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VICTORIAN BAR NEWS

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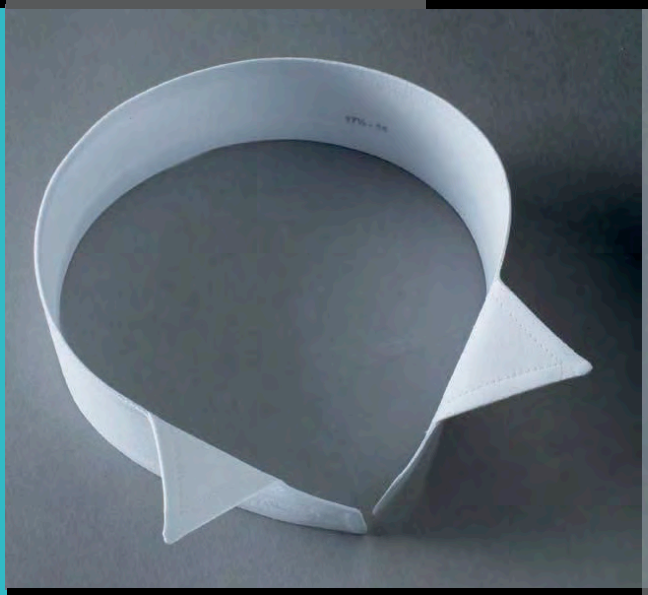

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ISSUE 155 WINTER 2014

VICTORIAN BAR NEWS

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Around Town

News & Views

Back of the Lift

Entries for Back of the Lift are current up to 20 May 2014.

Boilerplate

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VICTORIAN BAR NEWS

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Georgina Costello and Justin Tomlinson

PHOTO BY PETER BONGIORNO

Tradition and Progress at the Bar

The Editors

As barristers we are members of a profession. This distinguishes our endeavours from those of business people. Of course, we are business people, but the 'profession' tag underpins something else. We have all joined this profession with its extra demands, responsibilities and privileges. Why? It would be foolish to attempt a universally satisfactory answer, but let us tempt folly.

It is true that the work conditions are good, or at least as good as any self-employed worker can expect from a tyrannical, obsessive and overly critical employer. We can choose the hours we work and, to some degree, the type of work we do. Our colleagues are mostly polite, trustworthy and generous enough to share the cost of a photocopier. The remuneration can be good, although it is often not for the money that we take a brief.

It is likely that a major reason we were drawn to this profession is this one thing: independence. In fact, our profession requires us to remain independent. This is what it means to be more than a business, but a profession. When Owen Dixon said, "The Bar is no ordinary profession or occupation"[1] he had in mind more than the fact that eccentrics are attracted to its ranks. The Bar is not extraordinary because barristers are smarter or more honest than others in our community (but don't tell solicitors this). Barristers are unusual because "by virtue of a long tradition" they collaborate with judges and "fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community."[2]

It is very human to want things to stay the same, to deny or lament mutability in ourselves and our institutions, to treasure tradition sometimes at the cost of inviting progress and so it is no wonder we occasionally baulk at change in the institution of our Bar. It is a conservative institution, but it is peopled by professionals hard-wired to question and challenge. As Winston Churchill said, "To improve is to change; to be perfect is to change often." The Bar has no shortage of perfectionists, and as the content of this issue of *Victorian Bar News* illustrates, the Bar is both changing and improving as an institution.

Tradition, when fuelling bare nostalgia, may be counter-productive.

However, the Bar has many traditions that do more than fog the memory; they are foundations on which our profession progresses. The tradition of lauding independence and freedom of intellectual application is the driving force of progress in our profession.

The tradition of naming leading senior barristers "Queen's Counsel" has returned. The arguments for and against the change were printed in *Bar News* edition 153. It is true that the way in which the change occurred has not been immune from criticism.[3] That criticism expressed concern that the voice of opposition was not adequately sought or heard. Such concern may prompt discussion about Bar Council governance, such as whether up-coming resolutions should be advertised in "In-Brief" to enable dissent to be aired. However, as demonstrated by the list published in this issue, the vast majority of "Senior Counsel" have now chosen to change back (or forward, depending how you see it) to the Queen's Counsel title.[4] Part of the rationale for this reversion was that "QC" is a more effective honorific to promote and raise the profiles of our senior barristers in Asia, where it is said that title is better known and carries greater prestige among clients and lawyers than the title "SC". Whether this rationale is well founded is now somewhat of a moot point, but in making the choice of QC available to senior barristers, the Bar, like Janus, looked to the past and future at the same time, drawing on the power of our past to step into the global future.

This issue of *Bar News* covers historical stories of our people, for example, in the obituaries of barristers and farewells to retiring judges in the Back of the Lift Section, as well as in Philip Ayres' terrific study of Sir Ninian Stephen's career at our Bar. This issue also looks to the future, at areas in which to progress law reform, at Victoria's new arbitration centre, at new ways of practising our old profession and at examples of law reform and legal challenges at home and abroad.

We hope the content of these pages will inspire you to honour our traditions by celebrating the acts of courage, leadership, sacrifice, community service, intellectual rigour and achievement that are contained in this issue. These acts and our traditions ensure that barristers provide vital and important services to the law and our community.

Bar News is an important institution in itself, with a tradition of providing a platform for discussion of our profession, the greater institution of the Bar and important public and law reform issues. The *Bar News* editorial team continues to reflect back to you our collective challenges and achievements and aims to provoke discussion. We trust you will enjoy this issue.

THE EDITORS

1 *Re Davis* (1947) 75 CLR 409, per Dixon J, as he then was.

2 *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298 per Kitto J

3 See 'Queen's Counsel Restored on the Basis of Limited Poll, *The Australian*, 11 April 2014

4 Approximately 86%: 155 of the 180 SCs at the Bar immediately prior to the change, elected to apply for a change to QC on re-introduction of the Queen's Counsel title earlier this year.

The *Victorian Bar News* Team (L-R): Georgina Costello (Editor), Anthony Strahan (Deputy Editor), Maree Norton, Justin Hannebery, Sally Bodman, Catherine Pierce, Justin Tomlinson (Editor), Denise Bennett. Absent: Robert Heath (Deputy Editor).

Letters TO THE Editors

Sir Isaac Isaacs— *the 'Breaker' Morant Connection*

I note the article written by the Honourable Michael Kirby AM CMG, Isaac Isaacs, *Driven, Difficult, Influential* published in the same edition that also featured an article on the trial and sentencing of three Australians, Lieutenants Harry, 'Breaker' Morant, Peter Handcock and George Witton during the Boer War in 1902.

Readers may be interested to know that Isaacs KC MP played a vital role in the Breaker Morant case in representing George Witton following his imprisonment. Morant, Handcock and Witton were tried and sentenced in 1902 for shooting Boer prisoners. Morant and Handcock were executed and Witton's sentence was commuted to life imprisonment. In 1904, Witton was released from a British prison through Isaacs' efforts and returned to Australia.

Until now, Isaacs' work in representing Witton incarcerated in a British prison far from home has not been recognised and I would like briefly to highlight Isaacs' contribution to one of Australia's most controversial aspects of military history/law that persists today.

The link between Isaacs and his representation of Witton was not examined in biographies by authors Sir Zelman Cowen, *Sir Isaac Isaacs*, 1979 and Max Gordon, *Isaac Isaacs, A Life Of Service,* 1963 and this aspect of Isaacs' advocacy has until now remained unrecognised.

Isaacs prepared two documents, a legal opinion and a petition to the Crown. The opinion contained observations about a number of issues and arguments in favour of Witton's early release and although a pardon was not granted, Isaacs' persistence secured Witton's release.

Isaacs' representation of Witton was significant. It reflected his excellence as a barrister and his reputation for concern for matters that impacted on the Australian community and identity. Isaacs believed that Witton was innocent of the crimes of which he was convicted and he enlisted the views of 80,000 Australians who signed the petition that was sent to the Crown.

Isaacs' *pro bono* representation of Witton demonstrated his craftsmanship and determination to see that justice was done. He believed that Witton should not have been convicted and sentenced because of Witton's belief that he had followed lawful orders and had acted out of loyalty and a mistaken sense of duty. His opinion also raised doubts on many aspects of the arrest, trial and sentencing of Morant and Handcock.

Through recording Isaacs' representation of Witton, it is hoped that this aspect of Australia's military and legal history will be recognised as another example of Isaacs' sense of justice and his work continues to play a vital role in current proceedings to secure posthumous pardons for Witton, Morant and Handcock.

James Unkles

James Unkles is a lawyer, military reserve legal officer and Petitioner for the descendants.

Still Laughing

Having just read *"Has Humour a role in Court?"* Bar News 154 at page 56, I was reminded of my first appearance in the High Court as Solicitor-General for the State of Victoria (1982).

It must have been an important case because the Commonwealth and each State was represented by its Solicitor-General.

As the junior Solicitor-General I was last cab off the rank. I had to listen while the other Solicitors mumbled the same argument seven times. I rose to my feet knowing that I could not say the same thing for the eighth time. Instead, driven by a blind impulse, I decided to tell the judges a joke. They all laughed, except for Justice Mason (who liked a joke but not in court). It was the biggest mistake I ever made. When I next stood to deliver an argument in the High Court all the judges leant forward waiting for the joke. On each appearance for ten years I was obliged to turn up with a new joke. I would have retired early if my wife had not whispered "pension". Luckily there was at least one happy moment. The case was about the extent of the Commonwealth's powers with respect to insurance. By now Justice Mason was Chief Justice. I said –

> *I would like your honours to imagine a diagram often found in old books of logic. It is a big circle enclosing a smaller circle. The big circle represents insurance generally. That belongs to the Commonwealth. The smaller circle represents State insurance. The Commonwealth cannot have that. Your Honours, this is called the doughnut theory of constitutional law.*

It does not take much to amuse a judge sitting in court all day listening to counsel putting an argument, 99% of which the judge already knows. All the judges laughed. Except Mason CJ. But I swear I saw his shoulders shake. And I think I saw a tear run down his left cheek.

I have been told that during the following year at each Bar Dinner he attended he started off his address by saying *"Why don't you have a Solicitor-General like the State of Victoria?".*

I do not put forward this recollection as a suitable example for anyone who is not a Solicitor-General. *Hartog Berkeley*

Introducing our Newest Scholarship

The Victorian Bar Foundation and members of the Bar individually have donated very generously to the establishing of a new post graduate scholarship in Law. It is to be known as the Sir Ninian Stephen Menzies Scholarship in International Law and will be administered by the Sir Robert Menzies Memorial Foundation.

The Sir Ninian Stephen Menzies Scholarship in International Law recognises Sir Ninian's enormous contribution to Australian and international law and governance.

Brian Doyle, Chairman of the Menzies Foundation has expressed his warm thanks to the Bar for its support and particularly to Peter Jopling QC who has been tireless in supporting the fundraising.

The Foundation has recently announced the winner of the inaugural Sir Ninian Stephen Menzies Scholarship in International Law. The successful recipient is Ms Christine Ernst.

Ms Ernst has a Bachelor of Economic and Social Sciences and a Bachelor of Laws with First Class Honours from the University of Sydney. She has received numerous academic prizes, including the prize for first place in Australian Constitutional Law. Ms Ernst recently worked as Associate to the Honourable Justice Susan Kiefel AC at the High Court of Australia. Before that she was undertaking research at Sydney Law School specialising in international human rights law.

Ms Ernst will study for the Bachelor of Civil Law degree at the University of Oxford in the field of international law, focusing particularly on human rights law.

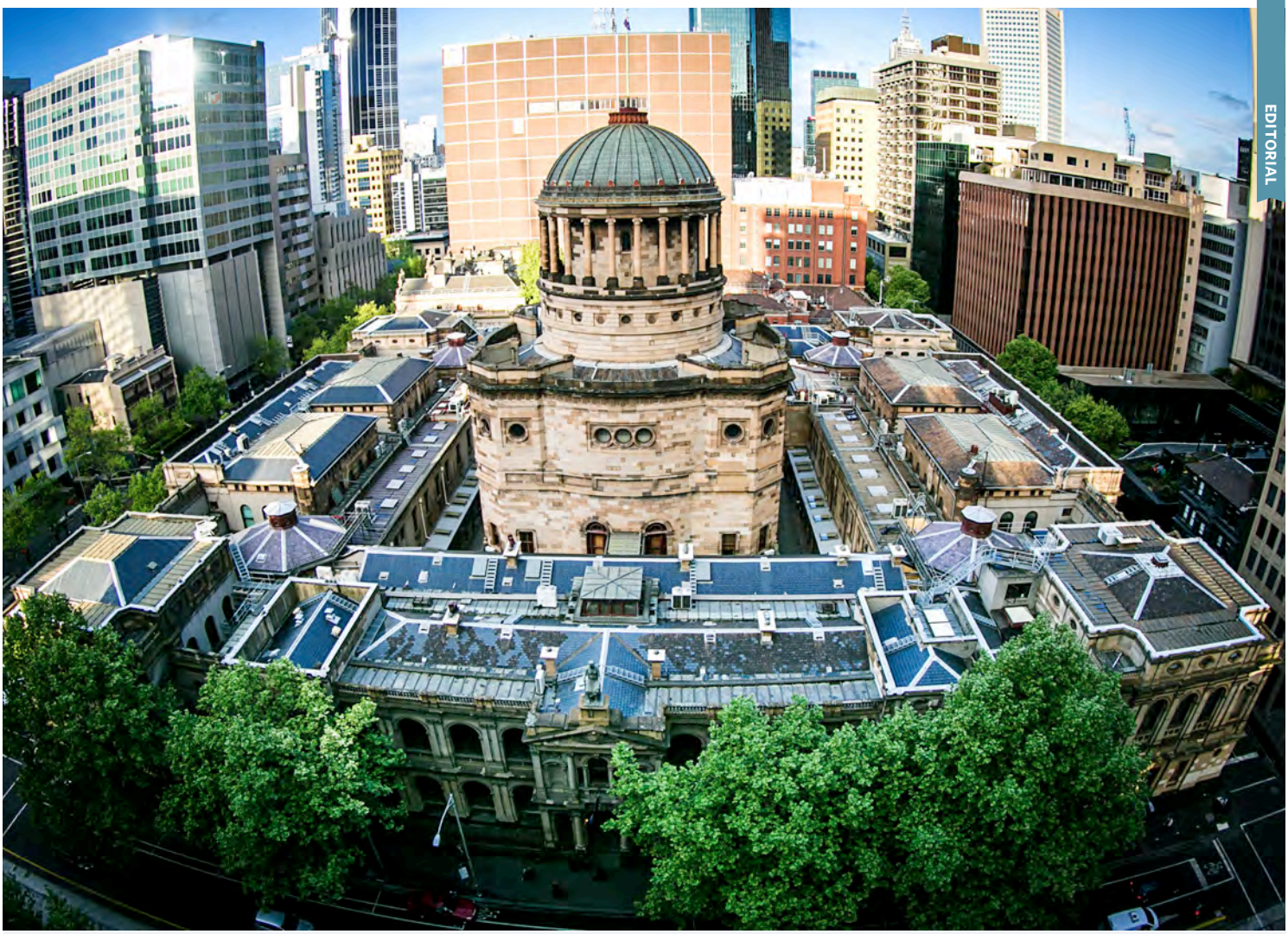
This new scholarship is designed to provide an opportunity for talented Australians who aspire to walk in the footsteps of Sir Ninian, and to make a contribution to Australian society. With generous donations from individuals, law firms, foundations and the Commonwealth Government, the Foundation plans to offer this scholarship on an annual basis. The Commonwealth is keen that applicants give strong consideration to pursuing their studies in an Asian country.

The Menzies Foundation was established in 1979 as a non-political, not-for-profit organisation to perpetuate the ideals of Sir Robert Menzies, Australia's longest-serving Prime Minister.

It supports prestigious postgraduate scholarships in allied health, engineering, law and medical research, as well as other activities of national importance.

The Foundation has been instrumental in the establishment of highly regarded Menzies health research centres in Darwin and Hobart and a health policy centre based in Canberra and Sydney.

Sarah Hardy,
CEO, Menzies Foundation



What Once was Old is New Again

VIC BAR NEWS

On 16 April 2014 senior counsel with the post nominal "SC" became entitled to change to "QC". The below list sets out those senior counsel who chose to use the post nominal QC, by reference to each division of membership. The remaining lists set out those senior counsel who elected not to apply to change their SC to QC.

Division AI (Victorian Practising Counsel) who chose to change from SC to QC

Brown QC, David J
Foxcroft QC, Hugh
Nikou QC, Olyvia
Symon QC, Helen M
Batrouney QC, Jennifer J
McGrath QC, George G
Borenstein QC, Herman
Glick QC, Leslie
Walters QC, Brian E
Collins QC, David G
Denton RFD QC, David H
Manly QC, Richard J
McArthur QC, Geoffrey G
Langmead QC, H John
Lewis QC, Gerald A
Walmsley QC, Bruce
Morfuni QC, Vincent A
St John QC, Jeremy W
Murphy QC, Terrence P
Garantziotis QC, Aristomenis
Richards QC, John B
North QC, Timothy J
Santamaria QC, Paul D
Caine QC, Bruce N
O'Brien QC, Frances I
Parry QC, Frank
Golvan QC, Colin D
Anastassiou QC, Paul E
Quigley QC, Michelle L
Riordan QC, Peter J
Neal QC, Anthony C
Noonan QC, John J
Delany QC, C James
Clarke QC, Graeme S
O'Callaghan QC, David J
Clelland QC, Neil J
Peters QC, James W S
Strong QC, Elspeth A
Hanscombe QC, Kristine P
Collinson QC, Peter W

PHOTO COURTESY OF MATTHEW TOWNSEND

Division AI (Victorian Practising Counsel) who chose to change from SC to QC(continued)

McGowan QC, Glenn C
McGarvie QC, Richard W
Wheelahan QC, Michael F
Wren QC, Christopher J
Hess QC, Barry J
Nolan QC, Anthony A
Blanden QC, Christopher J
Lyon QC, Gregory J
Anderson QC, Stewart M
Marks QC, Simon E
McDonald QC, Michael P
Thompson QC, Michael W
Panna QC, Andrew
Margetts QC, Timothy J
Martindale QC, Ian D
Kelly QC, Anthony J
Mighell QC, James H
Dixon QC, Jane A
Jones QC, Iain R
Connock QC, Matthew N
Caleo QC, Christopher M
Mawson QC, Ian F
Philbrick QC, John D
Robinson QC, Nicholas T
Cawthorn QC, Peter G
Freckelton QC, Ian R L
Waller QC, Ian G
Judd QC, Kerri E
Gleeson QC, Jeffery J
Moshinsky QC, Mark K
Middleton QC, W Ross
Jewell QC, Philip A
Dickinson QC, John P
Harrison QC, Craig W R
Wilson QC, Joshua D
Loughnan QC, Maryanne B
Kenny QC, Caroline M
Horgan QC, Samuel R
Glacken QC, Sturt A
Townshend QC, Christopher J
Brustman QC, David L
Tiernan QC, Francis J J
Wilson QC, Michael D
Papas QC, Nicholas
Hartley QC, Mary Anne
Wyles QC, Michael D
Crutchfield QC, Philip D
Steward QC, Simon H
Fleming QC, Michael F
Moulds QC, Andrew J McG
Chadwick QC, Peter A
Bourke QC, Justin L
Monichino QC, Albert A
Friend QC, Warren L
Marks QC, Samantha L
Williams QC, Daryl J
Niall QC, Richard M
Schoff QC, Georgina L
Solomon QC, Philip H
Harris QC, Wendy A
Batt QC, David J
O'Bryan QC, Michael H
Scott QC, Martin R
Kirton QC, Caroline E
O'Meara QC, Stephen A
Wood QC, Stuart J
Gorton QC, James P
Gray QC, Peter R D
Collins QC, Matthew J
Taylor QC, Lesley A
Donaghue QC,, Stephen P
Monti QC, Trevor S
McNicol QC, Suzanne B
Sest QC, Peter G
Ryan QC, Aileen M
Beale QC, Christopher W
Robins QC, Mark A
Shnookal QC, B A Toby
Pane QC, Nicholas
Roberts QC, Michael G
Hopkins QC, Nicholas D
Murdoch QC, A Neill
Corbett QC, Philip D
Sparke QC, Carolyn H
Lyons QC, Kevin J A
Alstergren QC, Edvard W
Clements QC, Andrew D
Quinn QC, Bernard F
Young QC, Brent M
Harding QC, Diana M
Maryniak QC, Andrew J
Gilbertson QC, David P
Harris QC, Gregory P
Osborne QC, Michael S
Sharpley QC, Stephen J
Attiwill QC, Richard H M
Dickson QC, Geoffrey R
Moore QC, Jonathon P
Annesley QC, Roisin N
Pizer QC, Jason D

Division AII (Crown Prosecutors and Public Defenders) who changed from SC to QC

Elston QC, Raymond A
Rose QC, Peter N
Silbert QC, Gavin J C
Trapnell QC, Douglas A
Williams QC, Michele M
Gyorffy QC, Thomas
Rochford QC, Mark J

Division BVIII (Other official appointments) who chose to change from SC to QC

O'Bryan QC, Stephen G

Division CI (Retired Judges & other Judicial Officers) who chose to change from SC to QC

Dodds-Streeton QC, The Hon Julie A

Division CII (Retired Holders of Public Office other than Judicial Office) who chose to change from SC to QC

Horgan QC, Geoffrey M

Division CIII (Retired Counsel) who chose to change from SC to QC

Wikramanayake QC, P Nimal
Thomas QC, Graham J
Clark QC, Peter H
Hillman QC, Colin G
Crennan QC, Michael J

SC's in Division AI who chose not to convert to QC

Ms Susan M Brennan SC
Ms Rachel M Doyle SC
Mr Adrian J Finanzio SC
Mr George A Georgiou SC
Mr Dyson F Hore-Lacy SC
Mr Andrew J Keogh SC
Mr Daniel Masel SC
Ms Fiona M McLeod SC
Mr Peter J Morrissey SC
Dr David J Neal SC
Mr Norman J O'Bryan AM SC
Mr Michael G O'Connell SC
Mr Paul F O'Dwyer SC
Mr Michael R Pearce SC
Ms Carmen M-F Randazzo SC
Ms Melinda J Richards SC
Mr Adrian J Ryan SC
Mr Tim P Tobin SC
Mr Nicholas J Tweedie SC
Mr Ted W Woodward SC

SC's in Div AII (Crown Prosecutors and Public Defenders) who chose not to convert to QC

Mr Peter B Kidd SC
Mr Andrew J Tinney SC

SC's in Div BIV (Solicitor-General and Director of Public Prosecutions) who chose not to convert to QC

Mr John R Champion SC
Mr Stephen G E McLeish SC

Cover Story: Vic Bar Dives into Spring Swim

SARAH LEIGHFIELD

The photo on the cover of this edition of Victorian Bar News features Colin Mandy of the Victorian Bar, swimming in the 2013 inaugural "Spring Swim" hosted by Swimming Victoria. Matthew Townsend of the Victorian Bar, who also took the photograph featured on the cover of the last edition of Victorian Bar News, snapped this photograph of Mandy in action, as well as other sensational shots of the VicBar Snappers which are featured on the Health and Wellbeing Section of the Vicbar website.

The swimming event consisted of three nights of swimming in September, October and November 2013, which were designed to pit organisation against organisation in a series of fun relay races, followed on each occasion by a social function. On 20 September 2013, eight of our barristers (swimming as the VicBar Snappers) braved the waters of the Melbourne Sports and Aquatic Centre and competed in five relays - a mystery relay; 4 x 50 metre medley; 4 x 50 metre freestyle; 4 x 50 metre backstroke/breaststroke and 8 x 25 metre freestyle.

Unbeknown to our team of intrepid swimmers, the VicBar Snappers was one of the few teams consisting of members drawn entirely from the same organisation. Many of the other teams had managed to co-opt elite Olympic representative swimmers into their ranks, or were made up of those whose weekend jobs contained a swimming aspect - such as a team of surf lifesavers. However our Snappers remained undaunted and had a lot of fun pitting themselves against teams containing casual swimmers and former and current Olympians alike.

The Snappers were then joined by two more VicBar teams - the VicBar Whitings and VicBar Flatheads - for the October and November events. Whilst our teams may not have been the fastest in the pool, they certainly were the most distinctive, sporting bright orange, green and blue swimming caps with Vic Bar emblazoned across them. Our sincere thanks to Amanda Howes, a law student, who spent a number of hours decorating our caps for us. Thank you also to our non-swimming colleagues who attended the events and cheered us on.

All in all, Spring Swim provided an excellent opportunity for our members to have fun, make new friends at the Bar, and rub shoulders with past and present Olympians, all whilst also gaining a healthy dose of exercise!

It is hoped that the Spring Swim will become an annual event and that we can continue to provide multiple VicBar teams in the future, so keep your eyes on 'In Brief' from mid-year and please join in.

Second Undefeated Season for Bar Hockey

ROB O'NEILL

After its dominant season in 2012, the Victorian Bar hockey team looked forward to 2013 with confidence. Unfortunately, the season was reduced to a single game as the New South Wales Bar was unable to scrape together enough players to come to Melbourne.

Our only fixture therefore was the "Scales of Justice Cup" against the Law Institute at the Hawthorn/Malvern Hockey Centre in October. The team was again led by Stuart Wood SC, but only off the field, as he was unable to play in the match itself due to illness.

Rob O'Neill stood in as captain, and the game saw the return of long time captain Judge Burchardt. We were delighted to welcome some young(ish) new recruits in Nigel Evans, Robert Williams and James Tierney. The remainder of the team members were John Morgan, Nick Tweedie, Andrew Robinson, Andrew Denton, Stephen Sharpley (GK), Barnaby Chessell, Ross Gordon, Craig Samson, Mark Weir and Mark and James Batrouney (sons of Jennifer Batrouney SC). Our loyal supporters Richard Brear and Jennifer and her husband Steve also returned.

We played a strong Law Institute team including several of their high-level players who had been missing the year before. Despite our win last year, we needed to lift our game to keep the Cup.

Thankfully, our recruits all proved to be good players, with Williams and Tierney providing strong drive through midfield. Denton starred up front with four goals, well-supported by Gordon, Mark Batrouney, Robinson and Morgan. The midfield featured Tweedie who starred at centre half, with strong contributions from Evans, Williams, Tierney and James Batrouney.

Burchardt and O'Neill on the backline fought hard but sometimes struggled for pace against the young Law Institute team. They were, however, magnificently backed-up by Sharpley in goal, who played to his usual very high standard.

The Bar got on the scoreboard first but the Law Institute answered quickly. That was the pattern throughout the match, which was dominated by the attacks. Four more times the Bar hit the front, four more times the Institute pegged us back. Happily, when the final whistle blew it was the Bar with its nose in front. The final score was 6-5.

In what must have been a tight contest, the trophy for best-on-ground was awarded to Sharpley, who edged out Tweedie and Denton. Stephen has now won the award four times.

Both teams were extremely grateful for the sponsorship from Kaleidoscope Legal Recruitment. Paul Burgess from Kaleidoscope played for the Law Institute and also organised welcome after-match refreshments. Our stalwart umpire Tony Dayton, who has been umpiring these matches for many years, officiated extremely well yet again.

BACK ROW: Ross Gordon, Nigel Evans, Mark Weir, Robert Williams, Craig Samson, Stephen Sharpley, James Tierney, Andrew Denton, Barnaby Chessell, James Batrouney. FRONT ROW: Mark Batrouney, John Morgan, Philip Burchardt FM, Andrew Robinson, Rob O'Neill, Nick Tweedie.

On Another Note:
The Vic Bar Community Choir

RICHARD LAWSON

Acronyms are getting out of hand. These notes are being written for HAWCVBCC. The Health and Wellbeing Committee Victorian Bar Community Choir. Thankfully, one can probably say "Vicbar Community Choir" and people will know what you mean. It started last September with a HAWC member, Laura Colla, putting the same leading question to anyone who crossed her path: "You can sing, can't you?"

And so it was that 60 barristers met at the Welsh Church Hall in LaTrobe Street at one o'clock on a Spring Thursday – reminiscent of the start of the Readers' Course or one's first day at school. Most of the gathering were sheepishly sizing each other up and looking to find someone they knew. Only a few, mostly women, looked calm and self-assured. The women, by the way, were in a sizeable majority. This was predictable but disappointing for we men. Why are we more reluctant to sing than our sisters?

Suddenly we were called to attention and introduced to the choir master, Mr Michael Leighton-Jones. What an impressive figure! His captivating Welsh tenor voice is matched by a distinguished musical pedigree and training.

Every subsequent Thursday lunchtime for the rest of last year, with patience and good humour he had us tackle the challenges of Gospel singing and Christmas Carols, all directed towards the choir's debut at the Essoign Club in December. It's probably fair to say that this performance was a qualified success. Now there is talk of an appearance at the 2014 Law Week and the up-coming Bar Dinner. Thursday one o'clock rehearsals have now become an on-going weekly fixture. The choir does, in fact, live up to the name of the committee that spawned it: Health and Well-being. New faces are a stimulation. The tenors variously practise in commercial, common law, family, crime and at VCAT. And if you've lost track and have almost started singing when it's the sopranos' turn, nothing else matters: the problem of tomorrow's client are then furthest from one's mind.

PHOTOS COURTESY OF MATTHEW TOWNSEND

2014 Victorian Bar DINNER

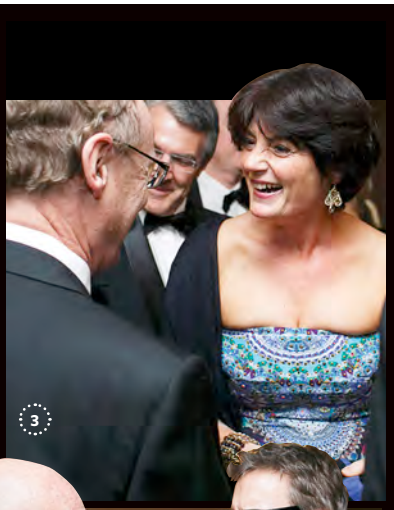
JUSTIN TOMLINSON

On 30 May 2014 a record number of barristers attended the Bar Dinner (550 in all). Once again, the venue was the spectacular Myer Mural Hall, the narrow welcoming hall of which gave junior barristers a literal opportunity to rub shoulders, and kneecaps, with the great and powerful of our Bar.

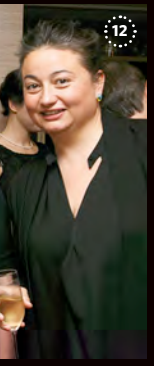
The Honoured Guests included the Governor of Victoria, his Excellency the Hon Alex Chernov AC QC, Federal Attorney-General, Senator the Hon George Brandis QC, and State Attorney-General the Hon Robert Clark MP. If there is a collective noun for a large group of judges (suggestions welcome), it would be appropriate to use it here in order to accurately convey how our Bar was honoured by the presence of so many at this year's gathering.

It is perhaps little wonder that the attendance number was so high, given the calibre of the promised guest speakers: The Hon Justice Hayne AC and Jeremy Ruskin QC. Their speeches did not disappoint and we are fortunate to be able to publish Justice Hayne's offering in the following pages. Additionally, and for the first time, these speeches are available for viewing on the web at http://www.vicbar.com.au/member-events/bar-dinner-2014 and although we are all self-employed, it may be wise to first check with your boss before playing these during work hours.

The evening was a great success and will be remembered by those attending for some time. It may also be true that those who extended the evening into the dawn (in noble homage to the finest traditions of the Bar and with an eye on personal legacy) paradoxically will find much forgotten. To assist such persons piece together material facts, and for others who did not attend, we offer the ocular proof of this year's Bar Dinner.



1. Michael Leighton Jones conducts the Bar choir
2. David O'Callaghan QC welcomes the Hon Justice Davies
3. The Hon Justice J Beach welcomes Shadow Attorney-General Mark Dreyfus QC MP and Fiona McLeod SC
4. Siobhan Keating and Matthew Albert 5. The Hon Associate Justice Randall and Dugald McWilliams 6. Eitan Makowski, Jacob Kantor, Katharine Gladman and Jessica Swanwick
7. Nasos Kaskani, Matthew Walsh, Michael Wyles QC, Andrew Di Pasquale and Daniel Crennan 8. The Hon Michael Black AC QC 9. Tim Margetts QC and the Hon Justice Digby
10. Michael Colbran QC, the Hon Justice Kaye and Simon Wilson QC 11. Adrian Finanzio SC, Paul Connor and Trish Riddell
12. Zubin Menon, Angie Wong, Simona Gory and Christina Klemis 13. David O'Callaghan QC, Jim Peters QC, his Excellency the Hon Alex Chernov AC QC, Federal Attorney-General Senator the Hon George Brandis QC and Jonathan Beach QC
14. Bar Chairman, Will Alstergren QC

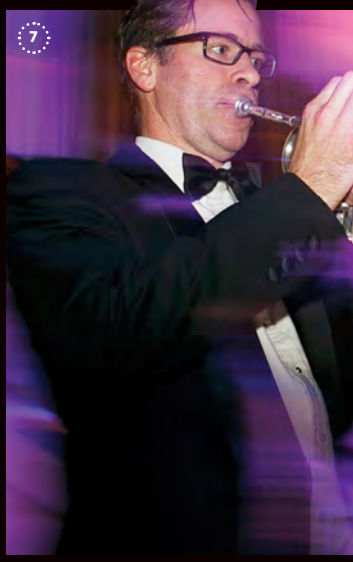


PHOTOS COURTESY OF JUSTIN HILL

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

2014 Victorian Bar DINNER

1. Sue Winneke and the Hon John Winneke AC QC 2. The Hon Chief Justice Warren AC and Mick Heeley 3. William Lye, the Hon Judge McInerney and the Hon Peter Rendit QC 4. The Hon Linda Dessau AM, David Bailey, the Hon Mark Dreyfus QC MP and Simon Wilson QC 5. The Hon Neil Brown QC and Gerard Meehan 6. Megan Casey, Jacob Kantor, Michelle Mykytowycz, Jessica Swanwick, the Hon Stuart Campbell, Katharine Gladman, Catherine Boston, Mia Stylianou and Stephen Devlin 7. The Hon Mark Dreyfus QC MP, Chris Wren QC and Tony Southall QC 8. Anthony Strahan and Kate Beattie 9. Stephen Jurica, Chris Winneke, Richard Attiwill QC and Jamie Gorton QC 10. Jeremy Ruskin QC delivering his speech 11. Roz Zalewski-Ruskin and Richard Stanley QC 12. The Hon Judge Wood 13. Rohan Hoult in reply 14. David Purcell, The Hon Justice Cavanough and Michael Wheelahan QC enjoying Jeremy Ruskin QC's speech 15. Simon Wilson QC and the Hon David Habersberger QC 16. Kathleen Foley, Alistair Pound, Simona Gory and Frances Gordon.



1. Stan Spittle 2. The Hon Peter Heerey AM QC and Jim Peters QC 3. Fiona Knowles, Amanda Burnnard, Hadi Mazloum and Samantha Holmes 4. The Hon Judge Kings 5. Patrick Tehan QC and Rosalind Avis 6. Paul Connor and Michael Galvin 7. Eugene Wheelahan 8-9. Barristers hit the dance floor

PHOTOS COURTESY OF JUSTIN HILL OF ZORZUT.COM.AU

2014 Victorian Bar DINNER

Lessons I Have Learned

SPEECH DELIVERED BY THE HON JUSTICE HAYNE AC

Life generally, and especially life working in the courts, provides endless lessons from which we may learn. I suspect that the principal lesson which I have learned in the course of my journey in the law is that the bounds of my ignorance keep opening ever wider before me. All too often, I fear, I am left wishing that I knew more, much more, about some subject than I do. But I hope that I may have learned something along the way. A very few of those lessons may be worth repeating tonight.

When the Chairman asked me whether I would speak at this year's Bar Dinner, my mind went back 30 years to 1984 and my first speech at a Bar Dinner. That speech had come about following a rather more blunt and forceful approach – as befitted the Chairman of the time, Hartog Berkeley. Hartog was not a man who took "No" for an answer. He rang me up and told me (in his distinctive tones): "I've got a little job for you Ken. You will do the toast to the guests at the Bar Dinner." And that was that.

The lesson? Chairmen of the Bar don't ask. They command!

That Dinner taught me two things. The first was about the perils of following the High Court. The then Chief Justice, Sir Harry Gibbs, spoke first at the Dinner. We all thought that we had assembled to celebrate the centenary of the Bar. Gibbs was of an older school. For him, the occasion we had assembled to celebrate was the "cen'tenry" not any newfangled occasion like a centenary.

I, like the dutiful junior I then was, and all following speakers (apart, that is, from Hartog), thought it only right to follow him and, to the great amusement of all concerned (both then and ever since), the "cen'tenry" it was for the rest of the Dinner.

The lesson? Follow the High Court!

The second thing I learned at the 1984 Dinner was more enduring. Because we were celebrating such a milestone in the life of the Bar, the powers that be decided that members of the Bar could invite partners.

Brian Shaw was the immediate past Chairman of the Bar. He was a leader of the Victorian and Australian Bar. I had had the privilege of doing a lot of work with Shaw and admired him immensely.

Shaw took his partner, Keith, to that Bar Dinner. In the climate of those times, 30 years ago, this was, I am sorry to say, an unusually brave thing to do. But it was done without any fanfare. This was not some grand political gesture by Shaw. It was an act of simple truth and devotion. And to the great credit of the Victorian Bar, it passed without remark.

The lesson, from that Dinner, 30 years ago? A very simple but important one: the Victorian Bar then had (and I believe still has) a social maturity, or if you will, plain old fashioned "grace and style", which no other Bar and very few other professional associations then could show.

That is why I was then, and remain, very proud of my being a member of such a body.

Since that Dinner, much has changed at the Bar and in the law more generally. Some for the better, some not.

On the "better" side of the ledger, this Bar has done, and continues to do, much valuable work in relation to the Indigenous peoples of this nation. I am delighted that tonight the Bar honours Justice Stephen Kaye for the national recognition he has been given for his work with young Indigenous lawyers. It is never to be forgotten that the Mabo litigation was devised, funded and run principally by members of this Bar, in particular Ron Castan, Bryan KeonCohen, Barbara Hocking and Richard Brear.

But there remains much to be done in that and many other areas.

Nevertheless, I hope that I can still say that the Victorian Bar is ahead of other Australian Bars in its endeavours. My evidence is of course anecdotal. But a year or two ago I went with my wife to a dinner to mark the end of a Supreme and Federal Court Judges Conference. I had spoken at the Conference; Michelle had been better employed helping to run the Nippers program at our local surf club. We were seated on Table 1, next to the Judge from another State who had chaired the Conference.

During the early stages of the dinner, that Judge turned to my wife and said: "So, did you enjoy the accompanying persons' program?" "No," she replied, "I was occupied at our local Surf Club".

He ploughed on.

"Apart from being the wife of Ken Hayne, what does Michelle Gordon do with her time?" he asked. There was a silence at the table. "Oh," she replied, "I work and we have a family."

"Do you work full time?" The silence at the table intensified. She replied, "Some would say I do."

Still he ploughed on. "What work do you do?" By now, the other members of the table had put their knives and forks down to observe the

> "The Victorian Bar then had (and I believe still has) a social maturity, or if you will, plain old fashioned "grace and style", which no other Bar and very few other professional associations then could show."

course of events. To her credit, my wife said only, "Oh, I am in the law". The Judge strode on, undeterred. "So, a solicitor?" he said. "No, I am on the Federal Court." "Oh," said the Judge, "you're *that* Michelle Gordon".

The lesson? Several really. Know your audience is the first and obvious one. But more important than that, do not make assumptions. And never make assumptions that are based in stereotypes which, if ever true, have long since passed.

I hope that at this Bar we have long since left behind the assumptions that underpinned that exchange. If we have not, we must and must do so now. After all, 30 years ago, the Bar proved to me and to others that it had left behind one set of prejudices.

The lesson? Grow up and leave the prejudices of yesteryear far behind.

For me personally, the three decades that have passed since first I spoke at a Bar Dinner have seen many changes. In my life in the law, there was taking silk, appointment to the Supreme Court, then the Court of Appeal and finally the High Court. Whether any of those changes were for the general good is something that you and later generations of lawyers will decide.

The pace of technological change seems to increase by the day. We cannot ignore these changes. We must accommodate them as they happen and not wait for years to see if they will catch on. That is why I have succumbed to the ubiquity of the tablet computer and, like many counsel, now sit in Court with all my materials on the iPad. But there are risks. Calling out "New High Score!" and highfiving your associate does tend to suggest to the very careful observer that you may not be giving full attention to the case.

As a new judge, you soon learn why they give you the best seat in the house. They put you up on a bench looking down on the rest of the courtroom for a very practical reason, not because you are more important than anyone else in the room. From the bench you can see and hear much more than counsel and their instructing solicitors sometimes seem to realise. You see the client sitting behind counsel looking shocked when certain evidence is given. You see, and often hear, the interplay between counsel and their instructors. And, as a Judge who is very close to me told me recently, you can see the instructing solicitor sitting at the bar table taking such great interest in the progress of the hard-fought litigation in which her client was facing a very large judgment that the solicitor spent the morning in Court using her computer, the screen of which faced the bench, first, to find and book a (very expensive) holiday online and then, to adjust the risk profile on her superannuation fund. Not a sensible use of computers in the courtroom. It is on a par with "New High Score!" and a high-five.

The lesson? There are two. First, never forget that the judge has the best seat in the house. Second, embrace technological change. But use it wisely.

From the best seat in the house you watch, as a trial judge, the endless parade of witnesses. All sorts and conditions of people, most of whom genuinely believe that they are trying to tell the truth. And it is that parade of people which I missed most when I left trial work behind and sat in appeals. But the most enduring memory of those days as a trial judge is the first time I watched a witness obviously turn sour on counsel and give evidence which was to the effect opposite to that which counsel who called the witness was expecting.

You do not have to be long at the Bar to know the terror which that brings for counsel. As counsel, you stand there, trying to look unconcerned, while the River Yarra courses down your back and the reef knot in your belly tightens further, wondering how to get out of this hole the witness seems so anxious to dig for you and your case.

But from the best seat in the house the reaction is very different. For the first time in your life you sit in the courtroom and think "I don't care. I really don't care. I am not responsible for what the witness is saying. I just have to decide the case." The relief is wonderful.

The lesson? The judge has a different reaction to what happens in court.

But cold hard truth and reality for a judge is never far away. Sooner rather than later as a judge, you learn that your judgment is not always right. And proof of that is found not only in what the Court of Appeal or High Court says about your judgments but also in life itself. It is as well for a judge to be reminded of this lesson, and reminded of it very often. There is a very public record of one such reminder to me.

In 1995, less than three weeks after the Court of Appeal was formed, I was party to a judgment in a sentencing appeal. The catchwords for the judgment read "Criminal Law – Appeal against sentence – Attempted trafficking in a drug of dependence – Sentencing parity – Minor criminal history – Excellent prospects of rehabilitation – Application allowed". The case concerned trafficking in methamphetamines. Those of us who sat in the appeal formed the judgment that the offender had excellent prospects of rehabilitation. His application for leave to appeal was allowed and he was resentenced in a way that required his immediate release.

The judgment which I (and the others) made in that case might

possibly be thought not to have been wholly borne out by subsequent events.

The offender was Carl Anthony Williams who, you will recall, was later to play a very large part in production and trafficking of methamphetamines in this State. It was the same Carl Williams who, on his pleading guilty to three counts of murder and one count of conspiracy to murder, was sentenced to life with a minimum term of 35 years.

I am not altogether certain that these events completely fulfilled the excellent prospects for rehabilitation which we had so confidently predicted 12 years earlier. It may not have been a triumph in judicial assessment of character.

The lesson? None of us is infallible.

And I would like to thank – I assume it to be – successive Chairmen of the Criminal Bar Association for the thoughtfulness they continue to show by sending me a copy of the judgment each year.

One of the many oddities about speaking at a Bar Dinner is the amount of advice which others offer about the speech. The best advice was given by Jeremy Ruskin, a few weeks ago. When we ran into each other in the street, he asked me how my preparation for this speech was going, and I lamented how slowly I was advancing.

Unprompted, he offered me a lesson I should have learned long ago. He said: "The two of us should Google the word 'No'". He was right.

But the most startling advice I was given this year was "You only have a year to go; tell them what you really think. Let them have both barrels!"

I am not quite sure who was meant to be the target of this onslaught: you, members of the Bar more generally, the political branches of government, other judges, or my colleagues past and present. Obviously, the person giving the advice thought that there was a pent-up reservoir of complaint or scandal or revenge to be let loose and that this was the last chance to do so. After all, in a year's time, the Constitution tells me that I must be taken off to the Home for Bewildered Judges, have the plaid rug put over the knees and a nice young person pause occasionally to wipe the dribble from the corner of my lips as I stare vacantly into space.

> "Like many counsel, [I] now sit in Court with all my materials on the iPad. But there are risks. Calling out "New High Score!" and highfiving your associate does tend to suggest to the very careful observer that you may not be giving full attention to the case."

It may be that I have not learned enough from the lessons doled out by life generally and by working in the courts (about which I spoke earlier). But I have no reservoir of complaint or scandal or revenge. I do not propose, after my retirement from the Court, to write any articles or memoirs telling how I, and I alone, have been the repository of all knowledge, wisdom and justice in the High Court or in any other position I have held. Some (and some is too many) seem to have done that before me. Any attempt I made to take sole occupancy of the moral high ground would be objectively wrong and, in any event, would be no more credible than any of their attempts. Futility may be reason enough not to do this. But there are other, more important, reasons not to do so.

When first I accepted appointment as a judge (now 22 years ago) that great leader of the Victorian Bar, Neil McPhee, lined me up, and in language befitting his time as a front-line infantry officer in the Korean War, told me that I was far too young to take the job but to remember that no one had forced me to do so. He said, I think rightly, that there are few more dangerous judges than those who look back to their glory days at the Bar and hanker to return. As he said, "Find the fun in it. If you cannot find the fun in it, give it up because you will be no use to anyone."

I have tried my best to follow McPhee's advice. It tells you nothing good about me that I still find the fun in what I do. You may think that this would form a suitable subject for a monthlong psychiatric convention, and in that you may well be right. But if, at this Dinner, I am to tell you what I *really* think, it can be summed up very briefly. There are very few who have the privilege I do, at my age and stage, to face the intellectual challenges I do, knowing that the answers which I give matter. That is a rare privilege and one for which I remain ever grateful.

The lesson from this can be seen as selfish. Life *is* easier and better if you find the fun in what you do. But there is a deeper and more enduring lesson for every one of us.

The work that is done in the courts is important. Because it is important it must be done well. And doing the work well does not depend upon what title you have, or which particular combination of letters appear after your name.

It depends upon you recognising that the work which you do matters. It matters to the people you deal with. It matters to the health of society generally. Doing the work well depends upon every one of us recognising that it is a privilege to play our part in the administration of justice. And with that privilege there comes a profound and enduring responsibility: to give the work all the energy and effort needed to do the work properly.

That, above all, is the lesson I have learned. It is a lesson whose truth bears repetition tonight. The work we do matters. It matters far, far more than we who do it.

For me, it is a privilege to be asked to speak at this Bar Dinner. You, Chairman, and you, ladies and gentlemen, do me great honour by permitting me to speak. For that I thank you all.

Arbitration in Transition in the 120th Meridian: The Pacific Hour

HELEN TIPLADY

On Tuesday, 25 March 2014, the Victorian Bar hosted three distinguished international arbitrators to present a CPD seminar on current developments in international commercial arbitration in the Asia-Pacific region. The seminar was presented by the Victorian Bar's International Arbitration Committee, and featured an address by Professor Datuk Sundra Rajoo on the topic of "Arbitration in Transition in the 120th Meridian: The Pacific Hour". The Professor's address was followed by a panel discussion featuring Professor Michael Pryles and Professor Anselmo Reyes, which was co-chaired by Martin Scott QC and Albert Monichino QC of our the Victorian Bar.

The starting premise of both the address and the panel discussion was the fact that international arbitration is increasingly being viewed on a regional basis. In that context, reference was made to the 120th meridian, being that which runs through the Asia-Pacific region. The development of international commercial arbitration in the Asia-Pacific region, and the possible role for Australia and Australian lawyers in such arbitration in the region, were the key themes of the seminar.

Professor Rajoo is the Director of the Kuala Lumpur Regional Centre for Arbitration and the Immediate Past President of the Asia-Pacific Regional Arbitration Group (APRAG). He has a wealth of experience in both international and domestic arbitrations, having accepted over 150 appointments as an arbitrator. In his address, Professor Rajoo made reference to the concept of globalisation, both in trade and commerce generally, and in the provision of legal services in particular. He noted the need, in such a context, for just, fair and effective dispute resolution, and encouraged all participants to base their interactions on notions of good governance, and to find ways to sustain and progress international dispute resolution.

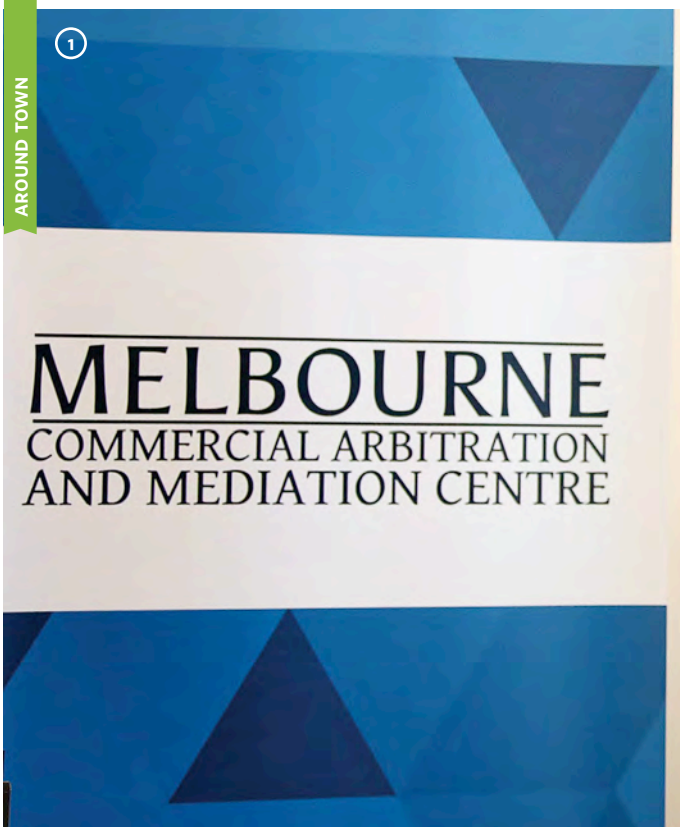
Professor Rajoo spoke of the importance of co-operation between nations in the development of international commercial arbitration, particularly in bridging the gap between developing and developed countries with respect to their methods of dispute resolution. Professor Rajoo noted that Australia is known for the strength of the training of its legal practitioners, and commented that Australian lawyers have an important role to play in this regard.

Professor Reyes practices as an arbitrator and advocate, and is concurrently Professor of Legal Practice at Hong Kong University and the representative of the Asia Pacific Regional Office of the Hague Conference. In reply to Professor Rajoo's address, he made three key points. First, Professor Reyes reinforced the need for a combination of competition and co-operation between arbitration and litigation so as to ensure integrity in both processes. Secondly, he commented on the role of arbitration stakeholders, including arbitrators and advocates, and the importance of the notion of stewardship and of mentoring the next generation of stakeholders. Finally, Professor Reyes considered the position of developing countries, many of which are anxious to establish international arbitral centres to attract arbitration, and trade and commerce, to their nations.

Professor Pryles is an internationally regarded arbitrator, having sat in over 400 cases worldwide. Among other appointments, he is currently serving as President of the Court of Arbitration, Singapore International Arbitration Centre, and is the Immediate Past President of the Australian Centre for International Commercial Arbitration. Professor Pryles suggested that in the international context, arbitration is the norm, and everything else (including litigation) should be considered a form of alternative dispute resolution. He encouraged Australian lawyers to view the Asia-Pacific as our backyard, and to strengthen our links with international law firms so as to assist in establishing a presence in Asia.

While Australia's geographical position is a potential disadvantage, Australian lawyers need to build on our strong international reputation and continue to focus our attention on the Asia-Pacific region. With that in mind, Victorian barristers with an interest in international arbitration need to focus on establishing and maintaining a presence in the Asia-Pacific region, while at the same time continuing to promote our own country as an attractive location for international arbitration.

"While Australia's geographical position is a potential disadvantage, Australian lawyers need to build on our strong international reputation and continue to focus our attention on the Asia-Pacific region."



Launch of the Melbourne Commercial Arbitration and Mediation Centre

VICTORIAN BAR NEWS

The Melbourne Commercial Arbitration and Mediation Centre was officially opened for business on Monday 17 March 2014 at a function jointly hosted by Victorian Attorney-General Robert Clark, Chief Justice Marilyn Warren AC, the Victorian Bar and the Law Institute of Victoria.

Addressing the audience at the launch, Will Alstergren QC acknowledged that the Centre was made possible through a collaborative effort on the part of the Victorian Government, the Courts and the Victorian legal profession. The Centre was established under a memorandum of understanding signed in 2011 by the Department of Justice, Victorian Bar, Law Institute of Victoria and the Victorian Supreme and County Courts.

The Attorney-General remarked that the Centre, headquartered in the William Cooper Justice Centre, would ensure parties had access to Melbourne's best arbitration and mediation facilities in the heart of Melbourne's legal precinct. "Today's launch of the Centre, including an innovative online venue booking facility, is an important step towards Melbourne becoming a key part of the international arbitration hub in the Asia Pacific region," Mr Clark said.

"The Melbourne Centre is the next part of the Australian arbitration grid. With Sydney, Melbourne and soon, hopefully, Perth, arbitrations will be encouraged and well-served in Australia" said Chief Justice Warren.

1. The Hon Chief Justice Warren AC **2.** Jonathan Beach QC **3.** Geoff Bowyer **4.**The Hon Robert Clark MP **5.** David Batt QC, Justice Melanie Sloss, Peter O'Donahoo **6.** The Hon Robert Clark MP, the Hon Chief Justice Warren AC, Jonathan Beach QC and Geoff Bowyer **7.** Paul Hayes, Bronwyn Lincoln (Herbert Smith Freehills), The Hon Neil Brown QC **8.** Michael Sweeney and Sally Bodman **9.** Marisa De Cicco (Dep Secretary - Criminal Justice), Clare Malone (Dept of Justice) and Elise Parham (Attorney General's Office) **10.** Caroline Kirton QC, Stephen Hare, Fiona McLeod SC

Bar Chairman William Alstergren QC and Vice-Chairman Jonathan Beach QC (now, the Hon Justice J Beach) sitting in Bar Council earlier in the year.

PHOTOS COURTESY OF DAVID JOHNS

FROM THE

Chairman's Table

WILLIAM ALSTERGREN QC

Well, it is now six months since I assumed the reins.

When I took over I thought it important to find out how the profession was viewing the Bar and where we sat generally. I visited many of the major law firms over a period of three weeks. I must say it was a rewarding and illuminating experience. I was very grateful for the opportunity to speak with many well respected senior partners and leaders in each firm.

Many of the firms I visited confirmed their support of the Bar and a keenness to strengthen ties with the Bar generally. It was obvious that, like ours, the professional landscape had changed for many law firms and efficiency was the key to the future to ligation in Victoria. It became obvious that the Bar has to move forward and actively demonstrate its value and standing in the profession if we want to continue to grow and prosper.

It was also obvious that barristers, especially junior members, are consistently being briefed late in litigation and much of the space the Bar occupied in litigation is now being kept in house in major law firms. It is also apparent that the best way for many law firms to run litigation from a business model is not to brief barristers until it is clear that the matter will not settle and will be

> “We are trying to change the culture and regain our rightful place as leaders of the profession.”

William Alstergren QC, The Hon Justice Middleton and The Hon Justice Judd at the Bar's Corporate Counsel event.

going to trial. By this stage all the preliminary discovery, pleadings, mediation and witness statements have been completed. Many of the firms I spoke to said that they see no need to instruct counsel for major interlocutory fights in court and are comfortable engaging one of their solicitors to appear. The bench does not appear to be encouraging parties to brief the person conducting the trial to appear beforehand to take responsibility for the pleadings or evidence.

So what to do about these circumstances?

There are a number of areas where we have opportunities. One of those is our capacity to deliver CPD seminars to solicitors, during which we can market counsel to the very people who brief the Bar. With this in mind, we are organising the Bar's first CPD conference with the LIV and corporate counsel on 17 October 2014. Each panel will have a solicitor, a barrister or two and a judge.

In addition, I invited every president of a regional or suburban law association to a dinner to hear Justice Jack Rush speak on the importance of the Bar. I also invited the Attorney-General, who spoke with great enthusiasm about the Bar and what great value barristers are to the profession. I am now rolling out a series of talks to each of the lawyers' associations to encourage them to brief well and brief early. Hopefully by 30 June I will have spoken to all 25 of them.

We are currently establishing a comprehensive data base for marketing purposes. We held a corporate counsel evening in May, with Justice Judd and Justice Middleton presenting on why it is important to brief barristers early in litigation.

We are trying to change the culture and regain our rightful place as leaders of the profession.

We opened Victoria's new International Arbitration Centre in conjunction with the Victorian Government, the Supreme Court, and our International Arbitration Committee. It is a great step forward and is in keeping with our efforts to promote our members as international arbitrators in Asia and elsewhere.

There are plenty of other challenges ahead. The introduction of the Base Line Sentencing legislation has caused the Bar some serious concerns. As a result, I invited the Attorney-General to address the Bar. The panel of speakers included Paul Holdenson QC, Jane Dixon QC and Peter Morrissey SC. It was an excellent session and allowed the Attorney to hear firsthand the concerns of the Bar. Further submissions are being put to Government.

Legal Aid has suffered further set backs in funding. The Federal Government's budget did not deliver the increased funding anticipated and further work will be done consulting the Commonwealth Attorney-General.

We continue to have a strong and collegiate Bar. A sign of this was our Bar Dinner held on 30 May. Over a month before the RSVP deadline it sold out. The Governor of Victoria, both the State and Commonwealth Attorneys-General, the Shadow Federal Attorney-General, five High Court Justices, the Chief Justice of Victoria and representatives of all our courts attended. This was, I am sure, in no small part due to our two fine speakers, Justice Kenneth Hayne AC and Jeremy Ruskin QC.

I thank the members of the Bar Council for all their work during the year and the Bar staff for their assistance. I especially want to thank Denise Bennett for all her assistance.

I cannot wait to see what we can achieve in the next half of the year.

The Attorney-General on Being Free to Disagree

SENATOR THE HON GEORGE BRANDIS QC, ATTORNEY-GENERAL FOR THE COMMONWEALTH

Last year, the Coalition took to the election a promise to repeal section 18C of the Racial Discrimination Act (RDA) "in its current form". After the election of the Abbott Government last September, I undertook extensive private consultations with a number of key interest groups, representing a variety of different views about the reform of section 18C. Those consultations involved, in particular, senior representatives of ethnic communities, including leaders of the Jewish community, who had particular sensitivities about any changes.

In March, the Government published an exposure draft of a suggested amendment to section 18C, for the purpose of engaging the wider community in the discussion. When the public consultation period closed at the end of April, more than five thousand written submissions had been received. Submissions came from peak groups such as the Australian Human Rights Commission (AHRC) and the Law Council of Australia. However, the vast majority of submissions came from individual Australians. The submissions reflect a diversity of strongly-held views, ranging from those who consider nothing short of outright repeal of section 18C will satisfy their concerns about freedom of speech, to those who wish the provision to be left alone entirely. In between those two absolute positions were many

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constructive suggestions about how the provision could be reformed.

Most submitters understood the Government's concern that section 18C, as currently worded, is too restrictive of freedom of speech. Thus, for instance, the Law Council of Australia on behalf, inter alia, of the Victorian Bar, submits:

> *The Law Council considers that freedom from racial discrimination and freedom of opinion and expression can and should be robustly protected and promoted in a way that enforces the indivisibility and complementary nature of the right to equality and the right to free speech. It considers that laws designed to protect against the identifiable harm caused by racial vilification must have due regard to the central position that the right to free speech holds in our community. However, it also recognises that the exercise of this right can justifiably be limited to ensure the enjoyment of other fundamental rights, such as the right to equality. ... The Law Council recognises that from a civil and political rights perspective, there is a case for amendment of the current provisions.*

The AHRC also acknowledges that "the legislation could be clarified ... to confirm that Part IIA deals with profound and serious effects, not to be likened to mere slights." The AHRC itself contains a diversity of views, from the Race Discrimination Commissioner, Tim Soutphommasane, who has strongly argued that the provision should not be amended, to the Human Rights Commissioner, Tim Wilson, who favours radical amendment if not outright repeal. It is, in my view, a good thing that the AHRC should reflect, among its Commissioners, the diversity of views which exists within the broader community about a profoundly important and controversial issue.

Liberty Victoria argued that the Government's proposal to omit "offend" and "insult" was desirable, but wanted the prohibition of "humiliate" retained. It welcomed the Government's proposal to include in the Act, for the first time, an explicit prohibition of conduct that "vilifies" on racial grounds.

> "The test of good faith on the issue of free speech is our willingness to protect the right of others to say things with which we disagree or of which we strongly disapprove."

What is clear from the process of consultation, and is reflected in the submissions which I have quoted from three of the most significant participants in the debate, is that many thoughtful people agree with the Government's view that the provision should be reformed. Indeed, I have seen nobody - including the Shadow Attorney-General - who claims that the provision as it currently exists is incapable of improvement. Rather, the concerns seem to be that to strengthen the freedom of speech protections will somehow weaken protection of minority groups.

That is a false antithesis. I agree with the view of the Law Council that these are complementary, not inconsistent, objectives. A well-worded provision can serve both. It is the Government's aim to achieve those twin objectives. The problem with the current section 18C is that it serves neither objective as well as it could. To outlaw conduct merely on the ground that it might offend or insult another member of the community is, in the Government's view, an impossibly wide limitation on freedom of discussion in a liberal democratic nation. The omission from the RDA of a prohibition upon vilification is an obvious oversight which needs to be corrected. Decent people may disagree on the question of how narrowly or widely the term 'vilify' should be defined, but there are few who would argue that the incitement of hatred is an exercise of free speech. Rather, the incitement of hatred is the use of speech to provoke social disorder; it belongs in the same category as other public-order based prohibitions on incitement.

If this debate has done nothing else, it has introduced an uncharacteristically philosophical tone to the discussion of public policy. All of a sudden, we see names like Voltaire and Mill being invoked in the opinion pages of the newspapers. That is no bad thing. Perhaps Voltaire did make the famous remark attributed to him ("I disapprove of what you say but I would fight to the death for your right to say it"), or perhaps the attribution is apocryphal. It nevertheless serves to remind us all of a very important truth: that the test of good faith on the issue of free speech is our willingness to protect the right of others to say things with which we disagree or of which we strongly disapprove. To defend that right is not to endorse or condone the other person's view; it is merely to recognise that in any free society there will be a multiplicity of voices, and that the State should never act as a political censor or arbiter of opinion. As Menzies, echoing Voltaire, once wrote:

> *Let us, on the threshold of our consideration, remember that the whole essence of freedom is that it is freedom for others as well as for ourselves: freedom for people who disagree with us as well as for our supporters; freedom for minorities as well as for majorities. Here we have a conception which is not born with us but which we must painfully acquire. Most of us have no instinct at all to preserve the right of the other fellow to think what he likes about our beliefs and say what he likes about our opinions. The more primitive the community the less freedom of thought and expression is it likely to concede.*

That is my view too, and it is the principled approach which the Government will take to the finalisation of its reforms to section 18C.

Repeal of Laws by Stealth, says Shadow Attorney-General

THE HONOURABLE MARK DREYFUS QC MP, SHADOW ATTORNEY-GENERAL

A vigorous debate is presently being waged over the Abbott Government's proposed repeal of the protections against hate speech in the *Racial Discrimination Act 1975* (Cth).

Though the Attorney-General is unable to name a single community group which supports his proposed *Freedom of Speech (Repeal of s 18C) Bill*, he does have the support of a small but vocal libertarian cheer squad. This noisy minority is armed with an ideological certainty better suited to a first-year university debate than a nuanced discussion about race, dignity, and the character of our national life. They preach a free speech absolutism which is alien to our liberal democracy, and seem oblivious to the well-justified and long-established restrictions on speech that include the law of defamation, aspects of trade practices legislation, and offensive language provisions.

Senator Brandis has ostensibly distanced himself from this rhetoric. When he announced the release of his exposure draft, he said that his proposal would "strengthen the Act's protections against racism, while at the same time removing provisions which unreasonably limit freedom of speech". He claimed that his law would contain a new prohibition against racial vilification, "sending a clear message that it is unacceptable in the Australian community.'"

A closer look at the government's exposure draft makes it difficult to take the Attorney-General at his word.

The crux of the proposed legislation is as follows:

> *(1) It is unlawful for a person to do an act, otherwise than in private, if:*
>
> *(a) the act is reasonably likely:*
>
> *(i) to vilify another person or a group of persons; or*
>
> *(ii) to intimidate another person or a group of persons, and*
>
> *(b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.*
>
> *(2) For the purposes of this section:*
>
> *(a) vilify means to incite hatred against a person or a group of persons;*
>
> *(b) intimidate means to cause fear of physical harm:*
>
> *(i) to a person; or*
>
> *(ii) to the property of a person; or*
>
> *(iii) to the members of a group of persons.*

The Attorney-General's claim that his proposed law would see racial vilification proscribed in a Commonwealth statute for the first time is simply misleading.

We should be clear about what the Brandis proposal entails: the complete evisceration of our federal hate speech laws. The noisy minority behind the changes are certainly under no illusions as to their effect. Chris Berg of the Institute of Public Affairs said the proposed amendments are "a magnificent example of how to repeal legislation without admitting you're repealing legislation".

While the proposed laws apparently borrow from existing state anti-vilification statutes – they are a retreat even from these limited protections.

The definition of "vilification" in every state and territory which has such a law already goes well beyond that proposed in the Commonwealth government's exposure draft. The *Racial and Religious Tolerance Act 2001* (Vic), for example, prohibits not only "conduct that incites hatred", but also conduct that incites *"serious contempt for, or revulsion or severe ridicule of"* a person. As does the current federal Act, it contains a provision stipulating that race need not be the only or dominant reason for the conduct. Senator Brandis would repeal this provision, too.

The insistence by the government that they oppose "vilification" is disingenuous. However narrowly Senator Brandis wants to define the term in his legislation, the Oxford English Dictionary holds "vilify" to mean "[to] depreciate with abusive or slanderous language; to defame or traduce; to speak evil of". Clearly it is this type of conduct, when pursued on the basis of race, which the present provisions prohibit. It is hard to imagine any conduct which would "incite hatred against a person" because of their race which would not also be "reasonably likely" to "offend, insult, humiliate or intimidate" a person on the basis of their race. Section 18C is the Commonwealth's racial vilification provision. It already prohibits what Senator Brandis considers "racial vilification", alongside other categories of hate speech which his law would permit.

Similar violence is done to the meaning of "intimidation". Justice Bromberg noted in the Bolt case

that "[t]he word "intimidate" is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence". Senator Brandis, however, expressly restricts the term to little more than what is already covered by the general law of assault. Perversely, it reduces the social scourge of racism to a matter of physicality.

It is concerning that Senator Brandis is claiming that his proposed gutting of the race hate protections in the *Racial Discrimination Act* is taking a stand against racism. Even more concerning is the claim that the government is striking a fair balance between tackling racism and protecting free speech. The breadth of the government's proposed "free speech" exemption in the proposed legislation puts the lie to this pretence:

> *(4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.*

It is hard to see why there is even a need for a free speech exemption to the narrowly-drawn prohibitions Senator Brandis is proposing. Exactly what sort of incitement to race hate or physical intimidation does the government seek to protect in the name of free speech? Nonetheless, the new exemption is dramatically broader than the present provision.

Crucially, the new provision removes the current stipulations in s 18D that exempt speech be "reasonable" and "in good faith", the requirement that Andrew Bolt failed to satisfy. In his zeal to condone Bolt's articles, which were not protected under 18D due to Bolt's errors of fact, distortions of the truth and inflammatory and provocative language, Senator Brandis's proposed changes would protect all manner of hateful demagoguery.

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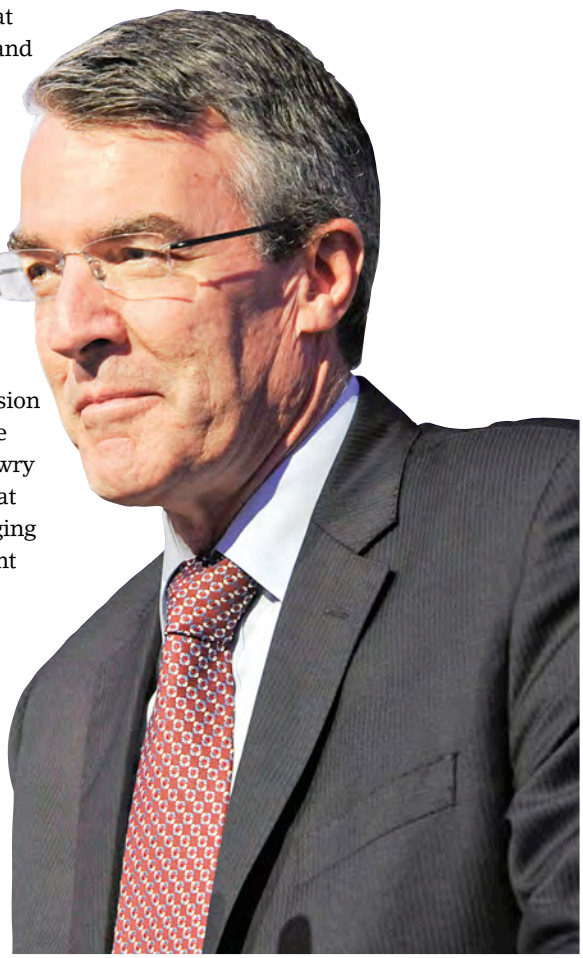
Thankfully, it does not appear that the wider community has been fooled by Senator Brandis's rhetorical sleight of hand. The government's opaque "consultation" has received many thousands of submissions from the public, the great majority of which I believe oppose the Government's plan. Senator Brandis is welcome to correct me on this point, but although the Government touts its commitment to free speech and open debate, it has refused my repeated requests to release the submissions.

A good sense of community feeling can be gauged from those submissions which have been put on the public record by their authors. The Law Council of Australia opposes Senator Brandis's proposed Bill on the basis that it "risks diluting the existing protections available to those seeking redress from racial vilification", uses "terms that are defined in ways that do not align with analogous State and Territory provisions or Australia's obligations under international law" and contains an overly broad exemption provision. Liberty Victoria, an organisation notably fond of free speech, said the Bill should be rejected as it "defines vilification and intimidation in terms far more limited than their generally accepted meaning", and the breadth of its exemption provision is "so great as to be ridiculous". The Executive Council of Australian Jewry put it succinctly when they said that "no case has been made" for changing the Act, noting that the Government had not engaged in any "formal process of consultation with the Australian people".

While Senator Brandis likes to talk loftily of Voltaire and Mill, he should not forget that this is not just some abstract debate. As one person put it to me at a community forum in Melbourne in April, "we are not Ancient Greeks debating philosophy". The widespread outrage in the community about the Government's proposed changes are evidence that this issue speaks to the lived experience of many Australians.

Our laws are not just technical documents. They set the standard for the way we treat each other. They say something about the sort of society that we aspire to. Though most Australians will never read the *Racial Discrimination Act*, all will have understood the message the government is sending. I truly hope that Senator Brandis withdraws his proposal in light of almost unanimous community opposition, but the spectacle of our country's first law officer proudly asserting the "right to be a bigot" in our national Parliament will not soon be forgotten.



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Sir Ninian Stephen speaking at the opening of Ninian Stephen Chambers, in 2012.

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Ninian Stephen at the Victorian Bar

PHILIP AYRES*

There is no figure in Australian legal history—John Latham, Owen Dixon and H. V. Evatt included—who undertook high-level extra-legal work as wide-ranging as that undertaken by Sir Ninian Stephen following his departure from the High Court in 1982: Governor-General, diplomat, mediator in Northern Ireland, founding member of the first war crimes tribunal since Nuremberg and Tokyo, and head of UN and Commonwealth missions to crisis zones from Cambodia to Burma to Bangladesh. It's not for nothing that he holds five knighthoods. In this article, however, my focus will be on his life at the Victorian Bar, because that is the period least well known and most relevant to the interests of this journal.[1]

The law was not Stephen's first choice of profession. That was diplomacy. In early 1940 he arrived in Melbourne from Switzerland at the age of 16 knowing nobody in Australia, in company with his mother and Nina Mylne, his benefactor, a woman who lived on wool cheques from her family's vast properties in western Queensland. Born near Henley-on-Thames in June 1923 of Scottish parents, deserted by his father at the age of three weeks, a seemingly unpropitious start, Stephen had nevertheless been educated at the best schools in Scotland, England and Switzerland, at Miss Mylne's expense. From her he had acquired his interest in diplomacy, history and politics, though not the

attachment to extreme-right politics she manifested in the 1930s (she took the 15-year-old boy to the 1938 Nuremberg Rally, for example, where over several days her connections ensured they enjoyed the best seats in the various stadiums).

Stephen spent 1940 at Scotch College, matriculating at the end of the year, with no idea what he would do. Miss Mylne was trying to talk him into journalism or the law. A friend, John Andrew, who had left school the previous year, was working as an articled clerk at Arthur Robinson & Co., Solicitors, and Andrew suggested he apply for a job as office boy there while deciding what to do. That seemed half-reasonable—pocket money, a little independence. His career was born of chance.

He started at Arthur Robinson's in that menial role, for ten shilling a week, doing odd jobs and working the switchboard. Having given Wesley Ince (a partner in the firm) three wrong lines in succession, he was told to "Go and test your skills in the great world outside, and collect my cigars from Dammans". Returning with Jamaicans instead of Cubans, his hopes of making headway in that firm seemed dashed. "Lad, if you can't tell a good cigar from a mediocre one", Ince exclaimed, "what earthly use could you ever be in the more specialised field of legal practice? Oh well, never mind, perhaps you can get this right—go up to the Athenaeum Club and collect the bottles of port they have waiting for me." That errand was completed without mishap, producing on Ince a noticeably surprised sense of relief.

Stephen's confidence gradually increasing, he soon applied to study law at the University. Accepted, he began a five-year course in February 1941, at the same time commencing articles with senior partner George Forrest Davies, who with Arthur Robinson had founded the firm. This parallel process of studying law at the University while doing articles was not regarded as the best—the ideal was a full-time commitment to a law degree, with articles done subsequently—but it provided an income and the security of a connection with a top law firm. It led to work as a lawyer but not to a degree in law, unless one did extra law subjects at the University in the final year, which was what Stephen would do—but not until 1949, for he spent 1942–1946 with the 2nd AIF. In 1949, with his law degree now behind him, Stephen asked Justice Arthur Dean, the father of a friend, to write a reference backing his application to join the diplomatic corps, which in the event was turned down. Diplomacy would have to wait till much later.

In 1950, following his admission to practise, Ninian continued to work for Arthur Robinson & Co. as one of their solicitors. The work was regular and the pay guaranteed—useful with a wife to support and a child soon on the way. He specialised in company law but did a range of work, much of it boring, a continuation of the things he had done as an article clerk.

Then, in January 1952, after careful thought and discussion, he took the risky but ultimately profitable course of leaving Arthur Robinson and going to the Victorian Bar, a much smaller place in those days, with fewer than 200 in active practice. Douglas M. Little (later Sir Douglas Little of the Victorian Supreme Court), a senior junior, had invited Stephen to read with him. Subsequent to the six months Stephen spent with Little, he moved into tiny chambers in Saxon House, Little Collins Street—"a room", as he later described it, "just large enough for three desks if you didn't mind having to crawl under your desk to get to your seat, back hard up against the wall, when you heard a solicitor-like footstep in the corridor outside. But it was paradise to the utterly homeless."

It was a tight little room because he shared it with two others, Ivor Greenwood and Ted Woodward, Stephen's first significant friends at the Bar, both younger than him. All three were on the road to success. Ted Woodward, ex-Melbourne Grammar, was 23, his appointment as QC 13 years ahead, 25 to his director-generalship of ASIO (which he would subject to much-needed reform), twenty-five years to his appointment as a Federal Court judge. He would be one of the chief proponents for Aboriginal land rights through the late 1960s and 1970s. Ultimately he would be offered but decline the governorship of Victoria.

Ivor Greenwood had attended State schools and Scotch College. He was a sober 25-year-old, an idealistic Christian uninterested in making money. Following graduation he had been associate to Sir Frank Kitto and then to Sir Owen Dixon, both on the High Court of Australia, and was fresh to the Bar. Although strongly anti-communist, the previous year he had publicly opposed Prime Minister Menzies' unsuccessful referendum push for the banning of the Communist Party of Australia, an anti-democratic move with which Stephen was also in strong disagreement—Stephen refused on principle to join the Returned Servicemen's League because they would not admit returned men who were communists. Greenwood had 16 years to go to his entering the Senate, 19 years to his appointment as Federal Attorney-General, 20 years to his inviting Ninian to join the High Court, 24 years to his death from a heart attack. As a young barrister he was specialising in commercial and local government law, two among the fields Stephen preferred.

They were not long together at Saxon House because Stephen was soon offered a room in nearby Selborne Chambers, Robert Menzies' old room facing onto Little

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Collins Street, by its occupant John McIntosh Young (another former associate to Sir Owen Dixon, and later Chief Justice of the Victorian Supreme Court), whose doctors had recommended a year in bed due to a relapse of tuberculosis contracted during the recent war. Menzies' room still had his name on the door and contained his old bookcases and many of his books, some of which Stephen later purchased.

Built in 1881, Selborne Chambers ran between Little Collins Street and Bourke Street and was entered at either end. A wide central hall or passageway, two storeys in height, ran the entire length. Along both sides of the lower or ground-floor part of this great passageway ran a line of Gothic arches behind which were the lower-level barristers' chambers. A saw-tooth roof high above the passageway admitted light. The upstairs rooms gave onto galleries running along either side of the central passageway, and the two sides were linked by cross-over bridges. Because the Little Collins Street end of the building was lower than the Bourke Street end, the building was stepped-up halfway along its length. Collegiality was enhanced by the almost startling openness of the interior, barristers calling across to one another from the upstairs galleries or down to friends below, and there was constant commingling and discussion along the passageway. The chambers were heated by their individual fireplaces, and their floors remained uncarpeted in the 1950s. Unlike the later and sterile Owen Dixon Chambers, Selborne Chambers was built for an organic professional corporation and enhanced it.

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To an undefinable but significant extent Stephen was handicapped at the Victorian Bar by not being embedded in Melbourne life and establishment circles, and by not being highly credentialled in the law. While he had spent a year at Scotch College, he had no cluster of Melbourne private-school friends, no years of playing or watching football, no membership of the Melbourne Cricket Club, no summers spent at Portsea or Sorrento, Barwon Heads or Lorne, while on the legal side the articled clerks course was considered by many as a second-best entry into the law. He had not had the student years at Melbourne University Law School, or the relationships developed through life in the University's residential colleges (Trinity, Ormond, Queens and Newman), or—perhaps most particularly—the "anointing" effect of an associateship with Sir Owen Dixon or other High Court judges. It was not that Stephen felt at an enormous disadvantage, and he was comfortable enough with his unconventional background. His schooling had more educational and social cachet than any Antipodean school could provide, but scarcely any of his acquaintances had heard of the Edinburgh Academy or St Paul's, or could name a private Swiss international school let alone afford one. In any case it appeared as a point of difference rather than connection with others in Melbourne.

It was clear to everyone, then, that he was not on a familiar, established, already-charted pathway. These differences made it all the more notable that he fitted in so well to these circles, perhaps because of a boyhood and adolescence of repeatedly adjusting to new environments and peer groups. His adaptability meant that by the 1960s he could appear to be entirely embedded within the legal world of Melbourne, though his foundations were so utterly different from those of his contemporaries. It's unsurprising that some of those with whom he shared chambers in the 1960s, notably Ivor Greenwood and Brian Shaw, were unconventional and highly individualistic men, though they possessed some of the credentials Stephen lacked.

Of reported cases in which Ninian Stephen appeared, and of the opinions he wrote, the earliest date from 1952–53. One or two of his earliest opinions bear annotations in John Young's unmistakable handwriting—Young inserts references to cases Stephen has overlooked, and alters or rearranges what Stephen has written. Presumably these date from shortly after Young's return to chambers, and they clearly reveal Young as one of Stephen's mentors. The two had several things in common, including having studied in Britain (Young at Oxford).

Both spoke German, Young fluently. In the late 1930s Young's father had been in charge of the Australian operations of Norddeutscher Lloyd and Hamburg Amerika Line, and in 1938 had sent him at the age of 18 to Germany to gain experience in the Hamburg offices. As John Young had spent much of 1938 and the first half of 1939 living in Hamburg, both he and Stephen had been in Germany at the same time, though Stephen for much shorter periods. Sir John told me he had no idea war was about to break out until sometime in 1939 his friends in England started writing "Get out of there!" By the time war did break out Young had enlisted in the Scots Guards and in 1941 was in charge of Rudolf Hess's guards when Hess tried to escape at Camp Z in Surrey. Through the second half of 1944 and early 1945 Young had fought with Montgomery's forces in northwest Europe, being twice mentioned in despatches. He and Stephen concentrated on similar areas of the law and over the years ahead they would appear together

in numerous cases. Young, whose tailored suits were always of the finest cut and fabrics, was likewise meticulous in preparing his cases, and his influence on Stephen's work as a commercial barrister was considerable.

From around 1955 Stephen's work in company law began to increase rapidly until by the 1960s it was dominating everything else. Between 1952 and 1970 he wrote around 130 opinions in this one area alone, considerably more than he wrote in any of the fields of contract, constitutional law, commercial law, equity, probate, trade practices, income tax, stamp duty, and the numerous other areas in which he felt comfortable to work. His opinions were sought because they were succinct, generally proved right, and were not expressions of his doubts—he knew his clients were *not* paying him for that.

In 1959 Stephen acquired his first reader, Brian Shaw, and from then on there were many: John Batt, Neil Brown, Garth Buckner, Charles Coppel, Bill Gillard, Peter Murley, John Monahan, Tim Smith, and Adrian Smithers. There were many because Stephen did not take silk until relatively late, at fourty-three in 1966. Neil Brown (later Federal Attorney-General) recalls that "Stephen always helped me immensely. He would simply stop working on whatever task he had before him and concentrate on my small problem and issue until it was resolved. He was one of the busiest non-QCs at the Bar, but he always seemed able to stop and take time to discuss my cases if I had a problem." That was in 1964, by which time Stephen was among the top two or three commercials at the Melbourne Bar, with close links to major Australian industrial concerns such as Broken Hill Proprietary, Carlton & United Breweries, Colonial Sugar Refining Company, Imperial Chemical Industries, Australian Paper Manufacturers, Associated Pulp and Paper Mills, Ansett Group, Mobil, Esso, Shell, News Ltd, ANZ and ES&A Banks, and a host of lesser companies. In several instances the barrister who suggested Stephen as his junior in these early years was Keith Aickin, formerly an associate of Sir Owen Dixon and, back during the war, Third Secretary at the Australian legation in Washington where Dixon had been Australia's Minister to the United States. Aickin became a QC in 1957 and would later serve on the High Court with Stephen.

"He was one of the busiest non-QCs at the Bar, but he always seemed able to stop and take time to discuss my cases if I had a problem."

In my biography of Stephen I examine in detail many of his most interesting cases, combing through the *Victorian Law Reports* and *Commonwealth Law Reports* for the interesting light they so often throw on his advocacy, the effectiveness of which was enhanced by his pleasingly urbane delivery, to the extent that it was impossible to imagine any judge becoming annoyed or angry with him.

In the 1960s Stephen became a member of the Liberal Party of Australia, a reflection of his individualist character and outlook, and some of his friendships (including with Ivor and Lola Greenwood and Alan Missen). Stephen was never particularly political, and though he played no active role in the Party, his act of joining it was significant. There was never anything "Tory" about Stephen, he was more a libertarian, and in those days the Party of Menzies was a small-l liberal party rather than a conservative party. He was also a member of the Melbourne Club, elected in September 1963—his proposer was John S. Bloomfield, a one-time lawyer, Minister for Education in the Bolte Government, ranked sixth in Cabinet; his seconder was Charles S. Booth, Chairman of Australian Paper Manufacturers, Australia's largest pulp and paper concern and one of Stephen's most significant clients.

In 1961 Stephen had moved into the new Owen Dixon Chambers at 205 William Street. His room was on the fourth floor at the north-eastern corner of the building, next to Ivor Greenwood's, and they shared a secretary, Miss Davis (no first-name terms in those days), who was accommodated in a cubicle carved out of the inner end of Stephen's room. There was no air-conditioning, so over summer the barristers opened the windows and rolled up their sleeves. Visitors would typically find Stephen with his feet up on his giant desk as he leaned back in his swivel chair drawing on his pipe—a safe substitute, he thought, for the cigarettes he previously smoked and still regularly borrowed from others. A leading solicitor would wander in for advice on some complex taxation arrangement, for instance Arnold Bloch. Stephen, feet up on the desk, would let him go into the vexed details, avoiding anything much in the way of comment himself, nodding sagely and saying "I think you are right, Arnold", or "Yes, that must be right", before finally, perhaps, throwing out a possible solution, while never claiming superior knowledge.

Stephen's fourth reader, John Batt, later on the Victorian Court of Appeal, was struck by Stephen's advice on the pleading of a difficult statement of claim: "Just tell the story". He was impressed too by Stephen's courtroom manner under fraught circumstances. One day they independently had briefs in the Practice Court before Justice Dean (who in 1961 had sentenced Robert Peter Tait to death): "Mr Justice Dean in coming into court sharp at 10.30 a.m. had found it empty. He adjourned the Court to the following day. When counsel arrived he was asked to return. He did so, unwillingly, and he required an

explanation. Fortunately Ninian was able to say that he had been caught in a train delay in the Jolimont yards, 'as I imagine my learned friends were'. He put the case charmingly in his mellifluous voice, soothed the judge's annoyance, and saved the rest of us from having to give any explanation."

Batt later learned that Valery Stephen was a close friend of one of Sir Arthur Dean's daughters, Ursula, but the point was that "Ninian appeared nerveless".

Stephen was appointed a Queen's Counsel on 29 November 1966—his colleagues thought it odd that he had not taken silk earlier. He also became a member of the Victorian Bar Council, and in a part-time capacity gave lectures in property law within the Law School at Monash University, where he also sat on the Faculty Board.

Nevertheless, "many thought Ninian had no serious interest in the law", as Bill Ormiston, a barrister at the time and later on the Victorian Court of Appeal, bluntly notes, and that observation is borne out by Ross Robson (whenever, as associate to Stephen on the High Court, he and Stephen were together on a trip, Stephen talked history, never law). "It was his ability to take in and understand difficult principles which placed him at the forefront of the Bar and it was this that his leaders valued so greatly", Ormiston points out. As an example he cites the time he went to Stephen's home in Burke Road "at about nine at night in a case involving issues of landlord and tenant law. He had had at least two conferences on other issues late that day and he had no time to look at the brief until his junior in another case left at about 8.15 p.m. Nevertheless, by the time I conferred with him, just after nine, he was on top of all issues including some difficult points of law, which I had spent most of the day preparing."

Stephen Charles, then a barrister and later on the Victorian Court of Appeal, had the pleasure of acting as

> "Stephen, feet up on the desk, would let him go into the vexed details, avoiding anything much in the way of comment himself."

Stephen's junior over an extended period of arbitration work. In 1968 a dispute arose between the Gas and Fuel Corporation and Snam Progetti, constructor of a steel pipeline to carry natural gas. Costs of construction had blown out due to the steel welds of the pipeline. Stephen and Charles were acting for the Corporation, Daryl Dawson for the contractor. "It was an immense pleasure being led by Stephen", Stephen Charles later recalled. "He always exhibited perfect unruffled Scottish calm." The only difficulty arose in conferences with clients. "Whenever Stephen addressed me, as he often did in conference, others present were frequently left with the impression that he spent a great deal of time talking to himself, and naturally assumed that a person of such distinction *would* address himself formally."

On another occasion, 29 June 1970, in the midst of the work they were doing together, Stephen rang Charles and invited him to his chambers. Charles's expectations of a pre-short-vacation drink or two turned out to be off-mark. "I've been under a lot of pressure recently", Stephen told him, "and I'm going across the road". By that he meant "I've been offered a position on the Supreme Court and I am leaving you in the lurch". The Bolte Government made the appointment the very next day, 30 June 1970.

In cases reported in the Victorian and Commonwealth Law Reports across the four years of Stephen's work as Queen's Counsel, from 1966 until his appointment to the Supreme Court of Victoria in mid-1970, his juniors in the Victorian cases were H. Ball, John Batt, J. B. Bingeman, Daryl Dawson (later on the High Court), M. N. O'Sullivan, G. H. Spence (later on the Victorian County Court), Clive Tadgell (later on the Victorian Court of Appeal), and R. K. Todd, each of them once. In the reported High Court cases his juniors were G. A. N. Brown, James Gobbo (later on the Supreme Court, and then Governor of Victoria), the outstanding S. E. K. Hulme (three times), P. A. Liddell and Clive Tadgell (twice). His admiration for Hulme and Tadgell reflected their abilities and Stephen's sense of affinity with them. Of his reported Victorian cases while he was QC he won seven out of nine, and he won seven out of the nine reported for the High Court too. The worst any judge ever said of his arguments was said by Justice George Lush, and one can almost hear him say it: in his opinion there was "no justification for the approach contended for by Mr Stephen", and as for the cases Stephen had cited, "In my opinion none of them lends support to Mr Stephen's argument". Not a single one.

His period as a barrister was probably the most satisfying of Stephen's life and he missed it when it was over, as he later recalled—"that intoxicating mixture of tension and excitement on the eve of each case, something that never wholly leaves you, however many cases you have fought; then that comfortable satisfaction when you have written the concluding part of an opinion; and the even more comfortable satisfaction when you write up your fee book at the end of the day."

* Among his numerous books, Dr Philip Ayres is the author of two major judicial biographies, *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah/MUP, Carlton, 2013), and *Owen Dixon* (Miegunyah/MUP, Carlton, 2003). He is a Fellow of both the Royal Historical Society (London) and the Australian Academy of the Humanities, and was a recipient of the Centenary Medal (for services to literature) in 2001.

1 The facts presented in this article are sourced and documented in the notes of my biography *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah/MUP, Carlton, 2013).

Ashley Halphen braving a Mongolian chill.

A MOMENT IN MONGOLIA

Breaking the Ice

ASHLEY HALPHEN

As we were about to land, planet earth had transformed into a mass of white, sliced up by a few black wavy ribbons that I presumed were roads. A flight attendant broadcast the usual final announcements - all I heard were the words, "it is currently minus 35 degrees".

Once again, I surveyed my immediate surrounds, looking for clues from my co-passengers, clad in ordinary casual clothing. They all seemed so relaxed. How did they exist in such an extreme climate? When the seat belt signs were turned off, only a few put on their jackets. "There must be more to it", I thought. "Perhaps life was entirely lived underground", I hoped. I exited the plane in the same clothes I had worn when departing Melbourne…in anticipation.

I made it from aircraft to airport and from customs to baggage claim. With each next step I was waiting to turn into a human ice block. My pick-up was there. I walked cautiously to the exit point. On approach, I realised my worst fears - no full time heated underground world. In the instant I stepped outside, I had to bend over to claim composure as my body was immediately racked in the grips of my virgin breath of fresh air.

> “Host-mother was listening intently while rubbing a lace of beads to cultivate eternal youth. Host-brother was rolling a quartet of sheep ankle bones like dice.”

The spectrum of colour was still black and white. The only sound was the crackle of crushing ice as the wheels of my taxi slowly approached Ulan Bataar, or ‘UB’ as the locals refer to their capital.

I had managed to put on a jacket and gloves by the time I climbed four flights of a naked, concrete stairwell and knocked on the door of my temporary home. It was like walking into a Christmas tree - colour had returned.

It was so cold under the ground and so cold above it…so cold even the stone walls said so…dare to stand still when the mobile rings…have the audacity to somehow reach a sweat and Mother Nature will freeze eyebrows…engage in conversation with a friendly stranger and fall prey to the bare skinned hand shake rule of etiquette…have the need to step inside a sauna heated building and begin the ritual of peeling off layers of clothing…have the inevitable need to return into the urban wilderness and undo what has just been done. And so it went on…

Mongolia, capped by Russia and heeled by China, is the most sparsely populated country in the world. Formed in the 12th century, her boundaries, political systems and culture have bounced between neighboring courts. For the better part of the 20th century communism was the nation’s anthem. By 1992 Mongolia had become an independent, democratic republic and the ball seems to have now stopped bouncing.

I had to take off my gloves, inner-outer gloves and inner-inner gloves, when I stepped inside the National Legal Institute of Mongolia. I could then more readily dismantle my hood, beanie, balaclava and neck warmer. Scarf and jacket were last to leave. Here I met my supervisor and her team. I was surrounded by intellectual giants in a research environment imploding in theory at the purest level of abstraction - no clients calling from prison desperately seeking bail here.

Mongolian law reform has had to react swiftly to a new political regime. There is no time for the gradual evolution of common law precedent. Passing new statutes involves locating international best practices in a given field and transplanting the model to Mongolia.

In a population that boasts 207 cloudless days a year, 30 per cent live the same nomadic lifestyle as those roaming the wilderness during the Chingiss Khan[1] era. Scientific findings estimate that 17 million people across Eurasia are descendants of Chingiss Khan, history’s ultimate medieval superpower, who founded an empire that stretched to the heart of the European continent. This momentous event marked the foundation of the state of Mongolia.

Although still one of Asia’s poorer countries, many living on a dollar a day, Mongolia is currently considered one of the world’s most important new democracies. But if you think “Lone Warlord Rangers riding shaggy horses are galloping off into a utopian democratic sunset”…then have another cup of tea….

On one morning of importance, I woke up to the ripping tunes of Tibetan-Buddhist prayer, aired live from the Gandan Monastery. Host-mother was listening intently while rubbing a lace of beads to cultivate eternal youth. Host-brother was rolling a quartet of sheep ankle bones like dice.

Outside, the air was crisp but not clear. No matter, so long as it remained completely still. How fortunate that winter is without wind. It was strange walking in the dark. I felt like I had not been to sleep.

I zipped up my jacket, fastened my scarf, pulled my hat tight over my ears and buried my gloved hands deep into my pockets. I trudged beside the icy black, oil-caked streets. Motorists, as usual, accelerated each time I crossed an intersection. In this winter of discontent, the chill smacked against my face, biting my nose and cheeks and causing miniature icicles to grow out of my nostrils.

When my face finally dug itself out of the scarf it was buried in, I saw rations of coal being sold on the roadside. The council workers in their orange fluorescent vests who chip at ice with shovels to make way for concrete-bearing pavements had disappeared. I was in the Ger District…nomads’ land.

Nomadic life is both a history and current affair of movement. Consistent with this lifestyle is the ger, a portable home used by nomads who carry the dismantled parts on camels or yaks to greener pastures for breeding and raising livestock. It comprises a crown and a wooden circular lattice frame covered by woollen felt for insulation. The structure stays upright by the weight of these covers.

After the fall of communism, the nomads came to town under the glow of a democratic rainbow. The city has not managed to absorb the increasing rate of numbers, leading to ger settlements forming and circulating around the entire boundary of the metropolis.

Spanning across rugged, sharp sloping terrain, these districts mingle in the horizon with neighboring factories that belch out enough smoke to blanket the heavenly sky. Up close, wire grows from the unpaved roads like weeds. People are bereft of the ordinary amenities associated with urban life. Alcoholism is rampant, unemployment is high and theft is part of life. The area stirs up grim visions of a shantytown. In this sub-zero, frozen world, I came face to face with a chilling level of poverty.

The George Halphen Scholarship supports 20 gifted local secondary school students in Mongolia living in poverty.

At a central point I met up with others. Together we were going to visit a pregnant mother and her four children, aged between two and 11. They were living in crisis. Father had abandoned his family, leaving only scraps from piled trash to eat.

We used a special vehicle to navigate through almost inaccessible terrain. The narrow, windy and snowcapped roads had sharp gradients fit only for Herculean skiers. We crunched past rows and rows of sagging fences until we arrived.

There was a clothes line outside. The clothes on the line were frozen. A mangy dog with lumps growing over its eyes barked as we approached. The door knob was a nail. The ger was slightly bigger than a walk-in wardrobe. We moved in a clockwise direction from the door which always faces south towards the fossil rich Gobi desert. The only light was from the smoke hole that poked through the centre of the roof. A pot of dirty water sat on the cast iron stove, the heartbeat of this circular domicile.

The children wore threadbare clothes suited more for the tropics than a sub-zero climate. There were no books or toys, just a pregnant mother and four children sitting on a dilapidated couch stricken by poverty. What would become of this family?

Mother of the family smashed a frozen brick of tea with a makeshift hammer. She then scattered the tea dust into the boiling water on the stove, poured in milk and sprinkled a few tablespoons of salt into the mix. I sipped the liquid product reluctantly.

The children received their new heavy warm jackets with the same thrill as having just been given an entire lifetime's worth of Christmas presents. I did not need to see anymore. What I had been contemplating as a possibility was now inevitable. A meeting was arranged…

Fast-forward to one year later…

The George Halphen Scholarship supports 20 gifted local secondary school students in Mongolia who live in poverty and would not otherwise be fully absorbed into mainstream public education. Students are expected to pay for transport, stationery, text books and the like. Special school programs are also expected to be paid privately. The Scholarship ensures that participants are equally placed with

A nomadic family in Mongolia receives a gift of winter jackets.

their school aged peers and have equal exposure to the available school curriculum. Gifted by the nourishment of education, they have every opportunity to one day make formidable contributions to their respective communities.

The Scholarship will continue until all participants graduate from high school…

Please contact Ashley Halphen if you would like more information about the George Halphen Scholarship Fund.

1 Readers may be more familiar with the common spelling, 'Genghis Khan'.

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

Dying with Dignity

THE HON STEPHEN CHARLES QC

Deficiencies in the Current Law

The doctor who treats a patient who is terminally ill, or suffering intolerable pain is faced with very serious problems of complying with the law while respecting patient autonomy. There is now legislation which specifically permits assisted suicide or euthanasia in several American states, the Netherlands, Belgium, Luxembourg and Switzerland. None of these jurisdictions have provided any evidence to support the objections of those who oppose a change in the law. But neither the Australian Government nor that of any Australian state has shown any willingness to reform the law concerning suicide.

At the outset it is necessary to lay out some basic legal propositions concerning homicide.

Murder

Murder occurs when a person by any deliberate and unlawful act causes the death of another person. A killing may be lawful – say in an execution, or in an act of self-defence. The act will be murder even though the other consents, or was already dying or near death. It matters not that the other's death was imminent. Nor does the act become lawful because the person responsible, if a doctor, believes he or she was acting in accordance with the wishes of the patient (or patient's family) or because the doctor thought that the patient had only hours to live. As to intent, the *mens rea*, if a person does an act causing death knowing that it is probable that the act will cause death, the actor is guilty of murder even if indifferent as to whether death is caused or not, or even if the actor wished that death might not be caused. There is no special defence for doctors.

Attempted Murder and Manslaughter

If a doctor is charged with murder after the death of a patient for whom the doctor had prescribed medication, at least two alternative verdicts must be considered. A verdict of attempted murder would be open to the jury if, say, it were impossible to determine how the patient died, whether because of the medication prescribed or due to some other cause. Attempted murder might also be an appropriate verdict when a patient did not die after a life-threatening medication was prescribed with the intention of hastening death. Manslaughter is a possible verdict if the doctor's actions amounted to an act of criminal negligence, and the verdict is always open to the jury if they are simply reluctant to come to a verdict of murder.

Aiding and Abetting

A person who aids, abets, counsels, or procures the commission of an indictable offence may be punished as a principal offender. The words "aiding and abetting" require presence at the scene of the crime, but "counselling and procuring" do not. The words are very wide. To be a principal in the second degree, the accused must have taken some part in the offence or acted in concert with those who committed it. Aiding and abetting means helping the accused to commit the crime, or intentionally encouraging – which can happen by word of mouth or simply one's presence and behaviour. What is required is conveying to the principal accused by words or behaviour that the aider and abettor is assenting to and concurring in the commission of the crime. Counselling requires just that, but it is not necessary to show that the counselling was a substantial cause of the commission of the offence.

In the case of Croft[1], there was a suicide pact, where one committed suicide in the absence of the other. The other was tried as an accessory and found guilty of murder.

Suicide

Suicide has not been an offence in Victoria since 1967. But if there is a suicide pact and the survivor caused or was a party to causing the death of the other by a wilful act or omission in pursuance of the pact, the jury may convict of manslaughter.

Suicide (Assisting or Inciting)

The 1997 amendments to Victoria's Crimes Act provide that any person who incites another to commit suicide,

> “One of the best known is Dr Bodkin Adams. He was not the best standard bearer for the medical profession. In the opinion of many he was an unconvicted mass murderer.”

or aids or abets any other in the commission of suicide or in an attempt to commit suicide, is guilty of an indictable offence and liable on conviction to up to 5 years’ imprisonment.

There is authority that a person who supplies a booklet which contains material capable of assisting a person to commit suicide does not aid or abet the suicide unless it can be proved that the supplier of the booklet intended it to be used by a person actually contemplating suicide and with the object of assisting or otherwise encouraging the person, and that the person supplied with the booklet then read it, and was assisted or encouraged by reading it to commit, or to attempt to commit suicide[2].

Recorded Cases

King George V died on 20 January 1936, peacefully at midnight. Shortly before his death, the King’s physician, Lord Dawson phoned his wife to ask that she advise The Times to hold back publication. Fifty years later on publication of Lord Dawson’s notes, it became apparent that an hour before the King’s death, Lord Dawson administered two injections of morphine and cocaine to ensure the King died painlessly in time for the announcement to be carried by the Times “rather than the less appropriate evening journals”. As Sir Douglas Black, a past president of the Royal College of Physicians, put it, Lord Dawson appeared to have committed an “evil” act for the sake of a “marginal” good, a somewhat euphemistic description of his intention to ensure publication of the death in The Times.

There are very few cases involving doctors for deliberately hastening death in the last 50 years, none in Victoria, two in Australia, and four in the United Kingdom. One of the best known is Dr Bodkin Adams. He was not the best standard bearer for the medical profession. In the opinion of many he was an unconvicted mass murderer. Between the years 1946-56 more than 160 of his patients died under suspicious circumstances, and 132 of them left him money or other items in their will. Many of his patients died after having been given “special injections” of substances the nature of which Dr Adams refused to describe to the nurses caring for his patients. His habit was to require nurses to leave the room before the injections were given, and he would also hinder contact between patients and their relatives. Dr Adams was tried before Devlin J and a Jury[3]. Devlin J instructed the Jury that –

> *If the first purpose of medicine, the restoration of health, can no longer be achieved, there is still much for the doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering even if measures he takes may incidentally shorten life. (emphasis added)*

This is one of the clearest expressions (if not the first) of the “doctrine of double effect” but it may also be a case of “double intention.” In a recent debate in the Western Australian Parliament regarding euthanasia, the Attorney-General rejected an argument based on a doctor palliating a dying patient by shortening his death with the response that the doctor was simply doing his job and that this was not euthanasia. The Attorney-General presumably had Devlin J’s words in mind. In 1991, Dr Nigel Cox, a U.K. rheumatologist of exemplary character, had treated a woman, Mrs Boyes, for progressive severe rheumatoid arthritis for over 13 years. She was in very severe pain and in the terminal stages of her illness. She refused all treatment, asking only that her pain and suffering be relieved. Dr Cox injected Mrs Boyes with potassium chloride which had no pain-relieving value and could only cause death, as it did. Dr Cox’s actions were reported by a nurse with a contrary moral view, after the event. Dr Rodney Syme, dealing with Dr Cox’s case in a paper[4] argued that:

> *Had Cox injected Mrs Boyes with a lethal dose of a sedative such as thiopentone (a barbiturate), he would not have been convicted. He was guilty of using the wrong drug, not of doing the wrong thing. No one suggested or believed that he had any intention other than to relieve Mrs Boyes’ suffering, of providing maximum palliation.*

This may be a medical or a moral view. But if it is intended as a legal proposition, I would, with respect, disagree. Dr Cox was charged with attempted murder (because Mrs Boyes’ body had been cremated before an autopsy could be performed, denying certainty as to the cause of death, which could have been her existing condition). He was convicted and sentenced to a year’s imprisonment, wholly suspended[5]. The General Medical Council merely reprimanded Dr Cox and allowed him to continue to practise.

There are several cases of suicide involving accused persons not of the medical profession in various States. Almost invariably the victim requested assistance in dying and the result of conviction was the imposition of a suspended gaol sentence. An exception is the N.S.W. case of *R v Justins*,[6] the dead person being one Graeme Wylie, a former Qantas pilot. Wylie was 72 and suffering from Alzheimer’s disease. He died from a lethal dose of Nembutal. He had attempted suicide by cutting his wrists six months earlier, and had expressed a wish to go to Switzerland to die. The Nembutal had been obtained for him by Caren Jenning, who had travelled to Mexico

for the purpose of buying it. It was given to Wylie by Shirley Justins, his long-term partner, and he voluntarily drank it. There were serious doubts as to his capacity to make decisions, which caused the Swiss organization Dignitas to refuse his application for assistance in suicide. Justins was convicted of manslaughter, which the judge took to mean that the jury found Wylie lacked the capacity to make an informed decision to end his life, and that Justins, in effect, must have been aware of this. The judge imposed a sentence of 2½ years' imprisonment with a non-parole period of 22 months. A major factor in this was that Justins had changed Wylie's will to provide much greater benefit to herself, and to exclude Wylie's daughters from a previous relationship.

In August 2009, the Chief Justice of W.A. decided the Rossiter[7] case, in which a quadriplegic patient had directed the discontinuance of the provision of nutrition and general hydration which would lead inevitably to Rossiter's death from starvation. Rossiter sought only analgesics for the purposes of sedation and pain relief as he approached death. He was found to be mentally competent and entitled to refuse medical treatment. Another case in contrast in the A.C.T.[8] was being decided at the same time by their Chief Justice. That case concerned a 59-year-old man who suffered from paranoid schizophrenia and was clinically psychotic, was refusing food and resisting treatment with a naso-gastric tube. The judge held that this patient could not be regarded as having consented to the withdrawal of, or refusal to apply, medical treatment, holding that it might be unlawful to decline to give him medical treatment which was available and might, in the short to medium term, avert imminent death.

Suggested Options for Change

Dr Nigel Gray has persuasively argued that there are two potential options to enable people to die with dignity. Dr Gray was of course aware that the law would have to be changed to allow these options to be pursued.

Option one involved a person giving a signed and witnessed request to a pharmacist to provide a lethal dose of Nembutal, which the person would take home and consume. Suicide would occur. The pharmacist, as the law now stands, would probably be guilty of aiding and abetting or inciting suicide and liable on conviction to imprisonment.

The second option involved the setting up of an organisation, staff members of which would assist a person willing to commit suicide. Upon request, the staff member, with an independent witness, would slip a needle into the suicide's veins and set up an intravenous drip, then drawing up a lethal dose of morphia and slipping the syringe into the drip. The syringe would then be handed to the suicide, who would then press the plunger. The staff member and the witness, as the law stands, would both be guilty of aiding and abetting suicide, and the staff member's actions would come very close to making both guilty of murder, particularly if the patient had to be directed or assisted in depressing the plunger, or if there was serious doubt as to the mental capacity of the suicide.

Problems for Doctors and Medical Staff

Doctors' problems commence with their professional obligations, which are a reality of modern medical practice. Dying may be associated with intolerable suffering and the doctor has a duty to relieve suffering. Sometimes palliative care cannot relieve all the pain and suffering of dying patients, and some suffering will only be relieved by death. The doctor may be repeatedly asked by a rational patient to end his or her suffering. The duty being to respect patient autonomy, the doctor may prescribe a dose of medication large enough to cause the death of the patient. In any inquiry following death, the medical notes should indicate the exact dosage given. Medical opinions may vary, others may have a different view of the likely imminence of the patient's death, and form an opinion that the doctor's primary concern must have been to hasten death rather than merely to palliate. Or the doctor may have the misfortune to be observed by a suspicious nurse as in the case of Dr Nigel Cox. A chance comment to a nurse or family member may support that view, that palliation was incidental to the main purpose. The doctor then runs the risk of a charge of murder, or aiding and abetting a suicide. Where the doctor has actually administered the medication, by injection, a charge of murder could be laid, as also if the drug was administered by another under the direction of the doctor. If the medication was voluntarily taken by the patient, with full mental capacity, aiding and abetting or inciting a suicide would be the appropriate charge. On the other hand if a patient demands the withdrawal or termination of treatment, the principal question becomes the mental capacity of the patient to make this decision.

Law Reform

The doctor's dilemma, whether to take the risk of hastening death to relieve suffering, in conflict with the criminal law, may arise in a number of different situations. The prescription of deep continuous, or terminal, sedation maintains the patient in a continuing coma until death, in circumstances where the cause of the ultimate death might be said to be the sedation. The procedure has been likened to "slow euthanasia." Dr Syme has argued that there is no doubt that the possibility or probability of death can be foreseen on many occasions when this procedure is used, creating potential conflict with the criminal law.

The absence of any relevant defence under the Crimes Act leaves the doctor exposed, and at risk of prosecution in a variety of situations, for at least aiding and abetting suicide. Mr Justice Devlin's reasoning in his charge in the Bodkin Adams trial seems to have been gratefully received by the medical profession, but various commentators have pointed out that the use of both intention and causation as a basis of criminality in medical situations, is highly contentious and in a sense hypocritical, in that the doctor who foresees a hastened death as a consequence of his or her treatment really has the necessary foresight to enable a finding of *mens rea* to be made by a jury. As several commentators have pointed out a more acceptable basis in legal reasoning might well be to argue the necessity of the doctor's treatment, the necessity to relieve pain and suffering, as the basis upon which the doctor's actions cease to be criminal.

The fact that there have been very few doctors prosecuted in Australia or the U.K. raises the question why agitate for a change in the law at all? If the community generally accepts that doctors not infrequently hasten the death of their patients to lessen their suffering and at their request, is that not of itself an implied special defence for doctors, and a sufficient protection without the necessity for legislative change? Furthermore might not the increased publication of information as to what doctors are doing, cause persons taking the contrary view to become much more watchful, and to complain more strenuously, if they believe they know of cases where the doctor's principal intention or even one of the doctor's purposes, was to hasten death?

At the very least, one would have thought these issues demand to be referred to the Law Reform Commission for a full review and hopefully clarification of the position of doctors.

Purdy v. D.P.P.

Debbie Purdy suffered from primary progressive multiple sclerosis. There is no known cure. She believed her continued existence would at some point become unbearable and wanted to end her life while still physically able to do so; but at that point she might be unable to act without assistance and so would need to travel to a country where assisted suicide was lawful. Her husband was willing to help her make the journey but in so doing ran a risk of being prosecuted for assisting a suicide. She sought assistance from the Director of Public Prosecutions (**"D.P.P."**) as to the factors he would take into account in deciding whether a prosecution should be brought. The D.P.P. declined to answer, and Purdy sought to review his refusal. She succeeded in the House of Lords[9].

The argument accepted by the Law Lords was that under Article 8(1) of the *European Convention on Human Rights* Ms Purdy's right to respect for her private life related to the way in which she lived, which included the way in which she chose to pass the closing moments of her life. In effect she and her husband were entitled to information as to the way the D.P.P. might exercise his discretion whether to consent to a prosecution, with sufficient precision to enable the individual to regulate his conduct accordingly.

As it happens Victoria now has its own Human Rights Charter[10], with many provisions based on or comparable to those contained in the *European Convention* and the Human Rights Act of the U.K. It is difficult to predict how the Courts will interpret the Victorian Charter, there yet being little judicial comment on it. But it may be possible to take action in Victoria, not seeking to change the law, which is the province solely of Parliament, but insofar as the medical profession or an individual believes the law to be unclear in its operation, seeking guidelines as to how the law is to be applied. When the law is unclear in its operation, it would seem reasonable (arguably a basic human right) that it should be possible to seek guidelines from the Attorney-General (or the D.P.P.) as to the circumstances which might make it more, or less, likely that a prosecution would be instituted for assisting or attempting suicide.

The U.K. D.P.P. has now issued guidelines, which do not apply to doctors, principal among which is that the person aiding the suicide must act wholly motivated by compassion. The guideline which somewhat surprisingly favours the prosecution of a suspect acting as a medical doctor where the victim was in his or her care was added in the final stages of preparation of the guidelines after a submission from the Royal College of Physicians which included the statement that "any clinician who has been part, in any way, of assisting a suicide death should be subject to prosecution".

It remains to say, however, that here the D.P.P.'s guidelines might conceivably make life more difficult for doctors by indicating (*inter alia*) that prosecutions may be launched if any treatment shortened a patient's life by even a small period. It has been said of the U.K.'s guidelines that "they please no one and for many there were unwanted, not least of all by the D.P.P."[11].

1 *R v Croft* (1944) (Court of Criminal Appeal) 60 TLR 226.

2 *A/G v Able* (1984) 1 Q.B. 795.

3 *R v Bodkin Adams* [1957] Crim.L.R. 365.

4 (2009) 17 JLM 439 at 435.

5 [2000] Crim. L.R. 37.

6 [2010] 79 NSWLR 544.

7 *Brightwater Care Group v Rossiter* [2009] WASC 229, Martin CJ.

8 *Australian Capital Territory v J.T.* [2009] ACTSC 105, Higgins CJ.

9 *R (Purdy) v D.P.P.* [2009] UKHL 45; [2009] EWCA Civ 92.

10 *The Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("Victorian Charter").

11 *A Critical Consideration of the Director of Public Prosecution Guidelines*, John Cooper QC, Halsbury's Law Exchange, at p19.

Advancing Advocacy

Australian Bar Association advanced trial advocacy course, Brisbane. CHRISTINE MELIS

When was the last time you received a review on the substance and style of your court performance? For most, the answer would be, "not since the readers' course." Advocacy is a skill and it is that skill that defines us as barristers. Yet, there are very few opportunities available for barristers to "workshop" cases and experiment with presentation. Rarely do we have the opportunity of seeing our own performance played back so that it can be reviewed, and feedback provided, by judges and senior practitioners from all over the country and overseas.

We would not dispute that we need to keep abreast of the law for our job but it is not often we consider that, in the same way, we need to challenge and refine our advocacy skills and keep them fresh throughout our life at the Bar. This is exactly what the ABA Advanced Trial Advocacy Course seeks to reinforce.

The ABA Course is run every year in the latter part of January across five days. There are places available for 42 barristers and seniority of at least two years at the Bar is a pre-requisite. The coaching faculty includes Supreme and District Court judges, Australian and International counsel from New Zealand and South Africa, as well as performance and voice coaches with expertise in voice, movement and impact. Lay witnesses are sourced from outside the course participants and expert witnesses are sourced from the fields of expertise required on the factual scenario of the case.

In January 2014, the course was held in Brisbane. I was a participant. Participants included barristers from all over Australia at various levels of seniority, including silks and one participant from Fiji. For five days and five nights we lived and breathed the facts of either a civil brief involving alleged breaches of the Australian Consumer Law or a criminal brief concerned with one count of rape.

Each day brought an opportunity to concentrate solely on one aspect of the trial process. Day 1: introduction to the course, the participants and the coaching faculty; Day 2: analysis of the case and openings; Day 3: examination-in-chief; Day 4: cross-examination; and Day 5: closings.

It was an intense week. Reflecting on it now, I can see why. It is a rigorous exercise to prepare a case; be reviewed on both substance and style for each aspect of trial performance; watch your performance on an iPad in the company of a voice and performance coach; do the exercise again whilst trying to incorporate the feedback received; watch demonstrations of an evening in preparation for the next day; and then do it all over again the next day.

But, the benefits are worth it.

The environment is as close to the real experience as possible. At least three coaches are assigned to each group of six on each rotation of an exercise so that you receive diverse feedback. The voice and performance coaches are on the ready to give you feedback on style, posture and body language. What I enjoyed most was the opportunity to concentrate on nothing but the case and how I might tackle each aspect of trial performance. It was refreshing not to have to worry about the outcome for your client; the week was all about us.

The course next year will be held between 19-24 January 2015 at the Federal Court Complex in Melbourne. Course materials will be provided in December 2014. At least three full-days of preparation is suggested before the course commences. I encourage you to consider undertaking the course. Whilst it is called a "course" you will be encouraged to think of it as a "retreat". As a participant you will have the chance to meet and get to know many barristers from around the country and in particular become very close with your group of six and your "home room coach" for the week. At dinner every night participants and coaches have the opportunity to chat and get to know one another in a relaxed environment. As the week rolled on I certainly felt like part of a wider family.

Registration for the 2015 course will open in August 2014.

Sarah Cherry (Vic Bar), Ben Munro (QLD Bar), Janine Wald (Vic Bar), Chris Gudsall QC (Coach NZ Bar), Kevin Andronos (NSW Bar), Christine Melis (Vic Bar) and William Lye (Vic Bar)

Winners and Losers in Australian Asylum Seeker Justice

GEORGINA COSTELLO

On 31 March 2014, Scott Morrison, Minister for Immigration and Border Protection, announced the axing of a taxpayer-funded legal advice service known as the Immigration Advice and Application Assistance Scheme ("the IAAAS scheme") for those who arrive in Australia illegally by boat or air.

For more than 20 years, the IAAAS scheme has provided asylum seekers, some of whom are tortured and traumatised people who have limited English language skills, with proper assistance from qualified advisors when making claims to be a refugee. According to Michael Colbran, President of the Law Council of Australia, the IAAAS scheme provided "modest funding to Australian lawyers and migration agents to provide limited assistance to asylum seekers so they [could] properly prepare their claims for refugee status or other forms of assistance."[1]

Announcing the cut, Scott Morrison stated, "From today people who arrived illegally by boat, as well as illegally by air, will no longer receive taxpayer-funded immigration advice and assistance under the (IAAAS). This election commitment will save the budget $100 million".[2]

The midyear budget review, released in December 2013 set aside an extra $2 billion to process refugee claims offshore, with the projected expenses of offshore processing over the next four years at $9.5 billion.[3] According to an analysis of budget and immigration data set out in the *Sydney Morning Herald* in December 2013, if the newly expanded refugee centres in Nauru and Papua New Guinea operate continuously at full capacity, and if the average asylum seeker's claim is processed in 143 days, the cost to Australian taxpayers per detainee will be about $220,000.[4] In light of these figures, the Government's decision to cut legal funding in this area to save $100 million is petty and disproportionate.

In 2012-2013, more than 4.5 million permanent and temporary Australian visas were issued. In the same year: (i) a mere 20,019 Humanitarian Program visas were granted (0.004% of the total visas issued that year); and (ii) 25,091 irregular maritime arrivals were intercepted

(excluding crew).[5] The number of asylum seeker arrivals to Australia is relatively small in light of our broader migration program.

Scott Morrison has said that asylum seekers will be free to access legal advice offered on a pro bono basis and will be assisted by the Department of Immigration and Border Protection.[6] But according to Rachel Ball, director of advocacy and campaigns at the Human Rights Law Centre in Melbourne, the Department has already refused an offer to provide asylum seekers with a list of free legal services.[7]

In March 2014, Sydney barrister Jay Williams, who is representing 75 asylum seekers detained in the Manus Island facility, was granted access to the facility by Papua New Guinea judge Justice David Cannings. Upon arrival, Mr Williams was ejected from the detention centre. PNG's attorney-general Kerenga Kua's rationale for this was that Mr Williams was not legally allowed to practise as a lawyer in PNG because he had not applied to the National Court for permission and did not have a licence to practise in PNG.[8]

Even in Australia, the right for lawyers to advise asylum seekers is restricted. Providing advice to asylum seekers in connection with a visa application, even if it is pro bono advice, constitutes migration assistance. Under s.260 of the *Migration Act 1958* (Cth), which is a penal provision, a person who is not a registered migration agent must not give immigration assistance. As such, barristers and solicitors are prohibited from giving pro bono migration advice unless they are registered as migration agents with the Migration Agents Registration Authority. People who practice as unregistered migration agents in Australia are breaking the law and may be subject to fines of up to $6600AUD or imprisonment for up to 10 years.[9]

Despite the Federal Government's stated commitment to cutting red tape, the present system of regulation means that non-lawyer migration agents are subject to one, less onerous level of regulation, whilst migration lawyers who register as migration agents are subject to two, overlapping and sometimes inconsistent layers of regulation.[10]

There is no stampede of migration lawyers eager to submit to double regulation in order to provide free advice to asylum seekers. Even if asylum seekers can access pro bono migration agents (cf those on Manus Island who have appointed Jay Williams to represent them) there is likely to be insufficient capacity left among solicitors and barristers who have the necessary registration as a migration agent, and are willing to do even more work pro bono, to meet the increased demand caused by the cut to funding.

On the current state of the law, detainees on Manus Island appear unable to lodge asylum claim asylums in Australia at all; instead their claims may have to be made in PNG. Accordingly, the IAAAS funding decision will likely have the harshest impact on those already in Australia with refugee claims (who arrived without a visa) or those who manage to get to mainland Australia without a visa in future.

John Gibson AM (1950-2012) was an accomplished Victorian barrister who signed the bar roll in 1981. Gibson appeared in many important cases in the area of migration. When named as a "Legend of the Victorian Bar" in 2012 it was noted that he had appeared for and looked after those in need, without fee, for years and years, without any expectation of reward or acknowledgment.[11]

On 18 March 2014, the Law Council of Australia announced Mr Besmellah Rezaee as the inaugural winner of the John Gibson AM Award for the Young Australian Migration Lawyer of the Year. Mr Rezaee holds degrees from Adelaide University and the Australian National University, speaks six languages (English, Dari, Persian, Urdu, Hazaragi and Pushto) and works as a solicitor and migration agent at Playfair Visa and Migration Services in Sydney.

Mr Rezaee was born in Afghanistan and lived the life of a refugee after his family fled Afghanistan when he was 11 years old. Mr Rezaee's father came to Australia as an asylum seeker and Mr Rezaee followed, arriving in Australia around 10 years ago.

Asylum seekers who are successful in their refugee applications may go on to become high achievers in our community, like young lawyer Besmellah Rezaee. Australia should continue to fund a modest legal aid program for asylum seekers, as it has done for more than two decades. This would help ensure that asylum applications made by people like Mr Rezaee's father are made competently.

1 Law Council of Australia Media Release "Law Council concerned by removal of IAAAS Funding", 2 April 2014.

2 Press release of Scott Morrison, Minister for Immigration and Border Protection, 31 March 2014.

3 Markus Mannheim, "Boat people: warning on rising cost of refugees - up to $500,000 each" Sydney Morning Herald online, 23 December 2013.

4 Ibid.

5 Department of Immigration and Citizenship Annual Report 2012-2013, Immigration Advice and Application Assistance Scheme http://www.immi.gov.au/about/reports/annual/2012-13/pdf/2012-13-diac-annual-report.pdf.

6 Above n.3.

7 Oliver Laughland, 'Legal aid denied to asylum seekers who arrive through unauthorised channels' The Guardian online, 31 March 2014.

8 Liam Fox, "Australian barrister Jay Williams thrown out of Manus Island despite court order, to be deported from PNG", ABC Online, 28 March 2014.

9 Information sheet on the Department of Immigration and Border Protection website. https://www.immi.gov.au/migration-fraud/giving-migration-advice.htm

10 Law Council of Australia supplementary submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business, 15 June 2010, http://www.pc.gov.au/__data/assets/pdf_file/0004/99175/sub027.pdf.

11 *Bar News*, No.152 Spring 2012, p4.

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

An Affair to Remember: A Note on the Orr Case

THE HON PETER HEEREY AM QC

Legal Limits, Federation Press, 2013, is a collection of excellent papers by Nicholas Hasluck, formerly a judge of the Supreme Court of Western Australia and a published novelist and poet, on the general theme of the relationship between law and literature.

One paper, entitled *Seeing What Happened*, takes as its point of departure the cause célèbre of Professor Sydney Sparkes Orr, who was summarily dismissed from his office of Professor of Philosophy by the University of Tasmania in 1955. The principal ground (as will be seen, there were others) was the allegation that Orr had a sexual relationship with Suzanne Kemp, an 18 year old undergraduate. Orr's action for wrongful dismissal was rejected by Justice Green in the Supreme Court of Tasmania in a decision upheld by the High Court: *Orr v University of Tasmania* (1957) 100 CLR 526.

As Hasluck notes, a later work by Tasmanian author Cassandra Pybus, *Gross Moral Turpitude*, William Heinemann, 1993, thoroughly examined the evidence and came down strongly in favour of the courts' conclusion.

In retrospect that conclusion seems unavoidable. There was, amongst other things, evidence that late one night Orr took Miss Kemp to a lonely spot among the sand dunes behind Bellerive beach, across the river from Hobart. Orr's car became bogged in the sand and he had to get the assistance of a nearby resident, who gave evidence at the trial. Orr's explanation that the visit was "merely for the purpose of discussing some philosophical problem or problems" (100 CLR at 529) would have sounded unconvincing for the most unworldly of judges, a category into which Justice Green certainly did not fall.

Beside the Kemp issue, the University relied on a number of unrelated grounds. One concerned a mature age philosophy student Edwin Tanner, who was also an accomplished artist. Orr was building a new home at Sandy Bay. It was alleged he offered to award Tanner the prize for Ethics (of all subjects!) in return for the student painting a mural for his new home.

Another involved a Dr Milanov, a lecturer in the Philosophy Department. Orr was said to have importuned Milanov for personal psychological advice in relation to his (Orr's) dreams and other matters. These included "personal information supplied by (Orr) concerning his relationship with Royalty" (100 CLR at 528). In particular, Orr speculated that he was the illegitimate son of the Prince of Wales, later Edward VIII and still later Duke of Windsor.

I vividly recall attending the trial at the old Supreme Court in Macquarie Street in 1956, my first year at Law School. Orr was in the witness box and presented his profile to the public gallery. He had the distinctive Windsor sloping forehead and chin, very similar to that of George VI on the coinage of the time.

“Orr’s supporters in the world of academe saw the case as a matter of academic freedom, with an overlay of libertarianism. Whether or not he seduced Miss Kemp was largely irrelevant. In the litigation, the priorities were reversed.”

Anyway, the Tanner and Milanov grounds, and some others which I cannot recall, were not upheld by the trial judge.

It needs to be mentioned that in 1954 Orr had been one of the prime movers in instigating a Royal Commission into the University. Its report had been quite critical of the University administration, and in particular the Chancellor, the Chief Justice of Tasmania Sir John Morris. There was a clear motive for payback as far as Orr was concerned. Moreover, Suzanne Kemp’s father was a very prominent Hobart businessman and his outraged complaint to the University Council got the matter off to a flying start. My old rugby coach and history lecturer, George Wilson, a strong Orr supporter, confided once at a barbecue that there were only three people who knew the truth of the Orr case, “God, Orr and Reg Kemp, and none of ‘em’s telling”.

Orr’s supporters in the world of academe saw the case as a matter of academic freedom, with an overlay of libertarianism. Whether or not he seduced Miss Kemp was largely irrelevant. In the litigation, the priorities were reversed. As an alternative, Orr’s counsel argued, without much enthusiasm one might infer, that the facts found by the trial judge did not constitute legal justification for dismissal.

The response of the High Court (Chief Justice Dixon and Justices Williams and Taylor, 100 CLR at 530) was as follows:

> *With this submission we emphatically disagree. Miss Kemp was a student in the appellant’s class, she was 18 years of age and it is apparent that she was then passing through a period of turbulent eroticism. Moreover there can be little doubt that she was eager to institute an intimate personal relationship with the appellant, but there is not the slightest doubt, upon the facts as found, that the appellant, having observed her feelings, became only too ready to take advantage of them and seduce her. The affair developed under the guise of the discussion of philosophical problems and, within a short period resulted in sexual intercourse taking place between them. Thereafter, it occurred on a number of occasions. We have not the slightest doubt that this conduct on his part unfitted him for the position which he held and that the university was entitled summarily to dismiss him. We can only express our surprise that the contrary should be maintained.*

A supposedly conservative bunch of judges was probably several decades in advance of feminist thought in seeing the matter through the prism of exploitation and gender-based power relationships.

Notwithstanding the setback in the courts, *l’affaire Orr* (enthusiastic supporters saw him as an antipodean Dreyfus) dragged on and on. There was widespread agitation by the Federal Council of University Staff Associations, which was the academics’ union. A black ban was put on the Chair of Philosophy for years. A number of lecturers at the Law School resigned.

Orr re-joined the Presbyterian Church and its ecclesiastical court, the Scots Kirk Session, retried the Kemp issue and exonerated him. The Church campaigned vigorously for his reinstatement, as did the Catholic Archbishop of Hobart, Dr Guilford Young.

Others were drawn into the struggle. Professor R D (“Panzee”) Wright of Melbourne University, later Chancellor of that University, became a public Orr partisan. His brother, Senator Reg Wright, had been leading counsel for the University of Tasmania in the litigation. (Later Orr and Panzee Wright were to have a bitter falling out.) John Kerr QC, later Governor-General, and Hal Wooton published in the journal of the Australian Association for Cultural Freedom what Cassandra Pybus describes (at 130) as “a devastating piece and it blew the case of Orr and Panzee Wright right out of the water”. The bibliography in the Pybus book details 53 publications. Finally in 1966, shortly before Orr’s death, a financial settlement with the University was achieved and the black ban lifted.

In the late 1950s, I was an articled clerk at Hodgman and Valentine, Orr’s solicitors. William Hodgman QC had appeared for Orr at the trial, led by Else Barber QC, and in the High Court, led by Maurice Ashkanasy QC. In the years following the litigation, Orr would turn up frequently at the office with miscellaneous requests. By this stage, perhaps understandably, Bill Hodgman’s zeal for the cause had rather waned and Orr would be sent off down the corridor to the articled clerk.

Orr was not the most appealing of personalities. He exuded self-pity. At the time, however, I was still a true believer and thought to myself that he had a lot about which to pity himself. It is not often the reasonable and pleasant people who become martyrs. Perhaps Dreyfus was a bit of a pain.

One of Orr’s legal problems concerned philosophy lectures he was giving, not of course at the University but in the rather unlikely venue of the Hobart RSL club. He was reduced to plying his trade as a philosopher, like Socrates of old.

At the time in Tasmania there was an entertainment tax. Orr wanted to know if he was exempt from that tax. I think I told him he was. In any event, Orr’s myriad problems did not include claims for Tasmanian entertainment tax.

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

You Take the Low Road, and I'll Take High Road...

Will Scottish Independence cause an Australian Republic?

DAVID H DENTON RFD QC[1]

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 2

Act to extend to the Queen's successors

The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SCHEDULE

OATH

I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

SO HELP ME GOD!

AFFIRMATION

I, A.B. , do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE: The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.)

The Scottish Question

I have long wondered how an Australian Republic may come about without the need to be divisive to our culture and social fabric. It is a challenge to change our Constitution and the 1999 referendum on the question of a republic showed that there are still so many ways of actually drafting a republican constitution. Desires for change are one thing; the need for change is another. However, what if the need came about by virtue of we Australians not doing anything much at all? Is it possible that such a momentous change could arise within a short time and make us revisit the issue of a republic by default?

This article represents no more than my thoughts as an intellectual exercise and without the benefit of any debate, so these ideas may possibly be wrong (a conclusion I would resist with some little force yet). Nevertheless, what if the Crown of the "United Kingdom of Great Britain and Northern Ireland" no longer exists for Australian Constitutional purposes?

Scotland seems to be proposing that very step.

The Scottish Government will hold a referendum of the Scottish electorate on 18 September 2014 on the issue of independence for Scotland from the United Kingdom of Great Britain and Northern Ireland. The population of Scotland is some 5.3 million people. The hurdles being faced at the referendum are not inconsiderable.

Alex Salmond, First Minister of Scotland and leader of the Scottish National Party (SNP), proposes that Scots will be asked: "*Should Scotland be an independent country?*" The Scottish Government has produced a comprehensive guide to an independent Scotland called "*Scotland's Future*" which runs to 650 pages. The Guide sets out the facts and figures and tries to provide information on:

- How Scotland can afford to become independent.
- Scotland's economic strengths and how it can make the most of its potential.
- How independence will help ensure that everyone in Scotland gets a fair deal.
- The ways in which independence will strengthen Scotland's democracy.
- An independent Scotland's place in the world.

The SNP argues that an independent Parliament elected entirely by people in Scotland will replace the current Westminster system. Under that system, elected representatives from Scotland make up just 59 Scottish MPs out of 650 members of the House of Commons (nine per cent); the House of Lords is wholly unelected. If Scotland votes 'Yes' in the referendum, the Scottish Government will negotiate with Westminster and the European Union so that Scotland becomes independent on 24 March 2016. Scotland will become the 29th member of the European Union and the 194th member of the United Nations and join NATO in its own right and be a unicameral parliament.

At the first independent election, on 5 May 2016, voters will have the chance to choose a government and policies for Scotland's future. Importantly, the apportionment of the national debt of the United Kingdom – expected to peak at 86 per cent of UK GDP -almost £1.6 trillion, in 2016/17 – will be negotiated and agreed as part of the overall settlement on assets and liabilities and split. Using 1980 as the base year, Scotland's historic share of the UK national debt in 2016/17 is projected to be approximately £100 billion. This

is equivalent to 55 per cent of Scottish GDP.

On independence in 2016, the Queen is to be head of state. An independent Scotland will become the 17th member of the Commonwealth to share the same monarch. It is noted here however, that in each of those other Commonwealth States the Crown is represented by a Governor-General. This is not suggested for Scotland.

Creation of the United Kingdom

How did the 'United Kingdom' come about?

The Kingdom of England was formally established by 927 AD by King Athelstan (with the process of unification taking a further 100 years to complete). The Norman invasion was launched in 1066 and William was crowned king on 25 December 1066. Edward I conquered Wales in 1282. Wales was formally integrated with the Kingdom of England in 1535.

The Kingdom of Scotland was established in the 9th century and was ruled by the House of Stuart from 1371 up until 1707.

The Kingdom of Ireland was created by an act of the Irish Parliament in 1541, replacing the Lordship of Ireland, which had existed since 1171. The Crown of Ireland was established as a personal union (rather than dynastic) between the English and Irish crowns, with the effect that whoever was King of England was to be King of Ireland.

When Elizabeth I of England died in 1603 the heir to the English Throne was King James VI of Scotland. Generally called the 'Union of the Crowns', this dynastic union was in place from 1603 until 1653 (when the monarchy was officially abolished) and again from 1659 until the two nations were united in 1707. However, at all times England and Scotland continued to be sovereign states, despite sharing a monarch, until the Acts of Union in 1707.

> "So it may now come to pass that due to matters evolving in Scotland and Westminster that Australian Constitutional Monarchists and Australian Republicans would be best served by renewing the debate on our future constitutional framework and with some urgency."

With the passing of the Acts of Union 1707 of the English and Scottish Parliaments the independence of the kingdoms of England and Scotland came to an end on 1 May 1707 when they merged the kingdoms of England and Scotland into the 'Kingdom of Great Britain'. This agreement is known as the 'Union of the Parliaments'. This entity also created a British Crown. The effect was to also create a personal union between the Crown of Ireland and the British Crown.

By the terms of the Act of Union 1800, the Kingdom of Ireland merged with the Kingdom of Great Britain and created the sovereign state of the "United Kingdom of Great Britain and Ireland".

This was a time of the British Empire, on which, it was said, the sun never set.

It was under this single Crown of a sovereign United Kingdom that the people of the Original States of Australia agreed to federate in 1900 under our Constitution.

Yet shortly thereafter, following the establishment of the Irish Free State in 1922, Northern Ireland (which had been created earlier by Westminster in the Government of Ireland Act 1920, partitioning Northern Ireland

from Southern Ireland) exercised its option of withdrawing from the Irish Free State within one month of the treaty coming into effect. Having left the United Kingdom, Northern Ireland re-joined the United Kingdom within the month. On this occurring the remaining constituent parts of the United Kingdom were renamed the "United Kingdom of Great Britain and Northern Ireland". The Irish Free State remained a 'dominion' and part of the Empire until 1949, when it became the Republic of Ireland and withdrew from the Commonwealth.

Currently, the United Kingdom of Great Britain and Northern Ireland is constituted by four countries: England, Northern Ireland, Scotland and Wales. It is the 'United Kingdom of Great Britain and Northern Ireland' itself that is the sovereign state under international law (not its constituent united parts).

'Yes' to the Referendum?

The legality of Scotland, as a constituent country of the United Kingdom, attaining de facto independence (in the same manner as the origins of the Irish Republic) or declaring unilateral independence outside the framework of British constitutional convention, is uncertain. The referendum being put in 2014 seems to allay fears of such a declaration and works upon the understanding of further negotiation with Westminster in the event of a 'Yes' vote.

It is recognised that the United Nations Charter enshrines the right of peoples to self-determination, and the Universal Declaration of Human Rights also guarantees peoples' right to change nationality. The United Kingdom is a signatory to both documents.

How Scotland may achieve independence may be assisted by of the experience of the Quebec Secession movement in Canada in the 1990s. In 1998 an advisory opinion of the Supreme Court of Canada was provided regarding the legality, under both Canadian and international law, of a unilateral secession of Quebec from Canada. Its opinion presents serious issues for the Scottish independence movement to accommodate.

That Court provided an advisory opinion on two specific questions which, in essence, asked whether Quebec had a right to secede under Canadian Law and / or under International Law.

Whilst deciding that under the Canadian Constitution unilateral secession was not legal, the Court considered that should a referendum decide in favour of independence, the rest of Canada would have no basis to deny the right of the government of Quebec to pursue secession. The Court strongly opined that negotiations would have to follow to define the terms under which Quebec would gain independence, should it maintain that goal. This involved four interrelated and equally important principles or values: federalism, democracy, constitutionalism and the rule of law, and protection of Minorities.

Importantly, the Court determined that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state. The Court stated that the right of a people to self-determination was expected to be exercised within the framework of existing states, by negotiation, for example. Such a right could only be exercised unilaterally under certain circumstances, under current international law. In its opinion under international law, the right to secede was meant for peoples under a colonial rule or foreign occupation. Otherwise, so long as a people have the meaningful exercise of its right to self-determination within an existing nation state, there is no right to secede unilaterally.

So if the referendum passes, what happens when there is no longer a single 'Crown of the United Kingdom of Great Britain and Northern Ireland' (as it is now called), or, more particularly, when there is arguably no longer a 'United Kingdom' in existence?

Will Scottish independence create one new state out of a continuing state of the current United Kingdom, being the Kingdom of Scotland (possibly so-named); or two new states: the Kingdom of Scotland and the Kingdom of England (as it resumes its historic name)?

If the factual and legal result is the creation of two new states, Scotland and the rest of the old United Kingdom, this will have consequences for membership of the European Union, NATO, international bodies and very likely, Australia and its States.

Some 'British' commentators (in the sense of the term 'Great Britain' which includes the Scots) argue that an independent Scotland is the one that becomes a new state. However, such a stance appears to ignore the realities of history and how the sovereign state of the 'United Kingdom' was itself created.

Clearly, Scotland has many legal and political issues to address to achieve its desired outcome.

Consequences for Australia?

Can Scottish independence impact on Australia's constitutional monarchical system of government and polity and its people who by our own Preamble to our Constitution, agreed to unite in one indissoluble Federal Commonwealth under "the Crown of the United Kingdom of Great Britain and Ireland" (which I shall refer to as the 'Original Crown')?

Arguably, it seems likely that it does.

By section 2 of the *Commonwealth of Australia Constitution Act* 1900 (UK) the provisions of the Constitution referring to "the Queen" extend to "Her Majesty's heirs and successors in the sovereignty of the *United Kingdom*".

That is, Australia's constitutional monarch is defined by reference to a continuing legal entity being the

'United Kingdom of Great Britain and Northern Ireland', not of a disunited Kingdom or some other sovereign nation as it may become.

Further, the Australian Constitution is unequivocal in that the legislative power of the Commonwealth consists of: the Queen (of the Original Crown), a Senate and the House of Representatives.

Under the Constitution it is this Queen (of the Original Crown) who has a representative in the Governor-General. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

The oath of office prescribed in the Constitution is to the Original Crown with the name of the King or Queen of the United Kingdom of Great Britain and (now) Northern Ireland for the time being to be substituted from time to time.

So what may happen if there is a formal disuniting of the United Kingdom so that the Original Crown is no longer legally that of the 'United Kingdom of Great Britain and Northern Ireland'?

Historically after Australia adopted the *Statute of Westminster* in 1942 any alteration in the law touching the Succession to the Throne of the United Kingdom of Great Britain and Northern Ireland required the assent of the Parliament of Australia and the Parliament of the United Kingdom. Further, under this Act no law was thereafter to be made by the Parliament of the United Kingdom to extend to Australia as part of the law of Australia otherwise than at the request and with the consent of Australia.

The *Royal Styles and Titles Act* 1973 (Cth) of course did not change the sovereignty of the United Kingdom but rather assented to the style and title of the Queen being changed to "Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth".

The *Australia Acts* 1986 of the United Kingdom and the Commonwealth, respectively, formally ended all power of the Parliament at Westminster to legislate with effect in Australia "as part of the law of" the Commonwealth, a State or a Territory. Section 1 respectively provides:

> *Termination of power of Parliament of United Kingdom to legislate for Australia.*
>
> *No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.*

In *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 the High Court determined that the *Australia Act* (in its two versions), together with the State requesting and consenting to legislation, amounted to establishing Australian independence as at the date when the *Australia Act* (Cth) came into operation - on 3 March 1986.

However, if Scotland achieves independence the Parliament at Westminster will need to pass legislation to facilitate a matter touching on the succession to the Original Crown of a new fashioned, yet fundamentally altered United Kingdom (as it must inevitably become).

Must it approach the Parliament of Australia to consent to this? After all, it is likely to have an effect on the law of Australia. The answer is legally – no, as the *Australia Acts* make this clear. However, it is arguable, by the likely abrogation of the Union Act of 1707 that the continued Original Crown, being "in the sovereignty of the United Kingdom", for all purposes, will disappear. It may be logically extrapolated that Great Britain without Scotland is not Great Britain at all – but merely "Britain" (comprising England, Wales and Northern Ireland) and a separate Scotland.

I suggest that an Australian constitutional vacuum may arguably exist, which must then be filled as the legislative power of the Commonwealth currently requires the Original Crown.

The *Australia Act* is not likely to provide a solution as recourse to it to fill the vacuum would be an exercise seeking to refashion the identity of the Original Crown as defined under our Constitution and this is likely to be an unlawful amendment of the Constitution.

Therefore, it is likely that a referendum under the Constitution will be the only certain way to ensure the indissoluble federation continues on a lawful basis.

Yet what is the form of the continuing federation to take? Republican or some form of altered monarchical framework – English, Scottish or, perhaps, Danish (after all their next Queen will be an Australian)?

Whatever is to happen, it is no longer a matter for Australians to simply await a reagitation of the republic debate after the passing of Queen Elizabeth. She may shortly not even be Queen of the 'United Kingdom of Great Britain and Northern Ireland' – nor, possibly, the 'Queen of Australia'.

So it may now come to pass that due to matters evolving in Scotland and Westminster that Australian Constitutional Monarchists and Australian Republicans would be best served by renewing the debate on our future constitutional framework and with some urgency.

Where does Australia go in this dynamic century and beyond?

An independent Scotland may yet give cause to the creation of an Australian Republic or even possibly our own monarchy (which would surely bring a smile to old William Charles Wentworth).

1 David H Denton QC is a member of Chancery Chambers and an Adjunct Professor of Law at Victoria University Melbourne.

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Direct Access – Future for Barristers?

Mark Frost

This article explains the way that "direct access" briefing works in England & Wales (E&W). In E&W direct access is a generic term for both "public access" and "licensed access" briefing programs.

Licensed access came into being in 1989 when a number of professions were recognised as entitled to instruct barristers directly without a solicitor. Accountants, tax specialists and surveyors were the three professions that initially took advantage of this arrangement, which has since been extended to various other professions and individual bodies such as insolvency practitioners, engineers, insurers and various ombudsmen. All such professions need a licence from the Bar Standards Board (the regulator of the Bar Council - the body which represents barristers) to be able to instruct a barrister directly.

Public access, which is the focus of this article, came into being in 2004 when any member of the public could instruct a barrister directly (without having to see a solicitor). Initially there were restrictions on the work barristers could do under such arrangements but those restrictions were relaxed in 2010 and removed entirely in 2013. So a barrister can now be instructed directly by any member of the public on any aspect of the law.

In October 2013 the Bar Standards Board changed the training of barristers who wanted to do public access

work. Now all barristers, regardless of their years of standing, have to attend a 12-hour course on public access which includes an assessment (with a pass mark). Then, provided they have passed the assessment, the barrister must notify the Bar Standards Board that they are going to do public access work.

In addition, barristers of fewer than three years' standing must have "a relevant qualified person" who is ready to provide guidance as necessary. That qualified person must, inter alia, have been practising as a barrister for at least six of the last eight years and must be qualified to do public access work.

So why has public access work come about? There are several reasons. Prior to 1994, solicitors in E&W could not generally appear in the higher courts as they did not have the right of audience. In that year solicitors were granted the right to be Higher Court Advocates (i.e. to appear in any court of the land). This took work away from the barristers, as historically clients instructed solicitors to deal with their case and barristers were only instructed by the solicitor if the solicitor wanted expert advice/representation. Solicitors with a right of audience began keeping work in house with less work going to barristers. This particularly affected younger members of the Bar who needed court experience. There were stories of newly qualified barristers in need of experience accepting briefs for a fee which probably did not cover their travelling expenses!

In addition, over the past 18 months to two years legal aid cutbacks have meant less work for both solicitors and barristers.

While there will always be opportunities for senior barristers to get "barristerial" work from solicitors in E&W, future work, especially for younger barristers, is likely to focus on public access and/or international work.

So, what is the message for barristers wanting to do public access work? There are three messages.

"There were stories of newly qualified barristers in need of experience accepting briefs for a fee which probably did not cover their travelling expenses!"

First of all there will be more "handholding of clients" – barristers will need to have more contact with clients than has been necessary in the past. Secondly, there is a risk that if barristers take on too much work they will get themselves into trouble (i.e. a complaint and/or a negligence claim). Thirdly, it is a good business opportunity for barristers looking to expand their practice area.

Barristers have always had to react to instructions which I, as a solicitor, send to them. With public access work, barristers not only have to react to the instructions of their clients, they must also be proactive as regards their matter and in order to obtain any future work.

Most people, businesses and other professionals, are simply not aware of the direct route to barristers so this needs to be explained to them. They need to be educated so that they can make an informed decision – do I want a solicitor or a barrister?

For example, a business might be prepared to fund an opinion of a barrister on how to manage business risk. This could be a sound commercial arrangement that could add real value to direct access.

Barristers are trained to sell their client's case – now they have to learn to sell themselves. Clients love having barristers representing them. It is a status symbol.

One of the benefits of public access in E&W is the cost-saving to the client, who can avoid solicitors' fees. In a market where everyone wants "more for less" this is a good selling point to the client.

Increasingly barristers have to decide how they will get work now and into the future, as well as the ways their chambers will have to change to cope with public access work.

There are a number of practical issues to consider, such as the initial interview, future contact with the client, money laundering, storage of files and documents, key date diaries, administration and associated costs, client care letters, closing letters and closing of files and, of course, fees.

Public access work requires a cultural change in the way that barristers and/or chambers operate. But it's important to look above the parapet: there is work out there for barristers who are prepared to be organised in dealing with public access work.

Another recent reform has further opened up the work that can be performed by barristers in E&W. From the 22 January 2014 barristers can apply for a practicing certificate that allows them to have conduct of litigation in any area including public access – that is, they can undertake work akin to running a solicitor's practice (something that was not previously permitted under the public access program). I know that in some States in Australia there are a number of practices of solicitors and barristers. While that can happen in E&W, it is the exception. That may change, of course, in the future.

I also know that in some Australian States direct access arrangements are available for corporate or government counsel without litigation experience, but is direct access something that could be extended here like it has been in E&W? Is the Victorian Bar facing problems like those facing the Bar in E&W? Is this the future for the Bar in Victoria?

Mark Frost has been admitted as a Solicitor in E&W for 34 years. He has, for the past six years, trained barristers in E&W on Public Access work.

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Looking back at a High Court Case on Religious School Funding: Freedom of or from Religion?

NICHOLAS GREEN QC

On a hot day in March 1979, I visited the old High Court building in Little Bourke Street. I was a student. It was the first day of the hearing in the State Aid case. Murphy J was sitting alone. Counsel were robed at the Bar table. The Judge came onto the bench wearing a lounge suit. He sent away the late Neil McPhee QC and the late Brian Shaw QC to return unrobed. Thus began the first day of the hearing of evidence. Once all the evidence was in, Murphy J ordered that the case be argued before the Full High Court. More than 30 years on, it is perhaps timely to recall the decision of the court, namely *Attorney-General (Victoria); Ex rel. Black v. Commonwealth* (1981) 146 CLR 559 (The State Aid Case).

Chapter V of the Constitution is headed "The States" and comprises 15 sections all of which concern the States, except section 116:

> *The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

The plaintiffs sought, among other things, a declaration that certain Grants Acts which gave assistance to church schools were invalid, and an injunction restraining the Treasurer, the Minister for Education and the Minister for Finance from making payments for that purpose out of the Consolidated Revenue Fund.

Although section 116 of the Constitution forbids the Commonwealth from making any law to prohibit the free exercise of any religion, it is silent on the question of protecting the citizens of the States in their religious worship or religious liberties. This is to say, section 116 leaves the State constitutions and laws free to legislate in relation to religious worship or religious liberties.

To ascertain the nature and extent of the prohibition in section 116, one notices what the section does not prohibit. As Chief Justice Barwick said in *the State Aid Case* at 582.

> *The absence of any prohibition upon the giving of aid to or encouragement of religion from the entire collocation of s. 116 is eloquent. No imposed observance: free exercise of religion: no religious test. No established religion.*

And at 584:

> *What the Constitution prohibits is the making of a law for establishing a religion. This, it seems to me, does not involve a prohibition of any law which may assist the practice of a religion, and, in particular, of the Christian religion. It is the establishment of such a religion which may not be effected by a law of the Commonwealth designed to do so.*

How does this compare with the position elsewhere, notably in the US, which has produced authority that was referred to in the *State Aid Case*? In *Bradfield v Roberts* (1899) 175 US 291, the Providence Hospital of the city of Washington was incorporated by an Act of Congress which gave it

> *...full power and all the rights of opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation.*

By another Act, making appropriations for the District of Columbia, an appropriation of $30,000 was made for constructing two buildings to be constructed on the grounds of two hospitals and to be operated as a part of those hospitals. Under that authority the District Commissioners made an agreement with the Providence Hospital, a private hospital, run by a congregation of Sisters of the Roman Catholic Church, for the construction of a building or ward on the hospital grounds and for payments by the District on that account to the hospital. The US Supreme Court held that the agreement was one within the power of the Commissioners to make. It held that it did not conflict with Article I of the Amendments to the Constitution that "Congress shall make no law respecting an establishment of religion."

In *Bradfield v Roberts* the appellant was a Mr Justice Bradfield who appeared in person. One of the attacks he made on the agreement between the Commissioners and the hospital was that the agreement was void because Congress had no power to make "a law respecting a religious establishment", it being said that the US Constitution prohibits the passage of a law "respecting an establishment of a religion". The court rejected that argument. Delivering the opinion of the court, Peckham J said at 298:

> *... Whether the individuals who composed the corporation under its charter happened to be all Roman Catholics, or Methodists, or Presbyterians, or Unitarians, or members of any other religious organisation, or of no organisation at all, is of not the slightest consequence which reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence.*

Having rejected the other allegations in the complainant's bill, the Court added at 299-300:

> *The act of Congress, however, shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is the opening and keeping the hospital in the City of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation. To make the agreement was within the discretion of the Commissioners, and was a fair exercise thereof.*

In *The State Aid Case* McPhee QC and his junior Jack Fajgenbaum, for the plaintiffs, argued that section 116 was the only provision in the Constitution that provided a formal guarantee of personal freedom. They contended (at 561): "True religious freedom requires not only freedom of religion but freedom *from* religion ..." [emphasis added]. Despite the force of this argument, it did not prevail. A six-to-one majority of the court (Murphy J dissenting) held that a law which provides for financial aid to the educational activities of church schools is not a law for establishing a religion even though the operation of the law might indirectly assist the practice of religion.

Counsel for the defendants, Shaw QC and his junior Kenneth Hayne, argued that the United States cases about the religion clauses were inapplicable to Australia because of the terms of section 116 and the difference in Constitutional history. In the alternative, they argued, if the US experience were relevant, it was clear that as at 1900, and even as subsequently developed, the US cases treated "an establishment of religion as meaning the setting up of a recognized state church" (571). One of the cases on which they relied was *Bradfield v Roberts*. It appears that in reply counsel for the plaintiffs submitted that it was implicit in *Bradfield v Roberts* that if the hospital could have been characterised as a religious corporation, or a corporation that existed for religious purposes, the appropriation would have been invalid.

Gibbs J was unpersuaded by the plaintiffs' argument. Gibbs J did not regard the US decisions as containing an authoritative exposition in its application to section 116. First, there were the differences between section 116 and the First Amendment. Second, the history of the US, which provided the background to the Constitution of that country, had been very different from that

> “True religious freedom requires not only freedom of religion but freedom from religion”

of Australia. Third, in construing the Constitution, the courts of the US had recourse to extraneous material, which Australian judicial practice dictated would be rejected. Finally, the course of the subsequent decisions in the US showed that the test adopted there, far from being clear and predictable in its operation, had led in its application to continuing controversy. Gibbs J added: “In any case, you should not substitute for the words of section 116 a test which those words do not appear to warrant, particularly when it does not commend itself by any obvious considerations of justice or convenience.” (603)

Justice Stephen said that the prohibitions in section 116 “say nothing … which would impugn the validity of the legislation which the plaintiffs seek to attack.” (610)

Justice Mason rejected the submission that the legislation under attack established any religion. He said:

> *It is altogether too much to say that a law which gives financial aid to churches generally, to be expended on education, is a law for establishing religion. The mere provision of financial aid to churches generally, more particularly when that aid is genuinely linked to expenditure on education, falls short of ‘establishing’ a ‘religion’ as we understand the expression. By it we mean the authoritative establishment or recognition by the State of a religion or a church as a national institution. (616)*
>
> *With his knack for exposing a party’s Achilles’ heel, Mason J said: “It is of great significance that, despite the very comprehensive researches into the history of the relationship between church and state in the Australian colonies, the plaintiffs have been unable to discover any instance in which the provision of financial assistance to churches to be spent on education, was described as ‘establishing religion’ or ‘establishing a church’.” (617)*

In dissenting, Justice Murphy said that the US decisions on the ‘establishment’ clause should be followed:

> *The arguments for departing from them (based on the trifles of differences in wording between the United States and the Australian establishment clauses) are hair-splitting, and not consistent with the broad approach which should be taken to constitutional guarantees of freedom.” (632).*
>
> *For his Honour, the effect of the US decisions was properly stated by President Kennedy in 1961: “The Constitution clearly prohibits aid to the school, to parochial schools. I don’t think there is any doubt of that. … (628)*
>
> *Murphy J was impressed by the fact “that under the Commonwealth laws vast sums of money were being expended for the support of church schools.” (632) In support, he referred to evidence that two Catholic parish school buildings, at Churchill and Corio, although not used wholly or principally for or in relation to religious worship had been used to celebrate Mass for the local parish each Sunday, confessions each Saturday, and occasionally for other religious services. It followed, he reasoned, that the effect of the Grants Acts had “the effect of establishing religion”. (633)*
>
> *Justice Aickin (635) adopted the reasons of Justices Gibbs and Mason. Although Justice Wilson considered that the plaintiffs’ argument concerning the application of section 116 carried “great weight” (649), he concluded that the challenged legislation was valid.*

The order of the court was that there be judgment for the defendants with costs.

Conclusion

As a result of the decision in *The State Aid Case*, an appropriation of money to schools (the financial aid to which is limited to their educational activities) conducted by the Roman Catholic Church is not a law “for establishing any religion” under section 116 of the Constitution. A separate question, which was not before the court, of whether the Christian religion remains recognised as a part of the Australian common law, is one that awaits another day.

This short article is not intended to be a philosophical treatise on whether there ought or ought not be freedom of, or from, religion, but in concluding, it is worth noting that at the time of the *State Aid Case* legislative expressions of fundamental human rights were not in vogue in Australian jurisdictions. This has changed and it remains to be seen, for example, what the effect, if any, might be of section 14 of the Victorian *Charter of Human Rights and Responsibilities Act* 2006, which states:

> ***14 Freedom of thought, conscience, religion and belief***
>
> *(1) Every person has the right to freedom of thought, conscience, religion and belief, including—*
>
> *(a) the freedom to have or to adopt a religion or belief of his or her choice; and*
>
> *(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*
>
> *(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

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PHOTO COURTESY OF DAVID JOHNS

White Ribbon Day: Not Violent – Not Silent

MURRAY MCINNIS, DIRECTOR AND LEAD AMBASSADOR (LEGAL SECTOR) WHITE RIBBON

White Ribbon Day is held on 25 November each year.

I am proud to say that the Victorian Bar has demonstrated a commitment to the White Ribbon campaign and has assisted greatly in raising awareness about violence towards women.

Violence towards women can be either physical or non-physical. Violence can occur across all cultures, professions, socio and economic groups and regions throughout Victoria.

Recently I was able to attend a forum hosted by the Police Chief Commissioner, Ken Lay, at the MCG. According to the Chief Commissioner,

> *At the conclusion of the forum we collectively vowed that we would no longer remain silent on the issue of violence against women and would speak out when we saw it as our responsibility to do so.* (The Age *10/4/2014*)

This year the Victorian Bar will hold an event on 27 November 2014 at 5.15pm at the Essoign Club to support the White Ribbon campaign. Members of the Victorian Bar are asked to note the date in their diary now. Further details will be provided prior to the event.

As many barristers know, the White Ribbon campaign

commenced when a group of men in Toronto, Canada launched the Canadian White Ribbon campaign in 1991. That campaign was launched after an event which occurred approximately two years earlier when a young man walked into a university at Montreal Canada armed with a semi-automatic rifle and a hunting knife. He entered a classroom and then separated male and female students and proclaimed that he was "fighting feminism". He opened fire and killed six women in the classroom. On that day a total of 14 women were murdered by him.

In 1999 the United Nations General Assembly declared November 25 the International Day for the Elimination of Violence Against Women. The international symbol for this event is the White Ribbon.

> "I recognize that this is a major challenge as it requires a major shift in attitude and indeed culture of men in Victoria and throughout the world."

It is important to note that in Victoria we have the largest number of Ambassadors and hold the highest number of events of any State or Territory in Australia. The male Ambassadors voluntarily serve an integral role in supporting the campaign.

The reported statistics in relation to violence against women only tell part of the story. It remains a disturbing story. According to the Chief Commissioner for the year to March 2013 in Victoria "there were more than 60,000 recorded incidents of family violence".

The cost to the community of family violence in Victoria is over $3 billion per annum. Nationally, the cost to the community is over $16 billion. This is part of the reason why the Commonwealth Government adopted the significant National Council Plan to Reduce Violence against Women and their Children (published March 2009).

The problem of physical and non-physical violence goes well beyond reported statistics. Sadly the statistics produced only tell part of the story and many crimes are unreported. Indeed, there are many occasions when non-physical violence does not appear to constitute a recognised crime and accordingly is not reported at all.

In Victoria it is understood the Women's Domestic Violence Crisis Service receives thousands of calls each year to a crisis hotline, but even those calls only represent a small percentage of the total number of victims who suffer either physical or non-physical violence.

The challenge for all men in Victoria is to raise awareness about violence towards women and to ensure that they do not remain silent on this important issue.

I recognize that this is a major challenge as it requires a major shift in attitude and indeed culture of men in Victoria and throughout the world.

Violence of any kind whether it be physical or non-physical is unacceptable.

The focus of White Ribbon is violence towards women. The challenge for volunteer Ambassadors, and others concerned about the issue, is to raise awareness about violence towards women. As the Chief Commissioner states, we should vow not to remain silent about the issue.

Whilst acknowledging the extremely valuable work and commitment of the Victorian Bar towards this important issue one does not forget the challenge of addressing the issue in the future. It is indeed a major issue and all members of the Bar should consider making some contribution towards the campaign whether by attending the Victorian Bar event referred to earlier in this short article or speaking out when confronted with attitudes which may lead to physical or non-physical violence towards women.

It is hoped that all members of the Victorian Bar will support this important campaign. Barristers can find out more information about White Ribbon at *whiteribbon.org.au* and donate at *whiteribbon.org.au/donate*.

For my part I am happy to discuss this important issue with any barrister in confidence and can be contacted on my Victorian Bar extension of 7480.

My Portrait and the Archibald

FRANK WALSH AM QC

In February 2012 I received a telephone call from Sue Johnstone. She is the widow of Robert Johnstone who, during his lifetime was one of my closest friends at the Victorian Bar. Sue informed me that an artist friend was seeking a subject for her to paint for entry into the Archibald Prize. She asked if I would be prepared to sit for a portrait. I accepted with some enthusiasm.

The artist, Maree Hart, visited my home and soon she was in the process of painting my likeness. The result was a lovely painting in which I am depicted as reflecting upon some of the highlights of my long life. I now consider that this portrait is steeped in history and proceed to record the historical facts which will hopefully endorse my claim.

In the portrait I am sitting in a chair and at a table. The table and chair were once the property of the Victorian Bar. The Bar had established a social club known as the Essoign Club, which originally had its home on the 13th floor of Owen Dixon Chambers. There were 12 myrtle-topped dining tables and 120 old colonial chairs. In its wisdom, the Bar, under the chairmanship of Ken Marks QC (later Mr Justice Marks of the Supreme Court of Victoria) decided to replace the tables and chairs. Until that time they were used by members of the Bar for lunch each day and were occupied by members in an orderly fashion. In that manner the most junior member could find himself or herself sitting next to the most senior justice of the High Court or Supreme Court.

The tables and chairs were replaced by white pinewood tables and chairs and the Bar Catering and Functions Committee was given the task of disposing of the old tables and chairs to best advantage. I was the chairman of that committee. With a somewhat heavy heart, I advertised the old tables and chairs for sale. There were no takers except a hotel keeper who offered $120 for each table and $10 for each chair to use in his bistro. I was distraught and personally, I suggested that we offer them to the members of the Bar at these prices. The members of the Bar Catering Committee and then the Bar Council agreed. There was an abundance of applicants so we drew lots for the tables and chairs. I was one of the successful applicants and the table and 10 chairs have adorned our family dining room ever since.

The artist has captured the table brilliantly in the portrait. The proximate end is clearly shown with its memorabilia and the myrtle table-top then fades away into oblivion. I love it. In the evening of my life it represents part of my personal history and the traditions of the Bar.

In the portrait I am shown turning the pages of a photograph album which records the launch of my autobiography "Splints to Silk". This book launch took place at the Reader's Feast bookstore on the 24th November, 2010. Immediately below the album is a copy of the Victorian Bar News No. 129 – the Winter Edition 2004. The front cover of this magazine shows a photograph of myself, clad in white tuxedo, evening wear, carnation in lapel, and playing the lovely old Conn E-flat alto saxophone which I purchased for 35 pounds on my arrival in Melbourne in 1949. The saxophone bears an inscription of manufacture, made in 1929. It is therefore more ancient than me.

With the 'Judge Frank Walsh All Stars' I entertained the members at the Victorian Bar Dinner held at the Zinc Function Centre at Federation Square on Saturday 29th March, 2004. This was one of the magic events of my life. One of the accoutrements in my possession on that occasion was the walking cane which is suspended over my right arm. This had been the property of Sir Henry Abel Smith, Governor of Queensland. He gave it to Senator Neil O'Sullivan who, in turn gave it to his son, Michael O'Sullivan QC. O'Sullivan gave it to me as he said "Your need is greater than mine." I still have it.

The next photograph, which is reproduced in oils in the portrait, shows the presentation to me of the Order of Australia Medal (AM) by Mr John Landy, the Governor of Victoria at Government House on 27th May 2004. From my perspective this was another wonderful event. Landy had studied at the University of Melbourne at the same time as myself – albeit in a different discipline. My membership of the Order of Australia is one of my proudest achievements.

The artist then chose to paint the photograph of myself with Mother Teresa of Calcutta. In November 1973 I was the site director at St Patrick's Cathedral for the Eucharistic Congress which took place during that month. The photograph was taken while I was enjoying the honour of conversing with

Mother Teresa in the front courtyard of this cathedral. My obligation as site director was to regulate the conduct of people in the cathedral and to protect all of the prelates and religious people who attended the cathedral. I attribute great value to my friendship with a lady who must one day become a saint.

There follows in the portrait a representation of a photograph of my wife Mary and myself in an English country garden in the year 1996. I am very glad that Mary figures in my portrait. She has meant so much to be over the years and her omission would deprive the portrait of historical validity. We have so enjoyed our travels and reflect upon them with pleasure.

The original of the next photograph was taken outside the old Castlemaine gaol on 1st February 2001. My 70th birthday party was held at that venue. I was charged with the offence of attempted longevity. Early in the evening I was handed in at the Castlemaine Police Station by my daughter Tess, then a sergeant of police. I was then taken in a divisional van to the old Castlemaine gaol. Upon arrival the police member went to the rear of the Divvy Van, placed my right arm in handcuffs and escorted me into the gaol. A substantial number of guests had assembled and a hilarious introduction was accompanied by boos and catcalls.

> "The only defence witness was my wife Mary. I sacked my barristers, Mr Patrick Tehan QC and Ms Julie Nicholson (as all good crims do) and I presented my own case."

During the evening my trial took place. The trial judge was Mr Barry Mahoney, a retired district court judge from New South Wales. The senior prosecutor was Justice John Winneke who led Ms Michele Williams SC in that activity. The jury consisted of 11 judges of the County Court of Victoria with Mr David Blackburn as foreman. Blackburn had been my junior in the last case which I had presented as a silk to the Supreme Court of Victoria. The prosecution witnesses were my nine children. The only defence witness was my wife Mary. I sacked my barristers, Mr Patrick Tehan QC and Ms Julie Nicholson (as all good crims do) and I presented my own case. A good night was had by all.

My portrait is accordingly steeped in history. My eldest son, Peter, who is presently Chief of Staff for the Minister of Transport in Queensland, advised me to prepare this commentary for presentation with the portrait. I failed to do this. Perhaps it was an omission, although I still consider that my reasons were valid.

RedCrest

A paradigm shift for the Supreme Court towards e-filing and electronic case management.

THE HON JUSTICE VICKERY*

The Supreme Court has developed an electronic system to improve efficiency and timeliness. Computers in common use in large commercial projects and everyday transactions are major contributors to the production of huge volumes of documentation in litigation. This in turn poses a serious challenge to access to justice and the timely and cost effective disposition of cases.

Harnessing the full potential of the computer itself can, on the other hand, provide a valuable management tool to deal with the problem, for the benefit of the Court, practitioners and litigants.

With this aim in mind, the Supreme Court, supported by the Department of Justice and the Department of Technology, embarked on the "RedCrest" project. [1]

RedCrest represents a paradigm shift for the Supreme Court from a hard copy document filing system to a case-centric electronic filing and case management system.

The project started in the TEC List of the Court as a pilot project on 22 September 2011. Following a successful trial with over 400 users, further development of the system has now taken place for the Commercial Court. It is proposed to introduce the system progressively to other divisions of the Court. By using a well-tested commercial software platform, costs have been modest for this type of project and operational efficiency has been maximised.

It is well-accepted that IT projects are high-risk enterprises. By adhering to special risk management principles developed during the project, RedCrest will be constructed to budget and delivered on time.

From the commencement date, scheduled for 1 August 2014, the filing of documents in the judge-managed lists of the Commercial Court[2] will be done electronically via the web. A new Originating Process will be available online to commence a proceeding [www.RedCrest.com.au]. The procedure will be governed by the RedCrest Rules[3], supported by a Practice Note, User Instructions and online training films.

In the initial phase, from 1 July 2014, RedCrest will commence online operation for training purposes. From this time, the system will go live with sample training cases loaded into the system, but new cases will not be accepted for filing until 1 August. Usernames and passwords will be issued during the training period to gain access to the full system.

RedCrest will provide a comprehensive "one-stop shop" case management system, presented in a simple, workable and secure format. It will offer a range of state-of-the-art features to assist in the management of a case from start to finish and will significantly enhance communications between the Court and those participating in litigation. The electronic file created in RedCrest will become the Court file in a proceeding in the Commercial Court. This may be accessed 24/7 by the Court, legal practitioners (barristers and solicitors) and others who have been approved by the Court and issued with a username and password. All documents in the case file, including filed documents and transcripts, will be accessible by solicitors and counsel and registered litigants for viewing and use.

The system is designed with simplicity as a central feature. For most users it will require little or no training.

RedCrest will provide time-saving and cost efficiencies for the Court, the legal profession and the public. To measure time savings, in 2012 the Court commissioned a productivity analysis by the Department of Justice. The time savings are summarised below (based on a four-day trial):

ROLE	ESTIMATED SAVINGS OVER A FOUR-DAY TRIAL
Judge & Associate Judge	8.5 hours per case
Associate	5 hours per case
Registry	1.5 hours per case
Solicitor	11.25 hours per case
Barrister	6 hours per case
Public	1 hour per case

The Court welcomes continuing input from the profession to keep abreast of developments and desirable upgrades for the system.

* Justice Peter Vickery is a Judge of the trial division of the Supreme Court of Victoria. He is Judge in Charge of the Technology, Engineering and Construction List and the RedCrest Project for the Court.

1 The name is derived from the Court's red seal in everyday use.

2 RedCrest will initially be used for Commercial List matters (Order 2 of Chapter 11 of the SCV Rules); TEC List matters (Order 3 of Chapter 11); judge-managed (not associate judge-managed) corporations matters (Chapter V); and Intellectual Property List matters (Order 2 of Chapter V111).

3 To be introduced into the *Supreme Court (General Civil Procedure) Rules* 2005.

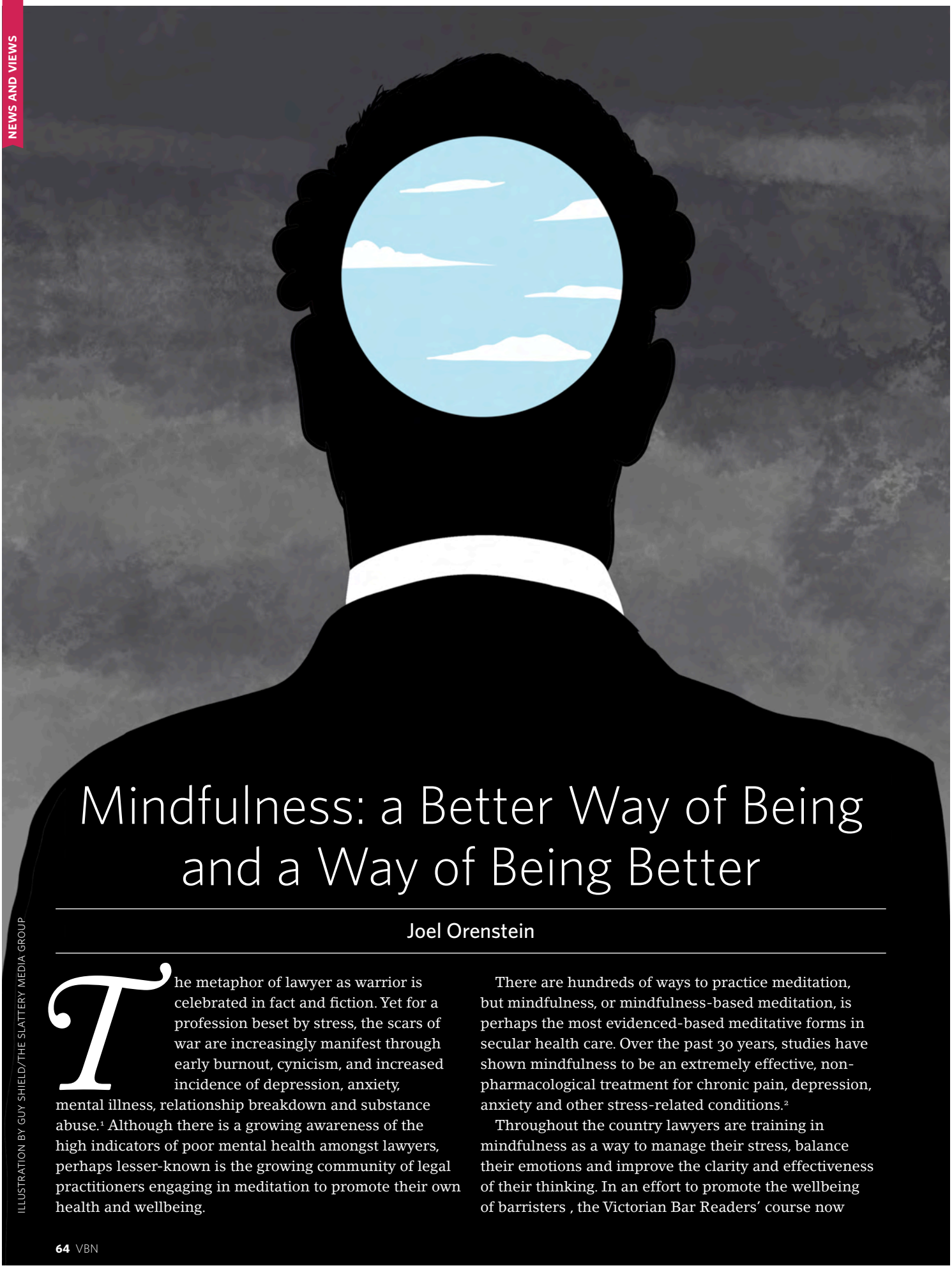

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

Mindfulness: a Better Way of Being and a Way of Being Better

Joel Orenstein

The metaphor of lawyer as warrior is celebrated in fact and fiction. Yet for a profession beset by stress, the scars of war are increasingly manifest through early burnout, cynicism, and increased incidence of depression, anxiety, mental illness, relationship breakdown and substance abuse.[1] Although there is a growing awareness of the high indicators of poor mental health amongst lawyers, perhaps lesser-known is the growing community of legal practitioners engaging in meditation to promote their own health and wellbeing.

There are hundreds of ways to practice meditation, but mindfulness, or mindfulness-based meditation, is perhaps the most evidenced-based meditative forms in secular health care. Over the past 30 years, studies have shown mindfulness to be an extremely effective, non-pharmacological treatment for chronic pain, depression, anxiety and other stress-related conditions.[2]

Throughout the country lawyers are training in mindfulness as a way to manage their stress, balance their emotions and improve the clarity and effectiveness of their thinking. In an effort to promote the wellbeing of barristers , the Victorian Bar Readers' course now

contains an introductory session on mindfulness. Over the past 12 months, the Bar's Health and Wellbeing Committee has twice offered six-week introductory mindfulness courses and an ongoing practice group meets fortnightly in the legal precinct.

But what is mindfulness and why is it proving to be such an effective tool for successful lawyering?

Mindfulness

Mindfulness in its most basic form is simple present-moment awareness. Mindfulness is not thinking. It is awareness of thinking, of emotions, and of the ways we experience the sensory world through seeing, feeling, hearing, tasting and smelling. Mindfulness practices develop and cultivate this faculty by purposely paying attention to what is occurring inside and outside of us, moment-to-moment, in a non-judgmental and open-hearted way.

Why would we want to develop and practice mindfulness?

Basically, mindfulness makes us feel better balanced. With awareness we are able to better deal with the ups and downs of life by directly counteracting the negative effects of stress.

If you stop and watch your thinking for a moment you will notice very quickly that the human mind is a wandering mind. Inattention and distraction forms the majority of our daily mental activity as the mind constantly seeks favourable experiences and pushes unfavourable experiences away. The result of wandering is distorted thinking, dissatisfaction, worry and churning of the mind, which is at the heart of stress, anxiety and depression. By grounding yourself in awareness of all that is occurring, including the wandering itself, you no longer need to get dragged along by it.

Simply put, mindfulness is just noticing what is happening in each moment without attempting to change anything. It is self-help that is immediately available and is radically different to our habitual way of dealing with life's ups and downs, as it does not require eliminating difficulty or imagining ourselves in a better place. With mindfulness we learn to discover a storehouse of clarity and calm that has been here all along.

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With perseverance of practice, we are able to observe with greater clarity, cutting through the distortions and reactions that habitually form the basis of our thinking. We can live life more fully and less on automatic pilot, thus being more present in our own lives.

The remedial effect of mindfulness

Stress is a natural response that is coded into our systems by nature in order to preserve life. The stress response is appropriate if it is only turned on when it needs to be and is turned off when it is no longer needed or prolonged. When activated inappropriately, we experience it as agitation and anxiety, which over time takes a huge toll on our mental and physical health.

Studies have shown mindfulness to reduce activity in the amygdala, the overactive stress centre of the brain. Apart from stress-reduction, mindfulness has been shown to be beneficial in a growing list of other applications. These include improved immune function, chronic pain relief, depression relapse prevention, treatment for anxiety, panic disorder, emotional imbalance, addiction and insomnia.[3]

Neuroscientists have also observed that mindfulness enhances executive functions of the brain, assisting short-term memory, processing information, making decisions and emotional regulation. Scans of long-term meditators indicate a thickening of the brain in the areas associated with the senses, memory and executive functioning, which may slow the aging of the brain and reverse the negative effects of long term stress and depression.[4]

Mindful Lawyering

Stress and conflict are a daily occurrence in legal practice – phones ring, emails pile up, deadlines loom, clients cry, judges yell, machines break, files are lost, mistakes are made, long hours are worked, cases are lost, etc, etc.

The reality of legal practice is that we are continually confronted with people at their worst in an environment that can be extremely toxic, combative and played at very high stakes. Because legal practice is so often highly charged, our ability to manage our thoughts and emotions when under stress will be the measure of our success or failure as lawyers.

Mindfulness therefore has a direct and immediate relevance to legal practice.

Yet mindfulness has greater relevance than just stress reduction. Mindfulness helps us to be fully present, to be aware of our own thoughts and reactions and more in tune with those of others. Consequently we are able to listen with more presence, space-out less and remain focussed for greater periods of time.

Greater focus and calm naturally improves the clarity of our decision-making. Remaining centred through mindful awareness allows our intelligence and wisdom to function fully, which has an enormous practical benefit on our skill base as lawyers.

At the same time, the more we are mindful, the more external circumstances stop affecting us in the same way they once did. In this

> "With practice, mindfulness can be immediately available in any moment, even the most stressful."

way the unpredictability of life does not dictate our functioning, nor cause us the same distress. Consequently, whether we win or lose, how well we slept, whether we receive praise or criticism, is no longer determinate of our level of satisfaction or success.

We also begin to see and react to others differently. We recognise in others what we ourselves are also dealing with – stress, fear, anxiety, excitement, anger, distractedness - and realise that on this basic level, we are all alike. Consequently, we have increased patience with others and our empathy naturally grows. This inevitably assists our relationships at work, as well as with family and friends.

Learning to Practice Mindfulness

Generally one cultivates the ability to be mindful through formal meditative practices, and then applies that ability in everyday life where it is most needed. With practice, mindfulness can be immediately available in any moment, even the most stressful.

Learning mindfulness is essentially a personal discipline based on your own process of enquiry and experience of the results of this enquiry. Consequently no amount of reading or research can teach you what it is about - you need to find out for yourself through the practice itself and, based on your own subjective experience, determine whether it is effective.

Like any lifestyle change, however, you actually need to do it for it to be effective. And similar to physical exercise, it is regular, daily practice that is required to experience the most benefit. Although there is no exact science as to what is optimal, 30 minutes per day of formal meditation practice is a good yardstick.

Mindfulness is usually taught to groups as the energy of the group generally assists you to motivate your own practice. You can also often relate to the experience of others to gain greater insight. At the same time it helps to learn from a teacher who has a thorough background in the practice and is experienced in talking about it with others.

Although mindfulness sounds simple enough, in practice, at least initially, it is quite difficult and for many it can take discipline, motivation and time to develop a new positive habit. With perseverance, however, you will soon discover that the benefits of regular mindfulness practice far outweigh habitual unawareness and the rollercoaster of stress reactivity.

As you integrate mindfulness into your life, you soon begin to experience mindfulness practice as a compassionate act of self-care, rather than a chore that gets in the way of your busy life. With this understanding, practice becomes filled with meaning and can become truly transformative.

Conclusion

There is no doubt that being a legal practitioner is stressful. And although stress is a natural biological response to perceived or actual threats, if left unchecked or ignored, the effects of stress can be disastrous to your health.

Mindfulness is a direct antidote to the negative effects of stress. But mindfulness goes beyond stress relief, fostering better balance, increased understanding and clarity in thinking, improved relationships and empathy with others, and an improved overall sense of wellbeing.

No doubt suffering poor mental health can be hugely disempowering. Looking after your own wellbeing through mindfulness practice is a way of rediscovering the peace that is at the core your being. And because mindfulness is not dependent upon external circumstances, it is effective even in the most outwardly stressful moments.

Given the highly charged and unpredictable nature of legal practice, mindfulness therefore is invaluable. As more and more of us are discovering, mindfulness is a core resource that not only makes us healthier, but also makes us better lawyers.

Joel Orenstein is the Director of Mindful at Work, a Melbourne-based training and consultancy practice dedicated to bringing mindfulness into the workplace to improve wellbeing, sustainability, job satisfaction and performance. He is also a lawyer and runs a sole practice working in the area of Indigenous rights, summary crime and child protection. Joel is a long-time meditator and consciously integrates mindfulness practices into his legal practice. Over the past nine years Joel has run regular workshops, courses and retreats for lawyers and other professionals focused on integrating mindfulness practices with professional life. He currently facilitates mindfulness programs to barristers through the Vic Bar Health and Wellness Committee.

1 For a detailed synopses of the latest studies on legal practitioner health and wellbeing, see, Dr Michelle Sharpe, "The problem of mental ill-health in the profession and a suggested solution" in Francesca Bartlett, Reid Mortensen and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge, 2011)

2 Jeff Brantley, "Mindfulness FAQ" in Barry Boyce (ed), *The Mindfulness Revolution* (Shambhala, 2011) 40.

3 Ibid; see also Craig Hassed, "The health benefits of meditation and being mindful" Lecture notes from lecture presented at Monash University, 2012.

4 Hassed, above n 3; see also SW Lazar et al, "Meditation experience is associated with increased cortical thickness." (2005) *Neuroreport* 16(17) 1893; E Luders et al, "The underlying anatomical correlates of long-term meditation: larger hippocampal and frontal volumes of gray matter" (2009) *Neuroimage* 45(3) 672.

Ethics Committee

BULLETINS

Ethics Committee Bulletin 1 of 2014

EMAIL COMMUNICATIONS – PRIVATE DISPUTES

Rule 119 provides:-

> *"A barrister may not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity in which he or she is directly or indirectly engaged, or for private advantage, save where that use is usual or reasonable in the circumstances".*

Rule 4(c) prohibits barristers engaging in conduct which is likely to bring the profession into disrepute.

When sending emails, many barristers use an electronic sign-off, identifying them as a barrister and showing their chambers address.

When sending any correspondence, including email correspondence, barristers ought to bear Rules 119 and 4(c) in mind, in particular when the correspondence concerns a private dispute.

It is not appropriate to include professional qualifications or to identify as a barrister when communicating in respect of a private dispute

HELEN SYMON QC
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 20 May 2014.

Back of the Lift

Adjourned Sine Die

Federal Court *of* Australia

The Hon Justice Dodds-Streeton

Bar Roll No 2280

On 1 April 2014, Justice Julie Dodds-Streeton retired from the Federal Court, marking 34 years' distinguished service in the law, including more than 11 years as a judge.

Her Honour's early career was as an accomplished scholar, academic and teacher, first of English history of the Tudor and Stuart periods, and then of company law, corporate insolvency and intellectual property (to name but a few of the many subjects taught by her Honour over almost 20 years as an academic at the University of Melbourne). It is not an exaggeration to say that a good proportion of the Victorian Bar benefitted from her Honour's inspired teaching in one form or another. Her Honour's love of scholarship and diverse academic interests resulted in a formidable list of publications on topics

ranging from *The development of the Egyptian Empire in the 18th Dynasty,* to *The Impact of the Roman Law of Succession and Marriage on Women's Property and Independence*.

Her Honour came to the Bar in 1988 and read with Joseph Santamaria (then QC). Her Honour quickly developed a substantial practice in company and commercial law, working frequently alongside Simon Whelan (then QC) in particular, in the significant litigation arising from the corporate collapses of Pyramid Building Society and Ansett Airlines. Her Honour was also counsel assisting the HIH Royal Commission. During this time her Honour served as a director of BCL and for more than 15 years on the Law Council Insolvency and Corporate Reconstruction Committee.

Her Honour took silk in 2001 and in July 2002, was appointed a judge of the Victorian Supreme Court, where she served for more than five years. In August 2007, her Honour was appointed a Judge of Appeal in that court. And in February 2010, her Honour was appointed to the Federal Court of Australia. Her Honour brought intellectual depth, analytical skills and a prodigious capacity for hard work to her judicial work.

At her welcome to the Supreme Court, her Honour quoted the advice given to new judges by the 6th Century Egyptian Sage, Phah-Hotep, who said: "*If you are a man who judges, listen calmly to the speech of one who pleads....Not all one pleads for can be granted, but a good hearing soothes the heart*". As was noted at her informal farewell, her Honour's judicial manner always adhered to that advice. She treated all who appeared before her with the utmost respect, courtesy and patience.

Throughout her career her Honour has had the constant support of her husband, Roger Streeton, to whom she said, on her welcome to the Supreme Court, any success she had achieved belonged equally. The great affection and admiration in which her Honour was held by all with whom she worked and served reflected her humanity and unfailing good humour.

Her Honour will be greatly missed by all members of the legal community who had the good fortune to work with or appear before her.

MEREDITH SCHILLING

Court *of* Appeal

The Hon Justice Coghlan

Bar Roll No 1366

On 7 February 2014 at a well-attended ceremony at the Supreme Court, Bar Chairman William Alstergren QC farewelled the Honourable Justice Paul Anthony Coghlan, fittingly with His Honour's daughter Georgina Coghlan of counsel appearing as his junior. His Honour's retirement concludes a career spanning nearly 45 years of service to the law, most recently as a highly regarded member of the Victorian Court of Appeal.

His Honour was educated at St Joseph's Christian Brothers College in North Melbourne. He graduated from law at Melbourne University and served articles at law firm Maurice Ryan and Francis Green. A few months after completing articles, his Honour moved to the Commonwealth Crown Solicitor's Office where he worked for 8 years.

He signed the Bar Roll on 9 February 1978, reading with Fred James, and went on to have 4 readers: Christine Giles, Patrick Southey, Dr Chris Corns and Dr David Neal SC.

His Honour's practice at the Bar specialised in crime, including the prosecution of many significant cases both at trial and appellate level. His Honour was a generous contributor to the Bar, serving on the Executive Committee of the Criminal Bar Association, the Bar Library Committee and teaching in the Readers' course. His Honour's commitment to Advocacy Training included regular participation in Advocacy Skills Workshops in Papua New Guinea, Vanuatu and Fiji.

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

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

His Honour served as a judge of the Supreme Court of Victoria from 7 August 2007. From 2010, his Honour held the role of principal judge of the Criminal Division of the Supreme Court.

On 11 December 2012, his Honour was appointed a Judge of Appeal of the Supreme Court of Victoria.

The Bar wishes his Honour a long and pleasant retirement with his wife Anne and thanks him for his service.

VBN

Supreme Court *of* Victoria

The Hon Justice Curtain

Bar Roll No 1433

For some a career as a judge on the County Court is enough of an achievement, but not so for Elizabeth Helen Curtain. She has achieved a long and successful judicial career both on the County Court and the Supreme Court. Her Honour was appointed to the County Court in November 1993. On the 13 October 2006 she was elevated to the Supreme Court of Victoria, and in May 2014 her long judicial career of over 20 years came to an end. Not that her Honour is old and infirm. After all, she was originally appointed at a very tender age. The exact age has remained discretely unmentioned. Her Honour was one of the first females appointed to the County Court and was indeed the youngest to be appointed to that Court. It appears that her Honour still holds that record of being the youngest judge to serve on the County Court.

On the County Court her Honour heard a wide variety of cases, although concentrating in the criminal jurisdiction. On the Supreme Court her Honour has sat almost exclusively in the criminal jurisdiction and in the main has presided over back-to-back murder trials. This is a difficult and often gruelling task. The attention of a sometimes critical media bears down on judges hearing high profile murder cases. Her Honour handled her Court with skill and patience, but no tolerance for those who wished to bend the rules or grandstand. Sentencing is also under intense scrutiny by the press and the public. Her Honour was rarely appealed, a testimony to the balance she achieved in this difficult judicial task.

As a County Court judge her Honour served as an alternative chair to the Youth Parole Board and the Youth Residential Board. On appointment to the Supreme Court her Honour served on the Adult Parole Board for more than six years from September 2007 through to December 2013; including leadership as the first female chair of the Board for seven months from the end of May 2013 through to December. The work of the Adult Parole Board and the questions of parole have again come under the scrutiny of the press. Her Honour handled this difficult job in a very balanced manner, despite criticism from quarters of the media.

Her Honour was educated at Mandeville, Loretto Convent; and at the University of Melbourne, graduating Bachelor of Laws in 1976. She served articles with John Chamberlain at Cole and O'Hair, solicitors. She was admitted to practice in 1977 and practised as a solicitor for about 18 months before coming to the Bar in 1978. Her Honour read with Lynne Opas QC who later became Judge Shiftan of the County Court. Her Honour practised at the Bar for some years in general civil, criminal and family law. In 1984 she was appointed a sessional member of the Motor Accidents Tribunal. The Victorian Administrative Appeals Tribunal, AAT, was established in 1984 and began operations in 1985. Her Honour was appointed as presiding member of that Tribunal and served for 2½ years until her appointment as Prosecutor for the Queen for Victoria in August 1987.

Her Honour was extremely busy during this time practising at the Bar as well as being a sessional member of the AAT.

In August 1987 she was appointed as a Prosecutor for the Queen for the State of Victoria and served in this role until her appointment to the County Court in 1993. Her Honour was only 32 when she prosecuted her first murder trial. Again, being a female prosecutor in those days was something of a novelty. But her Honour was always respected as an articulate and intelligent prosecutor.

Her Honour has sat on many committees and served the community in a wide variety of roles. These included being a member of the executive of the County Court of Victoria, a member of the executive of the Australian Judicial Conference and a member of the Victorian Criminal Trials Charge Book Committee. Her Honour was also head of the County Court Social Committee, a role in which she excelled. Her Honour also served as a Deputy Chairman of the Victorian Racing Appeals Tribunal. An interest in racing has continued throughout her career and she has been part of syndicates run by her husband Bruce, although perhaps the syndicates have not been as successful as some members would have liked.

Away from the law, she was a great supporter of her old school and the Catholic Church. She was director of the Jesuit Social Services Limited which conducts a range of diverse community social service programs providing assistance to those in need. Her Honour was a member of the School Council of Mandeville Hall from 2000 to 2002. She also assisted the Sisters in their work in the Loretto Vietnam Australia program at the Phu My orphanage in Ho Chi Min City in 2001, which assisted young Vietnamese students in rural and intercity areas.

Her Honour has also taught advocacy in the Bar's 1999 Trial Advocacy Workshop in Dhaka

Bangladesh and in 2005 the appellate advocacy course in Port Moresby, Papua New Guinea. She has also instructed on the Bar readers' course for many years and her Honour has assisted in tailoring the careers of over 300 barristers including many future judges, prosecutors and silks. She has always described the teaching of advocacy as being a fantastic experience.

During her time at the Bar her Honour thoroughly enjoyed its collegiate spirit and made many strong and lasting friends. In particular, she has recalled her days as a tenant of the 6th floor of Four Courts Chambers as being her "salad days". Her hobbies included theatre and in particular the Melbourne University Tin Alley Players. She made a memorable appearance in the 1984 Victorian Bar Review playing the bombshell barrel girl, Debbie, to the lecherous compare, "Fabulous Phil", played by Paul Elliott QC. She was extremely friendly with Douglas Salut QC who has unfortunately been deceased for many years and is not with us to celebrate her farewell from the Court.

Her Honour in recent years has married her long term partner Bruce Huston at the Mandeville Chapel followed by an extremely enjoyable reception at the Long Room in the Melbourne Cricket Club. Her Honour has always felt strong ties to her family, particularly her mother and father who were the licensees of the Beaconsfield Hotel and her happy upbringing in St Kilda.

Her Honour plans to spend longish periods of time overseas in her retirement particularly in Paris and New York. The number of practitioners, judges and friends who attended her farewell is testimony to her long and successful career. She hosted an enjoyable drinks party in the Supreme Court and later a dinner for close friends on her retirement. The Bar wishes she and Bruce well in her retirement.

PAUL ELLIOTT QC

Silence All Stand

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

The Honourable Justice Beach

Bar Roll No 1926

At Disneyland there is a rollercoaster called "California Screamin'", where riders are strapped in and blast off from a standing start preceded by a blaring audio countdown: "3, 2, 1 …". Minutes later the shaken riders are unsentimentally extracted from the carriage and replaced in time for the next launch.

His Honour's recent elevation brings the excitement of California to the Court of Appeal. His Honour's elevation is undoubtedly to be welcomed by the profession, particularly those members of the Common Law Bar most familiar with his Honour's methods. With those methods in mind, we anticipate recommending that the Court consider dispensing with the traditional announcement of parties and salutations in favour of an introductory "3, 2, 1". We're sure this would find favour with his Honour, who for years now will have been bemused by such surplusage: "everyone there knows who the parties are, that's why they're there, right?"

His Honour's no-nonsense, but acute and always efficient style, is familiar to all who have had the considerable benefit of experiencing him as a fellow barrister and, in the course of the last six years, as a member of the Supreme Court trial division. His Honour could never use three words when one would do. In an age in which cases seem to get longer because legal problems seem to be ever more complicated, his Honour's style endangers the trend (as well as the lives of any who might attempt to run a case long rather than short). His Honour's approach also has the collateral benefit of facilitating clear-minded settlement discussions, as the parties know that after the introductory "3, 2, 1" the case will move at warp speed until the participants are later ejected from the Courtroom.

Notwithstanding the rapidity that so characterises his Honour's style, his Courtroom is always impeccably conducted and his judgments are admirable repositories of sound legal principle often explained via a commendable embrace of the virtues of simplicity, practicality and common sense.

For all of these reasons his Honour's elevation to the Court of Appeal must be welcomed and celebrated, and the journey ahead to be admired.

We are conscious that we have spent this little time drawing attention to his Honour's many virtues, although his Honour would himself regard these words as inexcusably bloviated. Embracing the spare methods of Beach JA himself we should have replaced 424 words with a mere 14: "Beach has been elevated to the Court of Appeal, brace yourself for the ride!".

JEREMY RUSKIN QC
AND STEPHEN O'MEARA QC

Supreme Court *of* Victoria

The Hon Justice Rush RFD

Bar Roll No 1286

On the occasion of his welcome to the Supreme Court of Victoria his Honour was described as a giant of the common law and a true leader of our profession. His Honour's career has

been marked by integrity and courage in the pursuit of justice, formidable advocacy and by his treating with graciousness, dignity and respect, all who come across his path.

During his 31 years as a barrister (22 as Queen's counsel), his Honour appeared in many ground-breaking cases, often long, difficult cases, among them the first cases for Wittenoom miners suffering asbestos disease, the PQ contaminated blood-products case, the Stolen Generations case and Rolah McCabe's case against British American Tobacco. His Honour appeared in a number of significant inquiries including as Counsel Assisting the 2009 Victorian Bush Fires Royal Commission and the 2007 Inquiry investigating the crash of the Army's Black Hawk helicopter, and in the James Hardie Commission of Inquiry. In 2012 his Honour was commissioned to conduct the Victorian Public Sector Commission's inquiry into the senior structure of Victoria Police.

His Honour's advocacy was characterised by tenacity, forensic precision and masterful cross-examination. His Honour's words were never wasted, driving straight to the heart of the issue. His Honour's success in court was fuelled by long hours of meticulous preparation.

His Honour is well-known for his warmth and good humour and for his generous mentoring of both junior barristers and instructing solicitors. His Honour served for 13 years on Bar Council, including as Chairman of the Bar.

His Honour is a Captain of the Royal Australian Navy. Having enlisted in the Navy Reserves in 1982, his Honour went on to appear in numerous Courts Martial, inquiries and investigations. His Honour was recently awarded a Chief of Navy Gold Commendation for his exceptional service to the Australian Defence Force in the field of military law.

His Honour has an abiding love of the St Kilda Football club and was, at the time of his appointment, a member of the club's board. His Honour played football for the Old Xaverians, whom he passionately supports. It is rumoured that it was a knee injury alone that kept his Honour from a stellar football career.

The Bar wishes Justice Rush every success in his new role.

LISA NICHOLS

County Court *of* Victoria

His Honour Judge Dyer

Bar Roll No 1587

Robert Dyer was appointed to the County Court on 6 November 2013 following more than 33 years at the Bar.

His Honour was educated at Xavier College and at Monash University, where he completed a Bachelor of Jurisprudence in 1973 and then studied a law degree part-time, which he completed in 1977. During this time his Honour worked for some four years with the Commonwealth Department of Employment and Industrial Relations. In the final year of study his Honour worked as a liaison officer with the then Minister, Hon A A Street and divided his time between Melbourne and Canberra. Before coming to the Bar, his Honour completed articles with Maurice Blackburn & Co and then worked as a solicitor for two years in the firm of Wisewoulds.

Whilst at university his Honour developed a desire to succeed in motor sport and won a State junior rally series in the car which he used to drive to university. There are fellow students who travelled with his Honour who will recall that much of his Honour's motor sport training was conducted in the back streets between Monash and Kew. His Honour has also been a participant in many other sports which have included cricket, football and baseball. His Honour now enjoys cycling on the weekends.

His Honour came to the Bar in October 1980, participating in the second readers' course conducted by the Bar. His Honour read with Frank Ellis, whose practice was exclusively in worker's compensation, and also Con Heliotis, who practised in crime. In his early years at the Bar his Honour had a general practice in the Magistrates' Court before specialising in workers' compensation and later common law. His Honour respected the cab-rank principle at the Bar, and appeared for plaintiffs and defendants throughout his career. During the 1990s, his Honour developed a mediation practice and was one of the first nationally accredited mediators. Until his Honour's appointment he was retained as a mediator largely in common law matters.

His Honour had five readers, Maria Pilipasidis, David Podger, Dean Churilov, Patrick Kelly and Phillip Johnstone. His Honour hopes that his time on the bench will afford him a similar degree of professional satisfaction to that achieved as a barrister. His Honour is married to Susan, a retired secondary school teacher, and has three children, Lisa, Nicholas and Timothy.

KAYE MCNAUGHT

Her Honour Judge Quin

Bar Roll no 2725

On 7 March 2014, Claire Quin was welcomed to the County Court. Whilst Chief Judge Rozenes' reference to "Claire Bear" may have conjured up visions of a soft toy, her Honour's distinguished legal career bears no resemblance to her namesake!

Her Honour was educated by the Presentation Sisters, initially at Presentation Convent Windsor, and she completed her secondary schooling at Star of the Sea Gardenvale. Judge Quin went on to

Monash University, graduating in a Bachelor of Arts and a Bachelor of Law with Honours.

After a very brief encounter with the commercial law at Clayton Utz, where she did her articles, her Honour set off on a path that was to be her life for the next 24 years in the criminal law.

Her Honour was Associate to the Honourable Justice Vincent in the Trial Division of the Supreme Court, including at a time when his Honour presided over the Walsh Street killings' trial.

After two years with Justice Vincent, her Honour came directly to the Bar, where she read with Geoff Flatman QC, later the Director of Public Prosecutions and a Justice of the Supreme Court.

Her Honour signed the Bar Roll in May 1992. Her initial practice was in the Magistrates' and Children's Courts, doing crime and appearing in child protection cases for the State of Victoria.

It was not long until her Honour moved into higher jurisdictions, frequently being junior to Paul Coghlan QC, later a Justice of the Supreme Court, and Gavin Silbert SC.

During that time, her Honour also often appeared without a leader in a number of major Supreme and County Court trials and also in the Court of Appeal.

Between mid 2007 to the end of 2010, her Honour was assigned to the Special Sex Offences Unit within the Office of Public Prosecutions, a role which at times was harrowing but rewarding.

Most recently, for 18 months from August 2012 to November 2013, her Honour took on a full-time secondment from the Office of Public Prosecutions to be Senior Legal Counsel to the Victorian Parliamentary inquiry into the handling of child abuse by religious and other non-government organisations that resulted in the landmark "Betrayal of Trust" report.

Her Honour's work in that inquiry was commended by the Chairman of the Parliamentary Committee and her Honour's name was mentioned in the Second Reading debate in the Assembly, thanking her for her contribution.

In addition to a very busy legal practice, her Honour has managed to juggle, with the assistance of her husband, Ben, the demands of bringing up a young family, now aged from 11 to 17. They were present at her welcome, as were numerous members of the Bourke and Quin families and her Honour's many friends and colleagues.

Outside the law, her Honour is a very "proud, passionate and paid up" member of the Hawthorn Football Club, regularly attending games with her family. In the non-football season, her Honour's energies are directed towards horse racing in a number of roles – owner, former member of the Racing Appeals Disciplinary Tribunal and, during Spring Carnival, the host for many years of one of the most popular car park parties in 'Nursery on the Rails'.

I am sure, as her Honour concluded in her reply to the welcomes of the Law Institute and the Victorian Bar, that she "will do her best" in her new role on the Bench and be a valuable addition to the Court.

THE HON JUDGE BOURKE

Magistrates' Court of Victoria

His Honour Magistrate Alger

Bar Roll No 3218

On 10 September 2013, his Honour Ian Alger was appointed to the Magistrates' Court of Victoria.

Prior to taking up law, his Honour worked as a telecommunications technician before serving with the Victoria Police Force for 20 years and rising to the rank of Sergeant.

His Honour worked for some 10 years as an operational police officer before he commenced work as a police prosecutor in 1988. Such was the quality of his Honour's prosecutorial skills that he was headhunted to work at the Research and Training Section of the Victoria Police Prosecutions Division. There, his Honour's contribution to the Victoria Police Prosecution Manual and to the continuing development of the prosecutors' course was significant. His Honour was noted for his professionalism, attention to detail, his dry sense of humour and his sense of calmness and stability. On a number of occasions, his Honour was upgraded to perform duties as the Acting Senior Sergeant in Charge of Research and Training.

His Honour completed a Bachelor of Laws with Honours at Monash University in 1995 and commenced articles with the Victorian Government Solicitor's Office. It was a great loss to the police prosecutions division when his Honour left Victoria Police to join the Bar in 1998. His Honour practised with distinction at the Bar for 15 years.

His Honour had, as expected, a successful practice in criminal law but also worked equally as well in family and civil law. His Honour performed work as a volunteer supervisor with the Springvale Monash Legal Service and served as an assessor and moot court judge for the Bar readers' course.

His Honour is a welcome addition to the Magistrates' Court. His Honour's background, attributes and ability will serve both him and the community very well.

JOHN MARQUIS

His Honour Magistrate Schultz

Bar Roll No 2619

On 6 November 2013, his Honour Barry Schultz was appointed to the Magistrates' Court of Victoria.

His Honour served as a police officer with Victoria Police for 24 years from 1967 to 1991. His Honour worked

for a time in public relations for the Police Force, performing these duties informatively and with poise and sophistication. His Honour positively impressed those members of the public fortunate enough to meet him in the course of these duties.

His Honour was admitted to practice in December 1988, performing duties as a police prosecutor until his Honour left to complete the March 1991 readers' course. His Honour's departure resulted in the loss of great experience and ability from police prosecutions. As a police prosecutor, his Honour was possessed of great ability, professionalism and attention to detail. His Honour was a pleasure to deal with both socially and professionally.

His Honour signed the Bar Roll on 30 May 1991 and read with Max Perry. Max Perry found his Honour, both as a reader and after signing the Bar Roll, to be professional, well prepared and a great source of fun.

His Honour, very successfully, practiced at the Bar for more than 22 years mainly in the area of criminal law. His Honour appeared for both the prosecution and defence, displaying his trademark urbanity, compassion and professionalism. His Honour's practice included appearing on the Morwell and Bendigo Circuits.

His Honour had served for a number of years as a senior Instructor at the Leo Cussen Institute in the areas of Advocacy and Criminal Law. His Honour's instruction was always characterised by charm, organisation, preparation, and, of course, great competence. His Honour had also served as a moot court magistrate in the Bar readers' course.

His Honour is a welcome appointment to the Magistrates' Court. His Honour's great experience, ability and professionalism will enable him to perform his duties admirably.

JOHN MARQUIS

His Honour Magistrate Walsh

Bar Roll No 3321

On 19 November 2013, Timothy John Walsh was appointed to the Magistrates' Court of Victoria.

His Honour graduated from Monash University with a Bachelor of Laws and Economics in 1996.

His Honour had spent the 15 years prior to that working hard in the building and construction industry. The jobs his Honour undertook in that industry were various. He was a crane driver (dogman), a rigger, a forklift driver and a glazier. These roles may have underscored for him the importance of occupational health and safety regulation, a field in which his Honour came to specialise at the Bar.

His Honour served articles at Kenna Croxford & Co, under Warwick Teasdale. His Honour stayed on at the firm working as an employee solicitor for two years following his admission to practice.

After he completed the Bar readers' course in November 1999, his Honour read with Joe Gullaci (who recently retired from the County Court).

During his 14 years at the Bar, in addition to occupational health and safety law, his Honour excelled in appearances in regulatory law and criminal law matters. His Honour appeared in many criminal trials in the Supreme Court and County Court, acting for both the defence and the prosecution.

Outside the Bar, his Honour has been a great contributor to sports administration. His Honour has served as Chair of the Victorian Turf Cricket Association, a member of the board of management of the Moorabbin Saints Junior Football League, and as vice-chairman of the board of management of the South Metro Junior Football League.

In serving in these leadership positions, his Honour has already shown a capacity and willingness to lead and organise people. His Honour reaches the bench well-equipped to meet the challenges of working in the busy Magistrates' Court in which he will be called upon to deliver justice to people in our community.

We congratulate his Honour on his appointment and wish him all the best in his new role.

VBN

Her Honour Magistrate MacCallum

On 18 March 2014 the Governor in Council appointed Mary-Anne Elizabeth MacCallum to the Magistrates' Court of Victoria.

Her Honour graduated BA, LLB (Hons) from the University of Melbourne. She was admitted to practice on 3 April 1995 after having completed articles at Allens Arthur Robinson. In 1994-5 her Honour served as an Associate to the Honourable Michael Black AC QC, then Chief Justice of the Federal Court of Australia.

Her Honour worked as a researcher and assistant lecturer at Monash University, before being called to the Victorian Bar in March 1998 (as Mary-Anne Hughson), reading with Russell Berglund. Her Honour's practice included general, civil and commercial law, including property law, family law and some Children's Court work. She served as secretary of the Equality Before the Law sub-committee of the Bar.

Her Honour left the Bar in 2000, and worked as a solicitor in commercial litigation and family law. In 2007 she joined the Victorian Public Service where she has been a senior legal policy officer and adviser, including working closely with the Civil Procedure Advisory Group. In this capacity Her Honour played a part in the development of the *Civil Procedure Act*.

It may confidently be expected that her Honour's courteous, decent and straight-forward manner will make her a great asset to the Magistrates' Court.

TIMOTHY MCEVOY

Obituaries

David James Belson

Bar Roll No 1077

David Belson was born 25 January 1947. He died 4 September 2013, aged 66.

David went to school at Haileybury College and studied law at Monash, graduating B Juris, LL B. He served Articles with Phillips, Fox & Masel and was admitted to practice on 6 April 1972.

He signed the Bar Roll on 15 November 1973 and read with John Winneke (later President Winneke of the Court of Appeal).

One memorable brief during David's early years at the Bar was as junior counsel in the Beach Enquiry into Allegations against Members of the Victoria Police. That inquiry ran over 15 months and reported in 1976.

As David's practice developed he became an experienced common law advocate, and specialised in personal injuries and insurance work. For many years, until prevented by illness, he appeared regularly on the Mildura Circuit in both criminal law and personal injuries cases. He was a fearsome advocate. He also maintained his early interest in inquiries and inquests, and appeared at the coronial inquest into the Linton Bushfire, which ran for a year from 2000 into 2001.

David was a member of Foley's List and served for many years on the List Committee. He kept an open door and juniors and silks alike came to discuss their cases with him. In his early years, he also served as a secretary to the Bar's Young Barristers Committee.

Like some others at this Bar, and others, David's involvement in the law may have been an hereditary condition; David's father Victor, was a leader of the common law Bar and, later, a Judge of the County Court. From Victor, David inherited both his interest in legal and forensic contests, as well as an extensive personal law library. David maintained the later assiduously, and shared it generously.

When no longer able to appear in court, David developed a flourishing advice practice. The Victorian Managed Insurance Authority - in effect the State's insurer - among others, frequently sought his counsel.

David retired 30 November 2006, bringing down the curtain on over 30 years of dedicated practice that had earned him great respect among his colleagues.

VBN

Gregory (Greg) Joseph Meese

Bar Roll No2991

Greg was a big man with a generous heart. He liked to eat, he liked to drink and he especially liked to talk. You couldn't have a short conversation with Greg. This might explain why he couldn't tell a joke – they were so long in the telling that he often forgot the punchline!

Greg was the only child of Joan and Harry Meese. During his childhood his parents ran a milk bar in West Brunswick, followed by the post office at Northcote. Greg began his schooling at St Mary's in Thornbury before moving on to Parade where he met Tony Neal (now QC). From about 1966 the Meese family lived in Lower Templestowe – surrounded by orchards. Greg utilised the long bus rides to school to perfect his Latin with the aid of Tony's notes. He excelled both academically and in sport, particularly swimming and football.

After one year of the Articled Clerks' course, Greg studied law at Monash University, where he met his wife, Judi, and made many lifelong friends. Greg's lecturer for legal method was Daryl Dawson, now Sir Daryl Dawson, formerly of the High Court. Sir Daryl liked to talk about Professor Hart and was strong on Latin. Greg was a pretty humble bloke but he had a habit of sitting near the front in Sir Daryl's class and was considered by the rest of us as a bit of a "teacher's pet". Sir Daryl would often introduce a Latin maxim and go round the room asking for a translation. Having mostly failed to elicit a correct response, Sir Daryl would turn to Greg and say: "Mr Meese can you help us". Greg would always milk this moment. He would respond with feigned modesty: "I think it means…".

Greg became a solicitor in 1977 and soon after went into partnership with his best friend, Tony Moon. Despite being lawyers, Greg and Tony often struggled with the English language. Greg's daughter, Alice, once made the mistake of asking them to write a note for her to take to school explaining that she had to leave early to go to the orthodontist. They were unsure of the spelling of "orthodontist" and so they settled on the following note: "Alice will have to leave school early today because she has to see the very expensive tooth fairy".

Greg signed the Bar Roll in 1995. He was strong on licensing law and

became a preferred mediator for the Small Business Commission. He didn't wear a wig and gown much but was very proud to do so in 2013 when he moved Alice's admission to practice.

One of Greg's joys was serving on various tribunals and appeals boards for what is now AFL Victoria. He served in one form or another for over 25 years. This was substantial community service. Of course a short tribunal hearing was practically impossible with Greg in the chair, but I doubt anyone who appeared before him left thinking that they had not got a fair hearing. He met and made many friends in that role.

Greg was a loyal friend, brave, funny and generous. A loving family man. A great mate with never a bad word to say about anyone. He lived a good life. He will not be forgotten.

IAN PERCY

The Hon Norman Michael O'Bryan QC

Bar Roll No. 509

Norman Michael O'Bryan was born in October 1930 in Melbourne, the first child of Norman (later Sir Norman) O'Bryan, and his wife, Violet (later Lady) O'Bryan. His father was then a barrister and was appointed a judge of the Supreme Court of Victoria in 1939.

Norman was educated at Xavier College, Kew, where he excelled in sports, especially rowing. His 1948 crew, which contained a number of famous Australian oarsmen, including Jim (later Sir James) Gobbo and Brian Doyle (stroke of the medal-winning Australian VIII at the 1956 Melbourne Olympics), won the Head of the River, a feat which Xavier would not repeat again for more than 50 years.

He studied law at Melbourne University, where he met his future wife, Margaret Uniacke, who was studying Arts and Education. After completing his articles of clerkship at the law firm established by his brother-in-law, Frank Galbally (who married his sister Bernadette in 1948), Norman signed the Victorian Bar roll in 1954 and also married Margaret in that year. He had a very wide and busy practice as a junior barrister and Queen's Counsel (appointed 1971), which included cases in every jurisdiction concerning a variety of legal subjects, including criminal law (mostly prosecuting), personal injuries, industrial accidents, commercial disputes and a number of commissions of inquiry, including that into the 1975 Tasman Bridge disaster in Hobart.

Norman was appointed a Justice of the Supreme Court of Victoria in 1977 and was tasked in 1979 with overseeing the establishment of the Commercial Causes List, the forerunner of today's Commercial Court and then a new development, designed to encourage the speedy resolution of commercial disputes in the Supreme Court. He was the ideal judge for this task, being a firm believer in efficiency and economy in the resolution of legal disputes, no matter how large or complex. He presided over many famous trials as a judge and developed a reputation for firm but fair and, most importantly, speedy and efficient dispatch of court business. He also sat on many appeals. He especially enjoyed annual trips to Warrnambool as the Supreme Court circuit judge, which enabled him to spend time in and around Port Fairy, where his Irish ancestors had first settled upon their arrival in Australia in the 1840s. He retired as a permanent judge of the Supreme Court in 1992 but remained on the list of reserve judges until 2004, thereby completing the same 27 years of service to the Supreme Court of Victoria that his father had also completed in 1966. In his later years he served mainly on the Court of Appeal, especially in criminal appeals.

Norman served on a number of charitable and not-for-profit boards, including St Vincent's Hospital and the Old Xaverians Association. He was a very keen (tho' not talented) golfer and was in due course both the president and a life member of Peninsula Country Golf Club (now Peninsula Kingswood). He was also a very enthusiastic traveller and spent much time in Europe, especially in his ancestral Ireland, researching and investigating the O'Bryan family history. He proved an important fact that his father had long denied – that the original Irish family's name was not O'Bryan at all, but Bryan. This enabled him to make and retain contact with numerous members of the Bryan families who live in and around Kilkenny in Ireland today. He wrote and published a number of histories of the O'Bryan and Gleeson families, based on the extensive research which he had conducted in Australia and in Ireland.

Norman is survived by his wife, Margaret, six children (three of whom are senior counsel and one a Supreme Court judge's associate), 15 grandchildren and three great-grandchildren.

NORMAN O'BRYAN AM SC

John Fouhy Kearney AM QC

Bar Roll No 464

On 2 October 2013 John Fouhy Kearney AM QC died, aged 90. He was educated at Xavier College and at Newman College within the University of Melbourne. He was articled to his eldest brother, Patrick, at Kearney, Kelly & Co. and was admitted to practice in March 1949. In April 1951 he signed the Bar Roll and read with the late Arthur Adams (later a Judge of the County Court).

John established a broad general practice including planning, taxation and personal injuries, and tutored at Melbourne Law School in drafting and conveyancing. He took Silk in May of 1964 and in 1968 was awarded a Bachelor of Laws by thesis and was admitted in England and Wales and called to the Middle Temple.

John had a pioneering interest in indigenous land rights law, writing a UNO report titled *"History of the Law"*, concerning Aborigines in Victoria in 1969. He was senior counsel for the Kamkum and Butibum people in the ground-breaking indigenous land rights trial regarding ownership and acquisition of the Markham River delta, which included the airport and city of Lae, Papua New Guinea, in 1972. His junior counsel was the late Ron Castan, later senior counsel in the Mabo case.

A co-author of the draft Bill for an Administrative Appeals Tribunal and ombudsman adopted by the Victorian Parliament, he also succeeded Sir Zelman Cowen as chairman of the International Commission of Jurists, Victorian Branch. He was chairman of the Victorian Town Planning Appeals Tribunal from 1970 to 1976 and upon his retirement moved to Queensland, becoming a member of the Queensland Bar in 1978. He was also chairman of the Victorian Groundwater Appeals Board from 1970 to 1985. He was a charter member of the International Bar Association and its Town Planning and Environmental Law committee and the Australian member of the International Data Bank Committee on Town Planning Schemes.

John was a life member of the National Trust, Victoria, and the National Gallery of Victoria. In addition he sponsored students to attend university and was an advisor, sponsor and patron of educational institutions including Bond, Griffith and Melbourne Universities, Newman College, Marymount School, Somerset College, All Saints School and Xavier College. He served as president of Friends of Bond University; a member of the Griffith University Council and chairman of Griffith Gold Coast Campus Advisory Council. He was awarded an honorary doctorate of laws by Bond University, an honorary doctorate of Griffith University in 2000, and named a chancellor's fellow of Bond University. He became a Member of the Order of Australia in 2005 for services to the community as an advisor and benefactor to a number of education and church organisations and through the preservation of a number of architecturally significant buildings in Melbourne, including one of his many astute investments, the Block Arcade.

John passed away peacefully at his home in Mudgeeraba surrounded by his beloved wife, Alison, and family of four children and six grandchildren. Alison and John were married in Newman College on 2 September 1950. Alison recalls that during his proposal John said, "I haven't got anything, but I can promise you that your life will never be dull". As the above indicates he was true to his word.

CHRIS WREN QC

The Honourable John Francis Fogarty AM

Bar Roll No 542

The Honourable John Francis Fogarty AM passed away on 3 October 2013 at 80 years of age. John signed the Bar Roll on 8 March 1956, reading with Kevin Anderson (later a Supreme Court Judge). He had five Readers.

He was appointed to the Family Court of Australia in February 1976 and served with great distinction until his retirement in October 1998.

His career at the Bar saw him rapidly acquire a reputation as an exceptional advocate with a broad practice in civil jury work, testator's family maintenance and family law – but also a significant criminal law practice. He appeared as junior counsel for the Aboriginal people in the Gove Peninsula land rights case, and he assisted Mr Justice Woodward in his Enquiry into Aboriginal Land Rights. He was the editor of the Victorian Reports and consulting editor for the Australian Argus Law Reports. He authored Bourke & Fogarty's *Maintenance, Custody and Adoption Law* and (with Philip Cummins) *Bourke's Police and Summary Offences*.

His years on the bench were equally frenetic. He chaired the Family Law Council, he chaired the Consultative Group which led to the introduction of the Child Support scheme, the Victorian Family and Children's Services Council and was a Presiding Member of the Institute of Family Studies.

In 1991 His Honour was selected by the Victorian government to investigate the death of a small child Daniel Valerio and make recommendations about the management of abuse cases. His report led ultimately to mandatory reporting of child abuse in Victoria.

His Honour squeezed these extra-curricular duties in amongst his prolific work as both a trial judge and a member of the Appeal Division.

John was clearly amongst the foremost jurists to adorn the bench of the Family Court. It was claimed at his farewell sittings that the Family Law Reports contain 280 of his judgments, many of which defined major aspects of family law.

His lifelong friend Registrar Maurie Harold noted in an *Age* obituary that despite his busy life, John found time for his friends. He enjoyed a weekly lunch when discussion rarely related to work but rather an analysis of the week's footy, racing or cricket, plus a dose of current politics.

He loved the Demons and suffered a heart attack at the MCG immediately after the siren when Melbourne stormed home to defeat Carlton in the 2000 preliminary final. In later years, John wryly remarked that the only illness likely to be induced by following Melbourne was depression.

He was a member of the Melbourne Racing Club and enjoyed a day at the races, particularly during the Caulfield carnival. He also followed cricket and tennis.

In January 1992 he was made a member of the Order of Australia. Other awards he received included the White Flame Award (Save the Children Fund) and the Community Services Appreciation Award. He was patron of the Centre for Excellence in Child Welfare, the Mirabel Foundation and Family Life, and director of the Trust for Young Australians and the Child Protection Society.

John is survived by his wife, Alicia, sons Peter, Mark and Matthew, and grandsons Balin and David.

THE HON JOSEPH KAY

Henry Jolson OAM QC

Bar Roll No 1075

On 13 October 2013 the Bar lost one of its Legends. At the age of 66, Henry passed away after battling multiple myeloma for eight years. His passing has left a huge hole for many of us and the number of organisations which he supported.

His family, who were his pride and greatest legacy, are bereft of his support, guidance and love. To his wife Carolyn, his four children and six grandchildren, we can only imagine their loss. We offer them our sincere condolences.

Henry's legal career was well documented in both his son Jeremy's eulogy at the funeral, and with Will Alstergren QC's words at an occasion at the Essoign Club, when many members of the Bar gathered to pay tribute and recognise his contribution to the law.

After articles at Blake and Riggall, Henry worked at Ellison, Hewison and Whitehead. He was then to start as the Honourable Ninian Stephen's associate. However, family obligations came first, so instead Henry came to the Bar in 1973, to read with Alan Goldberg (as he then was). His practice had grown sufficiently by 1991 for him to take silk.

It was in the area of mediation where Henry made a unique contribution. It is not doubted that his efforts brought the concept of "legal" mediation to the forefront of civil litigation, to the point where it is now a compulsory step in all civil cases.

This was not the only unique contribution that Henry made to the Law. The design and functionality of the Jabot, now worn by virtually all barristers, was due to the business Ravensdale, established by Henry and Bruce Walmsley SC.

Apart from his own sporting prowess as an Ajax team of the century member and Victorian Amateur Football Association best and fairest winner, Henry also made a substantial contribution to sport administration. He was a director of AFL Western Bulldogs for 10 years, Australian Ambassador for the Peace team which competed in the AFL international competition, President of the Australian Bobsleigh Association and also a Judge of the International Court of Arbitration for Sport.

In recognition of his extensive and unique contributions, both to the law and the community, Henry was honoured with an OAM in the Queen's Birthday Honours List in 2012.

His guidance and good counsel touched many. They will keenly feel his loss.

TOM F DANOS

Eileen Stuart

Bar Roll No 1403

Eileen Stuart died on 30 October 2013 aged 102. She was born in Echuca and her family moved to Shepparton where she later met her husband Ivor Stuart. They moved to Melbourne in 1959 where she remained a housewife raising their five children.

Her life changed when she was sitting on her son Tim's bed reading a contract casebook just delivered for his first year law course. She looked up and said to her youngest son Bill, "I can understand this!" So at 52 years old she began her long love of the law.

Having completed her leaving certificate as a girl at Genazzano FCJ College she had to obtain her Matriculation, which she did studying part time at Taylors College. Eileen was admitted to the Articled Clerks Course at RMIT and after completing first year she gained entry into law at Melbourne University, graduating on the same day as Bill. She said, "On my graduation day I had to pinch myself. I had actually finished my degree."

They both completed the Practical Training Course at the Leo Cussen Institute and were admitted to practice on the same day. Eileen was 66 years old. She came to the Bar in 1978, reading with Ian Abraham, and remained at the Bar until retiring to nurse her husband Ivor for many years until he died at home in 1987.

Eileen then decided, at 76 years old, that she would continue her studies and obtain a Master of Laws. She said, "My memory was far from perfect when I began my Masters but improved immensely as I started using it."

Eileen obtained her LLM by major thesis, later published by Federation Press in 1994 as *Dissolution and Annulment of Marriage by the Catholic Church.* The preface was written by the Honourable Austin Asche AC QC (former Acting Chief Justice of the Family Court) who remarked, "This is a profound work of great research and integrity …" and "For Catholics and non-Catholics alike, Eileen Stuart has provided an invaluable guide to the present debate in the Catholic Church … all will benefit from this scholarly work where the issues are clearly set out, fairly considered and carefully discussed."

Eileen was well known at the Bar and enjoyed all whom she met during those years, particularly counsel in Tait Chambers. She is survived by four of her six children, 13 grandchildren and 20 great-grandchildren.

HIS HONOUR JUDGE BILL STUART

Lucia Bolkas

Bar Roll No 3466

Lucia Bolkas passed away on Friday 8 November 2013.

Lucia came to Australia from Italy when she was eight years old and excelled at school, going on to complete an Arts/Law degree at Monash University.

She was admitted to practice on 2 April 1984 and practised as a solicitor for 17 years. She worked for Clements Hutchins & Co. in the City; Piva & Associates in Fitzroy; and Victoria Legal Aid. She then moved into prosecutions work, first with the State Department of Public Prosecutions and then with the Commonwealth Office of Public Prosecutions.

Lucia spent 12 years as a solicitor at the Commonwealth DPP, where she became a senior executive specialist in the commercial prosecutions branch and did substantial work with ASIC.

Lucia signed the Bar Roll in March 2001 after 17 years as a solicitor. She read with Jennifer Davies (now Justice Davies of the Federal Court).

As a result of her work at the Commonwealth DPP, fraud prosecutions were her specialty at the Bar and her attention to detail was legendary in Deakin Chambers.

I had the great privilege of sharing a room in chambers with Lucia for 12 years. We were kindred spirits. In 12 years barely a cross word was said.

Lucia loved her work. Even during the times she was significantly unwell she threw herself into her trials with courage and an energy that was derived solely from her enthusiasm for the law and its application.

She was a ferocious but fair prosecutor.

The length and breadth of her experience in complex trials was never pressed. It revealed itself in daily chambers lunches when war stories were swapped, advice as to cases being run by members of chambers was sought and great debates as to the state of the law occurred.

Whilst she was passionate about work it was not the focus of Lucia's life.

Her role as a mother and wife were the most important of her life and she dedicated herself to her daughter Alexandra and her husband Arthur.

She showered her family and friends with loyalty, care and attention, wit and wisdom.

Lucia enjoyed "la dolce vita": good food, good wine and good friends.

She is greatly missed.

MELISSA MAHADY

Barbara Joyce Hocking

Bar Roll No 1256

Barbara Hocking died on Friday, 6 December 2013, aged 85. Born on 28 June 1928, she married Dr Frederick Hocking in 1951, a Melbourne psychiatrist, who survives her. They had four children. The family lived in Toorak for 50 years where she was a long-time active member of the Australian Labor Party.

Barbara graduated BA/LLB from Melbourne University in 1962 and completed her LLM degree at Monash University in 1970. Her thesis dealt with Indigenous land rights, early evidence of her life-long commitment to social justice. Her academic expertise greatly assisted both Ted Woodward QC (Snr), counsel for the plaintiffs in the *Gove* case (1971) 17 FLR 141 and the *Mabo* legal team when reviewing the legal issues and formulating the plaintiffs' approach and statement of claim, in early 1982.

Barbara was admitted to practice in Victoria and in the ACT in November and December 1975 respectively. She signed the Victorian Bar Roll in March 1976 and read with Leonard Ostrowski (later QC and a Judge of the County Court, now retired). Her Clerk was Barry Stone.

In September 1981 Barbara, along with others, gave a paper at a land rights conference at James Cook University, Townsville. The conference was organised by, among others, Eddie Mabo and Professor Noel Loos. Her paper, subsequently published in E Olbrei (ed), *Black Australians* (1982), was titled: "Is Might Right? An Argument for the Recognition of Traditional Aboriginal Title to Land in the Australian Courts." At that conference, the two lead plaintiffs - Eddie Mabo and Fr Dave Passi - gave instructions to Cairns solicitor Greg McIntyre and Barbara to pursue a case in the High Court to attempt to establish the principle rejected in *Gove:* the recognition of traditional Indigenous rights to land in Australian common law.

On returning to Melbourne, Barbara sought initial advice from Ted Laurie QC (who advised there was an "arguable case") and Ron Castan QC (who thought likewise). A month later, Ron Castan QC and I were formally retained, and serious work got underway in Melbourne. Initially there were no funds although legal aid was subsequently obtained. The claim was issued in the High Court in May 1982. Barbara took a very active role in articulating, explaining and drafting relevant arguments, guided by her deep academic knowledge of this area of law.

During the next four years, Barbara appeared, with the legal team, in the High Court in various directions hearings, participated in field research on Murray Island – a tough gig! – and also appeared in the first phase of the trial in the Queensland Supreme Court in October-November 1986.

Barbara was a valuable (and irrepressible) source of ideas and expertise, taking her part in the consideration of many substantive and tactical issues. I recall her wry smile, whimsical sense of humour and restless and inquiring mind, all displayed at many conferences in Castan's chambers at 'Golan Heights', especially her restless, inquiring mind. Her many talents were all highly valued by lawyers and clients alike. Like all of the legal team, she knew the potential significance of this litigation, and gave this case top priority in a busy practice, irrespective of remuneration considerations.

In May 1987, with the *Mabo* trial part-heard, Barbara left the Bar to take up the appointment of Senior Part-time Member of the Commonwealth Veterans Review Tribunal, retiring in December 1989. She was also appointed Chairperson of the Medicare Participation Review Committee, retiring in 1998. Meanwhile, *Mabo* proceeded, leading to two High Court hearings and judgments: *(No 1)* (1988) 166 CLR 186; and *(No 2)* (1992) 175 CLR 1.

In November 1992 Barbara was awarded the Human Rights Medal by HREOC for her contribution to the *Mabo* case and work over many years to gain legal recognition for indigenous peoples' rights. She later described this as her "professional life's work." In 1993 she received the inaugural Monash University Distinguished Alumni Award.

In retirement, she maintained an active interest in matters political, legal and Indigenous and delighted in her growing number of grandchildren. Barbara also travelled extensively abroad with family members.

At her memorial service in December 2013, two of her daughters and grandchildren spoke eloquently

to many family, friends, and colleagues of her devotion to her family and social justice causes, her active intellectual life, her many published writings and of her shining example as a (female) role-model to young lawyers.

I doubt that we shall see her like again anytime soon.

DR BRYAN KEON-COHEN AM QC

Lachlan Campbell Carter

Bar Roll No 2909

Lachie Carter died on 10 December 2013 aged only 46. He touched the hearts of many. When organising a function at the MCG to celebrate Lachie's life, his wife Nicole Brady told us she had catered for up to 600 people. We didn't say so at the time, but we thought 300 would be a wonderful turnout. Well, it was standing room only in the Olympic Room. More than 800 were there.

Lachie would have been embarrassed at the attention but still would have thought it was a pretty good do. Family and friends spoke of cherished memories. There were beautiful photographs of him, Nicole and their children Claudia and Zoe enjoying family events. His and Nicole's favourite poetry and music were read and played. The Carlton Football Club theme song accompanied his casket away. (No one had a greater passion for Carlton.) Children released navy and white balloons. Hundreds swapped tall stories and drank into the wee hours – until they could talk no more.

Lachie grew up in Ballarat and went to school at Ballarat College. Whilst studying Arts/Law at the University of Melbourne, he was the President of the Australian Law Students Association.

After working as a Ministerial Advisor to the Victorian Attorney-General Jim Kennan QC, Lachie came to the Bar in 1994. He read with Chris Maxwell (now President of the Court of Appeal) and Bryan Keon-Cohen (now AM QC). He also completed an LLM from Monash University and did substantial volunteer work with Fitzroy and St Kilda Legal Services whilst at the Bar.

Lachie had five readers – Justin Wheelahan, Mark Gumbleton, Richard Edney, Angela Moran and Grace Morgan – all of whom loved him dearly. We all did.

And that's because he was a great man. As both a human being and a barrister, he was learned, thoughtful, warm, caring, humble, passionate, loyal, fearless, dogged. Clients and friends alike felt safe with Lachie because they sensed – rightly – that he was there for them, whatever the fight, whatever the odds. Lachie once paid, out of his own pocket, for a psychiatric report for an indigent client appealing a conviction on the basis of fresh evidence. The appeal succeeded.

Lachie died as he lived – with courage and hope. He knew he was dying but hoped he wasn't. In his last days, we kissed him goodbye, but, somehow, it seemed he was really the one consoling us in our grief.

Lachie will be forever missed by Nicole, Claudia and Zoe, his mother "Skeet", his brothers Michael, Anthony and Rohan and all who knew him.

THE HON JUSTICE CROUCHER AND CHRISTOPHER BOYCE

Rex Patkin

Bar Roll No 960

Rex Patkin, a former Master of the County Court, died on 25 January 2014. He came to the Bar in July 1971 and practised mainly in what was then known as County Court Chambers until his appointment as Master in September 1988.

Rex was born on 22 September, 1939, educated at Melbourne Grammar School, RMIT (Aeronautical Engineering Diploma, 1960), and the Universities of Melbourne (LLB (Hons) 1964) and Monash (LLM 1971). He married Faye in the final year of his five-year Aeronautical Engineering course, and having then decided to study law, he taught part-time at Brighton Technical School for the first two years of his full-time Law course.

Rex served Articles at the firm of Russell, Kennedy & Cook and was admitted to practice on 2 May 1966. He then went to Monash as a Senior Teaching Fellow. He also worked with a firm of Patent Attorneys.

Rex came to the Bar in July 1971. He began reading with Richard Searby, and, upon Searby taking silk, completed his reading with John Lyons. He was on Foley's List and after the usual stint in the Magistrates' Court, he proposed to specialise in Industrial Property work. Although there was considerable paper work in that area, his appearances centred on County Court Chambers.

When I first met Rex in December 1973, I was in my second week of reading and I was opposed to him in CCC. He was already universally recognised as the leading counsel practising in CCC and he went on to become a legend in his own lifetime known as 'the King of CCC', a title he never relinquished until his appointment.

In those days the system of reading was quite different. There was no readers' course and no designated dates for intakes. One simply chose a

master who was prepared to take you as a pupil for six months, arranged a clerk and started practice. There was no restriction on accepting briefs from day one, even before actually signing the Roll of Counsel.

As might have been expected I duly lost my first case against Rex. I recall it was a slaughter of epic proportions, softened only by Rex's generous efforts after the hearing to explain my numerous errors and to offer his advice for future cases in CCC. Over the next few years I had occasional encounters with Rex.

By 1978 when my clerk Percy Dever gave me the job of taking over from Graeme Anderson (now his Honour Judge Anderson) the role of appearing daily in CCC, I was better prepared. Between 1978 and 1988 Rex and I probably held opposing briefs on average twice a day, amounting in all to say, 4000-or-so cases.

Rex had an extremely large practice in CCC. Many barristers will recall how Rex would arrive at CCC a few minutes before the Court opened at 11am with a bag full of briefs, usually at least 10, sometimes 20 and reputedly on one occasion 31. The total number of matters listed in the Court might vary from 30 to 100 per day. Upon his arrival, he would be surrounded by numerous other practitioners all eager to learn whether they were opposed to him and whether it would turn out to be a consent matter so they could get away early.

Rex was always a cheerful, friendly, polite and easygoing opponent who was a pleasure to work alongside. He was the same with all opposing practitioners and was incredibly generous with both his time and his considerable knowledge of the Rules of Court and the practice and procedure in the Court. He was in effect a tutor, especially to new barristers.

In fact, even some of the judges themselves, particularly those who were newly appointed or who had little experience of civil procedure, often sought his assistance on points of procedure during hearings in the Court.

Rex always harboured the openly expressed desire to be appointed a Master of the County Court. In September 1988 his wish was granted. He served diligently until retiring in November 2001. He was not always in good health and only four weeks after retiring he underwent by-pass surgery.

Apart from his love of the law Rex had two other loves – his wife Faye to whom he was devoted, and his family. He also had a deep affection for the Essendon Football Club. His other interests included tennis, sailing (he was a member of Black Rock Yacht Club and owned three yachts), ballet, opera, classical music and philosophy.

PETER T FOX

Roland Maxwell Lloyd Price

Bar Roll No 910

Roland Maxwell Lloyd Price practiced at the Victorian Bar for 32 years. He died aged 70, in January 2014, after a long and successful career as a barrister and member of the Victorian Civil and Administrative Tribunal.

The well-attended funeral of Roland Price was held at the Wesley College Chapel, on the grounds of the school where he was educated. Current and former members of the Bar and the Victorian Civil and Administrative Tribunal turned out in large numbers.

Roland graduated from the University of Melbourne with a Bachelor of Laws. After spending a year working at Maddock, Lonie and Chilsolm, he served articles with the Frankston firm Major & Co.

Roland was admitted to practice on 2 March 1970, then promptly signed the Bar Roll on 9 April of that year. Roland was the penultimate reader of retired Supreme Court Judge of Appeal, Stephen Charles, and his honour recently told Bar News:

> *Roland was a delightful pupil.*
>
> *As a barrister, he was hardworking and a team player.*
>
> *As a VCAT member, Roland would have been very kind and courteous to everyone appearing, and particularly helpful to those appearing unrepresented. No-one would have left his Tribunal thinking they had been unfairly dealt with.*
>
> *He was held in very high and affectionate regard by many members of VCAT.*

Roland started with a general practice, but after 10 years at the Bar he focused mainly on family law. In March 1993, Roland was accredited as a mediator by the Bar after completing training at Bond University. He was also accredited as a Child Representative Advocate by the Leo Cussen Institute.

Roland was delegated a Sessional Member of the Residential Tenancies Tribunal and the Small Claims Tribunal in 1997. In 1998, after its inception, Roland became a sessional member of the Victorian Civil and Administrative Tribunal and he served in that capacity for 15 years. Roland was assigned to the Civil Claims, Residential Tenancies and Owners Corporation lists and was an expert in automotive claims.

In July 2002, after more than 32 years' practice at the Bar, Roland took his name off the Bar Roll of Victorian Practising Counsel and surrendered his Practising Certificate. He continued as a Sessional Member of VCAT right up to his death this year and, although Sessional, sat virtually full time at the Tribunal for many years.

Throughout his longstanding career, Roland was highly regarded by the profession. He is survived by his wife Carolene and their daughter Charlene and son Steven. He will be sorely missed by his family and colleagues.

VBN

Clarinda Molyneux QC

Bar Roll No 1903

Clarinda Molyneux commenced at the Victorian Bar in 1984. She read with Jonathan Ramsden, later Family Court Judicial Registrar. Clarinda and I met in the March readers' group of that year and I quickly realised that my initial impression of her conservative and formal appearance belied a dignified charm and quiet friendliness. Her dry and often mischievous wit made her very popular.

A core of about 10-or-so of us – and we were a disparate bunch – formed close friendships that lasted for many a lunch or dinner in the years well beyond the readers' course as we navigated our careers at the Bar. A $2 note, which always seemed to make it safely back into its spot in her wallet when drinks were purchased at the Essoign Club, became legendary.

Clarinda relished her profession as a barrister. She was hard working and formidable, yet always courteous and calm and quickly developed a busy practice. She loved the challenge of the court room and a difficult witness and was unfailing in her courtesy towards her clients, juniors and instructing solicitors, her opponents and to the Court.

Despite her privileged upbringing and the social milieu of the family in which she grew up, she represented all of her clients, whatever their circumstances, with equal zeal and determination to achieve justice for them. She had no hesitation in accepting briefs which others may have regarded as unpopular or difficult. Her reader was Susan Dowler. Her family law practice saw her appear in Melbourne, Sydney and Parramatta. She enjoyed an extensive circuit practice in Mildura and Bendigo.

On taking silk in 1996, her practice broadened to include de facto property, wills, trusts and estates in the Supreme Court of Victoria. Amongst her many juniors were Batt, Colman, Combes, Connolly (later Connolly FM), Eilish Cooke, Clare Gray, Hartnett (later Hartnett FM), Kirby, Russell Young and Stoikovska. She unhesitatingly provided advice to her colleagues in chambers when they asked for help.

Clarinda served as Treasurer of the Family Law Bar Association, the Bar's Litigation Procedure Review Committee for Family Law and the CLE Committee during the time it established the mandatory CLE programme. Her sudden ill health three years ago forced her retirement from practice at the Bar.

Clarinda was complex, enigmatic and gregarious. At her funeral Mass at St Patrick's Cathedral, a cousin was quoted as saying of her that she had "an inner silence". Anyone who knew her at all well would comprehend that remarkable description.

Clarinda was one of six children and the only daughter of Patty and G C "Bing" Molyneux AO OBE. She was devoted to and loved her family dearly, including her large and extended family. She expressed real affection for and genuine interest in her many nieces and nephews and great nieces and nephews. In Hugh Fraser, her husband of nearly 25 years, she found love, companionship and support, which she cherished.

Speaking at her Funeral Mass at St Patrick's Cathedral, Father Brendan Hayes said that Clarinda faced the end of her life with faith and even thanksgiving. She reflected on her life, saying to Hugh, "I have had the most marvellous life. I have achieved all that I wanted to achieve. I regret nothing."

Vale: Clarinda Molyneux QC

ROZETA STOIKOVSKA

Barry George Hepworth

Bar Roll No 843

Barry Hepworth was born in Shepparton, 19 March 1927. Barry began his schooling at Zeerust Primary School (near Shepparton).

He continued at Christian Brothers College, St Kilda and completed the Intermediate Certificate. Upon turning 18, he enlisted in the Army – he was a Private in the 38th Infantry Battalion. The War ended some months later – but he was not discharged until 1947. He completed Leaving Certificate and Matriculation at Taylor's College; then studied Law at the University of Melbourne, graduating Bachelor of Laws.

Barry was admitted to practice in July 1957 and practised as a solicitor for nearly 11 years. He was a Principal in the firm of Hepworth & Paul, later Hepworth, Paul, Marriott & Co, with offices in Collins Gate in the City, and in Chelsea.

He came to the Bar in April 1968. Barry was a general all-rounder, though he practised mainly in Criminal Law – in particular, Criminal Trials. He had two readers, Vladimir Stuban and Peter Moloney. In February 1981, he transferred to the Masters & Other Official Appointments List upon appointment as a Deputy President of the Repatriation Review Tribunal.

After retirement from the Tribunal, Barry had his name removed from the Bar Roll in January 1990 in order to practise as a solicitor-advocate, which he did for some years.

VBN

Ceide Zapparoni

Bar Roll No 2705

Ceide Zapparoni died in San Francisco on 5 April, 2014 aged 49. She had practiced law in California after her early years at the Victorian Bar and died peacefully after illness in the company of close family.

Ceide came to the Bar in November 1991 and will be fondly remembered by her fellow readers and those with whom she came into contact for her extraordinary charisma, energy and warmth. Known to her friends as "Zappa" she formed close bonds quickly with a broad circle of friends to whom she was loyal and supportive.

At the University of Melbourne, she distinguished herself in Melbourne University Law Students Society mooting competitions (with me and Carolyn Sparke and opposed to Daryl Williams and Paul Holdenson in the final). She established the first trial advocacy witness-examination competition for the LSS, having won the ALSA competition in the first year such a competition was conducted. She also participated in the A-Grade Debating competition in a team known as *Women's Rea* with Samantha Marks and me. She was the perfect second speaker – concentrating on weighty content with a good sprinkle of humour to entertain. It was inevitable she would find her way to the Bar.

Her aptitude and quick wit was evident to her friends and teachers at Santa Maria College in Northcote and lecturers at the University of Melbourne but it was not until she commenced a Masters of Laws at the University of California at Berkeley that she discovered a real interest in academic pursuits. Her final thesis concerned corporate responsibility for human rights, a topic that troubled her as seemingly insoluble. She was very honoured to have been asked to speak on behalf of her graduating class as valedictorian and did so passionately.

Ceide served Articles with David Brahe at Gair & Brahe and was admitted to practice in April 1990. She served as Associate to Mr Justice Hampel on the Supreme Court and came to the Bar in the September 1991, reading with David Shavin. Like many associates, she could never bring herself to call her judge 'George' despite his warm invitation to her to do so and for many years fudged it by calling him 'Gudge". The Hampels attempted to teach her to ski with good advice, such as "the slope is your friend!" but without great success. They encouraged her to practice in crime. She picked up bits and pieces, but mostly her practice was in administrative law and general civil and commercial matters.

Ceide was admitted to the State Bar of California in March 1999. She practised at Cox, Castle Nicholson; then at Howard Rice Nemerovski Canady Falk & Rabkin; and was then a partner in the Farallon Law Group in the Bay area of San Francisco. Whilst at Farallon she was involved in a number of important public interest cases and had the chance to appear in court from time to time. She enjoyed this work very much, although her main focus was business litigation. At the time of her death, she was counsel for the San Mateo County.

FIONA MCLEOD SC

The Hon Dr Peter Buchanan QC

On 19 May 2014 Peter Buchanan, the longest-serving member of the Victorian Court of Appeal, passed away surrounded by his family.

At his farewell on retirement from the Court of Appeal seven months earlier, as at his welcome to the Court 16 years before that, tribute was paid to Peter's hallmarks as a jurist and advocate, and above all, his unpretentiousness and innate understanding of human nature.

Peter was born on 11 October 1943, educated at Scotch College in Melbourne, and then at Canberra High School on his father's transfer to Canberra to take up the position of Director of Civil Defence. He graduated from the ANU in 1965 with a first class honours degree, served articles of clerkship at Blake & Riggall, tutored at Monash University, and then commenced his doctorate studies in 1967 at the University of London on a graduate scholarship. He was able to complete his thesis in one year enabling him to pursue his real ambition of motorcycle racing on the European circuit. Peter raced a "Triton" (a Norton frame with a Triumph motor)

over the next two years, winning a first place podium in the British Open Class at Brands Hatch in 1968. The following year met with less success; he later awoke in hospital with a slight recall of his rear wheel giving way at Paddock Bend on the same track. It was neither his first nor last such visit to a casualty ward following a crash.

Ironically, his extraordinary ability to see good in all people almost waylaid what became a remarkable legal career. Early in his stay in London Peter happened to strike up conversation with two gentlemen in an East End pub, who seemed pleasant enough. Indeed, so pleasant that when a melee later broke out, Peter went to their aid, not realising that the accosters of his new found companions were undercover police who had come to arrest them for a factory break in. His ensuing entanglement in criminal procedure did not show great promise, but needless to say he got out of that scrap.

It was the wish of his father, Alfred ("Buck") Buchanan, that his Peter become a barrister. Buck enlisted in the Navy as a midshipman at the age of 12 and went on to command HMAS Arunta in the Battle of Leyte Gulf. During WWII Buck met his future wife Norma in the map room at Victoria Barracks when it housed the War Cabinet. In the interwar years Buck's father, a journalist by trade, had come to the Bar for a short while, but briefs in the Depression were few and far between and he soon returned to newspapers.

In 1970 Peter Buchanan came to the Melbourne Bar, where he read with James Gobbo who, 27 years later as Governor of Victoria, presided at the swearing-in of Justice Buchanan, Judge of the Court of Appeal. In 1984 Peter had taken silk, and continued an outstanding all-round commercial practice, combining it with an annual sojourn to race at Bathurst each Easter, the only real break he took from work.

Whether as counsel or judge, Peter had the peerless ability to see the real issues and accurately simplify the complicated, and to reduce the complex to its essentials. Peter's contribution to the law was immeasurable, literally. An attempt to search judgments of the Court of Appeal in his name provokes this response from the database: "this search has been interrupted because it will return more than 3000 results." He adjudged many notable cases, among them the "Jihad Jack" terrorism and the Rolah McCabe tobacco cases. The contribution continues, most recently with the High Court endorsing his earlier dissent on the practice of prosecutors suggesting a sentencing range.

When coming to the Melbourne Bar Peter settled upon North Fitzroy and adopted Fitzroy Football Club as his team. The demise of the Club in 1996 was devastating. He had worked tirelessly in providing (free) counsel to the Club in its battles with the then VFL. After a long mourning, Peter returned to following AFL football, embracing Richmond with equal passion, to be found every week in the outer of the MCG, among the Tiger faithful and in his element.

The Hon Dr Peter Buchanan QC is survived by his wife Patricia, and their sons, Sam, Patrick, Daniel and Michael.

STURT GLACKEN QC

(The above is an edited version of the obituary first published in The Age *on 22 May 2014)*

Gonged!

Australia Day Awards

The Hon Peter Gray AM was awarded as a member of the Order of Australia for his significant service to the judiciary through the Federal Court of Australia, to legal education, and as a mentor.

The Hon Dr Ross Sundberg AM QC was awarded as a member of the Order of Australia for his significant service to the law as a judge, reporter and educator.

The Hon Justice Stephen Kaye AM was awarded as a member of the Order of Australia for his significant service to the law and to the judiciary, particularly in the area of indigenous social justice and cultural awareness.

Major General the Hon Justice Richard Tracey AM RFD was awarded as a member of the Order of Australia for his exceptional service in the field of military law, as a consultant for the Director of Army Legal Services, and as Judge Advocate General of the Australian Defence Force.

Mr Peter Jopling AM QC was awarded as a member of the Order of Australia for his significant service to the law in Victoria, and to the community.

Other Awards

Fiona McLeod SC was inducted on to the Victorian Honour Roll for Women for her leadership, advocacy and long standing contribution to women in the legal profession and beyond.

Paul Hayes was awarded the Denis Callinan Award for his commendable community service in the field of sports law.

Victorian Bar Readers' Course

SEPTEMBER 2013

BACK ROW: Angie Wong, Jennifer Findlay, Brian Mason, Harry Venice, David Kelsey-Sugg, Yasser Bakri, Scott Morris, James Forsaith, Angel Aleksov, Simona Gory, Camilla Hopkins.
CENTRE ROW: Wendy Pollock, Denise Dwyer, Yuliya Mik, Kim Bradey, Andrew Blakeman, Raph Ajzensztat, Andrew Silver, Daniel Briggs, Kieren Hickie, Katherine Brazenor, Clare Cunliffe, Christina Klemis, Stephanie DeGuio.
SEATED ROW: Rebecca Thomas, Megan Tait, Augustine Aulanga, Anderson Kesaka, Ben Ryde, Laura Keily, Kate Burgess.
FRONT ROW: Simon Bright, James Mortley, Darren Bruno, David Carne, Zubin Menon, Nico Burmeister.

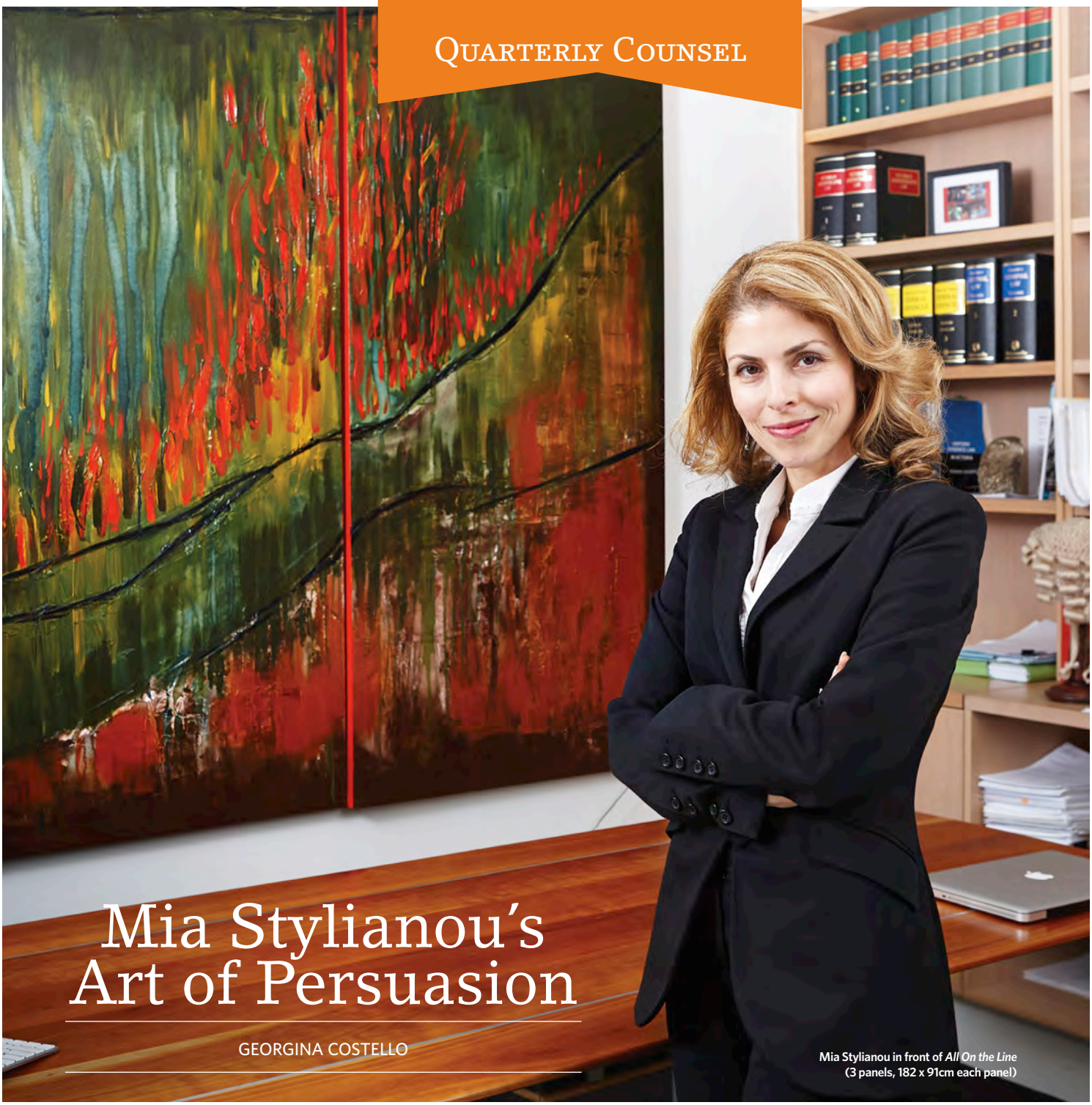
PHOTO COURTESY OF PAUL WEST

Victorian Bar Readers' Course

MARCH 2014

BACK ROW: Wendy Pollock, Gordon Chisholm, Penelope Renc, John Leung, Claire Nicholson, Timothy Chalke, Marcus Fogarty, Timothy Goodwin, James Westmore, Brenton Devanny, Fiona Knowles, Max Hume
MIDDLE ROW: Amanda Burnnard, Emma Murphy, Michelle Zammit, Jennifer Croxford, Marcus Fleming, David O'Brien, Michael Wilson, Rebecca Dal Pra, Georgia Berlic, Andrew Dimsey, Jason Korke, Krystyna Grinberg, Amelia Beech, Rachel Chrapot
SEATED: Georgina Coleman, Suzanne Kupsch, Joel Silver, Gordon Porter, Piria Coleman, Rachel Walsh, Victoria Blidman, Samantha Holmes
FRONT ROW: Andrew Blair, Philip Teo, Jesse Rudd, Andrew Denton, Hadi Mazloum, Campbell Thompson, Adam Chernok

PHOTO COURTESY OF PETER BONGIORNO



Mia Stylianou's Art of Persuasion

GEORGINA COSTELLO

Mia Stylianou in front of *All On the Line* (3 panels, 182 x 91cm each panel)

PHOTOS COURTESY OF PETER BONGIORNO

Busy Victorian criminal barrister Mia Stylianou is a talented painter. Her solo exhibition at the Essoign Club in 2010 was a resounding success. Seventy per cent of her works sold at that exhibition, many to barristers and barristers' clerks. More recently, two of Stylianou's large abstract portraits were selected for prestigious exhibition for two years running at the Hidden Faces of the Archibald in 2012 and 2013. Her work has been on show at the Hilton South Wharf and Media House and she has received a number of commissions within Australia and overseas.

Stylianou's work before signing the Roll of counsel included that of Associate Public Defender with Victoria Legal Aid. Her demanding caseload at the Bar includes the difficult work of prosecuting and defending serious crime, including sexual offences. Stylianou suggests, "Our work is so consuming that it is important to remember there is life outside it". She finds wellbeing and resilience in the act of painting, telling VBN:

"Painting gives me peace of mind, which helps with the angst and stress of trial work. The elation and disappointment I feel about my cases is often captured on my canvasses".

Stylianou says that as lovely as it sounds to be a full-time artist, she would miss the Bar if she gave it up, but is quick to add that her view depends on what day you ask her! Her work in the law often informs her art, but she says, "Every time I paint, it is the coming together of varied life experiences and impressions on one big canvas". She loves to work on large canvases and although the bigger the canvas the greater the physical exertion, she says for her, "It beats working out in a gym".

Stylianou's uncle was a painter in Egypt and she grew up with her uncle's paintings hanging on the walls of her family home. There was much displacement and disruption to Mia's childhood amid the political instability in Cyprus where she and her family lived until they migrated to Australia when she was almost eight years old. She had attended six different primary schools and lived at nine different addresses by the time she was 11. Art was a stabilising factor in her life amidst the chaos of change that characterised her early years. Stylianou says "art back then was one of few constants in a sea of change".

An inspiring school art teacher first introduced Stylianou to oil painting at age 13. The teacher was so impressed with young Mia's work that she tipped-off the local paper, which ran an article about the fledgling artist's first oil painting. As a teenager, Stylianou was an impressionist painter, but now says she finds abstract art to be "intriguing, liberating and great therapy at the end of some of the cases I deal with". She "paints in spurts". At the end of a trial she usually finds some time and solitude to paint.

You Know Who I am
152 x 125cm

In her chambers in Owen Dixon West, Stylianou's desk and chair are positioned before three large panels of one of her vivid abstract paintings. Whether in the studio or in chambers, for Stylianou the creative process never stops and art can be a useful analogy for court work. For example, when her clients are able to dig deep into their experiences and circumstances it gives her the material or palette she needs to paint a compelling picture of their life for the court.

Stylianou says that "ultimately the most important skill of a barrister would have to be the skill of persuasion and, of course persuasion is itself an art – albeit probably not as redemptive or therapeutic as that practised on canvas". Stylianou's art feeds her work and her work feeds her art and she is, today, unequivocally content to practise both.

Birds of Prey
122 x 180cm

Untitled
152 x 122vcm

Boilerplate

A BIT ABOUT WORDS

"Chaps"

JULIAN BURNSIDE

What an odd little word this is. Actually, it is three different words with the same form.

The first word is a variant of *chop*: a *chap* is 'an open fissure or crack in a surface, made by chopping or splitting'. It is rarely used like this nowadays. A related meaning is 'a crack in the skin, descending to the flesh: chiefly caused by exposure of hands, lips, etc., to frost or cold wind'. In that sense, it is more common as the participial *chapped lips* or (less commonly) *chapped hands*. As a plural, *chaps* also signifies the jaws of a person or animal; and by extension the jaws of a vice. *Chappy* meant talkative, in the 17th and 18th centuries. Some time in the mid 18th century, *chaps* in this gave way to *chops*: 'get your *chops* around this' sounds like slang, but is a very old usage. *Down in the chops* is a 19th century colloquialism meaning depressed; to *lick one's chops* is to gloat.

The second meaning of *chaps* is best gathered from cowboy movies. When they were popular in the 1950s and 1960s, they often showed chaps wearing *chaps*, which are made of leather, with fronts of dogskin with the hair on. In this context, *chaps* is an abbreviation of *chaparreras*, which in turn comes from *chaparral,* the dense, thorny scrub common in Mexico and Texas, through which the cowboy heroes often rode. *Chaparral* comes from the Spanish *chapa* the scrub oak. Chaps were worn over the pants to protect the legs while riding a horse.

Neither of these meanings springs to mind when someone refers to *chaps* these days. The commonest current meaning of *chaps* is caught by Oscar Wilde in *A Woman of No Importance* "One must have some occupation nowadays. If I hadn't my debts I shouldn't have anything to think about. All the *chaps* I know are in debt."

Oscar Wilde wrote *A Woman of No Importance* in 1893. His use of *chaps*, etymologically speaking, was not modern even then. As a casual reference to another man, it had been in use since about 1750. Wilde's other use of chaps was not modern either, but he was caught at it, and that was a serious mistake. In 1895 he was sentenced to two years' hard labour for the (recently outlawed) abominable crime of sodomy.

Chap is an abbreviation of *chapman*, a person whose business is buying and selling, a merchant. The abbreviated form emerged in about 1600. As the OED wryly notes: it "… seems to have come into vulgar use in the end of the 16th c. but it is rare in books, even in the dramatists, before 1700." Apparently the dramatists then, as in Wilde's time, were a bit racy.

The etymology of *chapman* shows that it is related to the German *Kaufman*, and the Dutch *Koopman*. (In keeping with the early fashion of artisans and traders taking their surname from their occupation, Chapman, Kaufman and Koopman are common surnames.) From the 15th to the 17th century *chap* meant a bargain or barter.

For a century or two, *chap* was also a vulgar reference to a customer, but it gradually lost the commercial connotation. Dr. Todd's edition (1818) of Johnson recognises this usage, but notes that "it usually designates a person of whom a contemptuous opinion is entertained". (It could be that the element of contempt mirrored the attitude of the English upper-classes to those who were 'in trade' - an attitude which sharpened as the industrial age generated vast wealth for some chaps, but not for most gentlemen.) Interestingly, the use of *chap* mirrors the use of *customer* outside its original commercial setting. Until the 1950s it was common to hear someone referred to as an *odd customer* or a *queer customer*, where *chap* would have been equally appropriate.

Customer was generally a guarded expression and so was *chap*, at first; but by the time Wilde wrote *A Woman of No Importance*, *chap* had largely lost its pejorative edge: the sense is friendly rather than scornful. When he used it in *A Picture of Dorian Gray* it is sympathetic and affectionate: 'The poor chap was killed in a duel at Spa a few months after the marriage'.

The Old English form of *chapman* was *céapmann*. It holds the clue to another mercantile connection: a *céap* was a market, but it also meant *a price*, *barter*, or *merchandise*. It is recorded in this sense since 1000 AD. In its sense as a market, it is

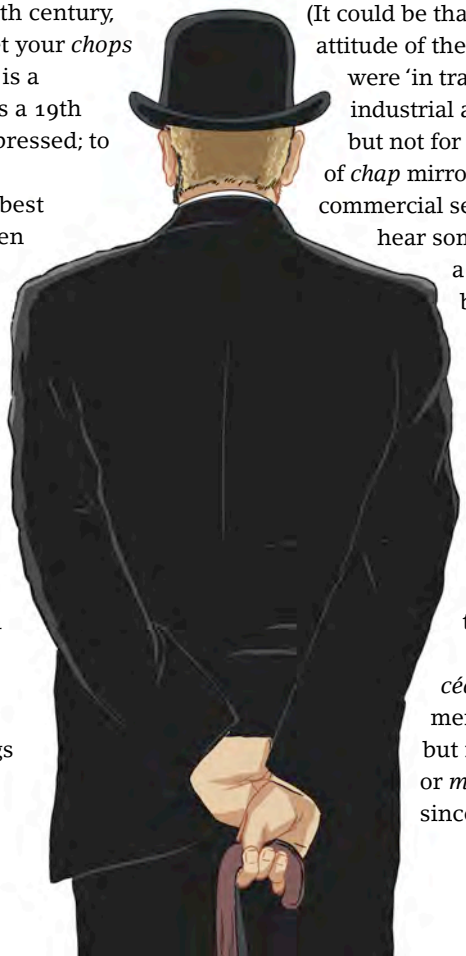


ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

still found in place-names like Eastcheap and Cheapside. In the same sense, it led to constructions such as *good cheap* (early 14th century) i.e. a good market, meaning (from a buyer's perspective) that prices were low. The equivalent construction *dear cheap* was also common, and meant a bad market, or a time of shortage; it now looks like an oxymoron.

By the 16th century, *good cheap* was a quasi-adjective:

> *He marvelled at how it was possible for so much victual to be found in the town and so* good cheap*...*
> Marlowe Doctor Faustus (1588):

Likewise in Henry IV, Part I (1598) Falstaff says:

> *Thou hast saved me a thousand marks in links and torches, walking with thee in the night betwixt tavern and tavern; but the sack that thou hast drunk me would have bought me lights as* good cheap *at the dearest chandler's in Europe.*

This usage led to the use of *cheap* by itself as an adjective meaning *inexpensive*. This was rare before the 16th century, but the transition seems to have been completed early in the 17th century. It is an interesting phenomenon: *cheap* was a noun, meaning *market* &c for at least 500 years and then in the course of a century it became an adjective meaning *inexpensive*. *Cheap* is now used only as an adjective. It can be neutral, or have pejorative overtones: it can suggest good value (*cheap price*) or low worth (*cheap victory*, and *cheap shot*). In my parents' time, if a person's conduct was described as *cheap*, it might mean that they were stingy, but it carried the slur that the conduct was low-born: not the sort of thing a chap would do. For a time, the two words, both from a common origin, had exactly opposite connotations.

Chap is now a bit toffy - it has a faded air of affectation about it. *Bloke* is matey. *Bloke* is much newer than *chap*: the OED's first quotation dates from 1851, when Henry Mayhew recorded London's street talk. For the next 70 years, it was used hesitantly by authors, because of its colloquial origins. Despite this tentative start, *bloke* has now effectively replaced *chap*, at least in Australian speech.

Interestingly (and unfairly) neither *chap* nor *bloke* can refer to a woman. Occasionally the jocular coinage *chapette* is heard, but it is not a real word and does not look like surviving to the point of recognition in a dictionary. Not in the sense of a *female chap*, at least. The online Urban Dictionary recognises *chapette*, but defines it as 'a mamon; one who pretends, and acts big shit; one who is full of shit.' It is not recognized by OED2 or Webster.

Just in case the Urban Dictionary sense catches on, it is probably best not to refer to a woman as a *chapette*. The danger is obviously unrecognised by 'Chelsea', whose website notes:

> *So what do you all think about this word "chapette" I made it up and my friend Ashtyn made fun of me for it ...for everyone who dosent (sic) know what a chapette is it is a girl kinda like the word dudette but better...*

Well, I don't think she was the first to coin it, but her intentions are good. And she is not quite accurate about *dudette*; it does not exist either. Surprisingly however *dude* admits two feminine forms. So even if you can't use *chapette*, and *dudette* does not exist, you can choose from *dudess* and *dudine*. Although these words are recognised by OED2, I suspect that they will remain in the obscure back rooms of language.

Just as *chap* drifted from vulgar to affected, *bloke* is slowly beginning to look a little dated as *guy* and *dude* weasel their way into Australian English. *Dude* is nearly as old as *bloke*, but is American rather than British. Originally it signified a dandy; now it is hip and classless. *Guy* is also American in origin, although influenced by reference to the effigy of Guy Fawkes, traditionally burned each 5th November in remembrance of the Gunpowder Plot. As a neutral reference to a man, it emerged in the 1840s, a few years before *bloke*.

It would be strange to refer to a woman as a *guy* or a *dude*, and impossible to refer to her as a *chap* or a *bloke*.

Still, as a general greeting *Hey guys* is understood as including women. I suppose that is some kind of progress, centuries after the first strange looking customer was called a *chap*.

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

RED BAG BLUE BAG

Visiting Solicitors' Offices

Red Bag A VIEW FROM SENIOR COUNSEL

I have been engaged to argue the case that members of counsel should not visit solicitors' offices.

When I came to the Bar in 1990 the very wise and urbane Stephen Charles QC spoke to my readers' course and cautioned against counsel attending solicitors' offices. Times were different then. The principal authority on professional conduct, practice and etiquette was *Gowans* (1979). Chapter 6 of *Gowans* commenced with the following proscription –

> *Save on occasions when the relationship of solicitor and client exists between a solicitor and a counsel and requires counsel's attendance or, in exceptional circumstances, where permission is granted by the Ethics Committee, it is a breach of professional etiquette to attend the office of a solicitor for any purpose.*

There were two exceptions to the rule –

(a.) as indicated, permission could be granted by the Ethics Committee; and

(b.) counsel could attend a solicitor's office on circuit for the purpose of conferring with a client or witnesses.

Permission had been given by the Ethics Committee in the following circumstances: to visit a solicitors' office to inspect documents too numerous to be taken to counsel's chambers; to take part in a telephone conversation with persons in another country where the call was pre-booked; and to conduct a conference in the solicitor's board room where a considerable number of lay clients and witnesses had to be interviewed. And interestingly, it was ruled not improper for counsel to attend a solicitor's Christmas party at premises not at the solicitor's office.

There is now no rule preventing counsel from attending solicitors' offices. It frequently occurs in at least the following circumstances –

(c.) mediations frequently take place at solicitors' offices;
(d.) counsel attend solicitors' offices for video-conferences;
(e.) when counsel are retained to act interstate, it is often necessary to use the facilities and resources of the solicitors' office as a base;
(f.) junior counsel are retained to assist in large discovery exercises; and
(g.) counsel even attend solicitors' offices for Christmas parties.

Does anything therefore survive of the old rule that counsel should not attend solicitors' offices? The answer lies in the fundamental precept of practice at the Bar, namely, independence. The ideal of independence underlies the Bar's Constitution, and the Practice Rules. Clause 4.1 of the Bar's Constitution prescribes the purposes of the Victorian Bar, which include to maintain in the public interest a strong and independent Bar. That purpose is furthered by a number of practice rules, that include –

(h.) a barrister is not to act as the mere mouthpiece of the client or of the instructing solicitor [16];
(i.) a barrister is not to present submissions as personal opinion [18];
(j.) limitations on what can be said by barristers to the media [58];
(k.) the cab-rank principle [86];
(l.) the sole practice rule [113]-[114]; and
(m.) the limitations on appearing with persons who are not members of an independent bar, such as solicitors [130]-[131];
(n.) The rationale for the old rule enjoining attendance at a solicitor's office for any purpose was to preserve the independence of the Bar. As the brief references to the Bar's Constitution and Practice Rules illustrate, independence of the Bar remains a central consideration to the Bar's existence.

By working and conferring in chambers, barristers maintain their independence, and the appearance of independence, from instructing solicitors and clients. Of course, the old rule is now too inflexible. And there are now so many valid exceptions to it, there can now be no rule at all. But the principle remains that counsel should not, without good cause, undermine their independence, or the appearance of independence. Counsel should not, therefore, attend solicitors' offices without good cause, where it might tend to detract from their independence. Prima facie, counsel should see solicitors and clients in counsel's chambers. Before departing from this norm by attending a solicitor's office, there should be some valid reason for doing so. The mere convenience or preference of the instructing solicitor is an insufficient reason.

Blue Bag A VIEW FROM JUNIOR COUNSEL

I remember the day I got my wig. And my gown, and a couple of beautiful, snow-white jabots. I put them on in front of the mirror and addressed myself as 'my learned colleague' or something similarly Rumpole-esque. And the day I first donned them as very Junior Counsel for a small matter in the Federal Court (in which we were successful), I thought it was Christmas.

As time wore on, the jabots took on a slightly yellow hue. Failures came alongside successes, and my days of oratorical splendour were sometimes succeeded by bouts of inarticulate awkwardness. But I was a Barrister. And when I told people that at parties, they were impressed.
A little bit in awe, but impressed. I liked that.

I didn't really have a 'lightbulb moment' per se to realise my mortality. But, over the years, I've watched the changes that legal firms have made to earn and retain clients. How they've had to alter their approach to a more service-oriented one.

And while I've felt vaguely sorry for them, I've also thought a lot about parallels with the Bar. It dawned on me that, horse hair and swirling robes aside, we are also, when all's boiled down, Professional Service Providers.

And, I have to say, I've really changed my perspective. It doesn't sit so well with the idealistic me prancing around in front of the mirror 20-odd years ago, but the times they are a-changing.

The solicitors who brief me are my clients and far from wanting to tug their forelocks whilst in my august presence, they have a right, as they are paying me, to be happy that they are getting value from my service. My financial stability depends on them briefing me again, or recommending others to do so.

So, if a solicitor asks me to come to their offices, why wouldn't I? To insist otherwise based merely on the fact that I am a barrister seems at odds with the modern world.

And after all, their offices are set up with special meeting rooms and modern equipment. Some even supply coffee that smacks of an expensive machine. I've even seen sandwiches. And cake. *Nice* cake.

As a moderately successful Junior Counsel, I don't run to flash chambers. Does it really preserve my dignity to have a couple of solicitors, and the clients, crowd into my chambers, balancing files on their knees because I have no separate meeting room? And is anyone, least of all me, going to enjoy the International Roast rustled up in the kitchenette down the hall? Or the slightly stale Marie biscuits I keep for such special occasions?

Quite frankly - Let me eat cake.

BOOK REVIEW

Constructive Conflicts of Interest

Best Practice in Construction Disputes – Avoidance, Management and Resolution by Paula Gerber and Brennan J Ong, LexisNexis Butterworths – Australia 2013.

GEORGE H GOLVAN QC[1]

The authors, Dr Paula Gerber and Brennan Ong, are leading construction law academics. Dr Gerber is currently an Associate Professor at Monash University Law School, where she teaches Construction Law. Brennan Ong is a PhD candidate and Research Assistant at Monash University Law School and is the Managing Editor of Construction Law International (he was also formerly an Associate to Justice Peter Vickery, the Judge in charge of the Supreme Court TEC List). Both have written extensively on dispute avoidance and management strategies in the construction industry, with a particular emphasis on Dispute Boards.

At the commencement of the book they make the pertinent observation that construction is a risky venture owing to the uncertainty of unknown factors that can emerge during the life of a project. Conflict is pervasive in the construction industry. Conflict often materialises into claims and inevitable disputes, which frequently conclude in arbitration and litigation, at great cost and inconvenience to the parties.

The book undertakes a helpful examination of the root causes of construction conflicts, how conflicts in the construction industry can readily escalate into disputes and what parties can do to minimise the risk of this occurring, or if a dispute does occur, how to best manage the dispute. Not surprisingly, conflict on a construction project all too frequently results in the parties adopting negative adversarial attitudes which damage relationships and which can severely impact upon the success of the project, resulting in delay and increased project costs.

The unique focus of this significant work, unlike most texts on construction disputes, which focus on strategies to resolve disputes after they have arisen, is on both conventional dispute resolution techniques, such as ADR, Expert Determination and Early Neutral Evaluation, and strategies for dispute avoidance.

The authors provide a comprehensive, thoroughly researched (with many helpful references) and very readable analysis of how conflict, which is an integral part of human interaction, can best be managed in the construction industry, by hopefully developing mutually cooperative and trusting working relationships on construction projects, from the outset.

Of particular assistance to prospective mediators is a useful discussion on the theory of "integrative bargaining", as a way of finding a mutually beneficial solution to the parties' conflicts by identifying the disputes, exposing the true needs and concerns of both parties by a process of open communications and helping the parties to fashion a solution which meets the greater number of the parties' interests; what is described in mediation terminology as a "win-win" solution.

The book has the most extensive and up-to-date analysis that I have read of the history and evolution, both overseas and in Australia, of what is known as Dispute Resolution Boards (DRBs), or Dispute Avoidance or Adjudication Boards (DABs), which are a relatively new innovation in construction and infrastructure projects in Australia, but have consistently proven to be remarkably successful in dispute avoidance in many large and complex construction and infrastructure projects. The theory behind DBRs is that the parties appoint a panel of independent third party experts with a mixture of experience and expertise, including technical, legal and ADR. Generally, a DRB panel consists of three persons, although on a smaller project the DRB can consist of one person, whose function is to assist the parties from the commencement of the project (even from the design stage if the project has design and construct elements), to proactively identify, manage and resolve disputes, or potential disputes, without resorting to arbitration or litigation. The DRB usually reviews project documentation, such as Contract Control Group Meeting Minutes, undertakes regular site visits and conducts meetings with key on-site and senior off-site personnel to monitor the progress of the project and facilitate frank and open discussions of any potential areas of conflict.

If the parties are unable to resolve a dispute by negotiations, the DRB usually has the ability to make non-binding recommendations, which experience has shown are invariably accepted by the parties, as they are recommendations by an independent expert panel with extensive knowledge of the project. Different DRBs adopt different approaches as to whether a non-binding

determination of the DRB is "without prejudice" or "with prejudice" (as adopted in Sydney's Desal Project), and entitled to be relied upon by a party in any subsequent proceedings. The authors favour the approach that a determination of the DRB should not be admissible in a subsequent proceeding, given that the purpose of the determination is to assist the parties to arrive at a consensual resolution. The opposing view is that a "with prejudice" determination will encourage the parties to resolve the dispute without recourse to litigation, as a court or an arbitrator is likely to be persuaded by an independent determination made by an expert panel with detailed knowledge of the project.

The record of success of DRBs in Australia is that in some 40 projects with DRBs, as I understand, no project has had a dispute referred to arbitration or litigation, and there have been few DRB determinations required, as most disputes have been able to be resolved consensually by the parties themselves in the course of the project. Remarkably enough, the Victorian State Government has still not come on board, and there have been no DRBs appointed on large construction and infrastructure projects in Victoria to date. This is presumably due to the perceived high costs of DRBs, which is not necessarily the case, and the often over-optimistic belief that their project will be free of disputes. The authors note that all Standard Form FIDIC Contracts now include DRBs as a feature.

The authors make a compelling argument for the legal profession involved with construction projects to change its mind-set from maintaining traditional adversarial attitudes, to appreciating the range of dispute avoidance and dispute management strategies, which are now readily available and proven, to better manage construction projects. This will hopefully result in more successful projects and satisfied clients whose relationship will not be damaged by acrimonious litigation.

The concluding chapter contains an apt quotation from Warren E. Berger, former Chief Justice of the United States Supreme Court, who noted:

> *The entire legal profession – lawyers, judges, law teachers – has become so mesmerised with the stimulation of court room contest that we tend to forget we ought to be healers of conflict. Doctors, in spite of astronomical medical costs, do retain a higher degree of public confidence because they are perceived as healers. Should lawyers not be healers?*

The publication of this work, which promotes a holistic approach towards construction disputes, is greatly welcomed, and should be included in the library of every lawyer whose practice involves dealing with construction projects.

1 (formerly Chair of the DRB of Sydney's Desalination Plant Project and currently Chair of the DRB of Sydney's South-West Rail Link Project)

EXCLUSIVE

New ACCC Formed

MEDIA RELEASE[1]

It can now be revealed that the Minister for Inclusive Wellness will put in place a game-changer: an Anti-Cliché Control Commission (ACCC). After a bitter turf war, the Minister has decided that this new structure will take over the functions previously exercised by the dysfunctional Agency for the Spread of Irritating Clichés (ASIC).

In an exclusive interview with Bar News, the Minister said that he had been looking through the window of opportunity over the level playing field. It was covered with sand, in which, at this point in time, he proposed to draw a line, as well as moving the goalposts. Enough was, having regard to forward Budgetary estimates and environmental implications, give or take, within the ballpark, enough.

The Minister had first considered naming the new body Clichés Australia (CA), like Cricket Australia, Parsnips Victoria (PV) and Scrabble Queensland (SQ). But in Canberra the number of letters in your acronym, which are allotted by the Australian Program for the Recognition of Acronyms (APRA), is a sign of status, a bit like stars for hotels and film reviews. So ACCC it will be.

The ACCC will have an over-arching overview, aiming for the empowerment of human capital through capacity building and a flat management structure.

Being over-arching, it will be able to drill down, taking care not to shoot the messenger.

It will be transparent and accountable, being incredibly fantastic, moving forward across a wide range of issues, including those out of left field.

Needless to say, it will be iconic, indeed uber-iconic. There will be more Russian orthodox religious emblems than you could shake a sauce bottle at.

This will be a game changer and circuit breaker, meeting a steep learning curve on a whole-of-government evidence-based approach across rural and regional Australia.

As it hits the ground running, the ACCC will literally tick all the boxes in our DNA as it engages in a national conversation, joining the dots as it pushes the envelope.

The Minister urges the Opposition not to trash the brand, or engage in a race to the bottom.

1 All media enquiries should be delivered to the Hon Peter Heerey AM QC who will respond with tongue firmly in cheek.

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*

High Court of Australia

NSW Registrar Births, Deaths and Marriages v Norrie

Before French CJ, Hayne, Kiefel, Bell and Keane JJ, 4 March 2014

BELL J: Mr Kirk, I think you have acknowledged that nowadays comparatively few pieces of legislation and subordinate legislation draw the binary distinction [between the genders] for which you contend. Your footnote 19 to paragraph 39 of your submissions is extensive and would appear to be a reasonably complete survey. It includes, for example, the combat sports regulation that requires in the case of a female combatant, that she may wear a lightweight sports-type brassiere. I mean, if this is the high point of submissions about the error of the Court of Appeal in failing to correctly deal with the difficulty of other legislation, it does not strike me as your high point.

MR KIRK SC: I do not think it is my high point, your Honour. I did not before and I certainly do not now.

Federal Court of Australia

Zwanenberg Australia Pty Ltd v Moira Mac's Poultry and Fine Foods Pty Ltd

Before Jessup J, 22 April 2014

MR SANTAMARIA QC: I must put to you, Mr Koops, that what – the sense in which you used the word "cooked up" means, as neutrally as possible, that he has exaggerated or embellished his fixed costs, his minimum fixed costs?

WITNESS: Look, the best translation in – would be "brewing". So he brewed his own costs. That doesn't mean that somebody is – I don't insinuate anything with that, just he brewed it up, so that's –

HIS HONOUR: I don't think we will go there, Mr Santamaria.

MR SANTAMARIA: Very good.

HIS HONOUR: We get caught up in metaphors of the food industry. We don't want to move into the beer industry as well.

MR SANTAMARIA QC: Your Honour may not wish to. Speaking of –

HIS HONOUR: Well, not after a long weekend anyway.

Supreme Court of Victoria

Matthews v. SPI Electricity Pty Ltd

Before J Forrest J, September 2013

MR ARMSTRONG: Your Honour will recall there were a few reports floating around in 2007, in particular from William S Buck that talked about asset lives and there's been some debate as to whether that means lives for depreciation or financial purposes as opposed to lives in service. This seems to indicate when the ESC talks about asset lives it's talking about asset lives for financial purposes.

HIS HONOUR: For the bean counters?

MR ARMSTRONG: The bean counters, your Honour, yes. If we can go back to the preceding page, if your Honour ever thought that bean counters don't have a sense of humour, have a look at the lust definitions. Obviously they are trying to price lust. But anyway, that's all for that one, your Honour. Mr Farrands doesn't want to comment on lust or anything else.

County Court of Victoria

O'Mara v Central Highlands Veterinary Group Pty Ltd

Before Judge Carmody and a jury of six

ROISIN ANNESLEY QC: When was your last litter that you bred?

WITNESS: I had a litter last year, but it was an accident. I didn't breed it, the dog bred it himself.

HIS HONOUR: When it's all said and done, that's always the case, isn't it?

1968 and all that

THE HON PETER HEEREY AM QC

1968 was quite a year: Civil Rights and the Black Panther Party in the US, the Tet Offensive, the Prague Spring and the May protests in Paris.

On an arguably less historically significant level, the 1968 Annual Victorian Bar Christmas Cocktail Party was the usual fun-filled event. So much so that a group of young barristers, accompanied by wives (some new) and girlfriends (some very new) decided to continue the evening by going on to dinner.

Those attending were Alex Chernov, Alan Goldberg, Brian Doyle, Peter Heerey, Tim Smith, Jack Fajgenbaum, Richard Stanley, Bill Gillard, the late Ron Castan and the late Jack Strahan.

The chosen venue was Lazar's just down the road in Little Bourke Street. A great night was had by all. It was decided that it would be a good idea to have a repeat performance the following year.

And so, for the next 44 years the group has dined at Christmas, first at restaurants and later at members' homes.

Sadly, two members, Ron Castan and Jack Strahan are no longer with us. The others recently had a wonderful evening at the 2013 event (see pic – Bill Gillard was away overseas).

PHOTO COURTESY OF PETER HEEREY AM QC

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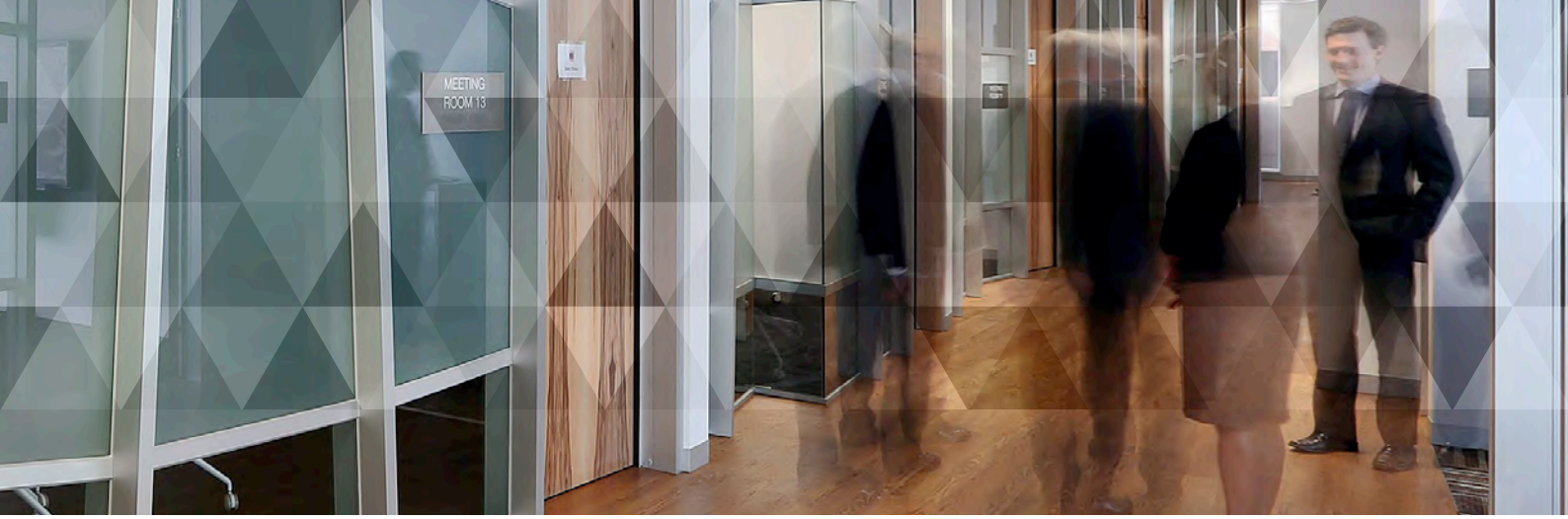

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