocacy and advice work. The plan seeks new opportunities for barristers to adapt and grow their work in emerging areas of

practice and to commit to ongoing professional development.

To thrive, the Bar must strengthen its relationships with corporate and government clients, pursue appropriate direct briefing possibilities and embrace opportunities for feedback and ongoing training. We also need collectively to promote Victoria as a jurisdiction of choice for issuing civil litigation and ADR.

Over the year the Bar has embraced and delivered new educational programs and facilities, communications and marketing strategies and invested in new chambers through BCL. We have actively engaged in public debate about legal aid funding issues, the work of the Adult Parole Board and overcrowding of prisons. We also engaged on issues concerning Aboriginal incarceration and constitutional recognition, regional pro bono legal assistance and other issues of law reform including direct briefing.

The Reading requirements, including the readers course and entry examination are being continually updated and refined to provide excellent advocacy training and early exposure to the tools of successful practice at the Bar. This year, a mandatory follow-up weekend was added to the course. Coaching accreditation has also been conducted to maintain the high standard and consistency of instruction provided in the course. The next phase in the evolution of our CPD program will be to introduce an extended learning program responsive to the needs of barristers in their early years, as well as appealing to those looking for further opportunities to hone their court craft and related skills. A number of components of the new program were introduced this year including seminars on advanced cross-examination, appellate advocacy, basic skills, handling expert witnesses and pleadings.

A new initiative, for the benefit of those considering making an application for silk, is a silk's development program. The program will assist applicants to prepare an application and will cover such topics as leadership at the Bar, sustaining high performance, the court's expectations, working with juniors and making the transition to practice as a silk.

2012-13 Bar Councillors.

"The [Bar's] plan seeks new opportunities for barristers to adapt and grow their new work in emerging areas of practice and to commit to ongoing professional development."

This year the Bar leapt into the cyber age and expanded its communications channels, with the launch of the Bar into social media including twitter, YouTube videos and blogs. I commenced a weekly Chair's Post in our electronic newsletter *InBrief* and on the website. I thank Bar Councillors from the junior category for their assistance in compiling the weekly Chair's Post and bringing this to life.

Fifteen years after the launch of the landmark report *Equality of Opportunity for Women at The Victorian Bar*, the Bar remains committed to equality of opportunity. In anticipation of the release of the findings of the Law Council's *National Attrition and Re-engagement Study* early in 2014, we resolved to launch a new equality project *Equality at the Victorian Bar-The Quantum Leap*. The aim of the *Quantum Leap* project is to address the causes of attrition and support the retention of women barristers. The project was launched in November 2013 by the Chief Justice and includes performance targets and data collection against which to measure progress, an unconscious bias educational awareness program, a new policy to address bullying, individualised mentoring or 'coaching', a parental leave CPD and re-engagement program, and the implementation of an exit survey for those leaving the Bar. The project represents the culmination of many years work by a number of committees and maintains the position of our Bar nationally at the forefront of these initiatives.

This year the silk appointment process was continued on a pilot basis. We are indebted to the Chief Justice for the invaluable support that her Honour and the Court have provided through the year to the appointment process and for the time and attention given in consideration of applications for appointment as senior counsel.

In Darwin in July 2013, we suggested and then participated in a historic joint meeting of the LCA and ABA. Both bodies drew attention to the need to address high rates of indigenous incarceration with specific justice reforms and strategies to address the difficulties faced by Aboriginal and Torres Strait Islander peoples coming before the courts such as legal aid, funding for interpreter services, diversion programs and sentencing options.

In September 2013, the Victorian Bar and the LIV launched the Wellbeing and The Law Foundation to support legal practitioners dealing with high levels of stress, anxiety and depression. Many other new initiatives have been enthusiastically embraced by the Bar including a review of health services and continuation of the 24 hour health hotline, a Bar choir and members have produced and appeared in theatre productions.

On behalf of the Bar Council and members, I express my thanks to the Bar's Chief Executive Officer Stephen Hare and the staff of the Bar office. As well as supporting the day to day activities of the Bar, this hard working team continues to find new ways to support members, associations, committees and the Bar Council and provides support for many of the projects referred to in this report. I single out for personal thanks the Bar Council's Executive Assistant, Denise Bennett, on whom I have relied so heavily throughout the year, Jacqueline Stone for her extraordinary contribution to the education programs, and Ross Nankivell for his unrelenting and good natured support of our court welcomes and farewells (this year a record number) and other functions.

Finally, I thank the members of the Bar Council for their warm counsel and camaraderie and Co-Vice-Chairmen William Alstergren SC and, Jonathan Beach QC for their wise counsel, support and friendship. I have greatly appreciated our time together.

Congratulations to our *Bar News* editors Georgina Costello and Justin Tomlinson and the Editorial Committee for this outstanding edition of the *Bar News*. I look forward to reading many more under their stewardship!

MESSAGE FROM THE NEW CHAIRMAN

Will Alstergren SC

I would like to take this opportunity to thank Fiona McLeod SC for her outstanding service to the Bar and the Bar Council on which she has served for 19 years. I have witnessed first hand the enormous amount of work she has put in over that time, particularly in the last 12 months as Chair. Fiona has been a marvellous leader.

I especially congratulate Fiona on the launch of the Quantum Leap project in November; one of her last acts as Chair. It was an outstanding achievement.

I am honoured to be Chairman of the Bar Council. I am also delighted to have been elected with so many incredibly talented, capable fellow Bar Councillors. It is a very strong team and my initial task will be to make the most of their vast talent. The new Bar Council includes nine new members with a good proportion of women elected in each category. It will be a great privilege to rely upon office bearers such as Jonathan Beach QC, Jim Peters SC, David O'Callaghan SC, Jennifer Batrouney SC and Paul Connor as well as the other outstanding senior and junior members of the new Bar Council. I look forward to working with them all in the coming year. I also look forward to working with the new Honorary Secretaries and members of the Bar Office.

We have a strong independent Bar that promotes access to justice and aspires to excellence in the profession. We must continue the work of previous Bar Councils by striving for equality and meeting the challenges ahead.

I am well aware that many of our members have struggled as a result of a downturn of work. One of the challenges in the coming year will be to look at different ways to promote the Bar and increase the work available to the junior Bar. I intend to meet with the stakeholders in our profession in an effort to understand what is happening and to consider what steps we should take. This will include consulting with heads of the jurisdictions, the State and Federal Attorneys-General, the Clerks, the LIV, Legal Aid, a range of solicitors, representatives of government departments who brief barristers and in-house counsel.

Legal Aid remains a critical issue for many of our members and the community at large. I look forward to working towards establishing a better Legal Aid system with the Criminal Bar Association and its members on our Bar Council, including Paul Holdenson QC, Greg Lyon SC, Chris Winneke, Emma Peppler and Karen Argiropoulos. I also look forward to working with all the Bar Associations in efforts to promote the Bar, our members and access to justice.

PHOTO COURTESY OF PETER BONGIORNO

PHOTO BY PETER BONGIORNO

Reform in the Court

Civil Litigation in the Supreme Court THE HON CHIEF JUSTICE WARREN AC

Recently the Supreme Court has pursued a number of innovative reforms in civil litigation. The highlights are the expansion of the Commercial Court, developments in IT and infrastructure and proposals for civil appeal reforms.

The Commercial Court

The formation of the Commercial Court has been one of the most significant reforms for the Court. It has attracted a large volume of commercial litigation to the Victorian jurisdiction.

There are a number of unique features about the Commercial Court. The first is the specialist judicial expertise that the Commercial Court provides. We currently have a large list of specialist commercial judges dedicated to commercial matters (Justices Hargrave, Judd, Robson, Vickery, Ferguson, Sifris, Almond, Digby, Elliott, Sloss and Associate Justice Daly), including dedicated judges managing a separate Corporations List who are assisted by specialist associate judges (Associate Justices Efthim, Gardiner, Randall and Derham). The second innovative feature of the Commercial Court is its mixture of flexibility and intensive case management. The moment a case is issued it is immediately subject to intensive judicial management and control. This means trial dates can be fixed well in advance or with as little as three or four days notice. Cases are on a fast, medium or moderate track as suits the litigation and the wishes of the parties.

The Supreme Court has recently received funding for further reforms to ensure the Commercial Court is equipped to deal with the significant increase in the number of cases. The major aspect of the reforms is the establishment of a dedicated Commercial Court Registry under the direction of a commercially experienced Judicial Registrar. It will be modelled, where appropriate, on the Court of Appeal Registry and its successful reforms of the criminal appeals process.

RedCrest

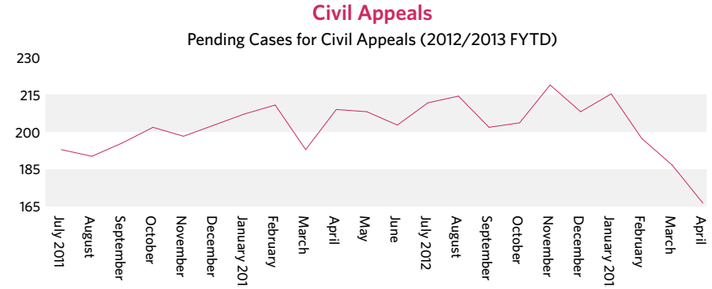
The Commercial Court will also run a pilot of a new and innovative IT programme called RedCrest. RedCrest enables the initiation of cases electronically and the filing and viewing of court documents. The system, which was successfully launched in the TEC List, and then used in the Kilmore East bushfire case and the Great Southern class action, facilitates electronic access to documents and information among the judge, associates, the registry and litigators as required. The trend towards centralised and efficient electronic communication and case management is likely to transform the nature of litigation in the Supreme Court in the next few years.

Civil Appeals Reform

The Supreme Court is also pursuing civil appeals reforms to manage the marked increase in the number of civil appeals and to reduce the time from initiation to hearing and determination of appeals. Since 2010, there has been a 40 per cent increase in the number of civil appeals in the Court of Appeal. In 2011-12, self-represented litigants initiated 25 per cent of civil appeals and applications.

The Supreme Court has looked closely at the recent English Court of Appeal reforms to develop a set of proposals to reduce backlogs and delays in the Court of Appeal. The UK Bowman Committee report, which was the basis of the English reforms, made a number of recommendations that shift the focus of appeals away from court-based advocacy towards increased paper-based advocacy and determination. The features of the Bowman reforms that the Court is hoping to adopt include the introduction of a universal leave to appeal requirement (except appeals from refusals to grant *habeas corpus)*, and allowing more leave applications to be dealt with on the papers rather than through an oral hearing. To facilitate paper-based determination, the Court will require a written case file to be submitted with the grounds of appeal and the time for filing an application for leave to appeal will be increased from 14 to 28 days.

The success of the reforms in the UK indicate that the changes will expedite civil appeals in Victoria. UK courts have reported that the reforms have discouraged the filing of unmeritorious or holding appeals that are later discontinued. The reforms have also encouraged greater clarity in relation to the issues of the appeal and therefore increased the likelihood of settlement



of appeals. The net result has been a marked improvement in the Court's caseload and a marked improvement in terms of speed and efficiency.

A special pilot was conducted in the Victorian Court of Appeal from April to June of this year. Two judges were dedicated to civil applications, Justices Nettle and Neave. To cut through the list of delayed cases, the judges considered the papers before the listed date for application. In some cases, the judges decided that the appeal would be heard at the same time as the application. The pilot resulted in a dramatic drop in pending cases, which bodes well for the success of future reforms. The new arrangement was continued by Justices Tate and Hansen. The next judges to sit for the balance of the year will be Justices Osborn, Santamaria and Beach. The downward trend in the graph demonstrates the success of the pilot.

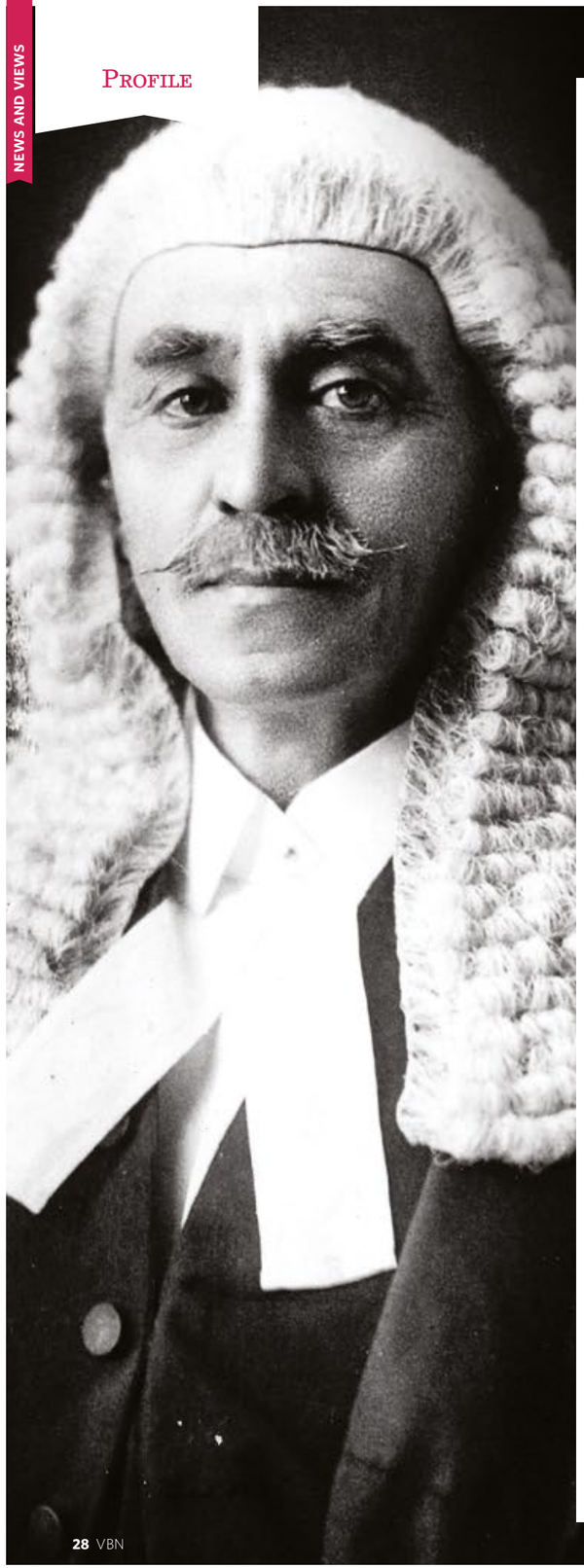
The Court is looking forward to the implementation of the reforms in the near future and the consequent likely significant reduction in delays and time frames between the initiation and finalisation of appeals. The civil appeal reforms are calculated to play a particularly significant role in the expedition of commercial litigation when necessary through the Commercial Court to the Court of Appeal.

> "The formation of the Commercial Court has been one of the most significant reforms for the Court. It has attracted a large volume of commercial litigation to the Victorian jurisdiction."

Conclusion

It is hoped that these innovations and reforms will enhance the level of service that the Court provides to litigants by improving the quality and efficiency of litigation.

Parties in the Kilmore bushfires litigation spread across the width of the William Cooper Justice Centre



Isaac Isaacs

DRIVEN, DIFFICULT, INFLUENTIAL

The Hon Michael Kirby AC CMG[1]

Isaac Isaacs was the first Justice of the High Court of Australia appointed from the Victorian Bar. He took his seat in 1906 at the age of 51. At his side was another Victorian, Henry Bournes Higgins. Isaacs was to serve 27 years on the Court, including a few weeks short of one year as Chief Justice. Isaacs was then appointed Governor-General of Australia in 1931, famously over the opposition of King George V. Isaacs was the first native born Australian to hold the federal vice-regal office. He performed impeccably, easing the path to an eventual shift from friends and relatives of the monarch to the appointment only of Australians of distinction.

Isaacs lived on until February 1948, having held two of the three Great Offices of State. This was a remarkable achievement for someone whose parents were, as we would call them now, refugees from the then Russian occupied part of Poland. He was born in a shop dwelling in Elizabeth Street, Melbourne. His father, Alfred Isaacs, had there established a tailoring business, working with his redoubtable wife Rebecca. Isaac was the eldest of six children, although two did not survive infancy. Truly, his story is one of the closest that Australian history yields equivalent to 'log cabin to White House'.

I never met Isaac Isaacs. At the time of his death in Melbourne in February 1948, I was eight years old. I did not even have the advantage, which Jim Merralls records in his story of Hayden Starke[2], of catching a glimpse of the Great Man from a distance. But every Australian law student and legal practitioner soon gets to know, and feel the presence of, Isaacs. His was a hugely energetic, opinionated, influential and powerful mind. Certainly, he is one of the four or five most influential Justices in the history of the High Court. Owen Dixon (whose term of office overlapped the end of that of Isaacs and who appeared before him many times in the Court) observed, on his passing, that Isaacs should be remembered primarily as a "greatly talented… judge of the High Court, an office to which he devolved himself with an energy, a learning, a concentration of mind and an intellectual resourcefulness that can seldom have been equalled". This is great praise from one who always chose such words with care.

> "Isaacs was, by all accounts, a difficult man. He has been called the first 'great dissenter' to serve on the High Court. Yet he was determined enough, persistent enough and fortunate enough to serve so long that he came to exercise great influence, particularly in constitutional doctrine."

Isaacs was, by all accounts, a difficult man. He has been called the first 'great dissenter' to serve on the High Court. Yet he was determined enough, persistent enough and fortunate enough to serve so long that he came to exercise great influence, particularly in constitutional doctrine. His greatest influence, which survives to this day, may be seen in his insistence, virtually from his first day of service on the Court, upon an approach to the interpretation of federal legislative powers that was not to be limited by the supposed 'reserved powers' of the states, nor even the need to adjust the ambit of such powers to the federal context. In this, he was an ardent Australian nationalist. He favoured the expansion of central power.

Despite a strong background in Victorian colonial politics, he was a persuasive advocate for the interests of the Federal Parliament. He moved from colonial politics to take a seat in the first Federal Parliament in June 1901. He later served as Attorney-General in the second Deakin Government from July 1905. It was then that the decision was made to enlarge the High Court of Australia from three Justices to five. Deakin's high opinion of him was cemented by close association with him in Victorian and federal politics and earlier in the Constitutional Conventions. Of the latter, Deakin was to write:

> *At the close of the [last] Convention, without assigning their precise individual order… it may be said that the first rank of men of influence… consisted of Barton, O'Connor, Reid, Wise, Kingston, Holder, Turner, Isaacs and Forrest.*

Ever modest, Deakin omitted his own name. For all these dazzling achievements, Isaacs was not an easy or congenial man. He was obviously brilliant and demonstrated this (to himself as well as others) from the start. He began his working career briefly as a teacher. However, he spoiled his chances in that vocation by suing the headmaster of the local school, claiming fees allegedly owing to him for teaching extra subjects. The claim was dismissed in court and Isaacs was sent packing, looking for another job.

This took him to the Prothonotary's office in the Victorian Crown Law Department. He enrolled at the Melbourne Law School and graduated LLB, with first class honours in 1880. He followed this with a master's degree in 1883. He was quickly known for a photographic memory - a gift later to be shared with him by Justice McHugh. University examiners questioned whether the detail and accuracy of his quotations and citations in his examination transcript indicated illicit use of a crib. But they did not. Isaacs was just head and shoulders above the rest; and he knew it. He took chambers at the age of 27 in Temple Court. He demonstrated an astonishing dedication to hard work. By 1890, his practice at the Bar had grown to such an extent that he appeared in 19 reported cases before the Full Court. When he took silk in 1899, he was recognised by all as a leading figure of the Victorian Bar.

His early foray into Victorian politics also ended for a time, like his teaching career, in a bitter dispute. He resigned as Solicitor-General over a disagreement with the Attorney-General of the day. Zelman Cowen was later to declare that each of them was wrong-footed. Those who worked with him as a lawyer were disconcerted, and often critical of him. But his talent was clear. When he became Federal Attorney-General, Robert Garran, inaugural Secretary of the Department, remarked on how he had come into his office early, having left at midnight, only to discover that in the small hours, Isaacs had recovered the draft of a Bill from the printer; reshaped it 'lock, stock and barrel'; and secured a pristine and improved draft. Lesser mortals sometimes found these talents hard to bear.

Likewise, Isaacs' insistence, even as Federal Attorney-General, in exercising a right of private practice and in accepting briefs, including in the High Court, right up to the moment of his appointment, led some of the more stately members of the Bar to disparage and excoriate him in private. In those days, before the terrible catastrophe that was later to engulf Polish Jews in their homeland, it was not uncommon for Isaacs to attract an all too common anti-Semitic criticism. Perhaps if he had not worked so hard, he might have pretended to a fashionable

> “By 1890, his practice at the Bar had grown to such an extent that he appeared in 19 reported cases before the Full Court. When he took silk in 1899, he was recognised by all as a leading figure of the Victorian Bar.”

modesty, expected in the Anglo-culture of his birth place. Isaacs was greatly gifted, displayed it every day of his life as a lawyer, and he did not care what others thought about it. He may even have been unaware of the full extent of his own abrasiveness.

It must have been a horrible shock to those three able and distinguished original Justices of the High Court, the day Isaacs arrived in their midst. Until then, there had been very few dissents, so powerful was the personality and influence of Sir Samuel Griffith. But Isaacs was not one to submit to anybody. And he was convinced that the implications which Griffith and the initial Justices had read into the Constitution (expressed in the doctrines of implied inter-governmental immunities and reserved state powers) were rubbish. Moreover, they were dangerous rubbish because, unless reversed, they would inhibit the growth of the powers of the Federal Parliament essential to achieve fully the aspirations he held about the federal idea.

Like many Australians of that time (and not a few since) Isaacs looked at the world map. Although much of it was then coloured with the pink colour of the British Empire, it clearly showed Australia on the edge of the highly populous landmass of Asia. He truly feared the ‘yellow peril’. In a number of his High Court opinions in migration cases, he showed, and expressed, a then typical fear of the “contaminating and degrading influence of inferior races”. These values were reflected in decisions such as *Williamson v Ah On* (1926) 39 CLR 95, where he described illegal migrants as “loathsome hotbeds of disease” who conspired to “defy and injure the entire people of a continent”. One of the reasons he adopted an expansive view of federal legislative power was because his concept of Australia was one that would continue to attract ‘white’ immigrants and repel those of different races who wanted to sully the racial purity of the nation.

So Isaacs disagreed with the foundation Justices that federal powers to make laws should be read down by reference to the context in which those powers appeared, namely of a Constitution that envisaged states with substantial residual powers necessary to their viability. Strangely enough, it was the foundation Justices and their interpretive approach (text, context and purpose) who adopted the more modern approach to interpretation of textual language. It was Isaacs who insisted on the former highly literalist approach so far as the grants of federal power were concerned. One can now criticise this viewpoint from the point of view of interpretive theory and empirical evidence on how meaning is ordinarily derived in life from text and context. One can lament the catastrophe that it has produced for the role and relevance of Australia’s states, with their decentralised governmental powers in the vast Australian continent. Still it was Isaacs’ view that was to prevail in the *Engineers’ Case* of 1920. After the foundation Justices had all departed the High Court, Isaacs gathered up the majority from Chief Justice Knox and Justices Starke, Rich and Higgins. To this day, the Isaacs approach dominates the interpretation of the Australian constitutional grants of power. The gifted legal historian, turned Justice of the High Court, Victor Windeyer, correctly saw the approach that Isaacs had long espoused essentially as the product of *extra-legal* forces rather than purely *legal* considerations. In the *Payroll Tax Case* (1971) 122 CLR 529 Windeyer J observed:

> *In 1920 the Constitution was read in a new light, a light reflected from events that had, over 20 years led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs... As I see it the* Engineers’ Case, *looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there.*

As a matter of personal philosophy and psychology, it seems probable that Isaacs’ view grew out of his humble background as an immigrant, living in a culture alien to his family—but a culture which he was keen to adopt and in which he was determined to succeed. That the Isaacs view has distorted the intended operation of the Australian Constitution cannot really be doubted. I suggested as much in the *Work Choices Case* (2006) 229 CLR 1—which was surely the apogee of the success of Isaacs’ opinion applied to section 35(xxxv) that would have shocked even him. But, in practical terms, the approach definitely helped both to build and defend a federal nation in a hostile geographic situation. It was to become important both in peace and war. It seems unlikely to be changed by the High Court any time soon. For good or ill, it represents the most lasting gift of Isaac Isaacs to Australia as a nation.

Did he have to be so combative in expressing his opinions? Zelman Cowen, who wrote a biography of him, describes his judicial style as “not so appealing” and his speaking style as “often rhetorical and verbose, like his judgments”. Above all, Cowen criticised him for his “unshakable conviction of the rightness of his opinion, and the utter and complete inability to see merit in any other view”. He was disputatious amongst his colleagues. He was insensitive. He was sometimes vain and even terrifying in his self-confidence. Griffith and Barton were constantly anxious that Isaacs was attempting to position himself to become Chief Justice. Barton reflected his own version of early Australian ethnic prejudice by saying “I don’t think there is the least bit of sincerity in the Jew-boy’s attitude”. All of which is to show that race was never far from the surface in the Australia of Isaacs’ time. Things have improved. Ironically, they have done so because a strongly centralised constitutionalism that Isaacs helped to build. This was later to play an important part as a consequence of international moves to prohibit racism and to provide remedies and afford education in Australia to help build a less racist society.

Isaacs held the office of Chief Justice for too short a time (42 weeks) to leave any particular mark, as such. According to contemporary records, when he took on the role of Governor-General, he was scrupulous in avoiding political entanglements. In difficult economic and political times, he helped Australia to steer a steady course. He thus upheld perfectly the particular magic of the peculiar system of government that is constitutional monarchy. He did so, despite George V’s fear over the way that a ‘local person’ would be appointed who would be subject to the temptations of political engagement. It says a lot that such a deeply feeling, opinionated and powerful man was able to restrain his performance in the vice-regal office so as to model it after the conduct of George V himself that is now the norm. Interestingly, on his retirement as Governor-General, Isaacs received a cable from the briefly enthroned Edward VIII. He told him:

> *My father, had he been spared, intended to send you a message thanking you for your valuable service as his personal representative in Australia. I am therefore doing this in his name and add the hope [of] years of happiness and leisure.*

If this was more than merely a royal gesture, it tends to suggest that the King was pleasantly relieved that Isaacs had not lived up to his combative reputation. Leisure, predicted by King Edward, was not Isaacs’ long suit. In the decade before his death, which coincided with the second global war which his constitutional interpretations helped the Commonwealth to fight with the necessary powers, Isaacs wrote and spoke of the urgent needs he saw for the country, including in matters of constitutional reform.

In his very last years, he also became more closely involved in Melbourne’s Jewish activities, although he never became religious. Jewishness was for him, personal and cultural. He was strongly opposed to Zionism. He lashed out at the contrary views of Professor Julius Stone, then recently appointed to the Sydney Law School. Zelman Cowen did not feel that this dispute reflected well on Isaacs. But Isaacs was not alone in his perspective. It was, for example, shared in the United States by Justice Benjamin Cardozo, his great contemporary in the United States judiciary. Still, his antagonism to Zionism made many enemies, especially after the shocking revelations of the Nazi genocide in Europe. All this Isaacs took in his stride. He had walked through life upholding his strongly held viewpoints in the face of strong contrary opinions. Nothing much changed in his retirement.

> “Any day that an Australian lawyer has legal problems, they can find still useful opinions of Isaacs in the law books, derived from his well-furnished mind, trained initially in the fine jurisprudence of 19th Century common law decisions of the great English judges.”

Any day that an Australian lawyer has legal problems, they can find still useful opinions of Isaacs in the law books, derived from his well-furnished mind, trained initially in the fine jurisprudence of 19th Century common law decisions of the great English judges. Writing recently about the problem of ‘sham’ in Australian taxation law, I stumbled upon remarks of Justice Isaacs in *Jaques v Federal Cmr of Taxation* (1924) 34 CLR 328 at 358, still as apt, vivid, practical and sensible as the day on which Isaacs put them on paper. Although, for his concept of Australia, he was uncompromising on the ambit of federal powers, in most other matters his lively mind was open to social data and consideration of the practical consequences of judicial decisions. Robert Menzies, that other towering Victorian lawyer politician of Isaacs’ era was surely right when he said, at the time of Isaacs’ death, that this was “one of the most remarkable men in the history of Australia”. Words of praise; but not affection.

So Isaacs was both very gifted and very difficult. Of course, he was blessed with good fortune. Yet he made the most of his opportunities. He is still cited in the High Court of Australia, more than most others from those early years. This is because his luminous mind springs out from the pages, even though its product must sometimes be separated from the chaff of loquacity and ill humour. If he lacked the qualities of urbanity, good manners, wit and decency typical of most of Victoria’s appointees to the High Court, he was clearly a one-off. Australia was, in part, shaped by his restless and determined personality. Our country would not have been the same if he had not existed. The Victorian Bar can be proud that it produced—and nurtured—such an astonishing lawyer of talent.

1 Justice of the High Court of Australia (1996-2009). Further material appears in the author’s “Sir Isaac Isaacs—a Sesquicentary Reflection” (2005) 39 MULR 880.

2 See *VBN* issue 153

NEWS AND VIEWS

Looking Back to Step Forward

The Women Barristers Association: 20 Productive Years

DIANA PRICE, CONVENOR OF THE WBA

This year the Women Barristers Association celebrated its 20th anniversary. A gala event was held on 5 June 2013. Judges, magistrates, barristers, clerks and politicians alike filled the Essoign with laughter and lively conversation. Chief Justice Warren delivered a compelling keynote address. All present were able to reflect on how the WBA has succeeded in making our Bar a fairer and more equitable place. Now is an opportune time to note just a few of those accomplishments, and to ready ourselves for the challenges which lie ahead.

It was 20 years ago that fliers first appeared in and around chambers inviting barristers to attend a meeting on 11 November 1993 at the Melbourne Mint. This meeting was called to discuss the formation of an association dedicated to addressing issues affecting women at the Bar. Barristers answered that call, and the WBA was created.

The idea to create such an association was that of Rachelle Lewitan, inaugural convenor of the WBA and now Judge of the County Court. Judge Lewitan and her colleagues met regularly at 'off campus' venues such as the old Nick's Spaghetti Bar. They discussed a need for an association devoted to achieving equality at the Bar, an association which would work to ensure that women have the opportunity to compete on equal terms with their male colleagues. These women became founding members of the WBA at our first formal meeting in November 1993.

Judge Lewitan and that early committee defined the purposes of our Association. They resolved the Association would aim to:

1. *Provide a professional and social network for women barristers*
2. *Promote awareness, discussion and resolution of issues which particularly affect women*
3. *Identify, highlight and eradicate discrimination against women in law and in the legal system*
4. *Advance equality for women across the legal profession generally.*

These four aims formed the pillars of the WBA Constitution. The WBA Constitution was launched on 15 March 1995 by the then Chief Justice of the Federal Court of Australia, the Hon Michael Black QC, and her Honour Rosemary Balmford then of the County Court and later our State's first female Supreme Court Justice. Over 180 barristers and judicial officers attended this launch. Chief Justice Black lent his support to the aims of the WBA and underscored the importance of ensuring women remain and flourish at the Bar. His Honour said:

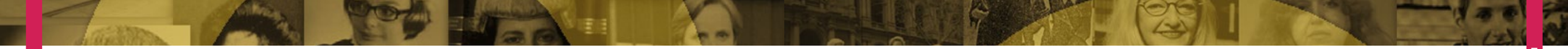
> *Nor, of course, can the community afford to lose women from the ranks of the specialist advocates who pursue the calling of a barrister and nor should women be denied the satisfaction and rewards that the Bar can offer.*
>
> *Plainly there is no shortage of work for the WBA to do.*

Indeed there was no shortage of work for the WBA to do in these early years. The priority of the Association was to overcome structural barriers which dissuaded women from signing the Bar Roll, or forced them to leave the Bar within several years of signing.

Women were barred from entering the legal profession until 1903. In that year legislation was passed to enable Flos Greig to be admitted as our first female practitioner. Women had previously been thought to possess some peculiar type of disability which made then unsuitable to practise law. Two decades later Joan Rosanove became the first woman to sign the Bar Roll. However, by 1993 very real structural barriers remained which prevented many women from staying on and flourishing at the Bar.

Many of these structural barriers would startle the new readers of today, male and female alike. All barristers were required to maintain chambers. Sharing of chambers was prohibited. Barristers were required to pay full subscription fees, even whilst on parental leave. The financial burden of these rules was considerable, and particularly so for women at the Bar. A female barrister

"It was 20 years ago that fliers first appeared in and around chambers inviting barristers to attend a meeting on 11 November 1993 at the Melbourne Mint."



who gave birth was expected to maintain her own chambers and pay full subscription fees whilst on unpaid maternity leave. This was often financially impossible, and women had no option but to leave the Bar. The loss of such talented women would be felt by her colleagues, within her chambers and by the Bar as a whole.

These are the types of structural barriers that the WBA sought to overcome. The WBA lobbied Bar Council to change the rules requiring women to pay full subscription fees whilst on maternity leave. The Association acted to ensure that in 1996 the Bar adopted a parental leave policy to reduce chambers rent for a period of time while a barrister was pregnant or caring for a young child. In doing so, the Victorian Bar was lauded as the first Australian jurisdiction to subsidise chambers fees for parents with primary care responsibilities.

> “In the past 20 years the active contribution made by the WBA has encouraged other like-minded organisations to form.”

The early achievements of the WBA were made with the support and encouragement of many. Throughout its history, the WBA has been fortunate to have strong support from within the judiciary and the senior Bar. Any attempt to comprehensively list these supporters would be doomed to fail. To name just a few, Chief Justice of the Supreme Court, the Hon John Phillips was an ardent supporter, as were leaders of the Bar such as Ronald Merkel QC and the late Ron Castan QC.

The WBA campaigned for the Bar to undertake an analysis of gender bias in the profession. The Bar Council agreed and commissioned Rosemary Hunter and Helen McKelvie to conduct the study. The WBA worked closely with the Equality Before the Law Committee to draft the terms of reference. The final report ‘Equality of Opportunity for Women at the Victorian Bar’ was published in 1998. The report found bias existed within the Bar, and that concerted effort was required to overcome the barriers impeding the progress of women barristers. Much to its credit the Bar Council, led by Chairman Neil Young QC, acknowledged the report’s findings and committed itself to the goal of eliminating bias.

In the succeeding years the WBA dedicated itself to fulfilling many of the recommendations of the Equality of Opportunity report. For example, the WBA helped establish the senior mentoring scheme. The creation of the role of senior mentors provides all new readers, male and female, with an additional source of advice and encouragement. The WBA also urged the Bar Council to introduce a clear process by which barristers were selected to join the various committees of the Bar.

A focus of the Equality of Opportunity report was briefing practices. The WBA was able to make substantial progress in this area. It was determined that steps needed to be taken to facilitate the ability of solicitors to identify women barristers who they might brief. In December 2000 the Women Barristers Directory was launched. The Directory enabled solicitors to search for women barristers by practice area and seniority. Our current Barrister Directory retains the same capability.

The WBA liaised with government to improve the opportunity of women barristers. In 2000 then Victorian Attorney-General Robert Hulls introduced a model briefing policy as government policy. This policy requires those who undertake government legal work to identify female counsel in the relevant practice area, give genuine consideration to briefing such counsel and to regularly monitor and report on the engagement of female counsel. It is important to note the policy is not a quota system, nor does it require women to be briefed preferentially. The principle underpinning the model briefing policy is that barristers should be selected on the basis of their skill, rather than their gender. Equitable briefing has certainly improved the rate with which women are briefed in certain matters. The WBA hopes that government and law firms will remain committed to equal opportunity briefing and regularly publish their progress in implementing this policy.

One of the four aims of the WBA is to provide a professional and social network for women barristers. Networking is essential to getting briefs, and quality briefs at that. The WBA has provided regular opportunities for barristers to meet solicitors. This has included practice area specific functions with law firms and regular networking events with Victorian Women Lawyers. In turn the WBA provides regular ‘Coming to the Bar’ information evenings for members of Victorian Women Lawyers.

The WBA has also held many networking events for barristers to meet one another. Such events have often coincided with celebrating judicial appointments, the announcement of silks or welcoming our newest readers. These gatherings enable members to meet others in their practice area and forge links between barristers of different levels of seniority. They have the added benefit of fostering collegiality at the Bar, allowing advice to be shared and creating informal mentoring opportunities.

Earlier this year Judge Felicity Hampel, a former convenor of the WBA, launched our new Chatham House Chatters event series. The series aims to provide regular informal opportunities to women barristers to converse about life at the Bar, and in particular discuss those topics that affect women. So far in this series members have attended a casual breakfast with judicial officers, an in-chambers event hosted by a silk and a panel discussion titled ‘Dealing with Difficult People’.

The WBA also seeks to mark and also preserve the history of women barristers. In 2003 the WBA produced a documentary film ‘Raising the Bar’ to commemorate our 10th anniversary. In May 2007 the WBA launched the ‘Women Barristers in Victoria Then and Now’ exhibition in the Supreme Court. That same year a film ‘Even it Up’ was produced as part of the Bar’s Oral History Project on the origins of the WBA and progress of women barristers. These wonderful resources are available on the Victorian Bar website by following the links ‘About Us’ and ‘Our History’.

In the past 20 years the active contribution made by the WBA has encouraged other like-minded organisations to form. Following the lead of the WBA the Bar established the Equality Before the Law Committee, now known as the Equality and Diversity Committee. The WBA and the Equality and Diversity Committee have often cooperated. For example, members of this Committee and the WBA partnered to write a code of conduct on sexual harassment and vilification. This code is now found in Part IX of the Rules of Conduct. At a national level the WBA was a founding member of Australian Women Lawyers. AWL launched on 19 September 1997 with Alexandra Richards QC as its inaugural president. The success of the WBA also reinvigorated the body representing female solicitors in Victoria. Today, Victorian Women Lawyers provides strong and effective support to women solicitors.

These are just a few of the accomplishments the WBA has made in its first 20 years. Each successive committee has striven for a Bar which is fairer, more equitable and inclusive. Credit must be given to each ordinary and committee member alike. We acknowledge the dedication of each prior convenor of the WBA, who are Judge Rachelle Lewitan, Fran O’Brien SC, Helen Symon SC, Judge Felicity Hampel, Judge Susan Cohen, Jeanette Richards, Justice Pamela Tate, Judge Frances Millane, Fiona McLeod SC, Samantha Marks SC, Kim Knights, Simone Jacobson, Caroline Kirton SC, Joy Elleray and Suzanne Kirton.

In her address to the WBA 20th anniversary celebration Chief Justice Warren cited three ongoing challenges for women barristers.

> “There is much to be proud of in the first 20 years of the Women Barristers Association. It has succeeded in making our Bar a fairer and more equitable place.”

The first is equitable access to better briefs. Her Honour noted that women rarely appear in substantial matters in the Supreme Court and particularly in the Commercial Court. The WBA will continue to work to redress this imbalance by facilitating networking and practice development opportunities. Individual solicitors and barristers can also help achieve this end by seeking to work with talented female barristers. For example, her Honour suggested that silks include a woman junior in their nominations for junior counsel when asked.

Tied to this topic of equitable access to better briefs is the question of income. Women are earning less than their male counterparts at the Bar. In March this year the Bar held its annual continuing professional development conference. Associate Professor Rufus Black was invited to present his paper titled ‘The Victorian Bar: Performance, Challenges and Opportunities in the Post GFC Legal World’. His analysis found that male barristers are earning more than female barristers, even when normalised for number of years at the Bar.

The data available to Associate Professor Black cannot tell us why this divide exits. What it does tell us is further research is necessary to examine the causes of this gap and to generate solutions. The WBA looks forward to partnering with the Bar Council to ensure all barristers are appropriately paid for their expertise.

The second challenge cited by her Honour is the difficulty of managing parenting responsibilities with maintaining a healthy practice. This will always be a challenge for parents at the Bar. The third challenge noted by her Honour is the realisation of true professional equality in terms of judicial appointments. In addition to judicial appointments, the WBA considers true professional equality requires more women to be selected as silk and elected to our Bar Council. These form part of the challenges that lie ahead.

There is much to be proud of in the first 20 years of the Women Barristers Association. It has succeeded in making our Bar a fairer and more equitable place. The WBA gratefully acknowledges the support it has received from judicial officers, members of Bar Council, senior barristers, clerks and the Bar as a whole. We must now meet the challenges ahead. At our 20th anniversary celebration, Chief Justice Warren said:

> *The last yards will be hardest but possibly the best. That being said, through their talent, legal skills, intellects and capacity for hard work, women have achieved permanence in the legal landscape. Now the extent of that presence needs to be relentlessly pursued. The continued advocacy and support of organisations such as the WBA will be vital to this process.*

Twenty years since its formation, there is still no shortage of work for the WBA to do.

NEWS AND VIEWS

Negotiating a path to politics and back again THE HON NEIL BROWN QC[1]

It is said on good authority that when Robert Gordon Menzies entered the Victorian Legislative Council in 1928, Owen Dixon said to him:

"Well, Menzies, it is quite easy, I am told, to convert a good lawyer into a good politician. But reconversion is impossible."

There is good authority for that observation having been made by Dixon, as Menzies himself revealed the remark at Dixon's farewell as Chief Justice of the High Court of Australia and it may be read in the Commonwealth Law Reports[2]. Menzies also said that it was "at once the most threatening and the most flattering remark ever addressed to me[3]."

What might not be so widely known is that Dixon had made the same remark six years earlier when John Latham announced to Dixon that he, Latham, was going into politics because it was his duty[4], which shows that, being devoid of modesty, he was a good politician before he was elected.

It has been suggested that I should examine Dixon's aphorism to see if it is true.

The assumption for my being asked to write on the subject might be that because of my illustrious career, I have disproved Dixon's aphorism, as I have become a good lawyer again after being a good politician.

On the other hand, before I let myself get carried away with this notion, I should acknowledge that I might have been asked to write on the subject because I was actually living proof of just how right Dixon was, in that I might have been a good politician after having been a good lawyer, but that I had definitely not been reconverted into a good lawyer.

Upon further reflection, it could just be that the statement was not applicable to me at all, as I had not been a good lawyer to begin with.

In any event I am, first of all, somewhat detached from Dixon's proposition, as I hate the word "politician", although I shall have to use it in this article. The word seems a derogatory description of our elected representatives, as it has connotations of Tammany Hall, smoke-filled rooms and sleazy deals. I have always preferred the word "parliamentarian" or, if I am in one of my more pompous flights of fantasy, "statesman".

Putting down these few thoughts has caused me to reflect on some aspects of my career, such as it was, and also to try to make some sort of appraisal of the good lawyer and the good member of parliament.

To return to Menzies' observation, why did he regard Dixon's statement as flattering and threatening? I think he was flattered by the assessment that Dixon thought that he, Menzies, was a good lawyer, but found it threatening because he must have reflected that if things did not work out well for him in politics and he had to return to the law, his prospects of succeeding at the law might be slim.

But he need not have been alarmed. Menzies himself was a good lawyer and he had a vibrant career at the Bar before he went into politics. When I undertook my articles, there was an old managing clerk in the office who used to brief Menzies and he told me that he was such an eloquent barrister that he charmed awards of damages out of juries that were so large they were impossible to hold onto on appeal. So Menzies needed to have no fear that if he quit politics he would not be able to re-establish himself and have a successful second career at the Bar.

In any case, I do not think that was what Dixon was getting at. I do not think he meant that lawyer politicians, if they left politics and returned to the law, had no prospect of success or of earning their living. Dixon would have known of examples of those who had done so and I am sure that he would have realised that ex-politicians would always find something to do in the law, that they might well be successful at their craft once again, have prospects of being appointed as judges or even appointing themselves as judges. As time has moved on, it has become apparent that quite a few former politicians, if we must use that word, have established or re-established reasonable practices at the law and of course some have become judges and made significant contributions to the law, even although they may not have been what Dixon called "good" lawyers. We will have a look at a few of them shortly. But before doing so let me re-iterate that I do not think Dixon meant simply that if the good politician left politics, he or she would not be able to be employed again in the law or be successful at it. What he meant, I think, is that during his political career a good lawyer will have had inculcated in him political practices and attitudes that would prevent him from being a good lawyer again; he would, if you like, have picked up some bad habits; then, when he returned to the law he would simply be a politician in lawyer's clothing and not a real or "good" lawyer.

"Putting down these few thoughts has caused me to reflect on some aspects of my career, such as it was, and also to try to make some sort of appraisal of the good lawyer and the good member of parliament."

NEWS AND VIEWS

But let us look at some lawyers who went into politics and whether they returned to the law; if they did, how did they fare? If they did not return to the law, why not?

Tom Hughes QC was a successful member of the Sydney Bar; he was a silk before he was elected to the Parliament; on any test he was a good lawyer, widely respected and of course successful; he was then a reasonably successful politician as Attorney-General, but probably would be the first to say he did not achieve his full potential as a politician, as he was cut off in his political prime as a victim of the quixotic appointments that Sir William McMahon made to his Ministry in 1971. After we foolishly voted Gorton out and McMahon in as leader of the Liberal Party, thereby ensuring that we would lose the next election, Hughes was denied a ministry, more out of spite and the fact that he was a friend of Gorton's than any lack of ability and he then abandoned his political career by not standing for re-election in 1972. So he left the Parliament before we could really say if he was a good politician. But he returned to practice, was phenomenally successful and was in every way the leader of the NSW Bar. Perhaps, when we are considering Dixon's theory, therefore, there should be another category; that of politicians who would have been better politicians, had lesser people like McMahon given them the opportunity to be better politicians, but who nevertheless were successful lawyers the first and second time around. Hughes would have become even more successful as a politician had he stayed on after 1972; he had that all-important and all-elusive quality of the good politician- gravitas, looked and sounded impressive and I think could have become Prime Minister. He had one great quality of those who distinguish themselves in the role of Attorney-General, that position where the politician intersects with the lawyer. As John Gorton put it to me when I asked him what he thought about Hughes as Attorney-General: "Most Attorneys-General tell you why the law will not let you do the things you want to. Hughes' great value is that he can show you how the law can be made to let you do things you want to."

Incidentally, although he may have left politics before we could tell if he was a good politician or not, I heard him make a very good political speech when he was a lawyer again, in the form of a eulogy at John Gorton's funeral and the way Gorton had been treated by Malcolm Fraser, all the time with Fraser at eye level and forced to take it in, like an Easter Island statue facing a Pacific gale; "riveting" is the word that comes to mind to describe it. So I would say that Hughes was a good politician, would have been a better one had he been allowed to, but was then reconverted to become a good and successful lawyer.

> "Kep Enderby, later Mr Justice Enderby, is another lawyer/politician/lawyer... when I arrived in Canberra, Gough Whitlam asked me to give Enderby a sort of permanent pair to accommodate his court appearances in Sydney, while still a barrister; I doubt if this could be done today, but they were more spacious and accommodating days and I had continued some limited practice myself."

Another lawyer from my time who returned to success as a lawyer after he left politics and who may not be as well known in Victoria as in NSW, is Maurice Neil QC. When Neil came to Canberra, he was already well-established at the Sydney Bar, although still a junior, and had received additional toughening in the jungles of Vietnam during the war (I do not know which of the two was the more rigorous battle field). He won the traditional Labor Party seat of St. George for the Liberal Party in 1975, held it in 1977, but lost it in 1980,which was inevitable, sooner or later, and then returned to the Bar, did very well and is still at it. I think the word "formidable" must have been invented for Maurice Neil for his work as a politician and a barrister. He undoubtedly had promise as a good politician and would have proved it, had he had a better seat and not been defeated in 1980. I sat next to him in the House and, while I would be listening to the debates and reflecting on life, Neil would be signing mountains of mail to his constituents telling them of the wondrous achievements of the Fraser government, occasionally making sharp interjections into the debate which infuriated the other side. His return to practice was equally impressive, appearing as he did in high profile cases and inquiries and Royal Commissions. The Sydney Morning Herald described him as "an aggressive advocate with a high Tory demeanour..." and I agree with that entirely. One test of judging a lawyer is to ask the question: would I be prepared to have my case put into his hands? For me, if Maurice Neil were the lawyer, my answer would have to be "yes". Like Tom Hughes, he would probably concede that he was not in the Parliament long enough for us to judge if he had been a good politician, but he was terrifying enough. Consequently, like Hughes, he shows the need for a category of politician who would have been a better one had he had longer at it, but who returned to the law and became (and still is) a good lawyer.

Kep Enderby, later Mr Justice Enderby, is another lawyer/politician/lawyer. He must have been a busy barrister in Sydney, as when I arrived in Canberra, Gough Whitlam asked me to give Enderby a sort of permanent pair to accommodate his court appearances in Sydney, while still a barrister; I doubt if this could be done today, but they were more spacious and accommodating days and I had continued some limited practice myself. Enderby was a silk in Sydney, but his subsequent political career can best be described as chequered[5]. He became Attorney-General it is true, after Murphy's elevation to the High Court and was instrumental in decriminalising abortion and homosexuality in the ACT, but his only real claim to everlasting political fame was in his immediately preceding portfolio, Minister for Secondary Industry. It was in that role that he delivered himself on one of the most profound statements ever made on international trade: "Traditionally Australia obtains its imports from abroad." He lost his seat in the landslide of 1975, which might deny him the accolade of having been a good politician. He was, therefore, one of those members of parliament like Hughes and Neil, who left the parliament before a final judgment could be made on their political careers. But he was certainly able to hold his own in the law after politics. He returned to the Bar in Sydney, was successful and became a judge of the Supreme Court of NSW where nothing is known against him. He also forged a steely resolve to advance the cause of Esperanto. So he is a case in point who illustrates my quandary; he made the reconversion to being a successful lawyer, but was he a "good" one in Dixon's sense? And had he been a good politician, before that? I frankly find it hard to say.

> "Withers was an effective leader of his party in the Senate and his reputation as an effective enforcer of party discipline earned him the nickname The Toecutter for good reason. Even to this day he has a threatening bolt cutter displayed on his sitting room wall."

As well as those like Hughes, Neil and Enderby who did not have time to prove beyond a reasonable doubt that they were good politicians, but who nevertheless were able to return to the practice of the law with success, there were some lawyers who were good politicians and who enjoyed it so much that they did not seem to want to return to the law.

Michael Hodgman QC, the Member for Dennison in the Parliament was one. He had been at the Bar in Tasmania with a successful practice and then became an indefatigable local member of parliament. He was on any test a good political tub-thumper, and as a Minister in the Fraser government, he entered into every political contest with gusto. He never tired of trying to convince everyone that Canberra, for which he was responsible as Minister for the Australian Capital Territory, was potentially the economic powerhouse of the Commonwealth, a very dubious proposition, but one that he pursued with vigour. He often made speeches to the effect that many leading companies here and overseas were just on the verge of investing in Canberra, a proposition he never ceased to advance to us with ever-increasing enthusiasm and on ever diminishing evidence. He certainly knew what politics was about, serving in the Tasmanian and Federal Parliaments in a variety of roles and with a variety of wins and losses. I know of successes he had as an advocate, but his true love was politics and I could not imagine him ever returning to full time practice of the law. He probably therefore does not qualify for "reconversion". But if he had attempted it he would have tackled it with enthusiasm and at least told you that he had been reconverted to being an active and successful lawyer.

Two others, who, like Hodgman, did not make the transition from politics to the law, really as a matter of free choice, were Reg Withers and Peter Durack both from Western Australia. Both were successful as politicians. Withers was an effective leader of his party in the Senate and his reputation as an effective enforcer of party discipline earned him the nickname The Toecutter for good reason. Even to this day he has a threatening bolt cutter displayed on his sitting room wall. His power came to its peak during the budget crisis of 1975 when he masterminded the then opposition's tactics through the labyrinthine rules and conventions of the Senate. He became a Minister in 1975, but his tenure was short-lived, as he was sacked by Fraser for a trifling administrative indiscretion. At that time Fraser was in full-integrity mode and it was difficult to prevent such decisions from being made. Withers never returned to the law, not because, as Dixon would say, reconversion is impossible, but because he was not interested in making the journey. He preferred to remain the good politician that he was and manifested this by becoming the Mayor of Perth and an *eminence grise* of the Liberal Party.

Peter Durack was a good lawyer, but ultra cautious and although he became Attorney-General, he would probably be described by Gorton as one of those Attorneys-General who saw their job as to keep the government out of trouble and who was more concerned with how the law prevented things from being done. That was strange, because he was also a calm and steady reformer, introducing the first Freedom of Information Act and promoting administrative review. But he was not at all a Tom Hughes type; he took a long time to make decisions, so careful was he to weigh up the evidence and every conceivable contingency that might or might

not arise if he made a decision this way or the other or perhaps if he did not make a decision at all. Not even a heart attack stopped him, for when his health crisis had passed he returned to the work as Attorney that I had looked after during his absence. He would have stayed on as a politician longer than he did, but he lost his party endorsement in 1993 after a mammoth run of 22 years in the Senate.

Bob Ellicott was yet another variation on the theme, that of the good lawyer who had difficulty adjusting, not to the law after politics, but to politics itself and, at least through my eyes, he seemed to find politics uncomfortable. He was of course a good lawyer to begin with, as he became Solicitor-General. He then turned his hand to politics, had a rapid rise and within a year of being elected to the Federal Parliament was Attorney-General. But only two years later, he was off again, resigning as Attorney-General on a matter of principle so lofty that none of us could understand it or why anyone should resign over such a comparatively minor issue, whatever it was. Politics, for him, seemed to be carried out on a lofty plane, far beyond the concerns of mere mortals. He was of course an active politician and a good advocate for his party, but he never seemed settled in politics. Not long after his resignation as Attorney, he was given another chance as a Minister, but he survived only for three more years, whereupon he was appointed to the Federal Court. He may also have felt uncomfortable as a judge, for he remained there for only two years, when he resigned to return to the practice of the law. In one sense he may prove Dixon's theory, as he seemed to migrate in and out of both politics and the law, being a better lawyer than politician, but never undertaking a permanent conversion.

The saddest case of the politician/lawyer in my time who showed immense promise that was not fully achieved was Ivor Greenwood. We were close, as I think he was the first person I told that I was going to go into politics or, more precisely, that I was going to apply for Liberal Party pre-selection for the newly-created Federal electorate of Diamond Valley. He also shared a group of rooms on the fourth floor of Owen Dixon Chambers with Ninian Stephen, with whom I read, and Brian Shaw, so I saw a lot of him. He was kind enough to give me a reference for the pre-selection, and encouraged me in every way. He was certainly a good lawyer himself, which I knew from reading some of his opinions, talking with him and from his reputation. He was cautious, reflective and inclined to understate things. He became a successful politician and Attorney-General in the last year of the McMahon government but, strangely, not Attorney-General in the Fraser Government, but Minister for the environment, housing and community development, where he remained until he sadly died in 1976, shortly before his 50th birthday. In many ways he was my hero. Had he lived longer he would have become an even more successful politician and then an equally successful lawyer had he returned to practice or become a judge. Moreover, he would have performed all of those roles with distinction and undoubtedly qualifies as a good lawyer—who could have achieved so much more.

> "One might not approve of [Murphy's] appointment to the High Court, but it probably shows that he was a good enough politician by organising it and presumably appointing himself."

But there are some who seem to disprove Dixon's theory; they were politicians and on some but not all tests were successful as such; they returned to the law and would have to be described as good lawyers.

I might surprise some by saying that I think Lionel Murphy was one. He was a good politician, at least in the limited sense that he got elected, stayed there, did his job and held executive office. When you look at the record of some politicians, even to achieve that modest record makes him a success. He delivered for his party in the Senate and performed his basic functions as a Senator and a Minister. The trouble with categorising him as a good politician too enthusiastically is that he is mainly remembered for a succession of mini scandals and for causing trouble for his leader and party. His performance in the raid on ASIO, in particular, was quixotic and bizarre to say the least and contributed to the perception and reality of the instability of the Whitlam government. One might not approve of his appointment to the High Court, but it probably shows that he was a good enough politician by organising it and presumably appointing himself. But on the assumption that he was a good politician, did he then reconvert to become a good lawyer and thus disprove Dixon's theory? Probably yes. I certainly thought he was a better lawyer than politician, his dissents were courageous and his judgments sufficiently concise and couched in such basic language with convenient sub headings that I could actually understand them. Perhaps there should be a new category in the Dixon aphorism: "It is possible for a not entirely successful politician to become a good lawyer."

Sir Garfield Barwick is a much clearer case. He was already a good lawyer at the peak of the profession when he was elected to the Federal Parliament and he served with distinction as Attorney-General and Minister for External Affairs, as the position then was. On all the objective tests it would have to be concluded that he was a good politician; he was elected, re-elected three times, held ministerial office, performed his functions and was skilful enough to avoid any major political problems, although there were inevitably controversies that arose during his political career. He also made the reconversion to being a good lawyer, as anyone who becomes Chief Justice of the High Court must be. It is of course difficult to assess his work as a judge, as his name engenders obvious dislike among those who had a different political disposition to his own; it seems that they assess his qualities as a judge and jurist by reference to their disapproval of him as a politician. This is particularly so with respect to the events of 1975 and his role in advising the Governor-General on matters resulting in the dismissal of the Whitlam government. That has to be put into the balance, but it should not affect his standing as a judge. It is also the case with some of his decisions on taxation law, where many disagreed with him at the time and still do. Opinions will differ on different issues, but the fact remains that he presided over a good court, delivered significant judgments and propounded and developed the law. He was a good lawyer.

Nigel Bowen was another. He was successful as a lawyer before he entered the Parliament and became a successful Minister for Foreign Affairs. I can remember some of his presentations in our Party room, although we overlapped only between 1969 and 1972, and I must say that they were clear and methodical and were presented logically and persuasively, as one would expect. Moreover, I cannot remember a single scandal or embarrassing event that involved him as a member of parliament or a minister, which is a lot to be grateful for in any period of government; in modern politics, just keeping out of trouble is a major achievement. So I would have to say that he was a good politician, albeit of the old school and probably close to being a statesman. When he left the Parliament he did so voluntarily and became a successful Chief Justice of the Federal Court. It is not meant to detract from his standing to say that he may not have been a great lawyer, but my impression is that he was usually right in his decisions. He also threw himself into the administration of his court. I recall visiting him one day in what seemed like some sort of war room, where he had flags and pins designating various movements of people and facilities around the nation to aid the efficient operation of the court. He is probably not thought of as a towering figure in the law, but a good lawyer? Yes.

Ian Viner was not the most dramatic or colourful politician I knew, but he was elected and re-elected, was an active Minister in some sensitive areas like employment and industrial relations and, when he retired and returned to Perth, he resumed his practice at the Bar, is clearly competent and so far as I know is still successful as a barrister.

> "What Dixon really meant, I think, is that the lawyer politician may consciously or subconsciously apply some of the attitudes picked up during his term as a politician, especially as a Minister, attitudes that are inimical to being Dixon's "good" lawyer."

Finally there is an interesting group of lawyer politicians consisting of Merv Everett, Tony Whitlam, John Reeves and Duncan Kerr, all former ALP members of the Federal Parliament who became judges of the Federal Court. But not all were appointed by Labor Governments: Reeves was appointed by the Howard government. In fact, someone in the ALP Diaspora pointed out to me that Reeves is the only former member of parliament appointed by Howard to a judicial position.

Leaving aside this essentially personal analysis, what Dixon really meant, I think, is that the lawyer politician may consciously or subconsciously apply some of the attitudes picked up during his term as a politician, especially as a Minister, attitudes that are inimical to being Dixon's "good" lawyer; like the notion that the state has greater rights than the citizen, that there is nothing really wrong with reversing the onus of proof, having retrospective legislation, or delegating excessive regulation – making power to the Executive; that state secrets are best kept secret; that governments are probably right in what they do and always know best; that ministerial declarations about citizens are probably right and that the government's motives are probably pure. Dixon might also have added that politicians became subconsciously mesmerised by these notions and by what they wanted to see and hear, rather than what the evidence and established precedent could tell them. Dixon may also have been afraid that the politician turned lawyer might find it hard (if not impossible) to see the law in the detached way in which the good lawyer can see it.

So you see now that endeavouring to verify or disprove Dixon's maxim is no easy task.

I think I will content myself with having resort to the good lawyer's response: it all depends on the circumstances.

1. The Hon Neil Brown QC has had a long and distinguished career in government and the law. He has been a Minister in the Federal Government, a Member of the Federal Parliament, Deputy Leader of the Liberal Party under John Howard and a delegate to the General Assembly of the United Nations.
2. 110 CLR(1963-64) v, at p.vii.
3. *Ibid*, at p.vii.
4. Philip Ayres, *Owen Dixon*, (The Miegunyah Press, 2nd Edn, 2007), p316, note 41.
5. Like mine.

NEWS AND VIEWS

Abraham Lincoln— Patent Lawyer

The Hon Peter Heerey AM QC

This year is the 110th anniversary of the death of the famous US Supreme Court Justice Abraham Lincoln (1809-1903).

His meteoric rise to national prominence is a familiar story. An obscure Illinois circuit lawyer, he was retained in the celebrated case of *McCormick v Manny*, an infringement suit over the patent for the McCormick Reaper.

After his triumph in the case he moved to New York where he built up a huge and lucrative practice before being appointed to the Supreme Court by President Rutherford B Hayes in 1878.

Much less well known is Lincoln's earlier foray into politics, culminating in his narrow defeat in the election for United States Senator from Illinois in 1855. (In those days Senators were elected by State legislatures.) After that humiliation, Lincoln turned to the law. A wise choice, since within six months he received the retainer in *McCormick v Manny*.

An intriguing counterfactual, one of the "What ifs?" of history, presents here. What if Lincoln had pursued his political ambitions, shrugging off the setback of 1855?

He might even have attained the Presidency in 1860 and stared down the secessionists. This may well have led to a bloody Civil War. Perhaps the Union may have won. Perhaps slavery may have been abolished sometime in the 1860s, instead of lingering until 1919 when the defeated Confederate States of America, as an ally of a defeated Germany, was compelled to abandon slavery under the Treaty of Versailles.

The foregoing is basically correct up to and including Lincoln's defeat of 1855. And he was indeed retained in *McCormick v Manny*. But thereafter the true and hypothetical stories diverge. What happened unfolds in the story told by Doris Kearns Goodwin in her magnificent account of Lincoln, *Team of Rivals*.

The defendant's lead counsel was George Harding of Philadelphia, a nationally renowned patent specialist. Since the trial was to be held in Chicago, Harding decided to have on his team a local lawyer who "understood the judge and had his confidence."

So Lincoln was engaged. He was paid a retainer and promised a substantial fee when the matter was completed. He immediately set to work on the legal issues, on the understanding that Harding would present the technical arguments.

Shortly afterwards, however, the trial venue was changed to Cincinnati. Harding was able to engage the man he wanted in the first place, the brilliant Edwin Stanton. Lincoln was not told his services were no longer required. He worked on throughout the summer. His requests for copies of depositions and other court documents were ignored, so he obtained copies from the court registry in Chicago.

In late September he arrived in Cincinnati. He met Harding and Stanton on their way to court. Years later, Harding recalled the shock of his first sight of the "tall, rawly boned, ungainly backwoodsman, with coarse, ill-fitting clothing."

Lincoln introduced himself and proposed "Let's go up in a gang." Stanton drew Harding aside and whispered "Why did you bring that damned long-armed Ape here … he does not know any thing and can do you no good." Stanton and Harding turned away from Lincoln and continued to court on their own.

The hearing continued for a week. Lincoln followed the case every day and stayed at the same hotel as Stanton and Harding, but was never asked to join them for a meal or accompany them to and from the court. When the judge hosted a dinner for lawyers on both sides, Lincoln was not invited.

The extraordinary sequel to this distressing episode in Lincoln's life is related by Goodwin in the following terms.

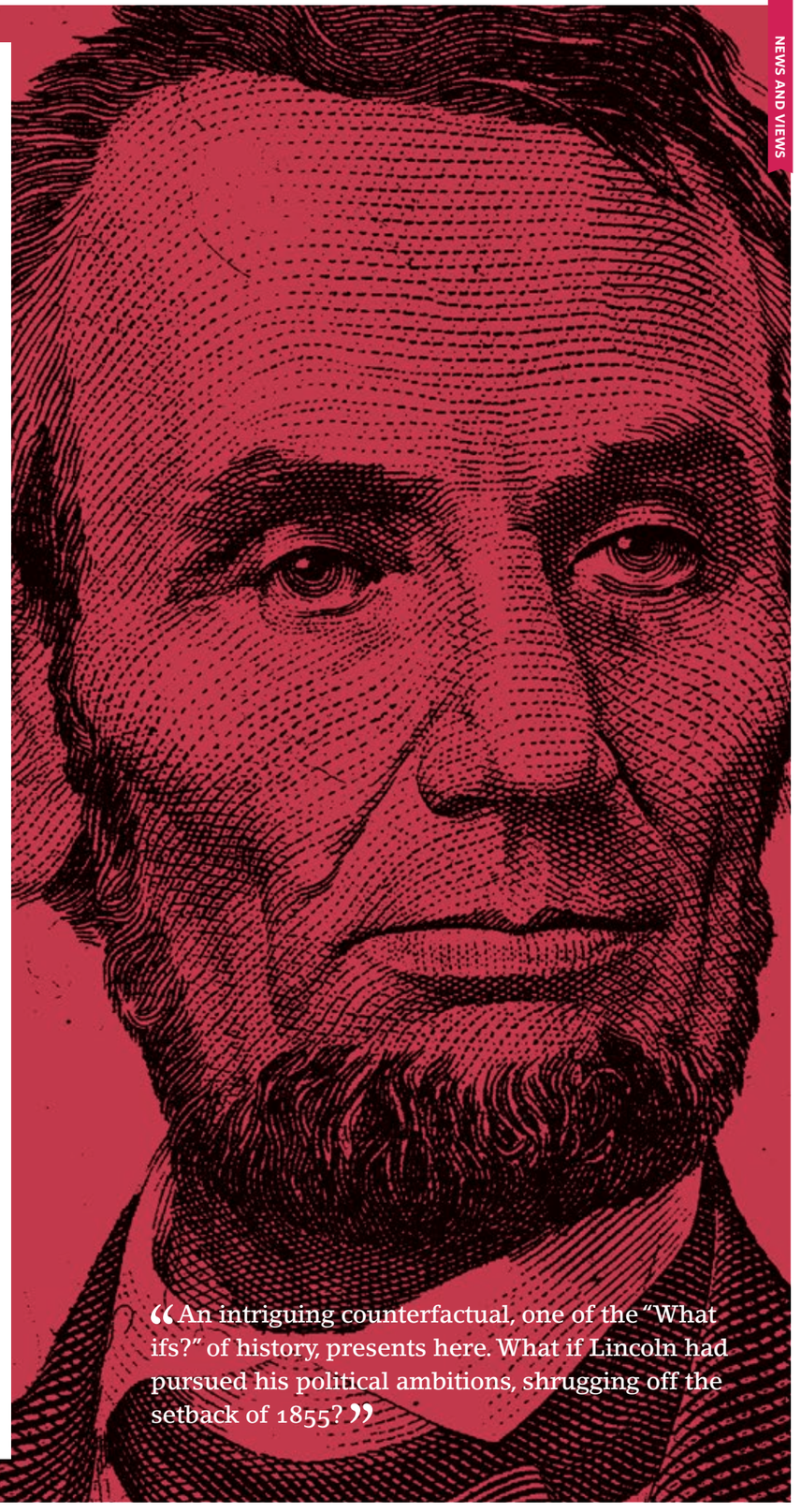
> *Unimaginable as it might seem, after Stanton's bearish behaviour, at their next encounter, six years later, Lincoln would offer Stanton 'the most powerful civilian post within his gift', the post of Secretary of War. Lincoln's choice of Stanton would reveal … a singular ability to transcend personal vendetta, humiliation, or bitterness. As for Stanton, despite his initial contempt for the 'long-armed Ape', he would not only accept the offer but come to respect and love Lincoln more than any person outside of his immediate family.*

Addendum

Lincoln was himself an inventor. According to *National Geographic,* Civil War Special Edition, 2013, p 24, he was the only President ever to hold a patent. It was for "an intricate contraption that used rubberised, air-filled, canvas floats he called 'adjustable buoyant chambers' to lift riverboats over sandbars in the shallow rivers of the West". His model is to be found in the National Museum of American History.

Addendum to an addendum

A patent for a similar purpose was obtained in 1421 by another famous patentee, Filippo Brunelleschi, architect and builder of the great dome of the Santa Maria del Fiore cathedral in Florence. To transport white marble along the Arno he devised a barge, dubbed by the Florentines Il Badalone, "the Monster". Contrary to the underlying rationale of modern patent law, his patent does not disclose its design but it was probably some sort of amphibious raft with giant wooden wheels. Anyway it sank or became stranded on its first voyage from Pisa to Florence and the marble was lost.



"An intriguing counterfactual, one of the "What ifs?" of history, presents here. What if Lincoln had pursued his political ambitions, shrugging off the setback of 1855?"

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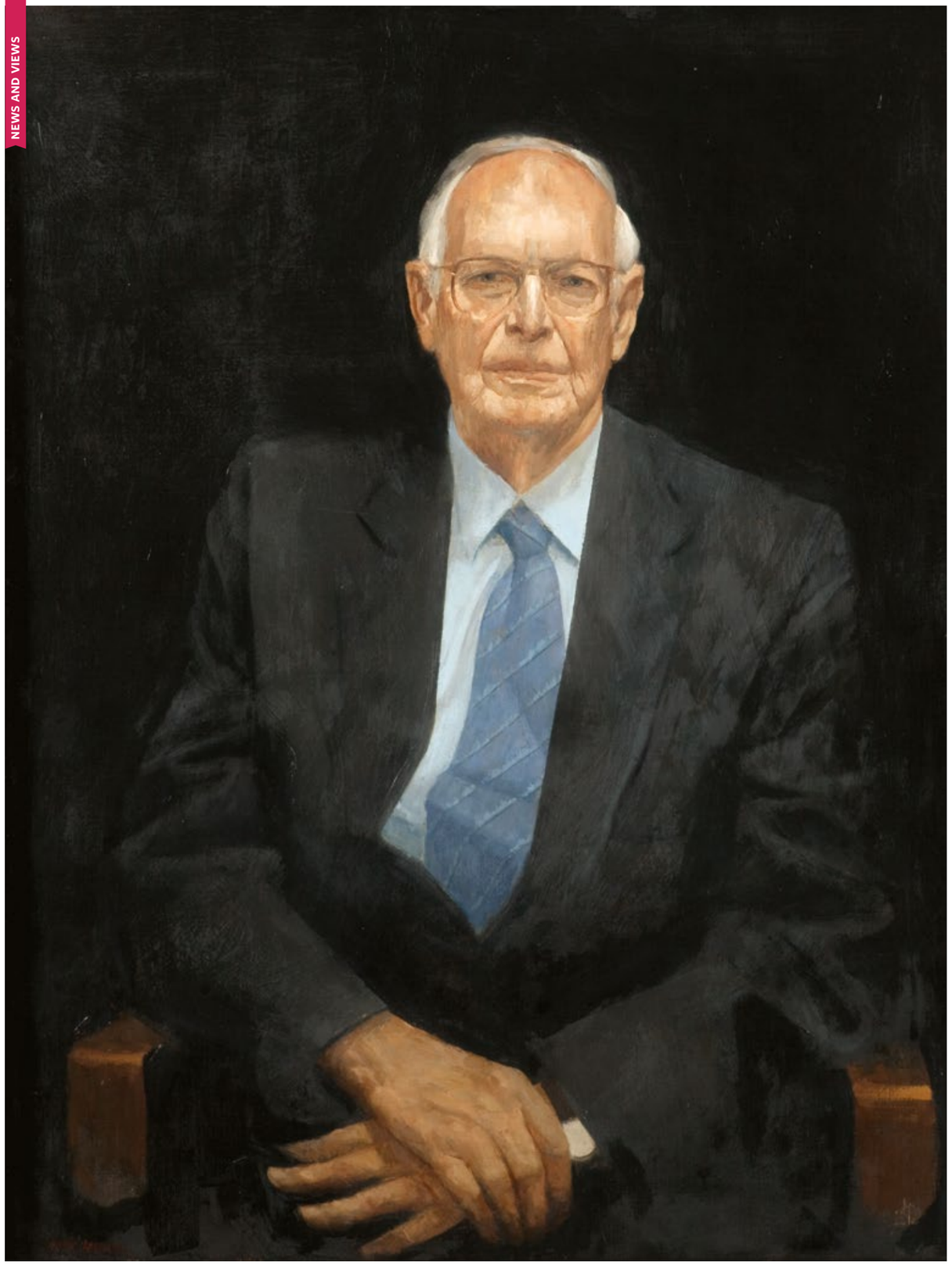


PHOTO COURTESY OF PAUL WEST

A Right Honourable Portrait

Sir Ninian Stephen by Rick Amor

PAUL HAYES [1]

Rick Amor's portrait of Sir Ninian Stephen was unveiled by Justice Hayne in 2006 and hangs in pride of place on the ground floor of Owen Dixon Chambers West.

Sir Ninian Stephen is a colossus of the Victorian Bar and Australian public life. As stated by Justice Hayne at the unveiling of Sir Ninian's portrait, "it is right that the Bar should commission and hang his portrait".[2]

Traditionally, the Victorian Bar has commissioned and hung portraits of its most prominent members who have served the institution, the state and the nation at the highest levels. Most visibly, these contributions are recognised in Owen Dixon Chambers and Owen Dixon Chambers West. Often, those honoured also have made significant contributions to the Victorian Bar itself over of the course of their careers. In this respect, our Bar's practise of honouring our celebrated leaders is no different to other Australian Bars, the courts, the Inns of Court, universities, hospitals and an almost endless array of professional associations.

Institutional recognition of great members is well understandable in terms of an organisation publicly demonstrating its gratitude for exemplary leadership and service and also by holding up those honoured as an example or inspiration to other members as being representative of the values so treasured by the institution. So, why portraiture? Why not a plain photo, or a plaque, or perhaps a page or a chapter in a book?

Well, historically, paintings are objects which are able to form part of and inform our working environment. Such works are able to be easily engaged with by many on a daily basis. They tell our story. To borrow a cliché, a picture 'tells a thousand words'. Sometimes a portrait will suggest an aspect of the subject's true character, as candidly captured by the artist, which might not be readily apparent to, or taken for granted by, those known to the subject. Often it is the little things, such as the way the subject is seated, or how they hold their hands or tilt their head, the eyes, the scene surrounding them, which betrays so much about their mood or demeanour.

Rick Amor's portrait of Sir Ninian Stephen is not the first portrait of him to be hung by barristers. That honour belongs to the New South Wales Bar, which acquired Euan McLeod's portrait of Sir Ninian and Lady Stephen from Watters Gallery in Sydney in the late 1980s. Aesthetically, Amor's portrait of Sir Ninian is in stark contrast to his portrayal in McLeod's work. McLeod's (even by today's standards) very contemporary depiction of Sir Ninian and Lady Stephen is perhaps best described by Sydney barrister and art collector Clive Evatt:[3] "At first glance it looks like a parody with garish colours of green, yellow and black, but on closer examination the sitters emerge as real people with character". It also suggests a slightly whimsical or larrikin edge to the then Governor-General—a wry smile while enjoying his pipe beside an amused Lady Stephen. Twenty years on, Amor's more reverential and realist representation of Sir Ninian also reveals a man of immense character, but captured in the autumn of his life. What is Sir Ninian thinking? Does this exercise of sitting for a portrait commissioned by the Victorian Bar provoke reflection by the subject on all that has preceded this? Or is it that he is slightly guarded and a tad uncomfortable under the spotlight, while he tries to mediate between his natural humility and his good grace in (perhaps reluctantly) agreeing to sit for the portrait?

These very questions are what makes portraiture so fascinating. By and large, people are interested in other people. Portraits can mean so many different things to different viewers, which is perhaps why the Australian public is peculiarly obsessed with the Archibald Prize, above and beyond all other art awards. As social beings, we all seek to know more about 'those', rather than 'what' surrounds us. Amor's portrait of Sir Ninian will no doubt pose a range of differing questions and observations, all of which will be informed by each viewer's own experience of Sir Ninian, known or understood.

Culture in an organisation is difficult to quantify in a spreadsheet. How can it be measured? What calculable value does it add? These are often the questions cynically put by accountants and managers who are often focussed on the 'bottom line'. Perhaps the best (and sad) answer to such questions is that the true value of a cultural legacy is never truly appreciated until it is lost.

The Victorian Bar's legacy over time of artistically acknowledging our truly outstanding leaders who have gone before us, is an invaluable contribution to our organisational culture. Sir Ninian Stephen is a fine example of this tradition. It was 'right' that the Bar commissioned Sir Ninian's portrait and it remains 'right' that this tradition continues.

1. Member of the Bar's Arts and Collections Committee
2. Elliott, P., et al (Eds), 'Unveiling of the Portrait of the Rt Hon Sir Ninian Stephen', (2006) *Victorian Bar News*, Volume 138, 36 at 37.
3. Evatt, C., 'The Artful Bar', (1988) *Bar News* (NSW), 7 at 8.

NEWS AND VIEWS

Can Fairness be Flexible?

What objectives and duties guide regulators when enforcing civil penalties?

ANTHONY STRAHAN

The notion of the State, in the guise of a regulator, imposing sanctions through civil proceedings raises questions about the responsibilities owed by the regulator in that process. Recent cases have raised two issues in particular. The first involves the duties of the regulator in conducting the case, and the content of any obligation to act fairly. The second is the regulator's role in negotiating and compromising civil proceedings.

Most contemporary legislation establishing regulatory regimes is based on strategic regulatory theory. According to that theory[1] the regulator has a range of graduated and flexible regulatory tools, ranging from education programs to criminal sanctions, and is encouraged to act flexibly or responsively in deploying these to achieve its overall objectives. Among tools available to regulators are "civil penalties"; that is, penalties obtained in a hybrid proceeding where the regulator (and not an independent prosecutor) seeks sanctions for a contravention. Significantly, although these proceedings result in fines or other penalties, they are civil and not criminal.

This essay considers whether the role of a regulator pursuing penalties through civil proceedings, and acting strategically with an eye to its overall objectives, is consistent with traditional expectations that the State will act with scrupulous fairness when prosecuting transgressions.

Strategic regulatory theory: a different approach

According to strategic regulatory theory, the essential goal of a regulator is to "stimulate maximum levels of regulatory compliance"[2]. The theory recognises that regulators work within financial and other constraints and must make choices about how to deploy finite resources.[3] It posits that a regulator should not seek to "punish" each regulatory infraction. Instead, a regulator should approach enforcement decisions in a "strategic" or "responsive" way designed to maximise compliance overall. A regulator should be armed with a suite of graduated and flexible regulatory tools, from educative programs designed to facilitate compliance, through to "big stick" sanctions. These regulatory tools are conceived of in a "pyramid" with the most serious sanctions being used most sparingly.

> "Strategic Regulatory Theory…posits that a regulator should not seek to "punish" each regulatory infraction. Instead, a regulator should approach enforcement decisions in a "strategic" or "responsive" way."

Flexibility is important in this theory.[4] Because the regulator's objective is to maximise overall compliance, "punishing" individual transgressors is not an end in itself. The regulator is encouraged to negotiate and settle enforcement proceedings if that will serve its objectives.[5] And compromise is a prominent feature of strategic regulation: for example, data for the period 1997 to 2003 demonstrate that most ACCC cartel cases settled.[6] In conducting itself "strategically" a regulator looks beyond the legal merits of a dispute, and considers issues in a broader perspective.

A. Civil penalties

One of the key enforcement measures available under contemporary regulatory regimes is the power to seek civil penalties.[7] The civil penalty regime contained in part 9.4B of the *Corporations Act 2001* (Cth) (Corporations Act) came into operation on 1 February 1993. Penalties include "pecuniary penalties"[8] but may also involve other types of sanction; for example the Corporations Act provides for "banning orders" that disqualify a person from managing a corporation.[9]

In *Rich v ASIC*[10], the High Court held that banning orders are not solely protective and have a punitive aspect. Earlier authority had characterised the power to ban as "protective".[11] The reasoning that led to the decision in *Rich*, particularly that of McHugh J,[12] points to a fundamental issue about the nature of civil penalties. Most broadly, it raises a question about whether this sort of legislation is consistent with Article 14 of the *International Covenant on Civil and Political Rights*.[13] It also exposes tensions regarding the regulator's role in these proceedings, and the duties it owes.

B. Duties of regulator compared with the duties of prosecutor

Crown prosecutors shoulder special responsibilities, including a duty to ensure that prosecutions are conducted fairly. An important manifestation of this duty is the obligation of a prosecutor to call all material witnesses.[14]

A regulator also has a duty to act fairly in the conduct of a civil penalty proceeding, but the content of a regulator's duty remains unsettled. In *Adler v ASIC*[15] the New South Wales Court of Appeal held that regulators in civil penalty proceedings do not have the duties of prosecutors in criminal proceedings.[16] That decision has been repeatedly followed.[17] But it has not been uniformly approved. In *ASIC v Mining Projects Group Ltd*, having referred to *Adler v ASIC*, Finkelstein J observed dryly:[18]

> *A lay person might be forgiven for thinking that in the present context the distinction between civil and criminal proceedings is somewhat artificial and that in both kinds of proceedings the regulatory authority or prosecutor (as the case may be) is under a duty to ensure that the decider of facts (judge or jury) is best placed to arrive at the proper and just result.*

> “Decisions in relation to enforcement place significant power in the hands of regulatory officers.”

Perhaps the reason courts have rejected this approach is that in a criminal proceeding a conviction may result in imprisonment whereas in a civil penalty proceeding the worst that can happen is that the defendant's career is ruined or his life is wrecked.

In *Morley v ASIC*[19] the NSW Court of Appeal was asked to reconsider the correctness of *Adler v ASIC* in light of the High Court's decision in *Rich*. Their Honours held that a duty to act fairly informed ASIC's obligations about the calling of witnesses.[20] Having reached this conclusion, the Court found that the appeal by the defendant directors should be upheld because the failure by ASIC to call a witness of central significance undermined the cogency of ASIC's case.[21]

ASIC successfully appealed to the High Court.[22] A unanimous, and at times emphatic, High Court found error in the Court of Appeal's reasoning that breach of the duty of fairness undermined the cogency of ASIC's evidence.[23] In reaching that conclusion the majority did not clearly define the duty cast upon a regulator, but assumed that ASIC was subject to some form of duty - perhaps described as a duty to conduct litigation fairly[24] - and held that breach of such a duty—assuming it existed—could not lead to the conclusion reached by the Court of Appeal.

Although the question of what a regulator's duty of fairness requires was left unresolved, some obiter comments by the majority shed light. The Court of Appeal had reasoned “that the public interest can only be served if the case advanced on behalf of [a] regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred”.[25] The High Court's majority found that premise was false for at least two reasons.[26] First, neither a criminal nor civil trial purported to be an examination of all information or evidence that exists in relation to the “question of guilt or innocence”;[27] the majority noted that, even in a criminal trial, parties are free to decide between them the scope of the controversy and the evidence which will be called in resolving it.[28]

Secondly, the High Court's majority considered that the Court of Appeal's proposition, that the public interest required a regulatory agency in a civil penalty proceeding to proceed based on the facts that “actually occurred”, inappropriately required the regulatory agency to make a judgment about what had occurred before it adduced evidence.[29] The High Court's majority stated that deciding the facts of the case is “a court's task, not a task for the regulatory authority”.[30] This observation appears in a short paragraph with no express authority to support it. On its face, it must be correct. However, the suggestion that an uncomplicated relationship exists between a regulator's understanding of the facts, and the regulator's conduct of the proceedings, oversimplifies a fraught issue.

One of the important decisions in an enforcement proceeding is whether or on what terms the proceeding should settle. That issue is crucial in the context of a regulatory framework that expressly encourages negotiation and settlement as a legitimate part of the “strategic” regulatory response. Although it is a court's function to decide facts, exercising a discretion to settle a proceeding without trial requires a regulator to make determinations about what has occurred, or at least what it will accept has occurred. This process can be controversial and raises two issues. First, in light of the (largely unexplained) duty of fairness cast on a regulator in conducting the case, how should the regulator approach settlement negotiations? Secondly, what role does a court play in this process?

C. Settling for more or less? Regulatory decisions on settlement

Decisions in relation to enforcement place significant power in the hands of regulatory officers. Recognising this, a 2002 Australian Law Reform Commission Report[31] (ALRC Report) recommended that regulators develop and publish enforcement guidelines setting out their enforcement approach.[32] Both the ACCC and ASIC publish enforcement guidelines.[33] These deal with the general approach taken by each regulator. Both broadly reflect the objectives of “strategic regulation”.

ASIC's enforcement guideline deals expressly with negotiated resolutions.[34] The ACCC Compliance and Enforcement Policy notes that the ACCC may recognise cooperation by, inter alia, “making submissions to the court for a reduction in penalty”. It also publishes a separate guideline dealing with “cooperation”.[35] All these guidelines omit a critical topic: the approach each agency will take to “assessing” the conduct alleged and agreeing a penalty in light of that conduct. Also omitted is an express description of the considerations the regulator will apply in “doing a deal”.

These issues are important parts of the “policy”, which can be traced to fundamental questions about the nature of the regulator's role. The extent to which a regulator will reduce a proposed penalty through negotiations may involve many factors. One obvious factor is the seriousness of the conduct alleged. Another is the strength of the regulator's case. However, the relevance of other factors, or even the propriety of relying on them, is less clear. For example, should a regulator more readily accept a penalty toward the lower end of the range in relation to a high profile target because the broad effect

> “[Prosecutorial guidelines require that] each accused person must be held to account for his or her criminal conduct and receive appropriate sanction. “Strategic” considerations, which are described more pejoratively as considerations of “expediency” in the NSW guidelines, cannot trump this requirement.”

of this will be to “stimulate maximum levels of regulatory compliance”, and a loss at trial could have the reverse effect? Or alternatively, is it legitimate for a regulator, faced with forensic difficulties, to settle for a modest penalty that does not reflect the true culpability of the defendant in order to conserve its resources? Should it agree to abandon an unexpectedly difficult case if a defendant will pay its costs? This sort of decision-making takes account of the broad objectives of the regulator and reflects “strategic” considerations beyond the strict legal merits. Private litigants in civil proceedings routinely consider analogous “strategic” issues in settling claims. However, that approach is at odds with traditional notions of the responsibilities of those imposing penalties on behalf of the state.

D. How do regulator guidelines compare with prosecutorial policies?

The guidelines published by the Victorian Director of Public Prosecutions include a section dealing with settlement. While the guidelines encourage steps towards encouraging an early guilty plea, that encouragement is qualified.[36] The practice of “plea bargaining” where a judicial indication of sentence is sought in chambers to facilitate a deal, is expressly renounced. Additionally, and significantly, the guidelines state:[37]

2.6.5 No plea will be accepted by the Crown unless it reasonably reflects the nature of the criminal conduct of the accused and provides an adequate basis upon which the Court can impose an appropriate sentence...

An absolute prohibition against the practice of charging a person with the intention of subsequently abandoning those charges in a “plea negotiation” also exists.[38] Similar provisions can be found in other prosecutorial guidelines.[39]

The detailed and prescriptive nature of the prosecutorial guidelines can be contrasted with the published documents of the regulators. Prosecutorial guidelines give a strong sense of both the functions of the prosecutor in achieving retribution in a particular case, and the public nature of those functions.

The prosecutorial guidelines guide prosecutors to lay charges on the basis of available evidence. Prosecutions then commence seeking punishment for the offence charged. The possibility of “settlement” is available and encouraged, and “charge negotiation” can be used to facilitate this. However, it remains an express and published requirement of the prosecutor's duty to ensure that any agreement reasonably reflects the nature of the criminal conduct and provides an adequate basis for sentencing. Each accused person must be held to account for his or her criminal conduct and receive appropriate sanction. “Strategic” considerations, which are described more pejoratively as considerations of “expediency” in the NSW guidelines,[40] cannot trump this requirement.

There is no requirement in the published guidelines of the regulators to ensure any negotiated outcome reasonably reflects the nature of the contravening conduct and provides an adequate basis for “sentence”. It is likely that regulators do take a different approach to prosecutors in settling proceedings. Both strategic regulatory theory, and the guidelines published by ASIC and the ACCC, suggest that regulators may have regard to “strategic” considerations when compromising enforcement action. The ALRC Report expressly noted that the objective of regulating the marketplace meant a regulator was likely to take a different approach to a prosecutor on questions of enforcement.[41] There is also anecdotal evidence to say that in agreeing penalties, regulators have tended to accept lighter sanctions than judges might have.[42]

E. Controversy about a court's role

Where negotiations result in an agreement between the regulator and a defendant, this raises (at least) two questions. The first relates to the Court's use of joint submissions as to an “agreed penalty”. The second concerns the function and status of a statement of agreed facts.

In settling civil penalty proceedings the practice of regulators has been to reach an agreed position with the defendant, then approach the Court with a statement of agreed facts.[43] There is conflicting authority on a court's role in such circumstances. The prevailing view has been that “both the facts, and also views about their effect, may be presented to the court in agreed statements, together with joint submissions by both the [Australian Competition and Consumer] Commission and a respondent as to the appropriate level of penalty”.[44] Additionally, at least in the Federal Court, where an agreement has been reached a court should not depart from an agreed figure unless it falls outside a permissible range.[45]

This approach acknowledges the impact that settlement has on general questions of resource management and community benefit[46]—factors well outside the legal merits of the dispute. The identified efficiencies generated by this approach are

> “It would seem to follow that a regulator, like any civil litigant, can take ‘strategic’ considerations into account and compromise enforcement action for something less than it believes is the ‘true’ factual position.”

clearly beneficial. But if, in order to achieve these efficiencies, the regulator proposes watered-down facts to a court that do not reflect its true assessment of the relevant contraventions, this is controversial. Also controversial is the notion that, where a compromise is reached the Court should, first, accept the facts put forward by the parties as the basis for imposing a penalty, and secondly, impose a penalty in line with the agreement unless it is outside a permissible range. Arguably at least, that approach cuts across traditional notions of the independent exercise of judicial power.

These issues came to a head in *ASIC v Ingleby*.[47] At first instance, an agreed penalty was rejected.[48] The trial judge observed that the agreed contravention did not involve any moral turpitude but merely an admission of negligence.[49] On that basis his Honour found that the proposed penalty was above the “permissible range” and imposed a lower penalty.[50] ASIC appealed successfully.[51] Significantly, the Court of Appeal rejected the notion that a court should accept an agreed penalty unless it is outside a permissible range.[52] The idea that the Court would “ratify” an agreed penalty rather than impose a penalty itself was regarded as heretical: the statutory power to impose a penalty was to be exercised by the Court.

The Court in *Ingleby* was also critical of the agreed facts, which it considered did not appropriately characterise the degree to which the defendant should be held responsible for what had occurred.[53] In fact, the “agreed facts” did not change between first instance and the appeal, so what the Court of Appeal could see, the trial judge could see also. Accordingly, the real concern raised by the Court of Appeal related to the extent to which the agreed facts, agreed contravention, submissions and proposed penalty, reflected the true nature of the contravening. Weinberg JA stated:[54]

> *It goes without saying that cases which involve serious contraventions of the law cannot be “settled” by agreed facts that do not present a fair and accurate picture of the relevant offending to the court.*

Inherent in that statement is the characterisation of civil penalty proceedings as essentially “penal” and “public”, notwithstanding their civil status, and the importance of a court’s independent function in imposing a penalty. That view has much to recommend it both as a matter of doctrine and policy. But for the reasons identified above, one might doubt whether the legislation makes the position as obvious as his Honour suggests. Until *Ingleby*, the accepted law had been that both the facts, “and also views about their effect”,[55] could be presented to the Court as an agreed position. In *Ingleby*, much turned on the agreed “effect” of stated facts. The trial judge, relying on the parties’ agreement about the nature of the contravention, considered the proposed penalty too high. The Court of Appeal made its own assessment of the agreed facts, reached a different view of their “effect”, and consequently considered the agreed penalty manifestly too low. The result perhaps illustrates both why Crown prosecutors are required to ensure any settlement “reasonably reflects the nature of the criminal conduct of the accused”, and the difficulties associated with a regulator settling a case other than on the “true” basis of what occurred.

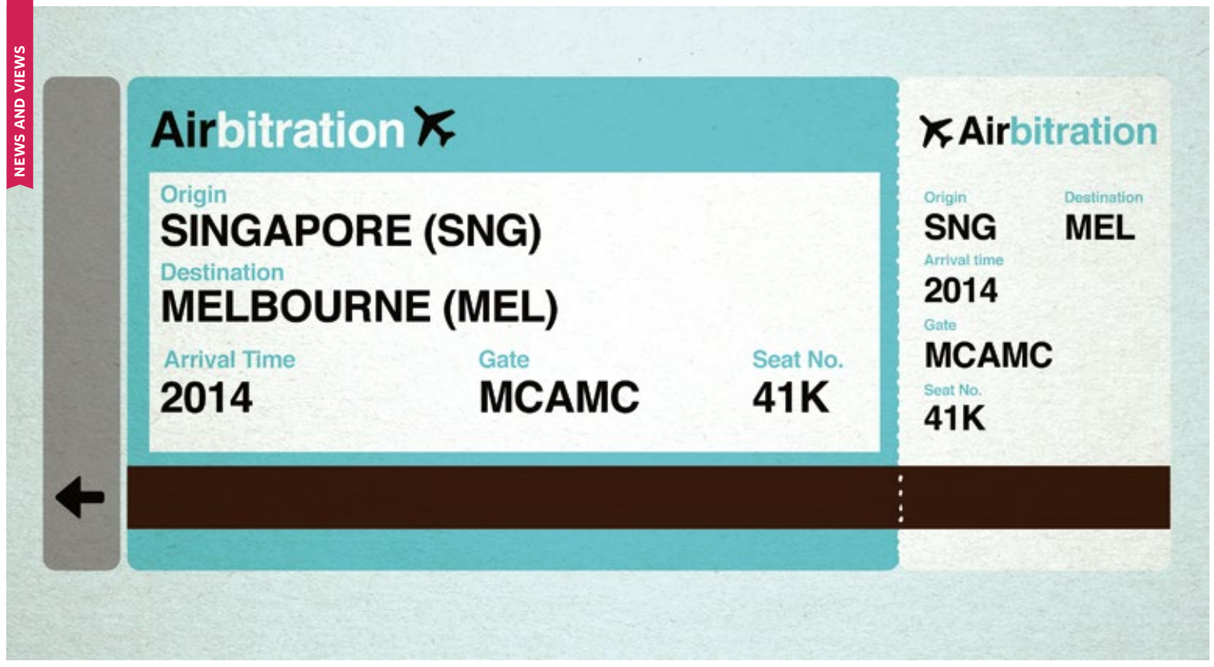
In a broad sense, the issues raised by *Ingleby* relate to the controversies arising from the *Morley* and *Hellicar* decisions, identified above. In *Morley* the NSW Court of Appeal observed that the State in a criminal proceeding must act with the objective of establishing the whole truth.[56] Under prosecutorial guidelines, something like this principle extends to the process of “charge negotiation”. Although, the High Court left the nature of regulator’s obligations open, the tenor of the judgment eschewed the sort of analogy with prosecutors that the Court of Appeal had made, and focussed on the civil nature of the proceeding created by the statute.[57] If this sentiment prevails, it would seem to follow that a regulator, like any civil litigant, can take “strategic” considerations into account and compromise enforcement action for something less than it believes is the “true” factual position. If that is right, contrary to the view expressed by Weinberg JA, it may not be the case that agreed facts always present a fair and accurate picture of the relevant “offending” to the Court. Private litigants in civil proceedings are recognised as making admissions, that do not reflect true facts, for tactical reasons.[58] Strategic regulatory theory suggests the corollary: that regulators in civil proceedings can agree “weak” facts and contraventions for strategic reasons also.[59]

F. Conclusion

Strategic regulatory theory, on which much of the current regulatory infrastructure is based, has at its core the notion that regulator is entitled to exercise its functions “strategically”; that is, with an eye to achieving objectives that are broader than the issues in dispute between the parties. Although regulators must act fairly, what that means is unclear. On one reading of the authorities, it appears that regulators can legitimately look to achieve their broad objectives at the expense of perfect justice in a particular case—at least where that involves agreeing a *lesser* penalty than might otherwise apply. If that is correct, it represents a fundamental shift away from traditional notions of State power, or at least State power manifested as the imposition by curial process of penalties against individuals for transgressions of the law.

Future cases will be required to determine the content of a regulator’s duty of fairness and also the role of a court in relation to agreed penalties.[60] The resolution of these issues may require fundamental issues about the nature of state power to be examined.

1 Bird, Helen, Gilligan, George and Ramsay, Ian, ‘Regulating Directors’ Duties —How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?’ at 9, available at *http://www.law.unimelb.edu.au/centres/cclsr/index.html*. This paper provides a helpful summary of strategic regulatory theory at 9.
2 Bird et al, at 10.
3 M Welsh, ‘Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice’ (2009) 33 *Melbourne University Law Review* 908 at 910.
4 L Castle and S Writer, ‘More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia’, (2002) 10(1) *Competition and Consumer Law Journal* 1.
5 Parker C, ‘The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement’, *Law & Society Review*, Volume 40, Issue 3, pages 591–622, September 2006, 592.
6 Parker, at 598.
7 The principal statutory regimes discussed in this paper are contained in Part 9.4B of the *Corporations Act*, Part VI of the *Competition and Consumer Act 2010* (Cth) and Part 5-2 Div 1 of the *Australian Consumer Law* (or the antecedents of those provisions). See also, by way of example, *Superannuation Industry (Supervision) Act 1993* (Cth), s 193; *Telecommunications Act 1997* (Cth), s 570; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 481; *Water Act 2007* (Cth), s 147.
8 See for example *Corporations Act* s 1317G.
9 *Corporations Act* s 206C.
10 (2004) 220 CLR 129.
11 *ASIC v Rich* (2003) 45 ACSR 305 at 313 [31]-[32] (first instance); *Rich v ASIC* (2003) 183 FLR 361, at 374-379 [48]-[80] (NSW Court of Appeal) and the cases there cited.
12 McHugh J at [41] pointed expressly to the analogy with sentencing principles involved in imposing disqualification orders. See also *ASIC v Adler* (2002) 42 ACSR 80 on the analogy between sentencing and imposing pecuniary penalty.
13 Whether civil penalty regimes comply with Article 14 of the ICCPR turns on whether the proceeding constitutes the determination of a “criminal charge” for the purpose of Article 14(3). The Senate Human Rights Committee has suggested civil penalties may by inconsistent with Article 14: see report of the Senate Human Rights Committee into the Human Right’s compliance of the *Superannuation Legislation Amendment (Reducing Illegal Early Release and Other Measures) Bill* 2012; *http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_cttee/reports/2013/1_2013/c13.htm_(viewed 13 July 2013)*.
14 *Whitehorn v R* (1983) 152 CLR 657; *R v Apostilides* (1984) 154 CLR 563.
15 (2003) 179 FLR 1.
16 (2003) 179 FLR 1 at 151 per Giles JA, Mason P and Beazley JA agreeing.
17 *Visy Industries Holdings Pty Ltd v ACCC* (2007) 161 FCR 122 at [112]–[113]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACCC* (2007) 162 FCR 466 at [74]; *Adler v DPP (Cth)* (2004) 185 FLR 422 at [43]; *O’Brien v ASIC* (2009) 74 ACSR 324 at [47]; *ASIC v Lindberg (No 2)* (2010) 265 ALR 517 at [51].
18 (2007) 164 FCR 32 at [35].
19 (2010) 247 FLR 140 (Spigelman CJ, Beazley and Giles JJA)
20 *Morley*, at [775].
21 *Morley*, at [777]; see also at [794]–[796].
22 *ASIC v Hellicar* (2012) 86 ALJR 522; (2012) 286 ALR 501.
23 *Hellicar* at [155].
24 Ibid.
25 *Hellicar* at [141] citing *Morley* at [717] and also at [776].
26 Ibid.
27 *Hellicar* at [142].
28 Ibid.
29 *Hellicar* at [143].
30 Ibid.
31 Australian Law Reform Commission, *Principled Regulation—Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002).
32 Ibid, Recommendation 10-1.
33 ASIC: ASIC Information Sheet 151, ASIC’s approach to enforcement; see also ASIC Information Sheet 152: Public comment; and ASIC Regulatory Guide 100: Enforceable undertakings. ACCC: ACCC Compliance and Enforcement Policy, February 2013; see also ACCC approach to cartel investigations, 2009; ACCC guidelines on the use of enforceable undertakings September 2009; ACCC cooperation policy for enforcement matters 2002.
34 ASIC Information Sheet 151, ASIC’s approach to enforcement, at 6.
35 ACCC cooperation policy for enforcement matters 2002.
36 Victorian Director of Public Prosecutions, *Director’s Policy on Prosecutorial Discretion*, at [2.6.2]-[2.6.5].
37 Victorian Director of Public Prosecutions, *Director’s Policy on Prosecutorial Discretion*, at [2.6.5].
38 Victorian Director of Public Prosecutions, *Director’s Policy on Prosecutorial Discretion*, at [2.6.6(g)].
39 See for example Prosecution Guidelines of the Office of the NSW Director of Public Prosecutions.
40 Prosecution Guidelines of the Office of the NSW Director of Public Prosecutions: Role and Duties of the Prosecutor.
41 ALRC Report at [9.39]
42 *ASIC v Ingleby* [2013] VSCA 49, [11]; ALRC Report 16.13.
43 *Evidence Act 1995* (Cth) s 191.
44 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 290 per Burchett and Kiefel JJ (with whom Carr J agreed). Followed in *ACCC v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *ACCC v. Prysmian Carvi E Sistemi Energia SRL (No. 5)* [2013] FCA 294; *ACCC v Kingisland Meat Works & Cellars Pty Ltd* (2013) 99 IPR 548; *Australian Building & Construction Commissioner v Inner Strength Steele Fixing Pty Ltd* [2012] FCA 499. Many other examples could be cited.
45 *NW Frozen Foods Pty Ltd* at 290.
46 Ibid.
47 (2013) 275 FLR 171.
48 *ASIC v Ingleby* (2012) 91 ACSR 66.
49 Ibid, at 73 [49].
50 Ibid, at 74 [59].
51 *ASIC v Ingleby* (2013) 275 FLR 171 (Weinberg and Harper JA and Hargrave AJA).
52 *Ingleby*, at 180 [27] per Weinberg JA; at 194 [99] per Hargrave AJA.
53 *Ingleby* at 181-2 [35] per Weinberg JA. See also 188-9 [73] per Harper JJA; and 194 [101] per Hargrave AJA. This appears an apt juncture to disclose that the author was junior counsel for ASIC on appeal, but not at first instance.
54 *Ingleby*, at 283 [31].
55 *NW Frozen Foods* at 290.
56 *Morley*, at [707].
57 *Hellicar* at [139]-[145] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [242]-[243] per Heydon J.
58 ‘1985 Interim Report on Evidence’ (Report No 26 Vol 1, Ch 34 p 421 para 755 of the Australian Law Reform Commission; *Australian Competition and Consumer Commission v Pratt (No 3)* (2009) 175 FCR 558 at 593–5 [70]–[74] (Ryan J). This proceeding is itself an illustration of the issues associated with compromising regulatory proceedings.
59 In L Castle and S Writer, ‘More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia’ (2002) 10(1) *Competition and Consumer Law Journal* 1. The authors expressly cautioned that one consequence of criminalising cartel conduct was the loss of “flexibility” in enforcement.
60 In *ACCC v AGL Sales Pty Ltd* [2013] FCA 1030, Middleton J considered *Ingleby* but followed NW Frozen Foods.



The Victorian Centre for Commercial Arbitration and Mediation

How, what, when, where and why? CATHERINE PIERCE

It is difficult to know how much domestic and international commercial arbitration work Melbourne presently attracts. The private and confidential nature of arbitration proceedings means that accurate statistics on the volume of arbitration work in Melbourne are impossible to obtain. An estimated 20 to 30 arbitration proceedings each year are currently held in the Court rooms within the County Court building that are available for hire for use in arbitration proceedings. Some arbitration proceedings are also conducted at solicitors' offices. Sydney already has an established ADR and arbitration centre. Victorian barristers will be interested to learn that Melbourne is on track to have a dedicated arbitration centre in William Street.

In 2011 the Victorian Bar, the Law Institute of Victoria, the Australian Centre for International Commercial Arbitration, the Chartered Institute of Arbitrators and the Institute of Arbitrators and Mediators Australia called for the establishment of an international dispute resolution centre in Melbourne in a joint submission to then Commonwealth Attorney General, Robert McClelland MP, and Victorian Attorney General, Robert Clark MP. Their call has now been answered.

In August 2013, the State Attorney-General, Robert Clark MP, gave his approval for the development of a new alternative dispute resolution centre to be known as the Melbourne Commercial Arbitration and Mediation Centre (with the acronym "MCAMC"), designed to accommodate state-of the-art facilities for the hearing of international and domestic commercial arbitrations. The MCAMC will have its headquarters on the fourth floor of the newly refurbished William Cooper Justice Centre, previously the old, vacant County Court building. The MCAMC will also have an on-line booking hub.

The proposal for a commercial arbitration centre in Melbourne originated in mid-2010 at a meeting of barristers practising in the field of arbitration chaired by then Bar Chairman, Mark Moshinsky SC. A media release published on the Bar's website on 26 July 2011 contended that an international dispute centre in Melbourne:

> *would consolidate Australia as a regional centre for the resolution of commercial and legal disputes and link to a network of international facilities and capitalise on the rapid growth in trade in the south-east Asian region, and infrastructure development in Victoria.*

"Victorian barristers will be interested to learn that Melbourne is on track to have a dedicated arbitration centre in William Street."

Following discussions with the Department of Justice, in February 2012 the Bar and the LIV successfully applied to the State Attorney-General for seed funding to develop an on-line ADR booking facility and a dedicated arbitration centre. In October 2012, Minister Clark announced that a first tranche of seed funding had been set aside for the booking facility. A second tranche of funding has been made available provisionally for the arbitration centre.

In December 2012, the Bar and the LIV submitted to the Victorian Attorney-General their plan for a centralised, on-line ADR booking facility to incorporate Melbourne's public ADR providers and centres: the Bar, the LIV, Liberty Group (at the County Court) and the Dever Centre. According to the plan, the on-line facility will be managed collaboratively with the assistance of staff from each ADR provider. The Attorney-General approved the plan in August of this year. The on-line facility is to be known as the Melbourne Commercial Arbitration and Mediation Hub.

A steering committee has been formed to work on the 12-month strategic plan for the arbitration centre. The steering committee members include Justice Croft on behalf of the Supreme Court, Judge Anderson on behalf of the County Court, Will Alstegren SC and Stephen Hare on behalf of the Bar, Michael Brett-Young of the LIV, and representatives of the Department of Justice and the Victorian Courts and Tribunal Service. The strategic plan will implement a two-year pilot program with the purpose of demonstrating the business case for the MCAMC. The pilot program involves five stages: writing software for the booking facility (the 'Hub'), collecting statistical data for marketing purposes, creating a website, promoting the MCAMC and developing a longer-term strategy to make Melbourne a favoured ADR venue.

Time will tell whether MCAMC will attract arbitrations to Melbourne. The choice of arbitral venue can be influenced by several factors, including the location and relative bargaining strength of each contracting party, the subject matter of the contract and the perceived neutrality of the arbitral venue. Similarly, the 'arbitration-friendliness' of a particular jurisdiction is a function of several factors. These include the existence of established arbitration facilities and a judiciary which, in addition to being independent, is supportive of and disinclined to intervene in arbitral proceedings.

As a potential arbitration venue in the Asia-Pacific region, Australia already has well-established competitors in Hong Kong and Singapore. Both countries are centrally located in Southeast Asia and served by thousands of scheduled flights per week to cities around the world. Singapore's Maxwell Chambers promotes itself as Asia's largest integrated dispute resolution complex with state-of-the-art hearing facilities. The *Model Law on International Commercial Arbitration 1985* of the United Nations Commission on International Trade Law (UNCITRAL), as updated in 2006, has long been the cornerstone of Hong Kong and Singaporean law on international commercial arbitration, and the courts of each country are seen to be supportive but not interventionist.

Australia, on the other hand, adopted the 2006 amendments to the Model Law relatively recently. The *International Arbitration Act 1974* (Cth) gave legal force in Australia to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 and the Model Law. The *International Arbitration Act 2010* (Cth) was enacted to amend its 1974 predecessor by adopting the 2006 amendments to the Model Law with the stated object of increasing the effectiveness, efficiency and affordability of international commercial arbitration.

On 1 August 2011 when the new *Federal Court Rules 2011* (Cth) came into effect, the Chief Justice issued a Practice Note summarising the scope of the Federal Court's jurisdiction in proceedings under the new International Arbitration Act. That jurisdiction survived a challenge in the High Court in March of this year. In *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, the High Court unanimously rejected the challenge to the constitutional validity of the Australian regime for the enforcement of international arbitral awards under the new Act.

There were many intervenors in the TCL case: the Australian Solicitor-General, the Attorneys-General of Western Australia, South Australia, New South Wales, Queensland and Victoria, and (as amicus curiae) a coalition of Australian arbitral institutions. The coalition was assisted by litigation funder IMF Australia Limited, notwithstanding that features of arbitration, such as its privacy and limited rights of appeal from awards, which are so attractive to contracting parties, would appear to present a disincentive to litigation funders.

The Commonwealth Solicitor-General, Justin Gleeson SC, hailed the High Court's decision as fortunate for our international reputation and for the livelihood of our arbitral community.[1] On the same day as it was handed down ACICA reported the decision as a landmark which delivered a win for Australian arbitration. Other commentators,

> “The choice of arbitral venue can be influenced by several factors, including the location and relative bargaining strength of each contracting party, the subject matter of the contract and the perceived neutrality of the arbitral venue.”

however, considered the mere fact of a challenge to be harmful to Australia’s claim to be a jurisdiction supportive of international arbitration. [2]

In a paper on the Federal Court’s International Arbitration List published in September 2011,[3] Justice Rares wrote:

> *Australian Courts recognise that arbitration clauses should be read, and thus construed, as liberally as possible, as affirmed by the Full Court of the Federal Court in Comandate Marine Corp v Pan Australia Shipping Pty Ltd. That approach won the endorsement of Lord Hope of Craighead in Fiona Trust & Holding Corporation v Privalov. There, his Lordship referred to that principle as being firmly embedded in the law of international commerce. That theme has recently been re-endorsed by Allsop P in the New South Wales Court of Appeal.*

Each of the States and Territories has enacted UNCITRAL-inspired legislation applicable to domestic commercial arbitration. The Victorian Parliament passed the *Commercial Arbitration Act 2011* to amend Victorian law applying to domestic arbitration by harmonising it with the law applying to international arbitration.

The Victorian Supreme Court is, like the Federal Court, officially arbitration-friendly. Supreme Court Practice Note 7 of 2006 states that the Court supports the wishes of disputants to resolve their claims by referral to arbitration. The Commercial Court includes a specialist arbitration list headed by Justice Croft. Recent Commercial Court decisions enforce and give express recognition to the Victorian Parliament’s objective of achieving consistency with 2006 amendments to the Model Law by eliminating merits appeals, subject to the possibility of an appeal on a question of law if the parties agree or the Court grants leave under the provisions of the Victorian 2011 Act.[4]

Contracting parties might make the choice of arbitral venue at the stage of negotiating their contract. Alternatively, the choice might be made only once the operation of an arbitration clause has been triggered. In either case, it may take a long time before Melbourne becomes a natural or obvious choice for the contracting parties and their advisers. How then to bring that about and make Melbourne a well-regarded arbitral venue?

Martin Scott SC, who heads the Commercial Bar Associations (CommBar) Arbitration Section, argues the case for the new arbitration centre in terms of creating momentum. He says that developing best practice for hosting arbitration proceedings occurs in a dedicated centre such as Singapore’s Maxwell Chambers and accords with international expectations. He believes the new arbitration centre will be a focus for increased professional development in this area of practice and that Melbourne’s facility will enjoy a prominent location in the legal precinct, but which is separate from the principal court buildings.

The large volume of bilateral trade between Victoria and southern China is a potential source of international arbitration work in Melbourne. With that in mind, from 12 to 19 May this year, in an attempt to promote Melbourne as a venue for international dispute resolution, Martin Scott SC led a delegation of members of the Victorian Bar and CommBar (including, Caroline Kirton SC, Michael Whitten and Colin King) to visit Guangzhou and Shenzhen in mainland China. The delegation was received by China’s largest arbitral institution, the China International Economic and Trade Arbitration Commission and by the Shenzhen International Arbitration Court. The visit was the first by an Australian legal professional body to either institution.

At the time of making the joint submission to the Commonwealth and State Attorneys General, Caroline Counsel, then head of the LIV, said:

> *The courts, the Government and the legal profession are united in their support for Alternative Dispute Resolution as an alternative to litigation—now we need to establish a first class dedicated facility in Melbourne.*

Two years on, members of the steering committee are tasked with promoting the centre at home and abroad. Recently, members of CommBar’s Arbitration Section, including Michael Heaton QC, Martin Scott SC, Albert Monichino SC and Michael Sweeney, toured the existing facilities at the William Cooper Justice Centre where the MCAMC will be located, so that they could share their views on the facilities with the steering committee. According to the Bar office, all Victorian barristers will have the opportunity to visit the future home of MCAMC following an official opening currently planned for March 2014.

1 In an address to a forum hosted by the University of Adelaide, reproduced in the ACICA News, June 2013 issue.

2 Cited in Albert Monichino, Luke Nottage and Diana Hu ‘International Arbitration in Australia: Selected Case Notes and Trends’ (2012) 19 *Australian International Law Journal* 181.

3 The Federal Court of Australia’s International Arbitration List: http://www.fedcourt.gov.au/case-management-services/ADR/arbitration.

4 See, e.g., *Yesodei Hatorah College Inc. v The Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622.

NEWS AND VIEWS

Compelling Altruism

Charitable Donation Conditions in Sentencing SHAUN GINSBOURG

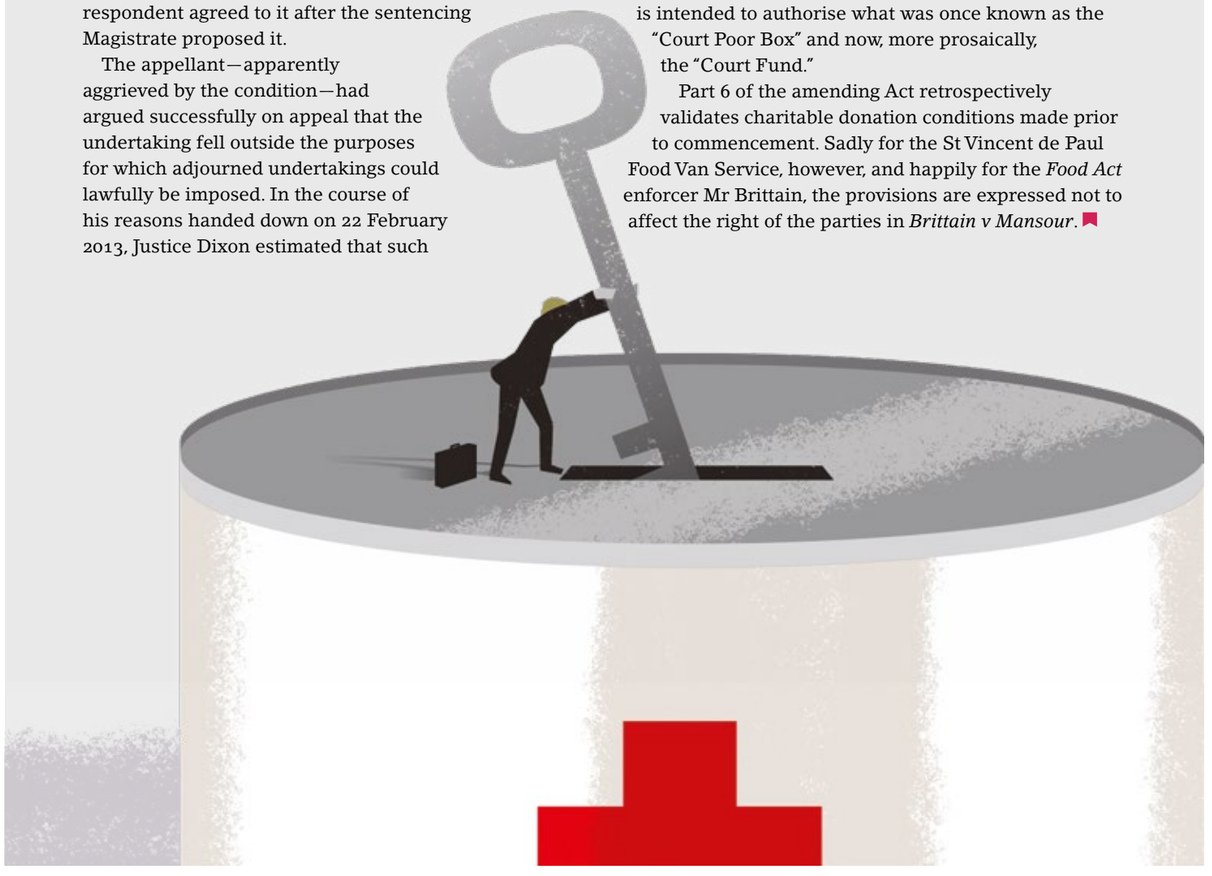
After less than four uncharitable months, from February to June, the Victorian Parliament legislated away the decision of Justice Dixon in *Brittain* v *Mansour* [2013] VSC 50. The decision held that sentencing courts lacked the power to include conditions requiring charitable donations in adjourned undertakings imposed under sections 72 and 75 of the *Sentencing Act* 1991.

Brittain v Mansour [2013] VSC 50 was an appeal on a question of law brought by an Environment Health Officer with the City of Melbourne, who had laid a charge of selling unsuitable food contrary to s12(2) of the *Food Act 1984*. The respondents, upon pleading guilty to the charge, were released upon giving an undertaking to, inter alia, “make a donation to St Vincent de Paul for their ‘Food Van’ Service to the Needy/Homeless in an amount of $2,500.” Whilst neither the prosecutor nor respondent has suggested the undertaking at the plea, the respondent agreed to it after the sentencing Magistrate proposed it.

The appellant—apparently aggrieved by the condition—had argued successfully on appeal that the undertaking fell outside the purposes for which adjourned undertakings could lawfully be imposed. In the course of his reasons handed down on 22 February 2013, Justice Dixon estimated that such conditions had resulted in “possibly millions of dollars” in contributions to charities by offenders released on adjourned undertakings. Nonetheless, said his Honour, this fact could not influence his task of determining the proper construction of the legislation.

By 4 June 2013, the *Justice Legislation Amendment Act* 2013 had been enacted to deal with the decision. Part 6 of the Act empowered sentencing courts to resume imposing charitable donation conditions when adjourning undertakings. This was achieved by amending the permitted purposes of adjourned undertakings to include “to allow the offender to demonstrate his or her remorse,” (new sections 70(1)(ba) of the principal Act) and amending the permitted conditions to include “requiring the offender to make a payment to an organisation that provides a charitable or community service or to the court for payment to such an organisation” (new sections 72(2)(c) and 75(2)(c)). The reference to court payments is intended to authorise what was once known as the “Court Poor Box” and now, more prosaically, the “Court Fund.”

Part 6 of the amending Act retrospectively validates charitable donation conditions made prior to commencement. Sadly for the St Vincent de Paul Food Van Service, however, and happily for the *Food Act* enforcer Mr Brittain, the provisions are expressed not to affect the right of the parties in *Brittain v Mansour*.



Court Jesters

Has Humour a Role in Court?

JUSTIN TOMLINSON

It is fair to say that humour is not cherished in Australian courtrooms. It is barely present, regarded with suspicion if it looms and generally unwelcome when it arrives. But perhaps this approach should be reconsidered, for to banish humour is to ignore one of the most effective communicating techniques and severely limit the range of persuasive tools available to us as advocates and, given that judgments give reasons that need to persuade in their own way, judges.

Humour has a bad rap. It is not uncommon to hear 'hilarious' examples of courtroom humour being recounted at Dinners of Occasion, buried under piles of oratorical muck so thick with self-aggrandisement as to smother any vestige of what was once, at best, a mildly amusing remark –consigning it to a deep well of the truly unfunny. Fool's gold is not hard to come by in war stories. As an example, *The Oxford Companion to the High Court of Australia* (OUP, 2001), in its entry on 'Humour', tried hard to dredge what it could from almost a hundred years of material and was only able to exhume such rib-cracking funnies as:

> Solicitor-General: "That concludes the first branch of my argument."
> Justice Menzies: "Mr Solicitor, would not 'twig' be a more appropriate word?"

I am literally *slapping* my thigh (it's not even a conscious reaction). But wait! Before you've had a chance to pick yourself up off the floor and catch your breath, there's more where that came from,

> Counsel: "Your Honour has me on the ropes"
> Chief Justice Mason: "On the canvas would be a more accurate expression."

And hurrah! (Etc.)

Humour is a valuable rhetorical instrument, it is a wonder it is not used more often. The reason is probably because it is so difficult a maelstrom to tame if one wishes to put it to the task of building one's own, or destroying an opponent's, argument. When it is used well it can be devastating, when imprudently employed, it can be fatal to the user.

Subtlety works best when attempting humour before a judge, as judges consider themselves to be subtle intellects (that is, 'subtle intellect' in the sense of a mind capable of discerning the finer points, not 'subtle intellect' in the sense of having smarts so barely there as to be indistinguishable from the thick air mouldering around the judicial brain).

Justice Kirby often worked the crowd in this dead-pan mode. An example from the *Oxford Companion*, taken from *Johnson v American Home Assurance Co* (1998) 192 CLR 266:

> *The ninety-first Psalm reflects the common human fear of injury to the foot. The Psalmist promises rescue from various misfortunes. The angels, we are assured, will take charge over the righteous:*
>
> *'They shall bear thee up in their hands, lest thou dash thy foot against a stone.'*
>
> *Unfortunately, angels did not intervene to protect the appellant's foot. But he had an insurance policy. This case concerns his attempt to obtain earthly rescue from the insurer.*

The example is light and yet the reader is instantly engaged. But is this the first box to tick when considering how best to write a judgment, that it be readable? Not if that's all the judgment does; although one is more likely to engage with an argument or legal principle if it is made available to you as a reader and not something you have to forage for like a truffle-pig in a wet forest of ratios and obiter. Humour can clarify and find the nub of things. An argument or principle will not necessarily be correct merely because it is engaging, but if it is engaging its correctness is likely to be readily apparent and if incorrect, its falsity more starkly exposed. This is because people are drawn to think about it, not fall asleep over it as it blindsides and calcifies. This has got to be beneficial for our legal system and it's why the practice of good rhetoric is essential to it. Humour has some significant part to play in that practice.

Immediately it should be noted that humour ought not be thrown about lightly. The fear that it is, or will be, founds the chief criticism of the use of humour, that it is it inappropriate. This is often taken to be Received Knowledge of Unassailable Truth. The Hon Murray Gleeson, when Chief Justice of the High Court, and speaking to attendees of the National Judicial Orientation Programme in 1998, spoke particularly of the use of humour by judges and gently sneered at,

> *...what might generously be described as judicial humour. Some judges, out of personal good nature, or out of a desire to break the tension that can develop in a courtroom, occasionally feel it appropriate to treat a captive audience to a display of wit. Sometimes this is appreciated by the audience, but sometimes it is not. When it is not the consequences can be very unfortunate. Judges and legal practitioners may underestimate the seriousness which litigants attach to legal proceedings, and they can become insensitive to the misunderstandings which might arise if the judge appears to be taking the occasion lightly or, even worse, if the judge appears to be making fun of someone involved in the case. Without wishing to appear to be a killjoy, I would caution against giving too much scope to your natural humour or high spirits when presiding in a courtroom. Most litigants and witnesses do not find court cases at all funny. In almost ten years of dealing with complaints against judicial officers to the Judicial Commission of New South Wales I have seen many cases where flippant behaviour has caused unintended but deep offence.*

None of that could, with respect, be doubted, except perhaps his not wanting to appear to be a killjoy. No such caution was shown in the very informative and meticulously researched, but ultimately soporific, Boyer lectures his Honour gave over six long weekends in late 2000 on the *Rule of Law and the Constitution*. The recordings were available at the ABC shop—a fact I know to be true because my mother gave me copies of the discs for Christmas that year, thereby dispelling any notion of her having anything but the blackest of humours, if not souls.

Similarly, the Hon Dyson Heydon threw ice blocks down the trousers of many an aspiring comic judge and, by extension, barrister, when he said in 'Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years'—part of an excellent collection of essays published as *Rediscovering Rhetoric* (Federation Press 2008):

> *Prepared humour, however, rarely works forensically, whether at the outset or at any later stage. Prepared judicial humour, of course, tends to trigger sycophantic, prolonged and bogus laughter on the part of everyone at the bar table, but that does not*

> “By reflecting on techniques and always interrogating underlying assumptions we develop the study and practice of advocacy, of rhetoric.”

make it right…it disturbs the solemnity with which grave issues should be approached.

“Sycophantic, prolonged and bogus laughter” is a phrase to remember when next guffawing obligingly at a judicial bon mot, whether in court or whilst thinking of whether to include the said judge in the list of referees for a silk application (think: ‘am I prolonging enough?’ and bear in mind the apparatchiks who stayed alive by clapping until their hands bled when appreciating Stalin’s jokes. Yes, you probably could laugh for just a *little* longer).

In other jurisdictions, judicial humour is perhaps not so alien. The two-page tour de farce of Hammond J, sitting in the High Court of New Zealand, (*Lowe v Auckland City Council* [1993] NZHC 238) is a case in point. In that case his Honour was called on to determine a Grave Issue and review Auckland City Council’s decision to fine a ratepayer $100.00 (in New Zealand money, if it can be called that) for failing to register his German Shepard, Ben. The reasons refer to the appellant’s claim that he was on “an invalid benefit, the exact amount of which is so pitiful that I forbear to mention it here”. The judgment is commendable reading for students of the absurd and should make a barrister think twice before highlighting the experience of attendances in that Court on their VicBar website profile. Is it the story we find funny, or the fact that New Zealand’s *High Court* was required to hear it? Probably both. Clearly Hammond J felt he was in a hilarious position, which he emphasised by inserting well-timed, if not exasperated, Latin aphorisms and the full text of a memorandum received from the apparently exasperated trial judge (his Honour noted that the first instance Judge was, “blessed with an anonymity not conferred on me”). Mercifully, the unsuccessful Respondent did not seek to appeal to the Privy Council.

The fact that the criticism of inappropriateness is often levelled by Eminent Jurists can often mean that the tremulous young advocate will discount and pooh-pooh the use of humour at all. Maybe (asks this tremulous young-*ish* advocate) this is to the detriment of the development of the advocate’s art. Litigation is a serious business and the experience often extremely stressful for all participants. Parties do not like to think their stressful experience is being disregarded and could hardly be impressed by lightness that falls thuddingly. The point is, however, the parties will be equally displeased if the argument has not worked, that is, if it has failed to engage and persuade the listener. Advocates should be always ready to hone their skill and they do that by engaging with the craft, interrogating its ‘rules’ and, on occasion, respectfully placing some of them in the toilet.

It is a supposed thing of legend that Sir Owen Dixon was not a funny man. All young barristers feel they know this and his dower face glaring down from his standing portrait which hangs in the chambers bearing his name, observing all those walking before him in a slightly bemused, disapproving way, confirms what we think we know—to be a great barrister (like Sir Owen Dixon) one must eschew levity. But this is probably to think too little of our most regarded Chief Justice and not allow for the fact that he undoubtedly did appreciate humour and its effectiveness, including when it cropped up in Court to level the playing field. A brief example is given in Philip Ayres’ biography of Owen Dixon (The Miegunyah Press, 2nd Edn 2007), when detailing the hearing of the *Bank Nationalisation Case*,

The atmosphere was unfriendly, the tensions considerable not only between barristers but also on the bench –Starke and McTiernan, for instance, were not talking to each other. Among Barwick’s supporting counsel was Richard Ashburner, among Evatt’s was P.D. Phillips KC. Phillips kept up a running commentary of dissent on Barwick’s six-day argument until finally Ashburner complained that owing to the noise Barwick was making addressing the Court he could not follow Phillips’ argument, a witticism that scored an entry in Dixon’s diary—it was his style of humour.

(Lest he ever be taken too seriously, it should be remembered too that Sir Owen looks down from his portrait through a cascading [is it voluptuous?] full-bottomed wig.)

And in thinking about how young barristers are encouraged to believe there is a blanket-ban on the use of humour, could anyone who has completed the readers course in the last 20-odd years have failed to appreciate the subliminal ecstasy of Professor Irving Younger as he demonstrated the techniques of effective advocacy, always building in a frothing crescendo to a paroxysm of hilarity. Was the hilarity intended? Yes. It was his effective way of getting his serious point, his *Ten Commandments of Cross-Examination*, across.

Notwithstanding the tendency to squash the prospect, the role of humour in advocacy and in judicial writing is worth reflecting on. By reflecting on techniques and always interrogating underlying assumptions we develop the study and practice of advocacy, of rhetoric. This is important because our judicial system is built on an assumption that the advocates who present arguments will each do so in the most persuasive way, with the result being that the decisions made should be based on a judge being convinced of an argument (the role of jury members is deliberately omitted, facts not principles are left to them). In this way, it is hoped, laws and judicial determinations should make sense at a common level and not be mere abstractions.

Humour is a universal human communication device. Humans succeeded, to date at least, as a species in large part due to our capacity to communicate and co-operate with each other. Showing others that you have a sense of humour is the most efficient way to ensure survival, from an evolutionary perspective. The other way to ensure survival, through brute strength, is very taxing on the energy consumption of the body and can require several long lunches to build up the stamina. Also, it is usually unsuccessful in achieving its ultimate aim. It is well known among biologists that whilst alpha-male chimpanzees are busy smashing the living daylights out of each other in an effort to win entitlements to the females, the beta-males will slink off with the ladies to tell jokes and generally have a good time. The beta-males are more successful, from an evolutionary perspective. The point is not to wonder at the proportion of alpha-males in practice at our Bar, rather it is to draw an analogy (admittedly stretched, but entertaining nonetheless) to submit that brute force of argument is not necessarily the only, or best, method to ensure the argument is accepted.

If advocacy is the art of persuasion (and it must be, Professor Hampel says so) then humour is at the heart of persuasive technique. To be persuaded a listener needs to feel allowed to agree, that is, the arguments must seem natural: matters on which reasonable minds might agree. Humour is a bedrock mechanism for establishing empathy. So much has been understood for a very long time, including by Cicero, who was almost as qualified as Professor Hampel. In *De Oratore* (described in Justin Gleeson SC’s essay, ‘Cicero’s De Oratore, Pro Milone and the Philippics: Character, Argument and Emotion’, in *Rediscovering Rhetoric*) Cicero acknowledged the role of wit in advocacy:

…it serves to win goodwill for the author; everyone admires acuteness which is often concentrated in a single word uttered either in repelling or delivering attack; it shatters or obstructs or makes light of the opponent or alarms or repulses him; it shows the orator to be a man of finish, accomplishment and taste; and most of all it relieves dullness and tones down austerity. However, there are limits on the use of wit. The audience prefers more serious weapons to be applied to the wicked and dislikes mockery of the wretched. The orator can easily tip over into the buffoon with an inappropriate use of wit.

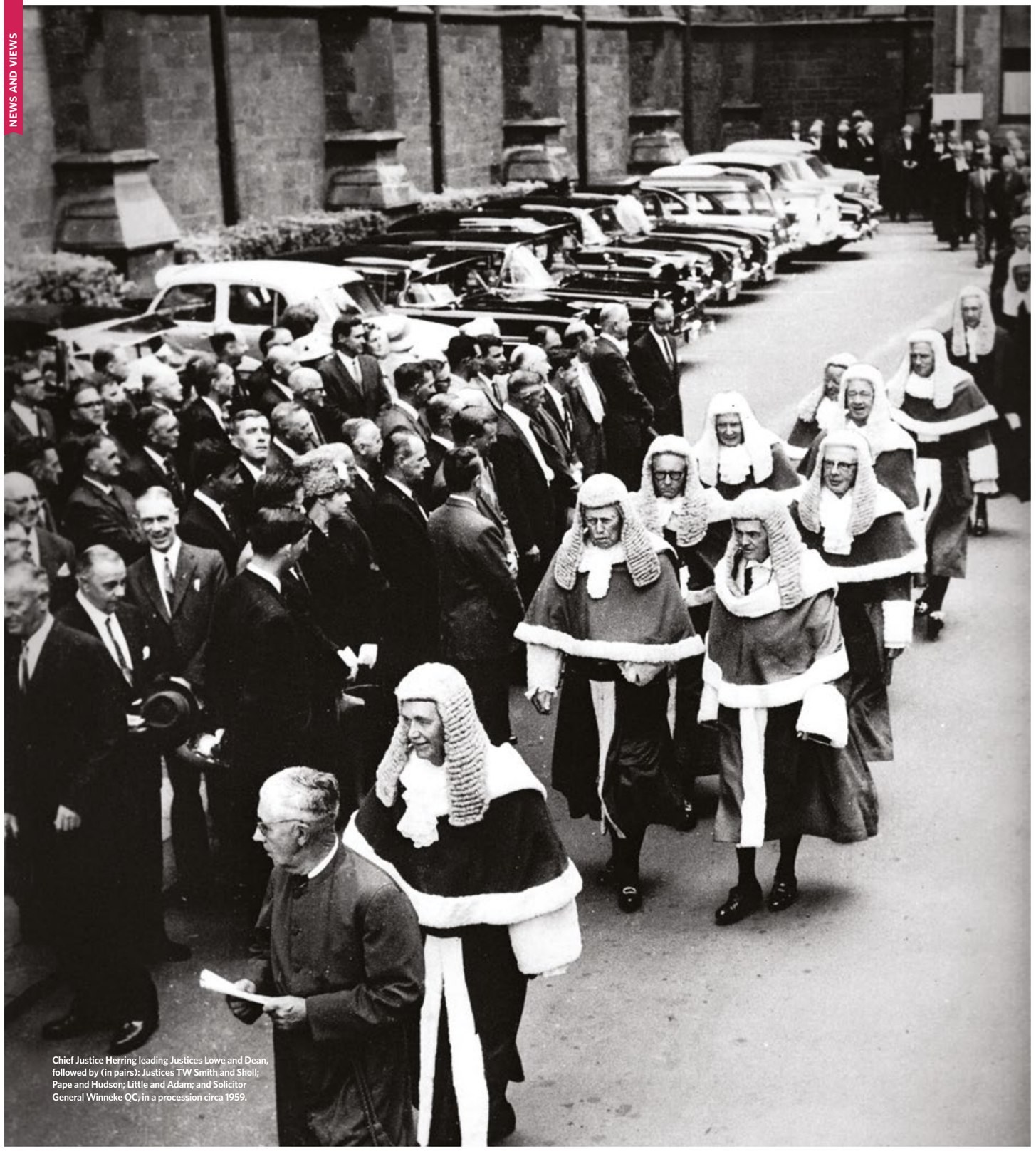
This approach is to acknowledge and welcome humour as a tool, but not let it rampage through the house, leaving vulgar notes in the fridge. Humour can reveal truth in ways that stern hectoring, or even well intended didacticism, cannot.

> “What the role of the Fool represents is the truth of the renegade seer, the one who can use levity to pierce obfuscation, but can only do so because he sits outside of an austere paradigm.”

Remember the Fool in *King Lear*—the professional jester and the only character in the play able to see clearly (even Cordelia is blinded by narcissistic martyrdom, disguised as loyal humility). King Lear hardly bubbles with one line funnies from the Fool being cracked between the play’s many banishments, indignities, adulteries, murders and eye gougings; although if King Lear has any funny line (albeit unintentional), it is Cornwall’s, on scooping out Gloucester’s one remaining eye, “out vile jelly!” which line often gets a laugh born of nervous energy from an audience just subjected to a harrowing torture scene. What the role of the Fool represents is the truth of the renegade seer, the one who can use levity to pierce obfuscation, but can only do so because he sits outside of an austere paradigm. He is not bound by convention, in fact, he is obliged to challenge it in order to fulfil the role of wise jester. Isn’t there the touch of the barrister in Lear’s Fool? Isn’t it a part of a barrister’s professional bones to feel obliged to challenge convention (within limits of ethical strictures and decorum) in order to make an inconvenient argument or represent a morally or politically unpopular client? Don’t we, like Lear’s wise Fool need to be prepared to interrogate and challenge power (whether in the form of the Ignorant Judge or Bombastic Silk or Spitting Instructor or Hysterical Client, or worse still, the Anonymous Legislator)? And isn’t power most terrifying when it is blind (although, this is not to say it is less scary when focussing its eyeball on a particular minority or idea)? Of course, Lear’s Fool cops it in the end. But it is apt to recall that Lear does not come to sight again at the end of the play wholly on his own—it is the Fool who leads Lear to the truth and he’s the only one with sufficient wit to do it in a way that is able to break through the fog.

Humour is undoubtedly a difficult skill to master and usually only works when it seems unmastered—or at least unaffected. It is probably true that many who have attempted it have wished they hadn’t, even as they stood open-mouthed in the courtroom, feeling the air-conditioning slowly dry out their lower throat and hearing nothing but the sound of the judge’s eyelids blink. Nevertheless, practice at the Bar needs humour and in truth it is not so foreign to us. Its use as a rhetorical means should be better understood, not feared, bearing in mind the revelatory power of humour—its ability to convince that the truth was always there, just hidden behind a little quip.

NEWS AND VIEWS



Chief Justice Herring leading Justices Lowe and Dean, followed by (in pairs): Justices TW Smith and Sholl; Pape and Hudson; Little and Adam; and Solicitor General Winneke QC, in a procession circa 1959.

The History of the Service for the Opening of the Legal Year

English Antecedents and the Melbourne Version

THE HON JOHN M BATT[1]

English antecedents

Before the Reformation, the custom of celebrating, at the opening of the judicial year, a Red Mass, attended by judges and lawyers, had originated on the Continent, the first recorded instance being at Notre Dame Cathedral in Paris in 1245. From the time of Edward I (who reigned from 1272 to 1307) such a Mass was offered in Westminster Abbey at the opening of Michaelmas term at the beginning of October, when the Legal Year commences in England.

A Red Mass is a solemn votive Mass in honour of the Holy Spirit, offered to invoke divine guidance for the new court term, the Holy Spirit being the source of wisdom, understanding and counsel, qualities required in the administration of justice. It is so called because the vestments are red, representing the tongues of fire symbolising the presence of the Holy Spirit. The judges also wear red robes. Traditionally, the servers are barristers in robes. The coming together of the Church and the Law may seem strange to some, but at least in England the Lord Chancellor was in early centuries both an ecclesiastic and a lawyer. Additionally, the Henrician legislation of the 1530s made the Church "by law established".

The Red Masses, which of their nature are very public, were not celebrated from the time of the Elizabethan Settlement and did not resume until late in the 19th century. While it is sometimes stated that such law services have been held continuously since the Middle Ages, it is doubtful whether, following the Elizabethan Settlement, services for the reopening of the legal year continued at Westminster Abbey but according to the rites of the Church of England. The possibility cannot be excluded, but the first such service is recorded in 1897. *Freeman's Journal*, on 11 December 1897, reported: "On Monday, for the first time in centuries, the reopening of the Courts of Justice was marked by a public religious observance." The service in the Abbey that day was attended by all the leading members of the profession and was such that it was thought, rightly as it turned out, likely to become an annual fixture.

Law services have been held annually in the Abbey since 1897 with the exception of the years 1940 to 1946 because of damage suffered to the

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Abbey during World War II and the year 1953 because the Abbey was still decorated for the Queen’s Coronation. The judges, a colourful sight in their full-bottomed wigs and ceremonial ermine-trimmed red robes, hoods and lace ruffs and cuffs, or in special robes of higher judicial office, arrive in a procession from Temple Bar, nowadays usually by car, though formerly on foot. Barristers wear formal court dress and solicitors and others concerned in the administration of justice attend. Statements of the size of present day congregations vary widely from 1,000 to 700 or 600. The service now appears to be ecumenical although Roman Catholics have had their separate service at Westminster Cathedral since its opening in 1903. The service is followed by a reception known as the Lord Chancellor’s “breakfast”, the word “breakfast” a reminder that before the Reformation those attending would have fasted before receiving communion in the service.

The Melbourne version

The first service in Victoria for the opening of the Legal Year occurred in Melbourne on Sunday 11 April 1841, when Mr Justice Willis, the first judge of the Supreme Court of New South Wales resident in the then Port Phillip District of New South Wales, attended a service at St James’s Church (now the Old Cathedral) accompanied by members of the infant Bar of the District in wig and gown. The next day the Court was opened for the first time in the District and at the opening the judge’s commission from Governor Gipps was read by the clerk.

Whilst it appears that for a number of years before 1946 a Red Mass was celebrated in one of the Roman Catholic churches in Melbourne, the earliest co-ordinated cathedral-style Law services in Victoria were held on 1 February 1946. On that day at St James’s Old Cathedral the Chief Justice, Sir Edmund Herring, led into church the procession of Supreme Court Judges (Macfarlan, Lowe, Martin and Fullagar), followed by Chief Judge Piper of the Arbitration Court and County Court judges, for a service conducted by Archbishop Booth with Anglican forms. Every seat was occupied, the service being attended by some 570 men and women of the law, including the previous Chief Justice (Sir Frederick Mann), the Attorney-General (Mr William Slater) and the veteran politician and solicitor G H Wise, who at the age of 92 made the trip from Sale, where he practised, for the service. Each year after 1946 on the day the Supreme Court resumes sitting after the long vacation, the service has been held in St Paul’s Cathedral.

The other service on 1 February 1946 was a Red Mass at St Patrick’s Cathedral. The procession was led by Gavan Duffy and O’Bryan JJ. According to *The Argus*, the congregation numbered some 300. Since then a Red Mass has been celebrated annually, usually at St Patrick’s Cathedral, on the same day as the service at St Paul’s, but usually at an earlier hour.

In 1947, the second year, over 1,000 attended St Paul’s Cathedral, including 100 barristers (a very large proportion of the practising barristers), one of whom was a woman. Sir Arthur Dean, a judge from 1949 to 1965, wrote in 1968 that the Chief Justice’s “proposal” to mark the opening of the Legal Year with religious services and by other means had been “markedly successful since 1946 both in Melbourne and in the provincial cities”.

In 1953, Mr EC Rigby CBE (who, subject to the Chief Justice, was the main organiser of the St Paul’s services from 1945 until his death in 1958) wrote that he expected to have 1200-1300 persons in attendance and that the idea of the service was spreading. The service was broadcast by a commercial station with a preliminary description of the procession and reported in the then evening newspaper, *The Herald*.

The transcripts of the 1955 and 1956 broadcasts are a roll call of leading judges, lawyers, and civic personnel of the past, including the Governor, Sir Dallas Brookes, and Lady Brookes. They disclose a confidence not now felt that there would be an attendance of at least 1200 and that there would be “a full attendance” at the Red Mass and Jewish services. Photographs from this period show Sir Edmund Herring leading the non-Catholic members of the then small Supreme Court bench from the Chapter House towards the Cathedral, all in Windsor dress, scarlet and ermine-edged winter robes and capes and full-bottomed wigs, an impressive sight. (In more recent times summer robes have, fortunately, been worn.)

The Cathedral archives hold Orders of Service for the years 1946-1948, 1950-1979, 1990-2004 and 2012-2013. In 1946, the Revd JD Mc Kie preached four months before his consecration. Thereafter, besides the several Archbishops and Deans, there have been guest preachers, who in the main have been provincial bishops, heads of other denominations, and leading clergy of other City churches or of collegiate or like bodies. In 2002 Fr Frank Brennan SJ AO, a law professor, was the guest preacher.

Because of gaps in the Cathedral’s holdings the following review of readers and attendances is incomplete and could be misleading. In the halcyon days of the ‘fifties and ‘sixties usually one of the lessons was, and sometimes both were, read by holders of high judicial, executive or political office, such as Sir Edmund Herring as Chief Justice and later as Lieutenant-Governor; Sir Henry Winneke as Solicitor-General and later as Chief Justice; Sir Charles Lowe ACJ; Prime Minister RG Menzies KC; Senator JA Spicer, Commonwealth Attorney-General; three Victorian Attorneys-General; Governors Sir Rohan Delacombe and, more recently, the Hon. Richard McGarvie, John Landy, and Dr David de Kretser; BL Murray QC, Solicitor-General; Frank Menzies, Crown Solicitor; and Professor Paton, University Vice-Chancellor. 1950 was a bumper year, with the Premier (The Hon T T Hollway) and the Prime Minister (Menzies) reading the lessons. In more recent times judges, along with the President of the Law Institute and the Chairman of the Bar Council, or their representatives, have continued to read lessons or, sometimes, non-scriptural or secular passages.

Seating is reserved each year for Ministers, Members of Parliament, the Lord Mayor and Town Clerk or CEO, though it is nowadays rarely fully occupied.

The 1946 service established the essential structure of the liturgy. It consisted of the National Anthem, versicles and responses, a psalm, lessons from the Old and New Testament, an address, an anthem by the choir, a prayer for “Our Sovereign Lord, King George,” the collect “Prevent us, O Lord, in all our doings” and the Lord’s Prayer, intercessions and the blessing, together with several hymns. There have always been prayers for the Sovereign and those in authority, for those entrusted with the administration of justice, and for righteousness and peace or for those in need.

Generally, the hymns have been well known ones, such as The Old Hundredth, “O God our help in ages past”, “Praise to the Holiest in the height”, “Immortal, invisible, God only wise”, “Praise my soul the king of heaven”, “The king of love my shepherd is”, and, as the final hymn, “Now thank we all our God” or, later, “All creatures of our God and King”.

The Court of Chancery in the mid 15th century. In this illumination on vellum, the Lord Chancellor is, unusually, not depicted as an ecclesiastic (in contrast to the Master of the Rolls). Counsel are busy with writs at the bar table and in the foreground a student (or a solicitor) examines (or chews) a pen.

From 1950 to 1958 there were set out in the header of the first page of the liturgy, perhaps for contemplation before the service, various verses in Latin from St Ambrose’s hymn *Splendor paternae gloriae*, the Meaux Breviary, the Cahors Breviary, a 7th century hymn and Bernard of Cluny. Latin had only recently ceased to be a prerequisite for Law at the University and so most present would have understood the verses.

By 1990 one finds a new heading “National Anthem (‘Advance Australia Fair’)”, but with the (in my opinion, much better) words adapted by Dr RL Sharwood, followed by the hymn “God save our gracious Queen” sung as a prayer for the Queen’s Majesty and for the administration of justice.

> “Whilst in several Australian cities and towns the services are now ecumenical, alternating between Anglican and Roman Catholic cathedrals, this has not occurred in Melbourne, although members of the judiciary have attempted to orchestrate such a service.”

The liturgy in the 1990 Order of Service was divided into numbered sections:

1. *The everlasting God and His Law;*
2. *The Human Right to Freedom and Responsibility;*
3. *Justice and Mercy in the Word of God; and*
4. *Prayers.*

In the second section there was a secular reading—from “Of Civil Government” by John Locke. The inclusion of a third and secular reading continued to 2006, but the readings in 2002- 2004 were religious, though not from the Bible. Since 2006 there has been a third scriptural reading, from a Gospel.

In 2002 the front of the Order of Service proclaimed a theme for the service, “Religion and the Role of Law in these troubled times”, and the service was tied to that theme. In 2003 again there was a theme, “Religion and the Role of Law in times of Terrorism”. The National Anthem was now headed simply “Advance Australia Fair”. That year seems to have been the first in which representatives of other denominations took part in leading the prayers. The 2013 Order of Service seems to be the first to call its service “Ecumenical”, though the service has long been so advertised.

From 1947 a reception, modelled on the Lord Chancellor’s breakfast, was held by the Judges of the Supreme Court at 11.30am in the magnificent reading room of the Court’s Library. Attendance was by invitation of the Judges, with the Heads of Churches, various dignitaries, leaders of the profession and public servants being among those invited. This continued for many years and then the receptions were moved to 4.30pm or some such time before being abandoned, I think to save the Court costs, towards the end of last century. The receptions were very crowded affairs. In recent years refreshments have been offered in the narthex of St Paul’s Cathedral after the service.

Sir Edmund Herring intended that services for the opening of the legal year should be held in the principal provincial cities in Victoria and such services have been held in circuit cities and towns in the State. The first Geelong Law services, a Red Mass and a “Protestant service”, were held on the day before the first Geelong sittings of the Supreme Court in 1952. It is not known how long such services continued, but they were revived by Justice Croft in 2011, by which time they had taken the form of an annual ecumenical service. One may also cite, as an example, the ecumenical service in St Paul’s Anglican Cathedral at Sale in 1981, attended by the presiding judge, Mr Justice Tadgell. Services for the opening of the legal year have also occurred, and in many cases continue to occur, in Adelaide, Brisbane, Perth and Sydney.

Whilst in several Australian cities and towns the services are now ecumenical, alternating between Anglican and Roman Catholic cathedrals, this has not occurred in Melbourne, although members of the judiciary have attempted to orchestrate such a service.

It appears there has been a Jewish service since 1956 and in more recent times, it seems this service has alternated between Orthodox and Reformed synagogues. A Greek Orthodox service commenced many years ago, but there has not been one in every year since. A Buddhist service has been held in some years this century. A secular gathering commenced in 2008 under the auspices of the International Commission of Jurists (Victoria).

I conclude by noting that, in modern times, Red Masses take place in many places besides England and Australia, including Edinburgh, Dublin and Quebec City. In the United States the Red Mass tradition is especially strong. The first was held in Detroit in 1877. Perhaps the best known is that celebrated annually since 1953 in St Matthew’s Cathedral, Washington, DC, on the Sunday before the first Monday in October, the latter being the day the Supreme Court of the United States begins its annual term. It is attended by Supreme Court justices, members of Congress, members of Cabinet, attorneys and others.

1 The Hon J M Batt was a judge of the Supreme Court of Victoria from 1994 to 2005 and a Judge of Appeal from 1997 to 2005. His Honour was Deputy Chancellor of the Anglican Diocese of Melbourne from 2002 to 2007 and Chancellor of the Anglican Diocese of Wangaratta from 2005 to 2010. This is an abridged version of a paper read to the Anglican Historical Society (Melbourne Diocese) by him on 19 June 2013.

INVITATION

The Dean and Chapter of St Paul’s Cathedral warmly invite members of the Victorian Bar and members of the Legal Profession to the Ecumenical Opening of the Legal Year Service, on Monday 3 February 2014, 9.30am, in the presence of His Excellency the Governor.

The Rt Revd John Parkes, AM KSJ LLB, Bishop of Wangaratta, will preach. This year, the Judges will provide morning tea after the service and welcome the opportunity to meet socially with other members of the profession.

Changes to Jury Directions in Criminal Trials

The *Jury Directions Act 2013* (Vic)

SHAUN GINSBOURG

Major changes to jury directions in criminal trials made by the *Jury Directions Act* 2013 (Vic)[1] have applied to all trials commenced after 1 July this year.

The Act was conceived by the Victorian Law Reform Commission in 2009,[2] and implements the recommendations of a review by the Department of Justice in 2012.[3] The Act seeks to address concerns that jury directions had become overlong and incomprehensible,[4] that their governing laws were too complicated,[5] and that misdirections had resulted in too many re-trials.[6]

The Act begins a staged reform process. It is currently limited to dealing with foundational and procedural matters, and with only two specific areas considered to be in the most pressing need of reform—the burden of proof and consciousness of guilt.[7] The next stage of reform is likely to involve inserting new provisions into the Act that deal with complicity, inferences and circumstantial evidence, tendency and coincidence evidence, and unreliable evidence. The Judicial Directions Advisory Group, convened by the DOJ, has published recommendations about these areas of law.[8]

Key changes

Guiding principles

Section 5 sets out “guiding principles” that must inform the application and interpretation of the Act. Section 5(4)(c) requires that a trial judge, in giving directions, “be as clear, brief, simple and comprehensible as possible”. This provision will provide strong support to a submission that directions proposed by an opponent, or the trial judge, are over-inclusive and therefore should not be given.

Sources of directions

Under the scheme of the Act, directions may originate from one of four sources.

The first is “general directions”, defined by s3 to mean “directions concerning matters relating to the conduct of trial generally.” These are essentially uncontroversial matters such as trial procedure. The Act does not prescribe the content of these directions and thus leaves current practice unchanged.

The second source is directions required by other legislation, for example, the directions on consent a trial judge may be required to give to a jury under s37AAA of the *Crimes Act 1958* (Vic) in a trial involving sexual offences.

The third source is directions sought by a party under the Part 3 directions request procedure, discussed below. The fourth source is directions necessary to avoid a substantial miscarriage of justice in the particular circumstances of the case under s15.

The directions request procedure

Part 3 provides that between the close of evidence and the start of addresses, defence counsel must tell the trial judge[9] what is in issue for each charged or alternative offence, alleged basis of complicity, and any defence: s10.

Prosecution and defence counsel must then each request “that the trial judge give, or not give, to the jury particular directions” for each issue and the evidence relevant to the issue: s11. The trial judge must give any direction requested by counsel unless there are “good reasons” for not doing so: s14. The trial judge need not give any direction not requested by counsel unless a substantial miscarriage would result, in which case a direction is required: s15.

Part 3 abolishes the common law rule—attributed to the decision in *Pemble v R* (1971) 124 CLR 107—that a trial judge must direct the jury in respect of any issue open on the evidence to be determined favourably to the accused, irrespective of whether the issue is raised by defence counsel. Section 16 expressly abolishes the rule.

The rule was heavily criticised by the VLRC and DOJ reviews. It was said to unnecessarily lengthen and complicate directions, particularly when trial judges, uncertain about the rule’s application, were over-inclusive in their jury charge. Further, the rule was said to be prone to exploitation by experienced defence counsel “reserving” appeal points by not raising available defences.[10]

Section 15 limits the trial judge’s obligation to give directions not requested by defence counsel to only those that are necessary to avoid a substantial miscarriage of justice. Thus any bases for acquittal that are open but tenuous at best would not require direction under the new Act, although they might once have enlivened the rule in *Pemble*.

Part 3 narrows the trial judge’s obligation to give directions requested by defence but not otherwise raised during the trial or addresses to the jury. Under s14(2), a judge’s determination of whether there are “good reasons”

> “The selective adoption of the Canadian and New Zealand model directions creates a serious risk of injustice.”

not to give a requested direction must take into account a failure by the defence to otherwise raise or rely on the matter. Under the *Pemble* rule, the fact that a matter is open on the evidence, even if not raised by counsel, would arguably determine that the trial judge has an obligation to direct.

Integrated directions

Directions that combine factual questions with legal directions, or a reference to the parties’ cases, are described as “integrated directions” by s19, which permits such directions to be given to a jury. For example, in a kidnapping case where the accused is alleged to have driven the complainant away in a locked car, the jury may be directed to acquit the accused unless they answer affirmatively the question: “Are you satisfied that A took C to a place different from the place she wanted to go, and locked the doors while driving?”[11]

Integrated directions are central to a series of measures in Part 4 that seek to make directions shorter and easier for juries to understand. Sections 17 and 18 generally restrict directions about the law and evidence to only so much as is necessary for the jury to determine the issues in the trial. Further, s19 provides that any law or evidence addressed in an integrated direction need not be repeated elsewhere in the charge.

Burden of proof

Part 5 of the Act effects very significant changes to the law about what juries may be told regarding the burden of proof.

Section 21(1) provides that if the jury directly or indirectly asks about the meaning of “beyond reasonable doubt” the response may include the following directions (among others) currently prohibited or discouraged under Victorian law:[12]

» *Under s21(1)(c), the judge may “indicate that it is almost impossible to prove anything with absolute certainty when reconstructing past events . . . and . . . the prosecution does not have to do so”.*

» *Under s21(1)(e), the judge may “indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility”.*

The DOJ review adopted these directions from model charges formulated by the Supreme Court of Canada in *R v Lufchus* [1997] 3 SCR 320 and the Court of Appeal of New Zealand in *R v Wanhalla* [2007] 2 NZLR 573. But the review declined to adopt the direction contained in the concluding sentences of both charges, which equated being satisfied beyond reasonable doubt to being “sure”.[13] The *Wanhalla* direction, for example, concludes: “if you are not sure that the accused is guilty, you must find him or her not guilty” (at [49]).

Directions that equate satisfaction beyond reasonable doubt with being “sure” are also given in the United Kingdom but are currently prohibited under Victorian law.[14]

The selective adoption of the Canadian and New Zealand model directions creates a serious risk of injustice. As Iacobucci J said in *R v Starr* [2000] 2 SCR 144,15 the entire *Lufchus* direction is necessary to convey to the jury that “[i]f standards of proof were marked on a measure, proof ‘beyond reasonable doubt’ would lie much closer to ‘absolute certainty’ than to ‘balance of probabilities’”. Without the full direction, there is a real danger the jury will place the standard at a lower point in the space between the two alternatives.[16]

A direction to juries that they should be “sure” before convicting would accord with principle. In *Keeley v Brooking* (1979) 143 CLR 162 Barwick CJ said: “To be satisfied beyond all reasonable doubt is, for the purposes of the law, to be certain.”[17] While it might well be thought unwise to direct juries in these terms under the currently restrictive approach, the more permissive s21(1) makes such a direction appropriate and desirable in a case where the trial judge has given directions under paragraphs (c) and (e).

Post-offence conduct

Part 6 of the Act renames “consciousness of guilt” evidence as “incriminating conduct evidence” (s22) and significantly changes the law in this area. Written notice must now be served before the prosecution can rely on incriminating conduct evidence (s23). The trial judge is no longer required to warn a jury about incriminating conduct evidence unless requested by defence to do so (s26) or required to do so to avoid a substantial miscarriage of justice (s15). Thus, for example, a warning that there are innocent reasons why a person may lie is no longer required unless requested (s26(a)) or compelled by s15.

Section 28 abolishes the common law requirement that warnings such as these should sometimes be given despite the wishes of defence[18]. This change should be welcomed. Defence counsel can now prevent a warning that he or she considers would harm his or her client’s interests by suggesting to a jury an improper line of reasoning that would not have otherwise occurred to them.
On the other hand, the change means that defence counsel must ensure they specifically request beneficial warnings, otherwise the trial judge will not give them, and any complaint on appeal will most likely be futile.

Another change effected by Part 6 is the removal, by s25(2), of the current requirement that a trial judge specify each act or omission covered by post-offence conduct directions. This change will shorten directions considerably in cases where the prosecution relies upon multiple lies. Part 6 does not change the test for admission and use of incriminating conduct evidence. The trial judge must first determine whether use of the incriminating conduct evidence is reasonably open, having regard to the evidence as a whole (s24). The jury must then be directed that they may only treat incriminating conduct as an implied admission if satisfied that it is the only reasonable explanation for the conduct (s25). This mirrors the common law at least as it has stood since *R v Ciantar* (2006) 16 VR 2619.

Section 28 cleans up any surviving rules that apply specifically to the proof of indispensable intermediate or essential facts by use of consciousness of guilt evidence. However, the removal of these rules is of little practical significance given the retention of the “no reasonable explanation” test by s25.

Conclusion

The *Jury Directions Act* 2013 should be seen as an opportunity for barristers to have an increased influence in the outcome of the trials in which they appear. The Act makes them the primary authors of trial directions. It also entrusts them with the power to prevent common law warnings—such as warnings about consciousness of guilt evidence—which in their judgement will do their client’s interests more harm than good. Finally, the more sparse content of judicial directions under the new Act will increase the prominence of counsel’s addresses, and hence their significance in jury deliberations.

1 References to “the Act” and sections in the Act in this article are references to the *Jury Directions Act* 2013 (Vic).

2 Victorian Law Reform Commission, *Jury Directions: Final report* (2009) (“VLRC report”).

3 Criminal Law Review, Department of Justice, *Jury Directions: A new approach* (2012) (“DOJ report”).

4 VLRC report, 30; DOJ report, 21–7.

5 VLRC report, 66; DOJ report, 19–21.

6 DOJ report, 27–8; VLRC report, 32.

7 DOJ report, 33.

8 Weinberg, M, et al, *Simplification of Jury Directions Project: A report to the Jury Directions Advisory Group August 2012* (“Weinberg report”).

9 By necessary implication, in the absence of the jury.

10 DOJ report, 41–7, DOJ report, 45–7.

11 This example is adapted from one given in the DOJ report, 71.

12 *R v Hettiarachchi* [2009] VSCA 270.

13 DOJ report, 93.

14 *Benbrika v R* [2010] VSCA 281 at [141] and see n99.

15 Quoting with approval from the judgment of Twaddle JA in the Manitoba Court of Appeal in the same case.

16 *Starr*, 267-8.

17 *Keeley*, 168.

18 *R v Hartwick* [2005] VSCA 264.

19 See also DOJ report, 109.

Castles in the Air

The Extension of Owen Dixon Chambers West. EDWIN GILL[1]

BCL has been developing accommodation for the Bar for nearly 55 years.

In 2009 BCL negotiated the purchase of Owen Dixon Chambers West (purpose built for the Bar), consolidating ownership and long term control of Owen Dixon Chambers East and West as the home of the Bar.

Despite significantly expanding the supply of chambers in recent years vacancies have remained low with significant unsatisfied demand.

BCL has considered leasing additional space, purchasing additional space as well as the expanding of existing owned buildings. Despite the significant short term challenges involved in adding additional floors to Owen Dixon Chambers West it seems overwhelmingly the best alternative for the long term. Considerable work was undertaken assessing and analysing alternatives.

In relation to the key factors of (i) demand; (ii) design; and (iii) position, BCL believed that:

i. There was excess demand generally but, in particular, for space of the type that could be provided by this development. In addition, a range of other chambers will become available as a consequence.
ii. Subject to practical and financial constraints, such a solution would enable furniture, fittings, finishes and services to be tailored to suit demand.
iii. Higher floors generally offer better views and a significant number of those seeking space place a high emphasis on views. The higher cost of building at that height on an existing and operating building is offset by the economies achieved from the use of existing services and common areas to the extent that is possible.

The engineering assessments and the initial feasibility analysis were completed late in 2012 enabling the BCL Board to conditionally agree that the project proceed. With the support of Bar Council, the design and more extensive analysis commenced at that time. Construction commenced in July 2013.

The construction of these new floors will add approximately 80 chambers to Owen Dixon Chambers West on floors 19, 21, 22, 23 and 24.

Plans of each floor, together with architectural images/renderings, are available on the BCL website (*bcl.net.au*).

Gray Puksand were appointed architects and Kane Constructions as builder. The extensive consultant team, the core members of which are noted below, provides some indication of the complexity of the project.

The upgrade of the high-rise lifts, which is now an integral part of this project, had been planned for 2014/15. The upgrade includes not only new motors, controls and fit-out of lift cars but also the extension of the lifts to the lower ground or Lonsdale Street level. It is presently planned that an upgrade of the low-rise lift bank will follow.

In going ahead with this project, BCL remains committed to improving accommodation and services to the Bar. To this end, BCL continues to undertake the ongoing refurbishment of Owen Dixon Chambers East, Owen Dixon Chambers West and Douglas Menzies Chambers, our owned buildings, as well as our tenancies in space leased by BCL. These refurbishment projects will proceed without interruption during the construction of the Owen Dixon Chambers West extension.

BCL would like to thank Gray Puksand Architects and the consultant team for their excellent work in designing this premium extension, scheduled for completion late 2014.

The vision of the Board of BCL in proceeding with this project should be commended as it clearly involves significant challenges but will be of long term benefit to the Bar.

Despite the short term challenges, we are certainly hopeful that upon completion tenants will appreciate the resolve and foresight of BCL and Bar Council in proceeding, thereby strengthening the Bar in an area of utmost importance to its core activities. The development of Owen Dixon Chambers will not only satisfy the current demand for additional chambers, including existing chambers becoming available as tenants relocate to the new floors, but will also help support and strengthen collegiality amongst members.

Consultant Team

GrayPuksand—Architects
Charter Keck Cramer—Valuers
Slattery Australia—Quantity Surveyors and Cost Planners
Design Guide—Building Surveyor
Equiset Constructions—Builders
Clive Steele Partners—Structural Engineers
Hanson Associates—Acoustic Engineers
Aurocon—Façade
ERM—Planning
Wood Grieve Engineers, specialists for the following:

» Mechanical (Air-Conditioning)
» Fire Protection
» Hydraulic (Water)
» Vertical Transportation (Lifts)
» Electrical and access control

1. Edwin Gill is the Managing Director of Barristers Chambers Limited

Artist's interpretation of the extension

HOBNOBBING *with* BARRISTER BLOGGING

PAUL DUGGAN[1]

Lack the time, publisher or masochism to write a legal text book?

But have an idea, observation and potential audience all worth more than a 140 character-limited tweet?

Then get a blog or contribute to someone else's—the obvious candidate is the Victorian Bar's recently launched blog—*bloggersatthebar.com*.

You won't be the first barrister blogger. There are at least a dozen active at the Victorian Bar already.

Further afield, the US and UK Supreme Courts each host their own blogs (*scotusblog.com* and *ukscblog.com* respectively) and the University of Melbourne Law School has recently launched its own, focusing on the High Court of Australia—*blogs.unimelb.edu.au/opinionsonhigh*.

What's involved in launching a blog?

For your blogging debut you will need an article (long or short) you are happy to share with the world, no more tech savvy than any competent email user, a spare half hour or so and a budget of precisely zilch.

Next step is to find a blogging host on the net like *wordpress.com*. You might opt to pay for some premium trimmings for your blog but you don't have to pay a cent to get started with something that looks entirely respectable.

You then set up an account, copy and paste your article on to your new blog, press the 'publish' button and wait for Google and its equivalents to bring 'viewers' to you. Readers who like your efforts can then choose to 'follow' your blog ('subscribe' in oldspeak) and will then be

automatically emailed your latest offerings whenever you add ('post' in blogspeak) to your blog.

But once you have your own blog, don't feel too special — *wordpress.com* alone hosts more than 60 million of them.

The hard part comes next. How do you maintain a blog that holds your interest and your audience's? And, besides, why would you bother?

I asked a few barrister bloggers for their thoughts. Here is a sampling of their responses.

Why do you blog?

Peter A Clarke (*www.peteraclarke.com.au*): "I enjoy writing. Always have. I like the discipline of trying to write concisely to a wider audience than a judge and an opponent. And there is a marketing element to it."

Sam Hopper (*samhopperbarrister.com*): "Because it works for the area of work I am targeting and for my personality."

Stephen Warne (The Australian Professional Liability Blog / *lawyerslawyer.net*): "It assists one's professional profile to the extent that the content is good. It is very useful as a repository of my own knowledge; if Ross QC had been born later I reckon "Ross on Crime" would be a blog. Blogging is also a species of service to the profession."

How much time does it take on average per month?

Miguel Belmar (*townplanningbarrister.com*): 1 to 2 hours.
Peter A Clarke: 8 to 16 hours.
Travis Mitchell (*travismitchellbarrister.com*): 10 to 20 hours.

Is blogging work or leisure for you?

"It is the greatest source of pleasure in my job," said Sam Hopper.
"Definitely work," said Travis Mitchell.
"Both," said almost everyone else.

Has your blog brought you work?

Sam Hopper: "Yes, it has brought me work but I don't know how much. (My clerk assures me that half of my marketing activities do not work. Unfortunately he won't tell me which half.)"

Stephen Warne: "Yes—including from interstate and internationally. Apart from interstate work I have advised clients in Russia, the Seychelles and Fiji and currently have a brief to appear in the Fiji Court of Appeal—all exclusively the result of the blog."

Has your blog brought you unwanted/unwelcome attention professionally or socially?

Stephen Warne: "The other day Brind Zichy-Woinarski QC was the first person to quote my blog at me in court. Sometimes to prevent this from happening I unpublish posts (which is easy to do)."

Sam Hopper: "I was approached by a pretty girl on a tram about a year ago

My first thought was, 'I've still got it'.

She said, 'This might sound a little strange…'

My second thought was, 'Yes, I really do still have it.'

Then she said 'I follow your blog.'

I heard the sound of a bubble bursting. Then we talked about our respective children. Oh well, it was fun while it lasted!"

Tips and traps for baby bloggers?

Miguel Belmar: "Write something."

Peter A Clarke: "If you blog on legal cases keep a check on exuberance and making glib comments, no matter how witty they sound in your head. It is amazing how many litigants search their own cases on the internet, sometimes years after the event. Some have written to me complaining about my style."

Travis Mitchell: "Work out your target audience. Don't publicise your blog until you have a few blogs actually posted already and then make sure you post regularly (especially to begin with)."

1. Paul Duggan's blog is at *paulduggan barrister.com*.
His focus is commercial litigation and commercial litigators.

> "For your blogging debut you will need an article (long or short) you are happy to share with the world, no more tech savvy than any competent email user, a spare half hour or so and a budget of precisely zilch."

Readers are also referred to the Ethics Committee Bulletin Number 3 of 2013, reproduced on page 71 of this *Bar News*, concerning obligations of barristers when commenting on cases in the media.

Ethics Committee

BULLETINS

Ethics Committee Bulletin 3 of 2013

BARRISTERS AND THE MEDIA

1. The Ethics Committee wishes to draw attention to the provisions of the Rules which prohibit a barrister from expressing personal opinions in cases in which the barrister is involved.
2. In the view of the Committee, the fundamental importance of the independence of the Bar is reflected in the Rules which prohibit a barrister from expressing personal opinions in cases in which the barrister is involved.
3. For example, Rule 18 provides that a barrister must not even in court express a view on evidence or a material issue which conveys the barrister's personal opinion on the merits of that evidence or issue.
4. This is also reflected in Rule 58 which relates to barristers' dealing with the media. It relevantly provides that:
   (a) a barrister must not publish or take any steps towards the publication of any material concerning any current or potential proceeding which appears to or does express the opinion of the barrister on the merits of the current or potential proceeding wor on any issue arising in the proceeding other than in the course of genuine educational or academic discussion on matters of law.
   (b) subject to (a) the barrister may publish or assist in publishing material concerning current proceedings by answering unsolicited questions limited to information as to the identity of the parties or of any witnesses already called, the nature of the issues in the case, and the client's intentions as to further steps in the case.
5. The Committee considers that "proceeding" for the purpose of the Rule includes applications before tribunals and disciplinary proceedings.
6. The Committee notes the very limited communications between barristers and the media allowed by Rule 58.
7. In the view of the Committee, caution ought always be exercised by a barrister in making public statements about cases in which the barrister is involved outside of court or tribunal hearings.

HELEN SYMON SC
CHAIR

Back of the Lift

In this Back of the Lift Section of the Victorian Bar News, the Bar acknowledges the appointments, retirements, deaths and other honours of past and present members of our Bar that occurred up to 6 September 2013.

Adjourned Sine Die

Federal Court of Australia

The Hon Justice Gray STEPHEN REBIKOFF

Family Court of Australia

The Hon Justice Young QC JOHN WERNER

The Hon Justice Dessau AM LINO MARCHETTI

Supreme Court of Victoria

The Hon Justice Harper AM QC KEVIN LYONS SC

Silence All Stand

Federal Court of Australia

The Hon Justice Pagone PHILIP SOLOMON SC

The Hon Justice Davies MELANIE SZYDZIK

The Hon Justice Mortimer ELIZABETH BENNETT

Family Court of Australia

The Hon Justice Johns ROHAN N HOULT

Federal Circuit Court of Australia

Her Honour Judge Jones ALLANA GOLDSWORTHY

Her Honour Judge Stewart ROHAN N HOULT

Victorian Court of Appeal

The Hon Justice Santamaria PHILIP CRUTCHFIELD SC

Supreme Court of Victoria

The Hon Justice Elliott VBN

The Hon Justice Ginnane PETER LITHGOW

The Hon Justice Sloss DAVID BATT SC

The Hon Justice Croucher ASHLEY HALPHEN

Supreme Court of Tasmania

The Hon Justice Estcourt THE HON PETER HEEREY AM QC

County Court of Victoria

His Honour Judge Ryan CATHERINE PIERCE

His Honour Judge Couzens AMY BRENNAN

His Honour Judge Cosgrave FRANCIS TIERNAN SC

His Honour Judge Meredith VBN

Magistrate's Court of Victoria

His Honour Deputy Chief Magistrate Braun TIM BOURKE

His Honour Magistrate Maxted VBN

His Honour Magistrate Lennon VBN

Obituaries

Brian Shaw QC THE HON JUSTICE HAYNE AC

Anthony Bonnici AM VBN

Maitland Lincoln SAM TATARKA

The Hon Barry Connell ROBERT HEATH

Roger Cleary IAN MCEACHERN

Stephen Shirrefs SC PETER MORRISSEY SC

Rowan McIndoe THE HON SALLY BROWN AM

John McArdle QC SUE MCNICOL SC

Back of the Lift
Adjourned Sine Die

Federal Court *of* Australia

The Hon Justice Gray

Bar Roll No 1022

At the ceremonial sitting of the Federal Court on 17 May 2013 to mark the retirement of Justice Peter Gray after 29 years as a judge of the Court, Chief Justice James Allsop stated: "the Court today is losing a part of itself." He noted that Justice Gray had served the Court for longer than any other judge in the Court's history, and that the name of the Honourable Justice Peter Gray was present in every volume of the Federal Court Reports from volume 1. In addition to the (more than 1700) judgments his Honour delivered during his time on the Court, his Honour leaves a legacy through his work in the areas of labour law, land rights and judicial education that stands as a testament to a career spent in the pursuit of social justice and devotion to the rule of law.

His Honour was educated at Carey Baptist Grammar School and the University of Melbourne. After graduation, he spent two years as associate to Justice Richard Eggleston on the Commonwealth Industrial Court, before completing a BCL at Magdalen College, Oxford. On returning to Australia in 1972 his Honour went straight to the Bar, reading with John Winneke QC. At the Bar, his Honour practised widely in his early years before establishing a reputation as a leading advocate in the field of industrial law. In 1984, at the age of 38 he was appointed to the Federal Court, the youngest person then so appointed.

His Honour once reflected that his judicial career had three phases: his early years in the Court's industrial division and on the Industrial Relations Court; his two terms as Aboriginal Land Commissioner under the Aboriginal Land Rights Act; and his later years as a docket judge in the Court's general and fair work divisions. The second of these phases included extended periods in remote locations, and was not without its hazards—often at the hands of his associates. He was abandoned in the bush, lost in a crocodile-infested swamp, and on one occasion left behind during a 4WD crossing of the Simpson Desert. But he also received an exposure to aboriginal people and culture that led him to describe this period as the most satisfying aspect of his legal career.

By the time of his retirement he had seen three Chief Justices and 54 judges come and go from the Court, and was the only judge to sit on a Full Court with both a former reader (Justice Marshall) and a former associate (Justice Bromberg). Although renowned for his forthright judicial manner, among friends, colleagues and former associates he is known for his irreverence, his love of the guitar and harmonica, and his enthusiasm for languages, bad puns and rhyming slang. His Honour has expressed a desire to continue his roles in indigenous mentoring and judicial education, and to spend more time with Ruth, their daughters Belinda and Alex, and his grandsons, Thomas and Wilbur. The Bar wishes him every joy in his retirement.

STEPHEN REBIKOFF

Family Court *of* Australia

The Hon Justice Young QC

Bar Roll No 1205

During their time on the bench, some judicial officers develop reputations as quiet, hard-to-read types. Sitting motionless as the Sphinx, they hear carefully crafted submissions in silence, without giving counsel the slightest indication as to whether their client has attracted judicial sympathy or their application is a winner in the making. Justice Young wasn't one of them.

Prior to accepting his appointment, Peter Young QC had a reputation amongst his peers as a sharp thinker, brilliant with numbers and capable of getting quickly to the heart of complicated legal issues. Those attributes no less characterised his Honour's 11 years on the bench as they did his previous 27 years at the Bar.

His Honour's practice was to dissect submissions as they unfolded, often mid-sentence, typically with a cheerful disposition. His Honour was careful to identify the probative evidence before him. He asked what questions he wanted answered. He gave litigants in person a generous audience. If he hadn't always read the file before walking on to the bench, it was because he didn't need to.

His Honour's great passion was horse racing, and it infiltrated every aspect of his judicial office, to the amusement of all who recognised it. According to his associates, his Honour's reserved judgments were typically written in chambers to the backdrop of the racing on the radio. He was known for asking his associates whether the barristers were "*in their stalls*" prior to walking on to the bench. He was heard to remind a confident applicant's counsel at interim hearings that there was always "*the possibility of someone getting a rails run*" at the trial.

His Honour conducted trials as the gentleman of the turf that he was. Unresponsive witnesses were shown the rails, hot-tempered cross-examiners were delicately tranquilised, and unmeritorious arguments were euthanased with dignity. His Honour was a considerate, respectful and utterly unflappable judge who managed litigants with grace and sensitivity; but come judgment day there was never any doubt as to who was first over the finish line.

The Hon Peter Young QC retired from the Family Court of Australia in April 2013. Until such time as a Collingwood supporter is appointed Chief Justice, the distinctive red sash over the black judicial robe will stand as Justice Young's enduring legacy to all present and future judges of the Family Court; a product, so it's said, of his Honour's life-long support for the Essendon Football Club.

Meanwhile, the Family Law Bar looks forward to Peter Young QC's continuing contribution to the profession in his capacity as a mediator.

JOHN WERNER

The Hon Justice Dessau AM

Bar Roll Number 1472

On 21 June 2013 members of the legal profession, family, and friends gathered in the Family Court at Melbourne to farewell Justice Linda Dessau on the occasion of her retirement following some twenty-seven years as a Judicial Officer, serving nine years as a Magistrate and eighteen years of outstanding service to the Family Court.

Her Honour was called to the Bar in 1979. This was a difficult period at the Bar and when she signed the Roll of Counsel on 29 March 1979, her Honour was the only person to do so. However, as was noted in the addresses at her farewell sitting, her Honour came to the Bar well equipped, having previously gained an Honours Law degree from Melbourne University and had risen to be an Associate at Wisewoulds.

Prior to her appointment to the Family Court in 1995, Justice Dessau had served as a Magistrate in the Children's Court, Coroner's Court, and the Melbourne Magistrates' Court. Additionally, following her call to the Bar, her Honour had been appointed as Crown Prosecutor, and then Senior Crown Prosecutor, in Hong Kong.

During her time with the Family Court, Justice Dessau enjoyed a reputation as a hardworking, professional, calm and compassionate judge. By way of illustration, her Honour chaired the Magellan Committee in the Family Court from 1997 to 2005, dealing with the most complex cases in which judicial case management is most critical and urgent. As a trial judge, her Honour always demonstrated an unwavering capacity to empathise and connect with litigants whilst still maintaining the dignity of the Court.

Further, her Honour was also involved in a number of national projects within and outside the Family Court ranging from child abuse, family violence, less adversarial proceedings, mediation, and judicial education.

Of significance, Justice Dessau was recognised for her service to the judiciary, particularly in the area of family law policy and practice, and to the community, when in 2010 she was appointed a Member of the Order of Australia.

Her Honour's achievements, however, are not limited to the legal profession. Justice Dessau has had a long standing involvement in various community institutions and boards, including opera, hospital, and football organisations. In particular, her Honour has been a passionate Essendon Bombers supporter and was appointed to the AFL Commission in 2008.

In her farewell reply, her Honour noted that she looks forward to the next stage of her professional, community, and family life. The Bar wishes her Honour every continuing success.

LINO MARCHETTI

Supreme Court *of* Victoria

The Hon Justice Harper AM QC

Bar Roll No 924

Justice David Harper retired from the Supreme Court of Victoria in June 2013 after 17 years as a trial judge and four years as a judge of appeal. His career is the epitome of distinguished service. Both as a barrister and a judge, he has used his considerable talents to improve the law and its administration. And he has done so with integrity, with humility, and with unfailing goodwill and good humour.

His Honour came to the Bar in 1970 and quickly established a busy commercial practice, taking silk in 1986. He made an enormous contribution to the Bar and its governance. He served on Bar Council for ten years including as Chairman in 1990-91. He also served as a director of Barristers' Chambers Limited during the development of Owen Dixon Chambers West. In these difficult roles, he was known for his patient, measured and wise response to issues which arose.

Justice Harper was appointed to the Supreme Court in 1992. As a judge, he had about him an innate sense of fairness. He treated everyone with dignity, with courtesy and with respect: whether fellow judges, barristers, parties, witnesses or court staff. He sought to ensure that even the losing parties went away feeling that they had received a fair hearing: in that endeavour, he was always successful.

His Honour brought to his work as a judge his great humanity and an appreciation of the human context in which disputes arise. He understood that people, often good people, make mistakes. His judgments were thoughtful and clear, imbued with compassion and fairness.

His Honour worked to improve justice in Australia and beyond. He was President of the Victorian Chapter of the International Commission of Jurists for seven years. Since 2000, he has been Chair of the Victorian International Humanitarian Law Advisory Committee of Australian Red Cross. He was a part-time commissioner of the Victorian Law Reform Commission and its predecessor. He was President of the Judicial Conference of Australia between 2010 and 2012. He was also President of the Victorian Association for the Care and Re-settlement of Offenders from 1995 to 2011. For these and other services to the community, he was made a Member of the Order of Australia in 2008.

The Hon David Harper AM QC is held in the highest regard by his colleagues in and outside the law. It is not only because he fulfilled all these roles with great distinction; it is also because he is an exceptionally fine person. As a judge of the Supreme Court, he will be much missed.

KEVIN LYONS SC

Silence All Stand

Federal Court *of* Australia

The Hon Justice Pagone

Bar Roll No 1956

In June 2013, Justice Gaetano (Tony) Pagone was appointed a Justice of the Federal Court of Australia.

Unusually, his Honour's judicial welcome on 21 June 2013 was the third occasion on which his Honour had been welcomed upon appointment as a judge. But I should commence at the beginning.

Justice Pagone came to the Bar in 1985. His Honour had, before then, received high academic distinctions in law from both Monash University and the University of Cambridge. Justice Pagone read with Allan Myers. His Honour was tutored by the very best in matters of taxation: in addition to his Master, that included Brian Shaw QC and Neil Forsyth QC.

His Honour had three readers, until the prospect of further readers was cut short by his speedy appointment as a silk in 1996. His Honour became an eminent tax silk. His Honour's magisterial command of language stood him in good stead in all superior courts.

His Honour's first appointment as a judge occurred in October 2001. It was a short-lived adventure. It was nevertheless noticeable (among other things) for the following extract in the important State Revenue case of *Uniqema v Commissioner of State Revenue* [2002] VSC 157.

Paragraph [3] commenced:

> *The Stamps Act 1958, unlike the capital gains provisions in the Income Tax Assessment Act 1936, does not specifically identify goodwill or its value as an item of property for assessment to duty under Heading VI. Goodwill can be an elusive concept and as difficult to hunt as a snark.*

The footnote to the passage was then as follows:

> *Lewis Carroll, The Hunting of a Snark.*

Perhaps bereft of further literary inspiration, his Honour resigned after six months. His Honour became Special Counsel to the Australian Taxation Office, appearing on behalf of the Commissioner in the Commissioner's most important tax cases. His Honour returned to private practice at the Bar in 2004.

The Bar's loss was again to the gain of the administration of justice, when in May 2007 his Honour accepted appointment for the second time to the Supreme Court of Victoria.

Commencing in 2009, his Honour became the Judge-in-Charge of the Commercial Court of the Supreme Court of Victoria. The role required energy and enthusiasm and his Honour brought those qualities in spades. A new Green Book for the Court was prepared under his Honour's guidance, processes were streamlined and innovative new procedures introduced. Extraordinarily, his Honour also found the time to publish two works of scholarship: *Tax Avoidance in Australia* (published in 2010) and *Tax Effective Writing* (published this year).

It might be supposed that his Honour has a fondness for taxation law. Perhaps his Honour has formed the view that the challenges presented by Federal taxation law will best suit his Honour's temperament and experience. His Honour's contribution to the law will, no doubt, continue to be substantial.

PHILIP SOLOMON SC

The Hon Justice Davies

Bar Roll No 1769

As a consequence of featuring in numerous articles and speeches on the occasion of her Honour's appointment to the Supreme Court, her Honour's passion for daring outdoor activities is well-known. Many may also be aware of her Honour's test of fortitude when required to stare down a very large brown bear during the course of a hiking trip in the Rocky Mountains.

Her Honour commenced her legal career in 1979 with Paveys (now Corrs Chambers Westgarth) where she completed her articles. She was admitted in 1980 and in 1983, signed the Bar Roll, reading initially with Kevin Mahony, until his appointment as Senior Master of the Supreme Court, then Philip Mandie, now retired Justice of the Court of Appeal.

Justice Davies was appointed Senior Counsel in 2004, having had a commercial practice specialising in revenue law. Her Honour was well suited to the demanding life of a silk and was briefed in some of the largest and most demanding tax cases. She was a leading revenue law advocate in Australia.

Her Honour demonstrated an extraordinary commitment to the Bar, evidenced by years of service on the Ethics Committee (including as Chair), the Equal Opportunity Committee, the Federal Court Users Committee, as President of the Tax Bar Association and as Assistant Convenor and Secretary of the Women's Barristers' Association

and, for a term, as a member of the Bar Council. She was also a member of the Business Law Section of the Law Council of Australia and on the education committee of the Tax Institute of Australia.

In 2009, her Honour was appointed a judge of the Supreme Court of Victoria. While at the Court, her Honour was one of the founding judicial officers of the Commercial Court and headed the Corporations and Taxation Lists.

Her Honour is also a Senior Fellow at University of Melbourne, lecturing in taxation law and written advocacy. Her Honour is a generous and inspiring teacher and mentor, who despite her many commitments gives of her limited time to support and assist past students and those she has mentored throughout her professional career.

With her unfailing tenacity and organisational efficiency, her Honour more than managed to combine the challenges of the Bar with the upbringing of her two sons, Rohan and Lachlan. Family is central to her, and with her Honour's love of challenging sporting endeavours being shared by her sons, her siblings and her parents, these two passions are frequently combined with much enthusiasm and joy. It is with that in mind that it was particularly special that her Honour's father, who had preceded her at the Federal Court, was on the bench at her Welcome Ceremony.

The Victorian Bar wishes her Honour satisfying and distinguished service as a Judge of the Federal Court of Australia.

MELANIE SZYDZIK

The Hon Justice Mortimer

Bar Roll No 2331

Debbie Mortimer SC was appointed a Judge of the Federal Court of Australia on 12 July 2013. Her Honour, a proud New Zealander, was born and raised in the western suburbs of Auckland. Her Honour's legal career started with a job in a law library in Auckland at the age of 14 where the decision to become a lawyer was made. True to that vision, her Honour subsequently attended Monash University where she obtained the Supreme Court Prize for both the Bachelor of Jurisprudence and the Bachelor of Laws in 1985 and 1987 respectively. Her Honour then completed articles at Goldberg & Window in Richmond, before becoming the Associate to Sir Gerard Brennan in the High Court.

Sir Gerard encouraged her Honour to become a barrister without returning to practice as a solicitor. Her Honour signed the Roll of counsel in 1989, reading with Neil Young (later QC). Following the birth of her Honour's son, Bryden, her Honour transferred to the Academics List of the Bar Roll, and became an Assistant Lecturer at Monash Law School.

Her Honour returned to the Practising List of the Bar in 1994 after the birth of her daughter, Hayley. A broad practice was quickly established at the highest levels in administrative and constitutional law, anti-discrimination and extradition law. Her Honour took silk in 2003.

Her Honour regularly appeared in significant cases either defending or challenging government decisions. Her Honour appeared in a range of notable cases, including landmark immigration matters stretching from *Tampa* in 2001, to *Plaintiff M61* and *Plaintiff M70* in 2010 and 2011 respectively.

Her Honour was the head of the Human Rights Committee at the Victorian Bar, and has a list of awards spanning her career. Notable among those awards, the Law Council of Australia's President's medal was awarded to her Honour in 2011. Also in 2011, her Honour received the Tim McCoy Award for Community and Legal Work, the Law Institute of Victoria President's Award and the Australian Human Rights Commission Law Award.

In addition to her reputation as an outstanding advocate, her Honour was known to junior barristers as an involved and supportive mentor and role model. Her Honour has also retained an involvement in academia, continuing to teach, including in conjunction with Cheryl Saunders in the Masters Program at Melbourne University.

Her Honour has been a key contributor to the intellectual and ethical rigour of the Bar over the last two decades. They are also the attributes that will make her Honour a formidable but fair Judge of the Federal Court.

ELIZABETH BENNETT

The Family Court *of* Australia

The Hon Justice Johns

Bar Roll No 3193

Notices in the lift are always looked at with mixed feelings. Apart from the occasional death notice and reminders that some of us have no hope of reaching our CPD points, there are the welcome notices of judicial appointments.

What a relief it was to see Sharon Johns' name on the notice board in July as a recent appointment to the bench of the Family Law Court of Australia.

No doubt her Honour will be pleased to know that part of this article will in the far future be cut and pasted as an obit, just to be posted in the lifts.

Now, Jake Shimabukuro is one of the best Ukulele players in the world but then again he's not a judge of the Family Court. Sharon Johns who was appointed a judge of the Family Court of Australia on 29 July 2013 is learning the Ukulele along with her son Sidney.

Her Honour may not have the time to reach the heights of Jake Shimabukuro or get to accompany Jimmy Buffet on Margaritaville, however, her well-received appointment will set a pleasant tone for all who appear before her.

Having been educated at Melbourne's Avila College, nestled in 1970's look alike Mount Waverley, her Honour completed her combined Arts and Law degree at Monash University.

The Arts degree helped her Honour develop her ongoing love of boogie boarding and the simple enjoyment of the sun and surf.

Her Honour's Law Degree led her to being admitted as a barrister and solicitor of the Supreme Court of Victoria in 1992.

Her Honour practised as a solicitor at Barker Gosling from 1993 until 1998 when she signed the Bar Roll.

Her Honour appeared in some of the more significant cases in the Family Court both at first instance and at an Appellate level and as an advocate was held in the highest regard.

A netball playing, ukulele picking, boogie boarder is just what we need up at the Commonwealth Law Courts right now.

Whilst her Honour's smiling face and cheery disposition will be missed around the corridors she is a most welcome addition to the bench.

ROHAN N HOULT

The Federal Circuit Court

Her Honour Judge Jones

Bar Roll No 3500

The elevation of Judge Suzanne Jones on 3 June 2013 to the Federal Circuit Court sees the addition of a hardworking, efficient and respected lawyer to this Court.

Judge Jones holds the academic qualifications of a Bachelor of Arts (Monash University) and a Bachelor of Laws (University of Melbourne).

Her Honour was admitted to practice in the Supreme Court of Victoria and was then called to the Bar in my readers group, in 2001. Her Honour was a well-respected and liked member of the Readers' cohort. She maintains many long-standing friendships from that time.

Her Honour had already made her mark in the field of Industrial Relations, as research assistant to Professor Dianne Yerbury at the Graduate School of Management at the University of New South Wales. Her Honour then served as an Associate to Deputy President Joseph Isaacs in the Commonwealth Conciliation and Arbitration Commission (now known as the Fair Work Commission) from 1977 to 1979.

Her Honour became the first woman to be appointed as an Industrial Officer of the ACTU.

In 1984, Judge Jones commenced work at the Australian Council of Trade Unions, becoming a Senior Industrial Officer in 1989 and a National Advocate in 1999.

Her Honour's work at the Victorian Bar covered a range of areas including industrial and employment law, discrimination law, personal injury law and immigration law. She was appointed to the Victorian Commission for Gaming Regulation from 2005 to 2011. She was also the Chair on the Victorian Law Reform Commission Advisory Committee on Employment/Work Place Relations Matters from 2002 to 2003. Her Honour was a part-time member of the Social Securities Appeals Tribunal whilst at the Bar.

In October 2011, Judge Jones was appointed as Commissioner of Fair Work Australia, plunging immediately into the Nurses Dispute—a particularly difficult, challenging and high profile matter.

As is her wont with all challenges facing her, her Honour applies her quiet and reserved demeanour, which she blends well with her ability to make decisions in a fair-minded and equitable manner.

Appointed as Head of the Termination of Employment Panel of Fair Work Australia in March 2012, her Honour notably brought her own touch to that role, bringing reforms that created greater emphasis on conferences to resolve matters alleging unfair dismissal, rather than formal adversarial hearings.

Judge Jones and I shared the experiences as "Mothers in Law" having children of similar ages. Our time together sharing chambers offered many chances to compare experiences, and to celebrate our successes on the home front and in the legal arena! Over that time I grew to know her as a hardworking, and very able lawyer. Her sense of humour was readily apparent, and she contributed greatly to the bonhomie on our floor of Isaacs Chambers.

Her Honour combines her legal career with family, snow skiing, love of travel and a predilection for supporting the Saints AFL team. I consider myself most fortunate to have shared chambers with her in our early days at the Victorian Bar (although our tastes in AFL football teams did not match!).

Her Honour has demonstrated her preparedness to work in new and difficult areas of law—and brings to her new role her determination, quiet resolve and adept legal abilities.

I am confident her Honour will bring to the Federal Circuit Court her substantial legal abilities, married with her commitment to justice and keen sense of fairness.

ALLANA GOLDSWORTHY

BACK OF THE LIFT

Her Honour Judge Stewart

Bar Roll No 2800

Kinky Friedman, founder of the Texas Jewboys and crime writer once said "money will buy you a dog, but only love will make it's tail wag".

The tails of two West Highland terriers were wagging faster than an unhappy judge's tongue when her Honour Judge Joanne Stewart was appointed recently to the Federal Circuit Court Bench.

Bobbie and Maisie are preparing to relocate to pleasant Parramatta, or preferably Sydney, to join her Honour, who has recently started sitting on the bench at the Parramatta Registry. Her Honour's partner Carey will accompany them. Talking to her Honour recently she told me her great loves were Bobbie and Maisie, her stepchildren, Carey, cooking and food. I think in that order.

Her Honour studied at Mooroolbark High School (which is in Victoria somewhere) was bought up by a single mother Maureen (who in her Honour's eyes has attained legend status) and with the aid of a beaten up VW drove her way into legal immortality at Monash University. Well, that's a bit over the top.

Her Honour did her articles at Mulcahy Mendelson and Round and joined the Bar in 1992. That year Charles and Diana had just separated and McDonald's had opened up in Beijing. These two events are representative of all family lawyers' dreams: a separation and a McDonald's changeover.

Her Honour read with the Honourable Peter Young QC and had two readers of her own, Sarah Mansfield and Sarah Fisken.

Her Honour was a brilliant, thoroughly prepared advocate, universally liked and respected, often feared and never ever wrong (so she often said).

But forget about all that. Above all, her Honour is a decent person, a voracious reader and a magnificent cook and hostess, hosting memorable Christmas parties.

Her Honour championed the Bar and in a recent conversation told me of the wonderful opportunities the Victorian Bar has given her. Let's hope her Honour remembers those sentiments if and when she returns to sit in Melbourne. There's nothing like an unhappy judge, and I am sure her Honour will never be unhappy.

ROHAN N HOULT

Victorian Court *of* Appeal

The Hon Justice Santamaria

Bar Roll No 1436

The island of Salina is a 90-minute boat trip from Messina in Sicily. I took that trip in 2012. If one goes to the cemetery on the island, one will see some very familiar and prominent Victorian family names. Bongiorno, Caleo, Costa, Dimmatina and Santamaria to name some. At the church on the island, a Santamaria family member says Mass—Father Felice La Rosa, who is B A Santamaria's first cousin, has said Mass on the island for well over 50 years.

Father La Rosa and his brother Nino, who also lives on the island, are intelligent, interested, patient and kind. They are leaders of their small community. They bind their community together and make people happy. They are especially attentive to underdogs, outsiders and those in need. Although his Honour's connection with the island is now tenuous, when I think of him, I think of Nino and Father La Rosa.

His Honour attends more funerals than anyone I have ever known. He does this not out of morbid curiosity but because he likes to attend the funerals of fellow Old St. Pat's Collegians and also of "old Movement people"— those who lived their lives in solidarity with the work of his Honour's late father, a leading Australian social activist for over 50 years. His Honour often returns from such a funeral saying excitedly "I had no idea that (the deceased) did x or y in his or her lifetime or that his second cousin was z". He is fascinated to learn of a person's family, social and professional connections.

His Honour has served the profession for 15 years as a Member, Deputy and Chairman of the Supreme Court Board of Examiners, as a member of the Council of Legal Education and as Chair of the Academic Course Appraisal Committee which approves universities and their courses for the legal profession. His Honour has also been a Member of the Bar Ethics Committee, a Trustee of the Bar Superannuation Fund, Chair of the CommBar Equity Committee and a member of the Bar's Academic and Continuing Legal Education Committees.

His Honour grew up as one of eight and has raised five children with his wife Susan (Soonie). The family is as close-knit as it is large and his Honour's commitment to all its members is no small matter. Six of his Honour's siblings and three of his children are law graduates (soon to be four when Helen graduates with her Melbourne JD). His siblings say it is because they cannot add up. This preponderance of lawyers means that while the love and mutual support within the family is palpable, so too is the high risk of the quip or pointed critique.

His Honour made the most of social as well as educational opportunities while at Oxford University. He developed cherished friendships there that have lasted decades and most significantly, met his English born wife Soonie there.

No one could accuse his Honour of living a life unexamined. Through university in Melbourne and Oxford, through his private study, and through his close relationships with a remarkably broad range of thinkers across the world, his Honour has immersed himself in the life of the mind.

Beyond his commitment to living his values, his Honour's defining characteristic is his inquiring mind. He is curious about most things and fascinated by the human condition.

His Honour is particularly interested in people and in teaching and helping others. His approach to people is the same, whether making submissions in Court, or buying a pie from Aldo who runs the Ferguson's stall at Victoria Market.

I had the pleasure of being a student in his Honour's Company Law classes in the 1980s. His Honour's patient and clear explanations of complex company law concepts set alight my interest in the topic. He is a natural teacher who imparted genuine enthusiasm for the law, and legal philosophy in particular, to many of my generation.

His Honour could be a beguiling and disconcerting advocate. Jeremy Ruskin QC describes his Honour as "that most cryptic of law arguers". In *Scanlon v The American Cigarette Company* [1987] VR 261, David Ashley QC (as he then was) was leading Ruskin for the plaintiff-applicant; Richard Stanley QC, leading his Honour, was for a defendant. It was a complex application for extension of time under the *Limitation of Actions Act*. His Honour made a "superbly cryptic" argument based on *volenti non fit injuria*. Ashley wasn't there, so Ruskin had to field it. So Delphic was his Honour's description of the *volenti* concept that Ruskin descended into panic. Over the luncheon adjournment, Ruskin sought counsel from Brian Shaw QC. Shaw sat looking pensively out of the window and slowly and deliberately placed each finger of his left hand seriatim against each finger of his right hand, and then reversed the process. After pausing further, Shaw said: "Santamaria's argument is silly". Suitably emboldened, Ruskin went back after lunch and persuaded the Judge to that point of view.

His Honour approaches life with humour and humility; qualities that help him to maintain a much admired independence and insouciance. His Honour appears to stand pleasantly apart from much of the cut and thrust of the legal world. He seems free from the insecurities that plague many of us, and charmingly indifferent to opinions about him.

It is no surprise then that so many within and without of the profession hold his Honour so dear.

His Honour's appointment to the Court of Appeal advances the administration of justice and furthers respect for the law. He will listen with an open mind, and with patience and care to the arguments made on behalf of the parties. Winners and losers will know they have had a fair day in Court.

His Honour's many friends wish him the very best in his new role.

PHILIP CRUTCHFIELD SC

The Supreme Court *of* Victoria

The Hon Justice Elliott

Bar Roll No 2484

Justice James Dudley Elliott was appointed to the Supreme Court of Victoria on 26 March 2013, thereby extracting one of the Bar's finest advocates and leaving a considerable void on the fourth floor of Joan Rosanove Chambers.

Schooled in Melbourne, Dusseldorf and Perth, and having always wanted to be a lawyer, Justice Elliott found his way to the law a little later than some, first working at a fast food outlet, then a major bank, and subsequently as part of a family furniture business. His Honour then headed east to become a 22 year old "mature age" student studying Arts/Law at Monash University while supported by his nursing wife, Tanya, and the limited funds his Honour could raise working in the bottle shop and bar at a nearby hotel. It has fairly been suggested that Justice Elliott was a far better barrister than he was bar attendant, and one might imagine that his Honour's pacifist nature and less than heavy build might not have been his most useful attributes during challenging moments at the hotel late on a Friday night.

Justice Elliott embraced university life, recognising it to be a privilege to be afforded the opportunity to attend university and gain what was then a free tertiary education; a matter which resonates strongly with his Honour today. Justice Elliott was an engaged and diligent law student who was recognised and respected for the results that flowed from his efforts—and no less so for being the primary carer for his first child, Josh, who arrived during those memorable but challenging university years. Family is, and always has been, central to his Honour's life and core.

Articles at Baker & McKenzie marked an enlightening year for his Honour. The 'fishbowl' in which his Honour and his compatriot articled clerks were collectively housed is fondly remembered by its inhabitants and his Honour has formed important and lasting friendships from that time. His Honour's next step in becoming Associate to Justice Brennan in the High Court laid the foundation for the fine legal mind that was thereafter to develop. His Honour speaks fondly and gratefully of this opportunity and experience, acknowledging not only its immense educational value but recognising that it was Sir Gerard who convinced his Honour to come to the Bar. And so it was that in 1990 Justice Elliott read with Peter Bick (now QC) and signed the Bar Roll.

As a junior barrister his Honour was "a most fashionable junior"; although those who shared chambers with him will immediately recognise that such a moniker was not directed toward matters sartorial. Hard work, honesty, intellect, humility, calm disposition and unrelenting integrity were but some of the qualities

BACK OF THE LIFT

that served his Honour well at the junior Bar. His Honour worked on challenging matters of all shapes and sizes in all forums. Four AM starts were routine and his Honour worked hard to serve his clients' interests and always to the best of his Honour's ability.

Justice Elliott was appointed as senior counsel in 2004 and Sir Gerard's exacting standards and strong work ethic remained ever-present in the way his Honour approached each task as a silk; he even developed a 'style guide' for his juniors that one suspects Sir Gerard would have been proud of. His Honour enjoyed popularity as a silk and an overflowing silk's practice emerged in no time at all. His Honour found great pleasure working with his juniors, as he did engaging with his six readers, and one suspects that this is an element of life at the Bar that he will sorely miss.

Outside life at the Bar Justice Elliott always gave his time freely and generously to friends and strangers alike, quietly supporting numerous causes and individuals in a manner and to an extent not known to many. In this, as in all walks of life, his Honour always acted selflessly and with compassion and dignity, including when faced with adversity, whether fairly or otherwise. His Honour finds solace at his farm in the King Valley which is the most special of places for him and Tanya. It must be said however, that to observe his Honour with a shovel in hand digging a trench nicely illustrates why his Honour's day job is and always has been directed towards pen and paper.

His Honour looked towards and embarked upon his appointment with his customary optimism, modesty, grace and enthusiasm and with the unwavering support of those closest to him: his wife Tanya and their children, Josh, Naomi, Caitlin and Jessica.

The Bar wishes his Honour satisfaction, good health and longevity in his new role. If history is any guide, the judicial qualities of balance, patience, courtesy, detachment and efficiency, which his Honour spoke of earlier this year, will emerge naturally enough.

VBN

The Hon Justice Ginnane

Bar Roll No 1519

On 7 May 2013, Justice Ginnane was appointed a Justice of the Supreme Court of Victoria.

Although Justice Ginnane was admitted to practice on 1 April 1977, it may confidently be said that his Honour was destined for a long and distinguished career in the law even before his admission to practice. His Honour's father, John Ginnane, had a long and distinguished practice in the Western suburbs of Melbourne before coming to the Bar.

His Honour graduated from the University of Melbourne with a Bachelor of Arts and Bachelor of Laws with Honours, obtaining prizes in employment law and sharing the exhibition in administrative law. His Honour was also an Assistant Editor of the Melbourne University Law Review, all pointers to an interest in and aptitude for the law.

Prior to admission to practice, his Honour served articles with Brendan McGuiness and on the day of his admission to practice, commenced work as Associate to the Honourable Reginald Smithers, Judge of the Federal Court of Australia.

Approximately 18 months later, his Honour signed the Bar Roll in October 1979 and read with Alex Chernov, later Justice Chernov of the Supreme Court and Court of Appeal, more recently Governor of Victoria.

His Honour had a busy and varied practice, principally practising in administrative law, employment and industrial law, trade practices and general commercial cases. His Honour was often briefed by the State of Victoria.

His Honour's practice was marked by attention to detail, hard work and unfailing courtesy. As a member of chambers, his generosity, advice and guidance, particularly to the younger members of the Bar, was renowned.

In 2003, his Honour took silk and quickly established a thriving practice as senior counsel. In 2009, his Honour was appointed a judge of the County Court of Victoria. Sitting in the County Court, his Honour's work was predominantly in the Commercial List together with extended periods of service on circuit in the Latrobe Valley, Shepparton, Bendigo and Wodonga, and two terms as a Vice-President of the VCAT. His Honour's attention to detail coupled with his Honour's courtesy and politeness ensured that the vast array and seemingly never-ending stream of work was dealt with without rancour or delay.

His Honour's link with the west of Melbourne was first established by association with his father's practice and his early education at St. Monica's in Footscray. His Honour's place as one of the heroes of the west was cemented by his Honour's significant part as counsel for the Footscray Football Club in opposing the VFL's application to revoke the Footscray Football Club's licence on the ground of insolvency in 1989.

The case was conducted on behalf of Ms Irene Chatfield, a member of the Footscray Football Club, and was instrumental in saving the existence of Footscray. The three-week adjournment provided time for millions of dollars to be raised in the "save the Bulldogs" campaign—a campaign which involved, amongst other things, the raising of money from supporters of all the other clubs and other active personal and corporate sponsors of Footscray.

His Honour was awarded a personalised Footscray (now Western Bulldogs) jumper and the undying thanks of Ms Chatfield, the Footscray Football Club and its many supporters.

His Honour has already shown fine form as a County Court judge, where his Honour's administration of the law has been of the highest order and while His Honour's recent appointment is the County Court's loss, it is a recognition of his Honour's continuing contribution to the law of this State. In that pursuit, the Bar wishes his Honour every success in his new role.

P.W. LITHGOW

The Hon Justice Sloss

Bar Roll No 2153

The Banco Court was filled to overflowing on 16 August 2013 when the profession gathered at the ceremonial sitting to mark the appointment of Melanie Sloss SC as a judge of the Supreme Court. The size of the crowd and the warmth of the welcome were testament to the very great respect in which her Honour is held and the affection with which she is regarded throughout the Bar.

Her Honour had been a member of the Bar for over 26 years, 10 of them as Senior Counsel. She read with Ross Macaw and John Karkar, and in turn had five readers herself: Rory Derham, David Batt, Chris Horan, Penny Neskovcin and Peter Willis.

Her Honour had a very substantial commercial practice, appearing in many major cases and being frequently retained in large, complex and long-running matters. Her workload was prodigious and her work ethic remarkable.

Nevertheless her Honour somehow manages to engage in an incredible range of activities. These include an unstinting devotion to the Tigers, a love of sailing, an unflagging fitness regime, regular registrations at conferences, attendance at what seems like almost every Bar seminar, and a less well known side as a rev head with a love for motor sports.

In addition to all this, her Honour devoted enormous time and effort in the service and betterment of the Victorian Bar. Most particularly she served as Chairman of the Bar Council, as well as Senior and Junior Vice-Chairman, but she also occupied many other positions, including on the Ethics Committee and the Executive of the Commercial Bar Association (for some 18 years), to name just two, as well as mentoring and assisting countless barristers.

Justice Sloss occupied chambers on level 18 of Owen Dixon Chambers West for some quarter of a century, sharing a secretary with Jim Merralls QC throughout. The floor is notable for the infrequency of any change in occupants, a feature which produced wonderful friendships but made it difficult for her Honour to secure larger chambers from the very small room in which she had commenced—a real problem given the vast body of papers arriving constantly for her attention.

Whatever facet of her Honour one considers, three particular sets of attributes emerge again and again: constancy and steadfastness; diligence and thoroughness; and loyalty and complete integrity—all qualities marking her as a quintessential candidate for judicial office.

DAVID BATT SC

The Hon Justice Croucher

Bar Roll No 3309

It comes as a privilege to inform members that the Hon Justice Michael James Croucher was welcomed as a judge of our Supreme Court on 9 August 2013. His Honour was born and bred in Myrtleford; a country lad in the truest sense who catapulted through later life after something of a late start. His Honour left school early to labour in green pastures but returned to academic pursuits 10 years later. At the ripe old age of 25, his Honour completed his education at Myrtleford Secondary College then glided through his Economics and Law degree at Monash University.

His Honour's timeline is a fast tracked version of events. Following his admission on 22 April 1997, two years then passed in a streak of speed as his Honour endured the rigours of practice as a criminal defence solicitor advocate. His Honour then signed the Bar Roll on 27 May 1999 and read with Simon Gillespie-Jones. A little over 12 years later, his Honour took silk.

By this stage, his Honour's practice was bursting at the seams; symptomatic of his rippling reputation and sheer ability. Many admired his effortless multiple daily appearances, be it in the Court of Appeal or High Court, he courageously agitated settled authority with aplomb. Such was his workload, one could easily have mistaken him for a duty lawyer. His Honour thrived in the chaos; always level, always focused.

His Honour's notable down to earth charm, modesty and, in particular, his acute knowledge of the criminal law, made him a walking/talking law library; authorities spilling from his tongue without pause or even punctuation.

All-nighters were not uncommon. His Honour made no secret of it as he presented in chambers after sun rise with a pillow nestled in his chest and blanket swung over his shoulder. Only a few hours rest was required for his Honour to resurrect his fierce adversarial spirit that manifested itself in succinct and powerful argument.

Notwithstanding looming deadlines, his Honour's generosity of spirit as mentor to colleagues and the notable contributions he made at the Bar only enhanced the regard, affection and respect bestowed on him as a stand out criminal barrister of his generation.

His Honour's worldly experiences, humility and powerful intellect place him perfectly at the judicial office starter's mark. Many at the Bar feel a profound sense of loss, but consolation begs some equilibrium in the anticipation of a judicial career charged with commitment and compassion.

His Honour needs no further accolade, time will prove his worth.

ASHLEY HALPHEN

BACK OF THE LIFT

Supreme Court *of* Tasmania

The Hon Justice Estcourt

Bar Roll No 3734

On 8 April 2013 Stephen Estcourt QC took office as a judge of Australia's oldest Supreme Court, the Supreme Court of Tasmania.

His Honour's particular connection with the Victorian Bar, and the basis for recognition in Bar News, is his past practice at our Bar from Dawson Chambers as well as Hobart.

His Honour was educated at New Town High School and the Elizabeth Matriculation College, graduating from the University of Tasmania as Bachelor of Laws with Honours in 1974. He practised as a solicitor in Launceston until 1990 when he was appointed a magistrate, an office he held for four years before accepting appointment as the inaugural chair of Tasmania's planning appeals tribunal.

In 1995, along with his now colleagues on the Supreme Court, Chief Justice Alan Blow and Justice David Porter, he established an independent Bar in Tasmania. He took silk in 1998 and widened his practice to include the Victorian Bar in 2004.

His Honour has been active in professional organisations, including the Law Society of Tasmania (President 1988-1989), culminating as President of the Australian Bar Association 2006-2008.

He has made substantial contributions in related areas, including as assistant editor and later editor of the Tasmanian State Reports (1986-2013), Commissioner of the Tasmanian Law Reform and Legal Aid Commissions, and lecturer and member of the Australian Bar Association's Advocacy Training Council.

His Honour had a wide commercial and administrative law practice. He gave generously to pro bono work, including appearances in the Federal Court and High Court.

On a lighter side, his Honour is a devoted gastronome. For some years he conducted a blog Reminiscences of a Food Tragic. One of his followers posted the following comment:

> *We've got lawyers in our street. Yes, I know, the planning laws of South Hobart need a major overhaul, but if you're going to have a lawyer a few doors up the road, then you could do worse than Food tragic Stephen Estcourt QC: supermodel, raconteur, patron of the arts, damn fine cook and food blogger extraordinaire.*

PETER HEEREY AM QC

County Court *of* Victoria

His Honour Judge Ryan

Bar Roll No 1585

His Honour's career at the Bar, including seven years as Senior Counsel and a Senior Crown Prosecutor, has been characterised by modesty, selflessness and good humour. His Honour's work as a barrister in Victoria is, however, only one part of his record of exemplary service to the community and the law.

As a junior barrister, his Honour served on the Bar Council for two years. His Honour also served on the New Barristers Committee, the Bar Ethics Committee, the Applications Review Committee and the Magistrates' Court Committee.

Though a self-titled "paddock footballer", his Honour nonetheless played in the Victorian Amateur Football Association with the Monash Blues Football Club from 1974 and during his first years at the Bar until 1981. His Honour then served the Monash Blues as General Secretary and President, and is now a life-member of the club.

In August 1995, his Honour was appointed a Crown Prosecutor. His Honour's colleagues recall that his Honour's trial preparation was as meticulous as his robes and jabot were immaculate.

In 2003, his Honour volunteered to join the Regional Assistance Mission to the Solomon Islands as Chief Legal Officer, where he oversaw the reorganisation of the Office of the Director of Public Prosecutions. Shortly before his Honour's arrival in Honiara, many people had been arrested on serious charges following "the Tensions". Prisoners could only be remanded for 14 days, so his Honour arranged for the Chief Magistrate to preside in the prison in rolling remand hearings, while his Honour worked to clear the backlog of cases. At the time, there was electricity in Honiara only for three hours of each working day, between 8 am and 11 am.

After 13 months in Honiara, his Honour's legacy would be a lasting one: not only did his Honour liberate copies of statutes and judgments previously unavailable to staff, he also implemented a program for the mentoring of local solicitors.

From March 2011 to June 2012, his Honour served as the Principal Crown Prosecutor in the Specialist Sex Offences Unit within the Office of Public Prosecutions. His Honour gained the admiration and respect of those who worked alongside him for helping them to handle the extraordinary pressures of working on cases within that Unit. In particular his Honour was admired for his care in explaining matters to victims and witnesses; to whom he explained matters in clear, simple and empathetic terms.

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

CATHERINE PIERCE

His Honour Judge Couzens

Bar Roll No 1253

On the occasion of his Honour Judge Peter Couzens' welcome to the County Court of Victoria, the Chair of the Bar Council, Fiona McLeod SC, made reference to his Honour's "iron-fist in velvet-glove" determination. In fact, Judge Couzens had long been knick-named by many "the velvet sledgehammer". The velvet part of this nickname no doubt comes from the unfailingly respectful, courteous and compassionate tone that he adopts towards solicitors and accused persons alike when handing down rulings, decisions and sentences. The sledgehammer reference is probably self-explanatory. Judge Couzens is no light touch and, in fact, has been known in recent years to publicly criticise the way in which the relevant legislation currently requires Magistrates to sentence 17 year olds as children. It is likely this dual ability of Judge Couzens to so easily engage individually with all walks of men, women and children, and to publicly espouse views that exemplify the independence of the magistracy and judiciary, that makes him an ideal President of the Children's Court of Victoria. He commenced this role on 30 April this year.

Judge Couzens completed his Bachelor of Laws in 1969 at the University of Melbourne. He served articles at Eggleston Clifton-Jones, before working for a number of years as a solicitor in Melbourne and then in England. He returned from England to work at Middletons Olswald Burt & Co before going to the Bar in March 1976. He read with Barton Stott, who later also served as a judge of the County Court. His practice at the Bar was broad, including family law, maritime law and personal injury, in addition to some work for the Crown.

Judge Couzens was appointed a magistrate on 3 July 1990 and served as such for the best part of 23 years. In that time, he sat predominantly at Melbourne, Broadmeadows, Prahran, Wangaratta and finally Ballarat, although he has sat in every metropolitan Magistrates' Court and in almost every country Magistrates' Court.

Judge Couzens' ever-present courteous, patient and calm manner on the bench also extended to his conduct off the bench. He has been known to take particular time to compliment members of staff of Victoria Legal Aid on the great work that they do, commonly under difficult circumstances, as duty lawyers. He has gained the admiration and often friendship of the court staff with whom he has worked over the years. Even the roses of the garden of Prahran Magistrates' Court could be heard sighing in despair at his departure following that Court's closure; his Honour played an integral part in establishing and maintaining that garden.

Off the bench, his Honour is also a keen sportsman. He played cricket at school and for the Bar but, in more recent times, his passion lies with the Bombers and horse racing, particularly jumps races. With the rigours associated with his new position, however, these interests may well have to take a back seat for a few years longer. The Bar wishes his Honour every success in his new role.

AMY BRENNAN

His Honour Judge Cosgrave

Bar Roll No 1824

On 9 May 2013 Paul Cosgrave SC was appointed to the County Court. His appointment brought to an end a career of almost 30 years at the Bar during which he excelled in the service of his clients and in his service to the Bar.

He was educated at Xavier College, where he was both a very talented cricketer and student. He completed a classical education studying both Latin and Greek through to his final year. His Honour attended Melbourne University and in 1980 graduated in Arts with an Honours degree in Law. He served articles with Corr & Corr and was admitted to practice in April 1981. He remained with Corr & Corr as an employee solicitor for a little over two years before enrolling in the Bar readers' course in September 1983. His Honour commenced his reading period with Peter Gray (recently retired from the Federal Court of Australia) and completed it with Ken Hayne (now a Justice of the High Court of Australia).

His Honour's career quickly gained momentum and he developed a diverse commercial practice both as a junior to a number of the prominent commercial silks, and on his own account.

The breadth of his Honour's practice included cases involving corporations and government agencies (the ACCC, ATO and ASIC), trade practices, securities, insolvency, professional negligence claims against auditors, accountants, engineers, valuers and lawyers, cases involving directors' duties and construction and engineering disputes.

His Honour's talent and very kind nature saw him attract ten readers (Sonja Roglic, David Forbes, Ted Woodward, Mark Black, Clare Folley, Lisa Lo Piccolo, Jeremy Whelen, Daniel Clough, Claudio Bozzi and Edward Moon). His readers are universal in their praise of his Honour's generosity in giving his time, assistance and advice, both during and after their reading period.

His Honour was appointed Senior Counsel in 2005, following which he continued to practise in the area of commercial law until his appointment to the Court.

His Honour was also a substantial contributor in the service of the Bar. During 1987-1989 he served two years as Assistant Honorary Secretary to the Bar Council. He served twelve years on the Applications Review Committee and almost ten years as a Director of Barfund Pty Ltd, the trustees of the Bar

Superannuation Fund. He chaired the Superannuation Section of the Commercial Bar Association for over seven years and served a year on the Bar Readers' Course Committee.

Despite having an extremely busy life at the Bar, his Honour's devotion to his family was never relegated to second place. His perspective on work and life outside work set a great example for all those at the Bar who knew him well.

His ability to combine the two is due to the support and understanding of his wonderful wife Gerardeane and to a selflessness which has always seen him put others before himself. His only real indulgences while at the Bar were to catch up for lunch with friends and to occasionally relax in his chambers at the end of a busy week and listen to some music. As to the latter, his Honour has an extraordinarily wide-ranging taste. One week he would be playing Palestrina, and the next it would be Lynyrd Skynyrd.

Whilst the Bar has lost an outstanding barrister and servant, the County Court has gained an excellent judge.

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

FRANCIS TIERNAN SC

His Honour Judge Meredith

Bar Roll No 2996

On 28 May 2013 the Attorney-General announced the appointment of Gavan Meredith to the County Court. His Honour's appointment follows an 18 year career at the Bar, and 27 years in practice. His Honour had very substantial experience as an advocate prior to coming to the Bar, mainly as an in-house advocate in the Criminal Law Division of the Victorian Legal Aid Commission. He then came to the Bar and quickly established a strong practice in Criminal Law.

Over his time at the Bar, his Honour earned a reputation for being a safe pair of hands both as the defender and prosecutor of complex and lengthy trials. He was entrusted with the prosecution of Commonwealth drug importation trials where substantial police resources had been invested. He was equally adept at defending these type of matters, as was evident from his work in the *Pong Su* case, concerning the alleged importation of 200 kilograms of heroin from North Korea. His Honour defended murder trials, notably being involved in the 'Salt Nightclub' case involving multiple accused and differing allegations of criminal complicity with the deaths.

His Honour's last appearance as an advocate in the Supreme Court was indicative of his capacity to calmly handle the most trying of circumstances. In *MK*, his Honour was faced with the unenviable task of defending a complex murder trial with a possible 'cut throat' defence, all without an instructing solicitor present after Legal Aid funding cuts. That Justice Forrest, hearing the case, ordered a stay of the matter until the imbalance in funding had been addressed was no reflection of Gavan Meredith's capacity to undertake his onerous task. As was noted by Justice Forrest in his stay ruling;

> *The applicant is represented by a careful, thorough criminal barrister with significant trial experience. The applicant will lose nothing by Mr Meredith's presence but, in my view, he will lose considerably by the absence of an instructor.*

His Honour's qualities are sure to be of great benefit to the County Court.

VBN

Magistrate's Court *of* Victoria

His Honour Deputy Chief Magistrate Braun

Bar Roll No 1059

On 26 March 2013 his Honour Magistrate Barry Braun was appointed as a Deputy Chief Magistrate for Victoria.

His Honour was educated at Wesley College and was a renowned schoolboy sprinter competing in the 100 and 220 yards. His Honour matriculated in 1964 and studied law at Monash University. After completing articles under the tutelage of Graeme Emanuel at Slonim, Velik & Emanuel, his Honour was admitted to practice in 1971. His Honour gave his time freely to the Fitzroy Legal Service whilst continuing to work as a Solicitor at Pavey Wilson Cohan and Carter (now Corrs Chambers Westgarth).

His Honour was called to the Bar in 1973 and read with Alex Chernov (now the Hon AC QC, and Governor of Victoria). His Honour's first chambers were Four Courts Chambers (now Douglas Menzies Chambers) which at the time were seen as an outpost to the modern Owen Dixon Chambers. His Honour has fond memories of his time at the Bar sharing chambers with the likes of his Honour Chief Judge Rozenes, Henry Jolson QC, John Riordan and others.

His Honour built a successful practice at the Bar in commercial litigation and insolvency. His Honour established a lucrative practice appearing in Ham Radio Organisation appeals before the Planning Appeals Tribunal, until he won the ultimate point which put a stop to such appeals.

His Honour was appointed a Magistrate for the State of Victoria on 28 July 1989.

His experience and expertise saw him become an integral player in the growth and improvement of the civil jurisdiction of the Court. The jurisdiction of the Magistrates' Court has since 1989 broadened and increased, now often hearing complex and lengthy matters which were once the sole domain of the County Court. His Honour is well regarded at the Bar for his ability to delve deeply into issues which invariably arise and quickly get on top of the facts and law relevant to such cases.

Over his 24 years on the bench, his Honour has sat in all jurisdictions of the Court and if not all, then most courts in metropolitan Melbourne and regional Victoria.

Away from the bench, his Honour enjoys family life with his children and grandchildren. His Honour took up skiing as a three year old and has maintained his passion for the winter sport to date. His Honour has traveled the world in search of the most exhilarating 'black runs' that nature provides. His Honour points to Aspen, Colorado as his favourite skiing destination, and when in this jurisdiction he spends most of his time at Mount Buller. Somewhat surprisingly his Honour has never sought to be made the permanent Magistrate at Mansfield.

His Honour's out of town winter pursuits probably arose as a result of his long time support of the Melbourne Football Club. Although, when cross-examined further, his Honour rightly conceded that he now supports the Geelong Football Club - borne out of desperation to enjoy football success. Although it might be regarded as cross-examination that "was not assisting him", it was certainly enjoyed by the writer.

TIM BOURKE

His Honour Magistrate Maxted

Bar Roll No 1565

In April 2013, Ross Maxted was appointed to the Magistrates' Court of Victoria. His Honour brings a wealth of experience to the Court.

His Honour graduated with an LLB from Melbourne University, was admitted to the Legal Profession on 1 April 1980 and signed the Victorian Bar Roll on 19 June 1980.

His Honour had a wide general practice as a barrister, initially in criminal and family law, later concentrating his practice in the areas of civil and commercial litigation.

In 2006, his Honour was one of the inaugural barristers to be accorded advanced accredited mediator status by the Victorian Bar. His Honour was an accredited mediator for 20 years, having become an accredited Victorian Bar mediator on 28 March 1993 and a nationally accredited mediator on 12 June 2008.

His Honour was ahead of his time in recognising the importance of successfully mediating apparently intractable disputes. From 2006 to 2007, his Honour was Chairman of the Victorian Bar Dispute Resolution Committee, having served as Deputy Chairman from 2004 to 2006, and as a committee member from 1995. His Honour was hardworking and supportive to others on the committee. That committee was responsible for the Bar's mediator accreditation and policy. In his role on the committee, his Honour was instrumental in establishing a pilot scheme for mediations at the Melbourne Magistrates' Court in 2004.

His Honour served on several mediator panels, including the national panel of mediators of the Australian Government Office of the Franchising Mediation Adviser and the Office of the Victorian Small Business Commissioner and was a sessional mediator in the Domestic Building Tribunal Victoria.

His Honour was also admitted to practice in the Supreme Court of the Northern Territory in 1999, where he practised full-time for one year and later as a visiting counsel.

When Attorney-General Robert Clark announced the appointment of Ross Maxted to the Magistrates' Court of Victoria, Mr Clark said "Mr Maxted is a highly regarded mediation and alternative dispute resolution specialist, with a wealth of experience particularly in commercial and business issues". The Victorian Bar wishes his Honour success and satisfaction in his new role.

VBN

His Honour Magistrate Lennon

Bar Roll No 3064

In May 2013, Dominic Lennon was appointed to the Magistrates' Court of Victoria and assigned to the Melbourne Magistrates' Court. His Honour was admitted to practice on 13 March 1989 and practised as a barrister from 1996 to 2002. He read with the late Douglas Salek QC.

His Honour has attained the degrees of BA, LLB and Grad Dip Mil Law. At the Bar, his Honour practised in commercial, criminal and employment law, before taking up appointments at the Migration Review Tribunal in 2003, the Refugee Review Tribunal in 2006 and the Social Security Appeals Tribunal. As a Tribunal member, his Honour was known as a strict adjudicator with a strong knowledge of the law.

His Honour worked for the Victorian and Commonwealth Directors of Public Prosecutions and later as a solicitor to the Australian Banking Industry Ombudsman. His Honour also served as the solicitor in charge of the Carnarvon office of the Aboriginal Legal Service in Western Australia for nearly two years.

His Honour has also served as a captain in the Army Reserve, working as a member of the Legal Aid Roster and in drafting regulations and preparing submissions to Boards of Inquiry.

His Honour's broad experience will equip him with a depth of understanding toward those who come before his Court, including those from indigenous and migrant backgrounds. In relation to his appointment, Victorian Attorney-General Robert Clark said "Mr Lennon's diverse experience in many aspects of the law, in a wide variety of contexts, makes him well suited to serve as a Magistrate." The Bar agrees and congratulates his Honour on his appointment.

VBN

BACK OF THE LIFT

Obituaries

Brian J Shaw QC

Bar Roll No 594

Brian Shaw died in March 2013. He became, and remained, a leader of this Bar, both in court and out of court, from soon after completing his pupillage with Ninian Stephen in 1959 until his retirement from full time practice in 2006.

Shaw came to the Bar with a stellar academic record: first class honours in Law and History from University of Melbourne, Vinerian Scholar and a First in the BCL at Oxford. It was said that JHC Morris (the great conflict of laws scholar) described Shaw as the best mind he had encountered in Oxford. High praise!

In his early years at the Bar, Shaw turned his hand to many kinds of case. His first reported appearance in the High Court, within a few months of completing reading, was as junior to Oliver Gillard QC in a local government matter. In 1962 he appeared as junior to Sir Henry Winneke QC, then Solicitor-General for Victoria, for the State in the case brought in the High Court on behalf of Robert Peter Tait to prevent Tait's execution. The report in 108 CLR captures the drama of the application and the Court ordering that the execution not proceed. But it also records Shaw, when the matter came back to the Court after the execution had been stayed, debating with Dixon CJ and other Justices what orders should be made to dispose of the case. The debate reveals the advocate Shaw was then, and remained for the whole of his career: fully prepared, alive to all of the issues and putting his client's case firmly and directly to the Court.

After practising for a time at the Bar in London, Shaw came back to Victoria and took silk in 1974. His practice was as large as he allowed it to become. There was much advice work because his opinions were highly valued. His court work was equally highly rated. For the most part he focused on commercial cases but in his later years as a silk, Shaw became the counsel of choice for the Commissioner of Taxation in difficult appeals.

Shaw thought deeply about all his work. That is why clients gave him the truly hard cases. That is why he did all of his work so well.

As a junior, working with Shaw was an education. You soon learned to be ready in conference for him to pause, think, and turn to you and say "yes, but why?" And if you could not say "why", you ran the risk of attracting the worst insult Shaw could apply: "That's silly".

Shaw served the Bar in many ways over many years including as its Chairman from 1981 to 1983.

Warm, generous, thoughtful. A cultured, private man, devoted to his partner Keith. Together, they revelled in Macedon and the farm. All this and more are the memories that those of us who knew Shaw will retain. And those of us who saw him at work, in chambers or in court, will also remember the mind that could take what seemed to be an insoluble crossword puzzle, reduce it to order and proffer to the client or to the court a perfectly formed solution.

KM HAYNE AC, JUSTICE OF THE HIGH COURT OF AUSTRALIA

Anthony Bonnici AM

Bar Roll No 798

Anthony Bonnici died on Sunday 24 March 2013. He was 82.

Tony—"Bonneech" as he was known by many—came to Australia from Egypt in March 1949. He attended the Austral Coaching College and the Leederville Technical School in Perth. After that, he was enrolled at the University of Melbourne from which he graduated Bachelor of Arts in 1960. Also in 1960, he was commissioned Pilot Officer in the Royal Australian Air Force Reserve.

After completing his Arts degree, Tony worked for a year as a teacher with the Victorian Education Department before returning to the University in 1961 to study Law. During his law course he worked as a research assistant in the Criminology Department.

Tony graduated in Law in 1966. He was admitted to practice on 1 December and came straight to the Bar, signing the Roll on 7 December 1966. He read with John Greenwell.

Tony established a broad general practice in most areas of law, specialising in matrimonial and immigration law—but also doing general commercial work, probate and personal injuries. As well as Victoria, he was admitted in New South Wales and in the Australian Capital Territory. In all, Tony practised for more than 46 years.

For many years, he served the Maltese community and wider communities, variously as President of the Phoenician Association, President of the Maltese Community Council of Victoria, Chairman of the Ethnic Communities Council of Victoria and Deputy Chairman of the Federation of Ethnic Communities Councils of Australia.

Commonwealth Governments of both persuasions appointed him to Boards—the Fraser Government to the Special Broadcasting Service Board; and the Hawke Government to the Advisory Committee on Immigration.

He was made a Member of the Order of Australia in the 1985 Australia Day Honours and received the Hellenic Excellence Award the following year.

VBN

Maitland Arnold Lincoln

Bar Roll No 966

My first contact with Maitland Lincoln was as a young solicitor contemplating a career at the Bar. Mutual friends suggested that Maitland might be an ideal pupil master (the language of mentors was still decades off) and so we arranged to meet at his home one evening. He greeted me at the door with a broad smile and an incisive question that was a hallmark of his outstanding skill as a cross examiner. "So dear boy, you want to become a barrister?" "Yes, I suppose I do" was the answer that first sprang to mind and the result was an association and friendship that was to last more than 30 years.

Maitland's brief to appear on this earth came to an untimely end on 23 April 2013 after 77 years as a result of a particularly aggressive brain tumour that was discovered in January while he and his beloved wife of almost 50 years, Susan, were visiting their daughter and her family in Montreal. Maitland and Susan were inseparable and his love for her and for their children and grandchildren knew no bounds. His love of the law and the practise of the profession of barrister came a close but undoubted second. His souped up British Racing Green MGB completed the trifecta.

Known with deep affection as "Grumblebum", Maitland, with his English accent and raffish charm, out-Rumpoled Rumpole. His wig was anything but white, having graced the heads of venerable members of the Bar of England and Wales before its near 50-year tenure on his head. He mastered (or is that mentored) four pupils in England and six more in Melbourne all of whom, including his Honour Judge Chettle, benefitted immensely from his skill and generosity of spirit.

Unlike Mortimer's famous character, Maitland appeared for both the prosecution and the defence with equal fervour and with unstinting dedication to the finest traditions of the Bar. He relished the courtroom fight and, but for his instructions being suddenly withdrawn, would have continued with a busy schedule of complex criminal trials in a practice that would be the envy of many, several decades his junior.

Maitland had a deep and abiding attachment to his Judaism and put his wonderful voice to good use as a chorister in the Melbourne Jewish Male Voice Choir and in the choirs of the St Kilda and Central Synagogues. He also very much enjoyed his starring roles in community musical theatre, most notably as the dastardly villain of the piece. His community engagement extended to a pivotal role in the founding of Gamblers Anonymous, driven by reason of his contact with and empathy for too many clients whose problems stemmed from an addiction to gambling. Maitland's passing marks the loss of one of the unsung legends of the Bar and his presence and joie de vivre will be deeply missed by all who had the privilege of knowing him.

Yehi Zichro Baruch, May his memory be a blessing.

SAM TATARKA

The Hon Henry Barwick (Barry) Connell

Bar Roll No 632

Henry Barwick (Barry) Connell passed away on 21 May 2013 at the age of 85. He was a former member of the Victorian Bar and a former Chief Justice of the Republic of Nauru.

In 1951, Sir James Darling appointed Barry Connell as the Senior History Master at Geelong Grammar School where he was an energetic and popular master and football coach. Sir James Darling once praised him for his "scholarship and a boundless energy".

In 1958, Connell commenced the study of law at Melbourne University. Having read with R.L. Gilbert, he commenced practice at the Bar in 1961.

In 1968, he became international legal adviser to the newly created Kingdom of Lesotho and went on to play a significant role in reviewing the Kingdom's international treaties. In late 1971, Connell was appointed Chief Secretary and Secretary for External Affairs in Nauru, as well as Secretary to Cabinet.

Returning to Melbourne in 1972, he continued to serve the Republic of Nauru in many and varied capacities, for example, as the Vice-Chairman of the Board of the Nauru Air Corporation, as a director of the Nauru Rehabilitation Corporation and as a trustee of the Nauru Phosphate Royalties Trust.

In 1991, Connell was one of Nauru's counsel at the International Court of Justice in The Hague in the case concerning Nauru's phosphate land. The case was settled in favour of Nauru with significant compensation being paid. Transcript of Connell's oral submissions reflect considerable scholarship, economy, erudition and talent as an advocate.

As an associate professor of law at Monash University, Connell taught law for over 25 years. He also took a number of government positions. In the late 1970s, he served as chairman

BACK OF THE LIFT

of the Victorian committee on discrimination in employment; in the 1980s he served as the chairman of Telecom's disciplinary appeal board; and he also served as a member of the Refugee Review Tribunal.

In February 2001, Connell was appointed as the Chief Justice of the Supreme Court of Nauru, a position he retired from in 2006. In early 2003, there was confusion as the identity of the President of Nauru stemming from a successful parliamentary motion of no confidence against the President, Mr Renee Harris. A former President, Mr Bernard Dowiyogo, had purported to assume the office of the President.

The matter came before Connell CJ when Mr Harris sought an injunction restraining Mr Dowiyogo from assuming the office of President. Connell CJ granted the injunction, pending determination of a constitutional reference received from Mr Harris regarding the legitimacy of Mr Dowiyogo's actions.

On 17 January 2003, Connell CJ handed down a judgment in respect of the questions the subject of the constitutional reference. See *Constitutional Reference; In re Article 55 of the Constitution* [2003] NRSC 2. Notwithstanding the contentious political atmosphere and other trying circumstances, including a submission put on behalf of Mr Dowiyogo that the judge himself was guilty of unwarranted political interference, Connell CJ discharged his judicial duty sensibly and calmly. Having determined that the passage of the no confidence motion did not require an election for President, Connell CJ left it to the Parliament to regularise the situation through its own procedures.

Connell CJ's words of encouragement and praise in the final paragraph of the judgment reflect and underpin his primary concern, namely to promote "the strong adherence of Nauruan society to the rule of law and a high level of parliamentary practice."

The same concern is reflected in many other judgments of Connell CJ, although the reasons were not always couched in terms of encouragement or praise. By way of example only, in *Hubert v Scotty* [2004] NRSC 4, Connell CJ dealt with a criminal appeal case in which the defendants had been convicted of offences under the *Dangerous Drugs Act* 1986 (Nauru). Connell CJ said as follows:

> *I was concerned that the charge was stated to be laid under s. 10(3) rather than s. 10(1)(c) of the Act. It was explained as a typing mistake. This should not happen and the Republic escaped embarrassment probably because there was no s.10(3). Much greater care must be exercised by those in authority for the entering of charges. The fact that this morning in Court the Act itself could not be produced by the Republic does not say much for the efficiency of the prosecutions branch.*

Barry Connell was a man with great talents and enthusiasm; he led a rich, varied and productive life. In essence, it was a life of service and dedication. The Victorian Bar is proud to claim him as a former member.

ROBERT HEATH

Roger John Radovick Cleary

Bar Roll No 2303

Roger John Radovick Cleary died on 3 June 2013. He was 65. Roger was brought up in Brighton, attended Kostka Hall and then followed in his father's footsteps to Xavier College Kew. He served long articles with his father, Jack Cleary, who had founded the firm of Cleary Ross & Doherty in the 1930s. Roger undertook the RMIT Articled Clerk's course and was admitted to practice on 3 December 1973. Roger practised as a solicitor for 15 years and as a partner at Cleary Ross & Doherty for 12 years. He distinguished himself as being a diligent and conscientious solicitor with a great sense of honour and respect for the profession and his clients.

In 1971 he was involved as a front seat passenger in a motor vehicle collision. Prior to the accident his friend had demanded that Roger don the sash seatbelt provided, which he did, despite protestation. After the head-on collision Roger was badly winded by the buckle of the seat belt and suffered only a dislocated toe. He thanked his friend in true legal fashion, by issuing a summons against him for personal injuries!

In his younger days, Roger was an enthusiastic footballer. He played for many years with the Old Geelong Grammarians (the "OGGS") and loved every minute of his involvement with the club. Roger was known for his dry sense of humour. He told of the occasion in one game when a large pack of footballers, including himself, had collapsed in a heap. He said that he immediately sympathised with the poor fellow who belonged to the unnaturally bent and twisted arm protruding from the mess of bodies. Roger then realised the arm belonged to him.

Through the OGGS, Roger met Sally Buchan. They married in 1977, had two children, Kate and John, and resided in Hawthorn.

After 12 years as a partner in the Bourke Street solicitor's practice, Roger decided he needed a sea change. He resigned from the partnership and the next day he commenced work as a building demolition contractor in Little Collins Street. Two years later, Roger decided to become a barrister and signed the Bar roll on 24 November 1988 and read with Brendan Murphy (now QC and the Victorian Principal Public Interest Monitor).

During the Bar Readers' Course Roger became friendly with Pilkington and shared chambers with him for many years. They, together with a number of other barristers, commenced a yearly "fishing" retreat in the July legal vacation on the Big River at Enoch's Point. Gilligan, Ross, McNamara, Turner, Gregurek, Duffy and Holden, among others, were willing participants in the festivities. On one memorable occasion during a formal dinner in the log cabin, resplendent with white dining cloth, a candelabra and crockery etc, Roger advised that he would show them his latest trick. He firmly took hold of the cloth, and to cries of "No Roger, no!", he pulled the tablecloth with the intention of leaving table contents in place. Unfortunately, the cloth had been secured with drawing pins on the other side of the table and food and crockery went flying in every direction.

Roger practised at the Bar for more than 23 years. From the outset, he practised principally in motor vehicle insurance claims with some Magistrates' Court crime and general civil work.

Roger always had a desire to be farmer and eventually was able to combine his legal career with the purchase of a property at Flinders. He commuted to the various courts for many years until his retirement on 21 January 2012.

Throughout his career at the Bar, Roger distinguished himself with his innate sense of fairness and integrity. His opponents in court could always be confident that he would represent his clients to the best of his ability without compromising his desire to treat the witnesses and other counsel in a considerate and respectful manner.

Roger is sadly missed by Sally and family and his many friends.

IAN McEACHERN

Stephen Shirrefs SC

Bar Roll No 1734

Stephen Shirrefs SC died recently after a hard-fought battle with cancer.

Stephen was a formidable criminal defence barrister: well-prepared, forceful and persistent. He could see and contest complex legal objections. He could sustain a lengthy and pointed cross-examination without repetition or flagging. Many a federal police officer quailed at Stephen's lofty stare and heard, in Stephen's imperious tone, a reproving "Now, witness, you know that wasn't the question ...". His appearance assisted him in court: tall, patrician and stern, he held himself well and conveyed conviction and focus at all times. Stephen enjoyed much success in committal hearings, securing discharges in several high profile cases.

Greatly to his credit, Stephen took on very challenging trials. He took silk in 2002, and came to enjoy a busy trial practice. During the "gangland era", Stephen defended several accused at trial, sometimes with great success and always with vigour. In that time, he crossed swords with judges of equal determination, notably Justice King. Stephen was able to maintain professional detachment, but his clients knew their barrister was a fighter, and never left court feeling under-represented. Stephen often appeared as Robert Richter's junior, and he learned a great deal from him, but ultimately he became very much his own man, with a distinctive courtroom presence and approach.

Although he sometimes presented as aloof and proud, a stance he used to effect in court, Stephen was a friendly and humorous fellow. At the ceremony following his death, his children spoke of his humour and his enthusiasm, and these endearing qualities were sometimes shown even in the demanding and nerve-wracking courtroom environment he inhabited. He had been a high achiever in junior sport, particularly in football, rowing and athletics, and he retained enthusiasm for participation until the end. Cycling was a passion later in life. He was a competitor by nature.

All the evidence above would prove, even if he had not avowed it in life and death, that he was a devoted Collingwood supporter. There was nothing aloof or patrician about Stephen when it came to Collingwood, and woe betide any indemnified witness who faced him on the Monday following a Magpie defeat. Nor was there anything aloof about Stephen in his family relations and his friendships. He was beloved by those close to him, and inspired affection in unexpected quarters. Stephen's practice often took him interstate. In Perth he represented a local identity, John Kizon, in a variety of proceedings; ultimately the two became friends. The crowd at the ceremony was a mixed and splendid collection, reflecting Stephen's engagement with his world. Patrician as he looked, he was never close to being a snob.

He was a renaissance man: singer, sportsman, lawyer, family man. He was Chairman of the Criminal Bar Association, he was counsel in major trials: he was a player and a contributor. The Bar is a house of many mansions, and is richer for Stephen's contribution. His family, his children and his beloved wife Lee may be assured his colleagues will remember him as he was: a formidable, talented silk.

PETER MORRISSEY SC

Rowan George McIndoe

Bar Roll No 1372

At first glance, Rowan McIndoe's trajectory to the Magistrates' Court bench was predictable - Scotch College, Melbourne University Law School, the Victorian Bar - but Rowan often confounded those who relied on first glances. Appointed a prefect at Scotch, it was a matter of perverse pride that he was the only prefect without sporting colours on his blazer; although a keen bush-walker, organised sport was at best incomprehensible and at worst risible to Rowan. He was already a fine musician; his sister recalls Rowan, in primary school, teaching a neighbour the basics of music theory.

BACK OF THE LIFT

In his final year at school he studied with Mack Jost, a choice which so infuriated the Head of Music (who thought Rowan should have contented himself with the school piano teacher) that he refused to let the school's best pianist play in the Foundation Day concert.

At Melbourne University, Rowan undertook law and arts degrees but also studied music theory and practice, taught at Collingwood College and wrote for a number of university publications. He spent as much time in the organ lofts of Melbourne churches as in the Law Library and, many examinations later, was one of the first Australians to be admitted to the Royal College of Organists, a qualification recognised worldwide as a measure of achievement and distinction.

After graduation, Rowan commenced articles at Rodda, Ballard and Vroland and was admitted in 1971. But by 1973 he was teaching full-time, initially at Caulfield Grammar and then at St John's College in Braybrook. He was a provocative and inspiring teacher with a rare capacity to articulate ambition and unlock doors to further education. Among his students were Rob Stary and Peter Gordon, each of whom has publicly acknowledged Rowan's role in the realisation of their aspirations; he was quick and accurate in his recognition of their potential and effective in demanding its development.

In February 1978, Rowan signed the Bar Roll, reading with (the now) Hon Frank Vincent AO QC, then (as now) a maverick whose passion for advocacy and for the under-dog appealed to Rowan, who developed into an able advocate with an abiding and intelligent sense of humour. He loved words and brought insight, introspection and constant arbitration to the use of language in every document he drafted and every submission he made. He loathed pretence, whether at the bar table or on the bench; he could be a formidable opponent.

When a good friend became a magistrate in 1985, Rowan made no secret of his view; she had taken a retrograde step. The following year he joined her on the bench at the Melbourne Magistrates' Court, cheerfully acknowledging his change of mind. He sat mainly at Melbourne, Ballarat and Sunshine Magistrates' Courts until his retirement in in 2009. He was an incisive magistrate and a witty, loyal and popular colleague.

Rowan never lost his passion for music; a fine improviser (an essential skill for organists) he directed a number of choirs and wrote a choral Mass which was first performed at St Carthage's Church in Parkville. On one trip to Italy and France he moved from monastery to monastery, staying in guest quarters and playing their very old mechanical organs, a time he recalled with joy.

Rowan died on 1 July 2013; like many highly creative people, he was assailed by demons which ultimately destroyed him. At his request, it was in St Carthage's that he was farewelled, at a memorial service at which Douglas Lawrence directed members of the Australian Chamber Choir (including the Bar's Ross Nankivell). The service ended with a full church sitting in silence while Rhys Boak played Bach's Toccata in F Major, a work which has been described as unique in form and harmonic structure, grandiose in size and style and mysterious in its origins. No wonder Rowan loved it. Among those present were at least three of his former students from St John's, as well as many barristers and members of the judiciary, and friends made, and kept, over decades. Rowan leaves a wife, Hellen, his cherished children, Myfanwy (Miffy) and Michael, and siblings Janet and Ken and their families.

THE HON SALLY BROWN AM

John Dermot McArdle QC

Bar Roll No 922

John McArdle was born on 4 November 1944 and died on 17 August 2013, aged 68.

John was educated at Marcellin College and St Kevin's College. He graduated B Juris, LL B from Monash University and later completed the Graduate Diploma of Criminology at the University of Melbourne.

He served articles with Frank Galbally at Galbally & O'Bryan and signed the Bar Roll on 3 September 1970. He read with Eugene Cullity (later QC and County Court Judge).

He had seven Readers: James Crowther, Michael Dodson, Anthony Bull, Alan Marshall, Gregory Wicks, Peter Ryan and Paul Moran.

John was very generous, both with his time and with his advice. He was keen to encourage young people to join the legal profession, specifically the Bar.

John was a member of the Bar Council for four years, Secretary of the Clerking Committee for 11 years and also served on a variety of other Committees.

After more than 24 years at the private Bar, John became a Crown Prosecutor in October 1994 and a Senior Crown Prosecutor in July 1995. He took silk in 1998. He served as Acting Chief Crown Prosecutor on various occasions.

John retired on 30 June 2012 after nearly 18 years in Prosecutors' Chambers. Until 2011, John carried the bulk of the Crown's appellate work and appeared in more than 600 matters in the Court of Appeal and a number of reported cases in the High Court.

John had integrity. This is something much more than honesty; integrity implies a series of values. John had his own values, and refused to compromise them whether they were fashionable or not.

John had a gift for friendship. His support, guidance, insights and constancy were unwavering. He had the most remarkably keen and astute powers of observation and investigation. There was simply nothing he missed.

He was a prolific reader of books, journals and newspapers. He had an intellectual inventory of incredible depth and a genuinely well-worn library to match. His book collection was massive.

John understood things about ourselves, those around us, facts about historical and political events and personalities, names of art collections and orchestral scores, that we will now never know.

John had an intelligence and wisdom that was well tempered. He always thought the best of people, indeed never said an unkind word about other people, was mild mannered, kind and thoughtful. He was a true old-fashioned gentleman. He also had a deep faith, a spirituality and devotion to the Catholic Church. Yet he rarely revealed this.

Although quite ill, John passed earlier than expected. His funeral was a testament to his friendship and popularity. That John was highly respected by his professional colleagues and friends was evident by the fact that there were over 300 people present to celebrate his life.

SUE McNICOL SC

GONGED!

Awards and other appointments

The Hon David Ashley AM QC, was awarded as a member of the Order of Australia for his significant service to the judiciary and the law and to the beef cattle industry.

Michael Colbran QC was elected President of the Law Council of Australia in June 2013, replacing Joe Catanzariti upon his appointment as vice-president of the Fair Work Commission.

March 2013

Victorian Bar Readers' Course

Back row: Sally Whiteman, Andrew Buckland, Siobhan Keating, Nicole Papaleo, Natalie Blok, Nathan McOmish, Dion Fahey, Nicole Mollard, Alexandra Folie, Georgia Douglas, Christopher Terry, Dimitri Ternovski, Andrew Barraclough, Clare Exell, Michael Symons
Centre Row: Kathie Nickson, Paul Rule, Philip Cadman, Phillip Johnstone, Alexander Solomon-Bridge, Hayden Rattray, Paul Bourke, Kieren Mihaly, Sarah Lean, Robert Williams, Andrew Newman, Phillip Bloemen, Fleur Shand, Sarah Bruhn, Jeanette Swann, Wendy Pollock (Bar Office), Susan Porter
Seated row: Astrid Haban-Beer, Julia Frederico, Eugenia Levine, Nicola Pachinger, Karina Popova, Gemma-Jane Cooper, Jaclyn Lontos, Millicent Lang
Front row: Robin Chan, Andrew Sim, Kylie Weston-Scheuber, Haroon Hassan, Michelle Wilson, Timothy Dowling, Daniel Snyder, Harlis Kirimof, Damien McAloon

PHOTO COURTESTY OF PAUL WEST.

Sara Hinchey, Truffle Hound

Bar Roll No 3035
MAREE NORTON

Sara Hinchey wasn't in chambers in July, not that that is unusual per se. More unusual, perhaps, she wasn't enjoying a European summer, at the Bar Conference in Rome or elsewhere. No, she was in Melbourne, teaching interested folk about the wonder of the truffle.

truffle: n. *1 Any of various underground funghi of the order Tuberales ... having a rough warty exterior, regarded as a great culinary delicacy and collected in France and northern Italy with the help of trained dogs or pigs (*The New Shorter Oxford English Dictionary*).*

Hinchey's love affair with the truffle began in the home of many great love affairs: Paris. In the City of Light to celebrate a special birthday, Hinchey and her husband, Tom Pikusa (also of our Bar), ordered the "truffle supplement" when dining at Le Meurice. Hinchey was promptly given a pair of white gloves to don, followed by a white truffle to hold and smell. The intoxication was immediate; the affair had begun.

The Truffle Hound

Since then Hinchey has turned her passion for truffles into a business enterprise. In 2011 the Truffle Hound (*www.trufflehound.com.au*) began sourcing, selecting and showcasing the freshest and best Australian (black[1]) truffles in truffle masterclasses. These classes quickly

PHOTO COURTESY OF AMY COLLINS

outgrew their original venue—Hinchey's living room—and are now held in the food tech lab at the Princes Hill Secondary College.

During truffle masterclasses, Hinchey encourages students to be hands on, so that they come to really understand what good truffles look and smell like. Students learn about how favourably Australian black truffles compare with those from Europe, as well as how to store truffles to maximise their shelf life and, most importantly, how to get the most out of truffles in the kitchen.

In 2013, the Truffle Hound collaborated with Melbourne restaurant royalty, holding truffle dinners at Ladro and Grossi Florentino. Next year, Hinchey has been invited to present a truffle masterclass as part of the public cooking and gardening program run by the Stephanie Alexander Kitchen Garden Foundation.

Sara Hinchey in the kitchen with renowned chef Guy Grossi

Hinchey's truffle "dos" and "don'ts"

For the uninitiated, truffles have a taste best described as "umami". Hinchey speaks of the aroma (more so than the taste) of the truffle, likening them to a shitake or porcini mushroom. Beyond that, there's significant variation among truffles, depending on their origin. Truffles from Western Australia can have a hint of the salty aroma of the sea, whereas Tasmanian truffles smell more earthy, as do truffles from Victoria, but with a hint of sweetness.

Do serve truffles with rice, pasta, potato, parsnip, celeriac, Jerusalem artichoke, polenta or white meat (red meat is also suitable, but it is important to ensure the flavours of the meat and any condiments do not overshadow the delicate aroma of the truffle). A sprinkle of salt works very well too. Think truffle shavings on a velouté, a bowl of buttery pasta, a plate of scrambled eggs.

Don't serve truffles with citrus, tomatoes, pepper … Sweet, acidic or highly aromatic flavours that compete with the truffle should be avoided. Hinchey describes a nougat ice cream with truffles she once tried as "too much".

From the Bar to the [kitchen] Bench

While Hinchey loves her work as a barrister, she finds that her teaching provides a refreshing change from the stress of work at the Bar. "As lawyers, we often see people at their lowest ebb. It's satisfying work, but often, in the end, no one is completely happy with the outcome," says Hinchey. "By contrast, the people who come to my classes are generally relaxed, happy, excited. They might have received the class as a present, so there may be a sense of celebration. It's a nice counterpoint to my work as counsel".

Hinchey's two professional worlds aren't entirely without overlap, it must be said. While Hinchey (tongue firmly in cheek) credits her Jack Russell, Wallace, as the "real" truffle hound, she admits that her truffles are more often than not sourced via the List D clerks' office, rather than through Wallace's industry.

1. Truffles come in two varieties: black and white. Hinchey estimates that black truffles sell for around $2,500 - $3,000 per kilo, whereas a kilo of white truffles will set you back around $9,000.

PHOTO COURTESY OF GROSSI FLORENTINO

Bar Council 2013-14

STANDING FROM LEFT TO RIGHT: Emma Peppler, Daniel Crennan, Paul Connor (Assistant Honorary Treasurer), Samantha Marks SC, Christopher Winneke, Michael Stanton, Jack Tracey, Karen Argiropoulos, Elizabeth Brimer, Miguel Belmar Salas, Michael Wheelahan SC, Michelle Sharpe, Kim Knights
SEATED FROM LEFT TO RIGHT: Greg Lyon SC, David O'Callaghan SC (Honorary Treasurer), Jonathan Beach QC (Senior Vice-Chairman), William Alstergren SC (Chairman), Jim Peters SC (Junior Vice-Chairman), Paul Anastassiou SC, Jennifer Batrouney SC, Paul Holdenson QC

SENIOR COUNSEL 2013

On 25 November 2013, the Hon Chief Justice Warren AC appointed the following barristers as senior counsel in and for the State of Victoria (listed in order of seniority).

Brent Maxwell Young SC

Bar Roll Number: 1781
Date of Admission: 2 April 1979
Signed Bar Roll: 19 May 1983
Read with: Lloyd Bryant
Readers: Michael Grove, Shane Gardner, Lesley Taylor SC and Greg Hughan
Areas of Practice: Crime, civil liberties, occupational health and safety

Diana Mary Harding SC

Bar Roll Number: 3305
Date of Admission: 4 November 1987
Signed Bar Roll: 27 May 1999
Read with: Stewart Anderson SC
Readers: Ray Alexander
Areas of Practice: Revenue, administrative, commercial law and Trusts

Andrew John Maryniak SC

Bar Roll Number: 2494
Date of Admission: 7 April 1988
Signed Bar Roll: 31 May 1990
Read with: The Hon Justice Middleton
Readers: Glenys Jardine and Benny Browne
Areas of Practice: Intellectual property, trade practices law

David Paul Gilbertson SC

Bar Roll Number: 2831
Date of Admission: 7 April 1988
Signed Bar Roll: 27 May 1993
Read with: The Hon Justice Judd
Readers: Margo Harris and Sue Porter
Areas of Practice: commercial, administrative, corporations, media and defamation law, with recent focus on defamation, contempt, insider trading and market manipulation

Gregory Peter Harris SC

Bar Roll Number: 2894
Date of Admission: 2 April 1990
Signed Bar Roll: 26 May 1994
Read with: Robin Brett QC
Readers: Amelia Macknay and Sarah Varney
Areas of Practice: Commercial, major building and construction, oil and gas, major torts, company, equity, insolvency, banking, administrative and revenue law

Michael Sumner Osborne SC

Bar Roll Number: 2895
Date of Admission: 23 April 1992
Signed Bar Roll: 26 May 1994
Read with: Tim North SC
Readers: Christian Juebner; Wendy Powles, Hugo de Kock, Jonathan Wilkinson, Damien McAloon, Kieran Hickie
Areas of Practice: Commercial law

Stephen John Sharpley SC

Bar Roll Number: 3162
Date of Admission: 25 May 1992
Signed Bar Roll: 20 November 1997
Read with: The Hon President Maxwell
Readers: Stephen Linden and Annette Charak
Areas of Practice: Tax, commercial law

Melinda Jane Richards SC

Bar Roll Number: 3057
Date of Admission: 1 March 1993
Signed Bar Roll: 23 May 1996
Read with: Her Honour Judge Cohen
Readers: Jim McKenna, Ray Smith and Joel Fetter
Areas of Practice: Employment and industrial law, equal opportunity and human rights, public law (including inquiries) and common law personal injuries

Geoffrey Rowan Dickson SC

Bar Roll Number: 3084
Date of Admission: 7 April 1993
Signed Bar Roll: 21 November 1996
Read with: Terry Murphy SC
Readers: Natalie Vogel, Marita Evans and Yael Steel
Areas of Practice: Family law, with a focus on complex property matters

BACK ROW (4 PEOPLE) L-R Melinda Richards SC, David Gilbertson SC, Geoffrey Dickson SC, Michael Osborne SC
MIDDLE ROW (5 PEOPLE) L-R Stephen Sharpley SC, Andrew Maryniak SC, Jason Pizer SC, Susan Brennan SC, Richard Attiwill SC
BOTTOM ROW (6 PEOPLE) L-R Nicholas Tweedie SC, Jonathon Moore SC, Roisin Annesley SC, Brent Young SC, Gregory Harris SC, Diana Harding SC

Richard Hugo Muecke Attiwill SC

Bar Roll Number: 3039
Date of Admission: 7 April 1993
Signed Bar Roll: 23 May 1996
Read with: David J O'Callaghan SC
Readers: Bruce Cohen, Nigel Evans, Andrew Downie, Dan Bongiorno and Fiona Spencer
Areas of Practice: Commercial, civil and administrative law

Roisin Niambh Annesley SC

Bar Roll Number: 3200
Date of Admission: 11 April 1994
Signed Bar Roll: 28 May 1998
Read with: Tim North SC
Readers: Nicole Mollard
Principal areas of practice: Common law, professional negligence and commercial

Jonathon Peter Moore SC

Bar Roll Number: 3188
Date of Admission: 11 April 1994
Signed Bar Roll: 28 May 1998
Read with: Paul Santamaria SC
Readers: Tom Bevan, Daniel Hochstrasser, Caryn van Proctor, Christina Klemis
Areas of Practice: Commercial law

Susan Margaret Brennan SC

Bar Roll Number: 3215
Date of Admission: 11 April 1994
Signed Bar Roll: 28 May 1998
Read with: Jeremy Gobbo QC
Readers: Robin Robinson and Louise Hicks
Areas of Practice: Planning and environment law and associated areas such as licensing, gambling regulation, heritage

Jason David Pizer SC

Bar Roll Number: 3323
Date of Admission: 4 March 1996
Signed Bar Roll: 18 November 1999
Read with: The Hon Justice Almond and Paul Santamaria SC
Readers: Emrys Nekvapil, Barnaby Chessell, Mark Costello, Benjamin Jellis, Fiona Batten and Simona Gory
Areas of Practice: Administrative law and commercial law

Nicholas James Tweedie SC

Bar Roll Number: 3222
Date of Admission: 4 September 1996
Signed Bar Roll: 28 May 1998
Read with: Chris Wren SC
Readers: Henry Jackson, Jonathon Rattray, Emma Peppler and Daniel Robinson
Areas of Practice: Planning and environment law, liquor and gaming, administrative and government law and some statutory crime

A Bit About Words

JULIAN BURNSIDE

"Dead"

It is hard to imagine that we do not all fully understand the word *dead*.

It may come as a surprise then to discover that the OED2 entry for *dead* occupies 14 columns in volume IV and comprises about 12,000 words. Of course, that quantity is largely made up of quotations, but for all that it is an impressive amount of learning for an apparently straight-forward word. The principal entry for *dead* (as adjective, noun and adverb) is followed by entries for various composites such as dead-beat, dead-centre and dead drunk.

The OED2 entry for *dead* focuses on its principal use as an adjective: describing a person or thing which had once been alive but is no longer. But this sense allows a number of shades of meaning and includes the following:

- *dead to the world*: unconscious or fast asleep;
- *dead from the neck up*: brainless, stupid;
- of species which have become extinct, notably in the idiom *dead as a dodo*;
- of things (practices, feelings, etc.): No longer in existence, or in use; extinct, obsolete, perished. For example, *dead languages;* or *love is dead*.
- of inanimate things: e.g.
  - » *dead place*: 1712 Le Blond's Gardening "It is more difficult to make Plants grow in Gaps and dead Places, than in a new Spot.";
  - » *dead weight*,
  - » *dead angle*: "any angle of a fortification, the ground before which is unseen, and therefore undefended from the parapet",
  - » *dead rent*: "a fixed rent which remains as a constant and unvarying charge upon a mining concession, etc."
- Similarly, *dead embers*, dead acoustics.

It is interesting to see how a word which is generally thought to be the flipside of life can be applied to things which never lived and never could.

Dead as a herring dates back to the late 17th century, was a minor vogue in the mid-18th century, but its use has fallen away in the past hundred years or so. It makes little sense. At the time the expression was in more common use, the North Sea was referred to as the Herring Pond and was abundantly stocked. Even today the herring stocks in the North Sea, although depleted, are recovering.

According to Funk, it means very dead. All fish smell bad a while after they are dead. Apparently herring start to smell sooner, and worse, than other dead fish (I cannot vouch for this) so a dead herring smells exceedingly dead.

Perhaps because *dead* can apply so broadly, it has spawned a large number of idiomatic expressions. Some of these are obvious metaphorical uses of the word. *Dead drunk* is understandable once *dead to the world* is understood, although it might just be an example of *dead* as an intensifier. *Dead wicket* is as easily understood as *dead acoustics*.

Similarly, for a horse to *run dead* is easily understood.

Some other idiomatic expressions are much less obvious, for example: *dead broke, dead centre, dead keen, dead right, dead certain*. Here the connection with death has for all practical purposes vanished, and *dead* is used simply as an intensifier. Likewise *dead beat* in its original sense meant utterly exhausted (1821). Later it came to mean a worthless idler who sponges on his friends (1863), and in Australian slang a person who is down on his luck (1898). But originally, *dead beat* was another example of *dead* being used simply as an intensifier, with no reference to death.

The use of *dead* as an intensifier stands interestingly against *dead as a herring*, where it is the herring which intensifies the effect of death rather than the reverse.

In this use, it goes back a long way. Thomas Nashe, a 16th century pamphleteer, in *Almond for Parrat,* wrote in 1589: "Oh he is olde dogge at expounding, and deade sure at a Catechisme." (*Parrat* was an alternative spelling for *parrot*. By a nice historical symmetry, *dead as a parrot* is one of the best known recent idioms for "completely dead". It was used in the Monty Python show first screened on 7 December 1969 and is very widely recognised, although the OED2 remains conspicuously silent on the subject.)

Dead as a doornail is another idiom which is far from obvious. It also goes back a long way. In 1680 Otway wrote in *Caius Marius*: "As dead as a Herring, Stock-fish, or Door-nail." It has curious origins. In times before bank safes and sophisticated domestic security existed, solid doors were an essential part of front line defence of hearth and home. Back then, doors were very strongly made, typically a solid timber frame with solid timber panels attached. The various pieces were typically nailed together. To make it more difficult to break through the door, the nails used were longer than the combined thickness of the frame and panels together, so they protruded through to the opposite side. The protruding end of the nail would then be hammered over flat, making it virtually impossible to pull the nail out and correspondingly difficult to break the door apart. It is still possible to find doors made this way, and one glance makes it clear that this was a very strong door.

But once the protruding end of the nail had been hammered flat, the nail could not be re-used: it was, metaphorically, dead. *Dead as a doornail* is the idiom which resulted.

Dead reckoning is another use of *dead* which has nothing to do with death. It is a means of reckoning your present position at sea (or more dangerously, in the air) by starting with a previously known position and calculating subsequent speed and direction while adjusting for known wind, currents and other forces which might affect your progress. It is done without reference to observable fixed points such as stars or landmarks. It is a pretty rough and ready way of calculating position, and is subject to all manner of errors. One theory has it that it is really *ded* reckoning, for *deduced* reckoning. This stands awkwardly with the fact that it has been spelled *dead* reckoning since about 1587, and is referred to in *Moby Dick* (1851) and in *Walden* by Thoreau (1854).

> "It may come as a surprise then to discover that the OED2 entry for dead occupies 14 columns in volume IV and comprises about 12,000 words."

The OED2, which gives 1613 as the earliest use, defines *dead reckoning* as "The estimation of a ship's position from the distance run by the log and the courses steered by the compass, with corrections for current, leeway, etc, but without astronomical observations" but it does not venture any theory about how it came to be so called. Perhaps it is mute testament to the danger of proceeding that way: at sea, and especially in the air, if you run the risk of calculating your position wrongly you may end up dead.

Most of these uses are *dead* as an adjective: qualifying a noun. But in its use as an intensifier, *dead* is used as an adverb, qualifying an adjective: *dead lucky, dead centre*, etc. These uses as different parts of speech pass almost unnoticed.

It can also be used as a noun: and is so used in such familiar expressions as *bury the dead, loud enough to wake the dead*, etc. and, less familiar, in the US slang *on the dead* meaning in deadly earnest.

But *dead* can also be used as a verb, and when so used it strikes the ear very oddly. Most of us have heard Bluebottle in the Goon show complaining that someone has "deaded me". That usage sounds simply wrong, but it dates back to the 14th century. It can be used intransitively:

- Chaucer "Al my felynge gan to dede." (1384)
- Bacon "Iron, as soon as it is out of the Fire, deadeth straight-ways." (1626)
- Fuller "Their loyalty flatteth and deadeth by degrees." (1654)

But it can also be used transitively (but only as a past participle, it seems):

- Spenser "Our pleasant Willy…is dead…With whom all joy and jolly merriment is also deaded." (1591)
- Nashe "Tree rootes…stubbed downe to the ground, yet were they not utterly deaded." (1594)
- Wilson "This…deaded the matter so, that it lost the Cause." (1653)
- Milligan "You rotten swine! You've deaded me!" (1956)

All these quotations except the last come from OED2. The last comes from memory but it is accurate. It is interesting to see that it sounds absurd despite having centuries of usage to support it.

In contemporary Aboriginal slang, *deadly* is a word used with two distinctive features. Despite its form, it is used as an adjective not as an adverb, and its meaning is opposite of what you might imagine: it means excellent or very good, and thus parallels the way *wicked* is used in contemporary slang. *The Deadlys* is the name of an Award to Aboriginal and Torres Strait Island people for outstanding achievement.

PICTURE COURTESY OF J TOMLINSON.

BOILERPLATE

Gallimaufry

JOHN COLDREY

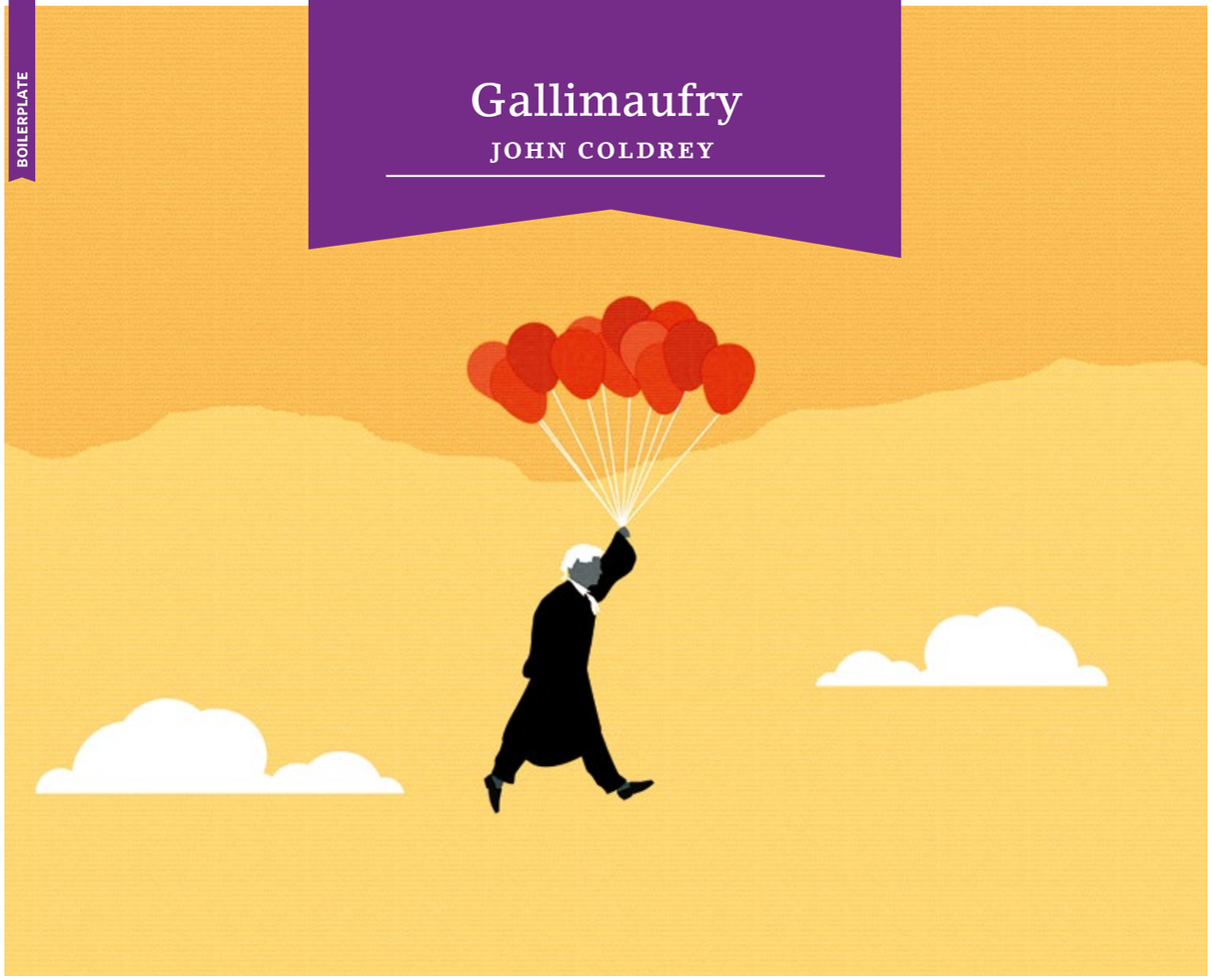

ILLUSTRATION BY GUY SHIELD

As readers will know, I am a man of few words. Unfortunately I tend to recycle them.

But I have always enjoyed the witty comments of others—especially if they are quirky.

Take, for example, the one liners of WC Fields, who has been described as the Oscar Wilde of hard liquor.

"A woman drove me to drink and I never even had the courtesy to thank her".

"I always keep a stimulant handy in case I see a snake, which I also keep handy".

"What contemptible scoundrel stole the cork from my lunch?"

The English actress Dame Edith Evans, having been charged the outrageous price of 17 shillings and sixpence for a pineapple at Fortnum & Mason, remarked, when tendering a one pound note "Keep the change, on the way in I trod on a grape".

On the sporting front, Daymon Runyon proffered the advice: "The race is not always to the swift; the battle is not always to the strong: but that's the way to bet".

Lee Trevino, the American golfer is quoted as saying: "What a terrible round! I only hit two good balls all day, and that was when I stepped on a rake in a bunker". This may be contrasted with the inadvertent humour of the Football Association goalkeeper who was quoted as saying: "I'd give my right arm to play in goal for England".

From a legal perspective there was FE Smith (later Lord Birkenhead) who, when responding to a politician who sought his directions to the toilet, advised "Go down the first corridor on the left and you will see a door marked "Gentlemen"—but don't let that deter you".

Sometimes amusing comments are quite innocently made.

Two counsel on the Ulster Circuit were confronted by a foul odour when they entered the courtroom.

They were attempting to locate its source when the judge appeared. No doubt trying to put him at his ease one of the barristers remarked: "There was a bad smell in the Courtroom even before Your Honour came onto the bench".

"As a barrister I was guilty of criticising a Supreme Court judge. (Shame.) It was at the MCG during an AFL final which had attracted 90,000 spectators. Consequently I was somewhat disconcerted when a gentleman in the row in front turned around and announced: 'I'll have you know Justice C is my cousin!'"

Some comments are deliberately vituperative. Heard in an English robing room were the observations:

"There is nothing wrong with Justice A that lockjaw wouldn't cure".

"Judge B is improving. Gaps are appearing in his ignorance".

As a barrister I was guilty of criticising a Supreme Court judge. (Shame.) It was at the MCG during an AFL final which had attracted 90,000 spectators. Consequently I was somewhat disconcerted when a gentleman in the row in front turned around and announced: "I'll have you know Justice C is my cousin!"

Imbued with the confidence imparted by the cloak of anonymity and Mr Foster's inestimable lager, I responded, "Don't worry, your secret is safe with me".

(This was possibly my best riposte ever.)

Words are often misconstrued in court transcripts.

In a plea in mitigation a character witness stated: "I have great respect for this young man. He can sleep under my roof at any time".

What emerged from the transcript was: "I have great respect for this young man. He can sleep under my wife at any time".

No doubt the witness would have been surprised at the type of rehabilitation he was recorded as proposing. (Or, as the Bible might have said "Greater love hath no man than he lay down his wife for a friend".)

In Alice Springs, a magistrate who was given to pontificating sentenced an Aboriginal defendant who had taken and used a motor car with these words: "Defendant, a man's house is his most important possession. His motor car is his second most important possession. You have taken a man's second most important possession, and I intend to punish you with a severe fine".

As the defendant was leaving the Court, the Aboriginal Field Officer, who had a wonderfully wicked sense of humour, came up and said:

"You heard what that Magistrate said. You'd betta never steal any bloke's house!"

Perhaps the prize for bold advocacy should go to Judge David Parsons who, when working for Central Australian Aboriginal Legal Aid in Alice Springs, represented a client charged with criminal damage. He had smashed the windscreen and snapped the aerial off "a man's second most important possession".

This, argued the young Parsons, was an offence of trivial proportions. It was, after all, summer, and there would be no rain, and the lack of a windscreen on the vehicle would benefit the occupants by allowing the ingress of copious quantities of refreshing air. As for the broken aerial, everyone knew that the two local radio stations could be adequately accessed by utilising a suitably bent wire coat hanger.

It is sheer coincidence that shortly thereafter, Parsons left Alice Springs and joined the Northern Territory Bar in Darwin.

Then there are the occasional judicial witticisms:

I particularly like the comment attributed to Sir Guy Green, former Chief Justice of Tasmania, about an acquaintance:

"Deep, deep down, he's a very shallow person".

But for judicial sangfroid it is difficult to beat Victoria's own Sir George Lush.

A prisoner, having been refused bail, observed that his honour was nothing but "a fat little bastard" ("bastard" is the expurgated version).

Sir George attracted the attention of his Associate and remarked, "I didn't realise I had put on weight!"

The approach barristers take to Courts of Appeal differs from country to country. So you have the English counsel who announced to the appellate court that he had three submissions. One was so good it was absolutely unanswerable, the second was arguable, and the third had little or no substance. The presiding judge said: "Well give us your best point first." To which the barrister responded: "Oh no, I've been caught like that before. I'm not telling your Honours which is which!"

This may be contrasted with counsel's more respectful approach in a Southern United States appellate court. The Chief Justice, in responding to his submission, lent forward and said: "That ain't the law in my court, son." To which counsel replied, "It was until your Honour just spoke".

Finally, it's time to mention Frank Vincent.

While he was sitting in the Practice Court, an earnest young counsel submitted:

"Your honour must exercise your discretion judicially". This elicited the reply:

"That's what takes all the fun out of this job. What's the point of having a discretion if you can't exercise it however you like". There is no record of counsel's response.

It was his Honour who once expressed the view of a fellow barrister:

"If he was half as clever as he thinks he is, he'd be five times as clever as he actually is."

Regardless of the maths involved, this is clearly not a flattering formula.

Surely that's enough words for this edition.

Red Bag, Blue Bag

Justice delayed is counsel dismayed

Red Bag

As a youngster, my mother used to tell me that "all good things come to those who wait". But sometimes, there is waiting and then there is WAITING.

Case in point—some 12 years ago, I appeared in the Supreme Court in a rather complex dispute. I won't bore you with the details, but let's just say it went for some months. There were 16 experts, including at least four who were based overseas, 30 lay witnesses, and the better half of a pine plantation in Court Books. About $450 million was in dispute. The outcome of the trial could mean the making, or breaking of my client, Company B.

Needless to say, the other half was rather pleased about the new beach house that resulted from the fruits of that trial.

Despite the case ending more than a decade ago, judgment was only handed down yesterday. Big Firm A's name had changed four times in that period as a result of numerous international mergers. My junior had left the Bar and entered politics. Company B had made an absolute mint out of something called an "app" and no longer even cared about the outcome of the case.

About eleven years after the trial ended, Partner C was cleaning out files in the office and came across the case again. There had been no word from the Court, so Partner C asked me whether there was anything we could do to "hurry up" the judgment. "Could I," Partner C queried, "bring it up (in an oh-so-casual way) with Judge D at the annual Bar/bench golf tournament? Perhaps it had just been forgotten?"

"No, no, no!" I replied. "It would ruin a good day of golfing! What I can do," I said, "is ask the Bar Chairman to raise it with the Chief Justice (after the golf day of course)." Partner C sighed with relief.

Not long after that, Partner C was contacted by Judge D's new associate and told that judgment would be handed down. A new junior was briefed. The other half submitted some renovation plans for the beach house…

We won by the way.

Blue Bag

A month ago, I appeared before Magistrate X. My case involved a couple of warring neighbours. You know, the usual: starts off as a bit of an issue about who should pay for fencing, then turns into world war three over overripe fruit trees dropping their goods on the neighbour's lawn, and then someone "accidentally" shining their hunting spotlights into the other's backyard. Yawn.

I was acting for Mrs A. She's 93, but pretty switched on for an old lady. She gets around on that mobility scooter like a formula one driver! AND she even has her own Facebook page (ok, so she just uses it to post jam recipes for Doris down the street, but hey, it's a start).

Anyway, the case ran for a couple of days. No sweat though, I was pretty awesome (I'd even highlighted the good bits in my brief. I know! How brilliant is that?). Mrs A seemed really tired at the end though. She said she thought it might be time for her to go to some place called the "Pearly Gates". I'm not quite sure where that is, or even what it is, but the way she described it, it sounded like some kind of holiday resort at a giant airport lounge.

At the end of the case, Magistrate X said that judgment was going to be reserved and handed down later. It could be some time, said Magistrate X. Reserved? Some time? What the? Don't they just do these things on the spot?

But oh no. Now I must wait. But for how long? I've already been waiting a month. How much longer is it going to be? One week? Another month? Six more months? Magistrate X didn't say! And my instructor has heard heard NOTHING from the Court.

I've heard rumours that some barristers have had to wait for almost a year (yeah, you heard me A YEAR) for judgments.

Man, a year! I can't wait that long! I need results! How can I possibly update my blog, or tweet what an awesome result I got for Mrs A (as I am sure I will), if I have to wait?

If it takes that long, by the time Magistrate X decides the case, my inevitable victory will be OLD NEWS! The horror! The shame! What kind of impact will that have on my rating on *Ratemybarrister.com.au*?

Oh yeah, and I suppose Mrs A would like to have her dispute resolved. Preferably before she goes to that Pearly Gates place.

The Grand

333 Burnley St, Richmond

BY SCHWEINHAXE

Richmond. It is the place to live! Myself and Schweinhaxette were catching up with great old friends that we have known since university. We wanted to go to a place that had fine food but with a bit of buzz.

Schweinhaxette made a booking at The Grand in Richmond. It is a hotel that sits rather grandly on a corner. Its peeling and faded paint give it a somewhat distressed look, and the colonnades out the front lend a grand air.

We arrived for an 8pm booking. As our friends were already in the lounge bar we joined them for a glass of Billecart and a fine Morreti beer. Carlton was playing Sydney on the TV in the bar so I managed to sneak a peek of this while catching up. From the lounge bar I could see a further bar out the back. It was full of people who were clearly not headed for the dining room. Music was playing and people were starting to lose themselves in the thrill and excitement of a Saturday night. People in their twenties and thirties about to kick off their evening!

After a while we headed into the dining room, drinks in hand. You can sort of get away with this conduct in a hotel. However, as we entered the dining room, it was plain to me that this was a very different place to the lounge bar: carpet, white table clothes, beautiful lighting and patrons who looked like they knew how to spend money. We were seated at a table near the entrance to the kitchen but were quickly and expertly moved to a terrific table by a window when that became available.

The dining room serves Italian fare. I had the *Calamari alla griglia*. This was char grilled baby calamari with parsley, capers and anchovies. It was delicious and light. My male uni mate had the same. Schweinhaxette had the risotto with duck and Taleggio cheese. This was spread over a shallow plate. Schweinhaxette described it as creamy but not heavy. My female uni mate knocked off three expertly poised scallops atop a pile of squid ink zucchini spaghetti. Not much more to say! This was all washed down with an Abbazia di Novacella Mueller-Thurgau (a German white grape variety), from the Alto Adige region of northern Italy, around the base of the Dolomites. It was crisp and aromatic—the perfect accompaniment.

To mains. Unfortunately, my male uni mate ordered the 500g T-bone with salsa. That meant I had a choice, same as him or risk ordering some other dish that had three wafer thin little slices of meat. I went big and ordered the T-bone. It was large but cooked perfectly to medium rare. I avoided picking up the bone to chew until I could resist temptation no more. We ordered fries to fit in with the monster steak and then a rocket, pear, walnut and parmesan salad—a lighter contrast.

Schweinhaxette had the *Lombo di Cervo con funghetti*. This was a pan-seared loin of venison with truffled honey and vincotto served with king oyster mushrooms. I tasted it. What a perfect union of game and honey. The vincotto gave it a cleansing bite. Magnifico! My female uni mate had the *Anatra arrosto con gnocchi alla Romana*. This was roast duck with semolina gnocchi and an orange and juniper berry sauce. She described it as delicious but did leave all of the skin. I regret that I did not manage to knock it off. The Grand's excellent wine list with its strong Italian bent made the choice of red a difficult one. We decided to 'go local' and enjoyed a Tellurian Tranter Shiraz 2010 from Heathcote. This single vineyard Shiraz was all class. Velvet-soft tannins, ripe blackberry and licquorice notes with a touch of spice. A harmonious, elegant wine which matched our red meat choices perfectly.

Although well and truly sated, we could not resist a sweet finale so we ordered the *bavarese al cioccolato* to share. This was chocolate marquise with coconut lime sorbet and chocolate crumble. It came with four spoons, so just a 'piccolo' indulgence and truly delicious!

I am not going to talk too much about price. Why bother for such a wonderful evening over food and wine? However, the price was about $150 per head inclusive of tip. The dining room has achieved a hat in *The Age Good Food Guide* every year since 2006, except for 2010.

The Grand also caters for groups and functions and has private rooms upstairs. It would make a great floor lunch venue. I see a fantastic and sumptuous lunch followed by after lunch drinks in the bar. Lovely!

Guten Appetite!

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*

Federal Court of Australia

Short v Ambulance Victoria
Before Justice Marshall, 17 October 2013
HIS HONOUR: What was exhibit MFI-G is now exhibit FA.
PATRICK WHEELAHAN: Thank you your Honour.
HIS HONOUR: And that's no comment on the exhibit.

Supreme Court of Victoria

Muir v. Manganelli
Before Justice Beach, 10 September 2013
TREVOR MONTI SC: Your Honour, just in relation to what's been said by our learned friend, we'll be lifting the veritable roof off the Southern Stand of the MCG if an attempt is made to introduce a new expert witness into this case at this time ...
HIS HONOUR: Well, Mr Monti, you've amended the statement of claim twice since Friday, if you try to lift the roof off, you might find it falls on your head.

Federal Court of Australia

Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (Rec & Mgr) (In Liq) & Ors
Before Justice Murphy, 14 May 2013
ROBERT STRONG: The question is that it would have been possible for the board to decide to revoke the deed and not proceed with that amendment, wouldn't it?
WITNESS: I can't see why it would be possible, no. I used to say as a doctor it's possible to be kicked to death by a duck, but it's unlikely to happen.

Supreme Court of Victoria

Regent Holdings Pty Ltd v State of Victoria
Before Justice Beach, 28 August 2013
DAVID CURTAIN SC: Yes, Your Honour. I was telling my opponents that in scouring the Southern Ocean Mariculture documents, I saw an order for ten kilograms of abalone from the Flower Drum on one of the pages.
HIS HONOUR: Mr Middleton's been—no.
CURTAIN SC: Probably. Perhaps in anticipation of a visit, your Honour.

Federal Circuit Court of Australia

MZYXS v Minister for Immigration & Anor
Before Judge Reithmuller, 23 Oct 2012
MATTHEW ALBERT:... the reason that's the case, your Honour, is twofold. Firstly, the use of the Oxford comma before the "or", which is to divide it up, to have the "mere" attached to the first bit not to the second or the third.
His Honour: I know what one is but how many Australians have you met that know what an Oxford comma is?
ALBERT: All those who have been to Oxford...[A]n Oxford comma belongs before an 'and' or an 'or'.
HIS HONOUR: I know what one is but what I'm asking you is how many people do you think actually do know what one is?
ALBERT: It doesn't change its use in the English language and it may or may not have been appreciated by the member, but she used it whether she meant it or not.
HIS HONOUR: Well, many people don't think you need an Oxford comma. It's mere surplusage from those of Oxford.
ALBERT: Your Honour, we say it has - it can't be ignored. It's there. It's there and it can't be ignored, but if your Honour is not wanting to give any weight to the Oxford comma, so be it. There's a second reason, and the second reason is that a mere theory is the same as a suspicion.
A mere theory is a suspicion. That is to say when the phrase is used as it is a number of times here, "mere theory or suspicion."
HIS HONOUR: What's the difference between a theory and a mere theory?
ALBERT: I'm not sure of the answer to that, your Honour...
HIS HONOUR: Or a suspicion and a mere suspicion.
ALBERT: Well, your Honour.
HIS HONOUR: Is it a bit like a cat and a meerkat?
ALBERT: Your Honour is going well beyond my expertise.

Victorian Civil and Administrative Tribunal

Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd
Before Senior Member Vassie, 14 November 2011
MICHAEL PEARCE SC: You say, though, in paragraph 18 of your witness statement, in December 2004, that you were nervous about Mr Zampelis?
WITNESS: Mm.
PEARCE SC: Okay. You say that he had a history of being litigious?
WITNESS: Mm.
PEARCE SC: And at that point, you were suspicious of his motives?
WITNESS: Mm.
PEARCE SC: So what I'm asking you is, had you formed a view at that stage about Mr Zampelis that he was a difficult customer?
WITNESS: Mm.
PEARCE SC: And he could be a formidable negotiator?
WITNESS: Well, he told me he had a law degree.
PEARCE SC: That's enough to scare anyone?
WITNESS: Yes, exactly.

Extraordinary Chamber of Courts, Cambodia

The Co-Prosecutors against Kaing Guek Eav, (charged with the murder of 12,382 identified individuals, torture, persecution and crimes against humanity).
Before Judges Prak Kimsan (Cambodia), Rowan Downing (United Nations), Katinka Lahuis (United Nations), Huot Vuthy (Cambodia) and Ney Thol (Cambodia), August 2008
Found in the draft transcript of proceeding. Reference by English transcriber: "I am having a problem identifying the witness Mr Ti Pist."*

* The 'witness' turned out to be to the court typist.

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