ISSUE 156 SUMMER 2014

# VICTORIAN BAR NEWS

## A very good fellow

The Hon Michael McHugh AO QC on James Merralls AO QC

## Why we need a federal anti-corruption body

by Stephen Charles

# Ten years at the top

Two Chief Justices celebrate a milestone

## Sir Owen Dixon's papers

Bar lore



**The art of the bar:** Peter O'Callaghan QC gallery launch

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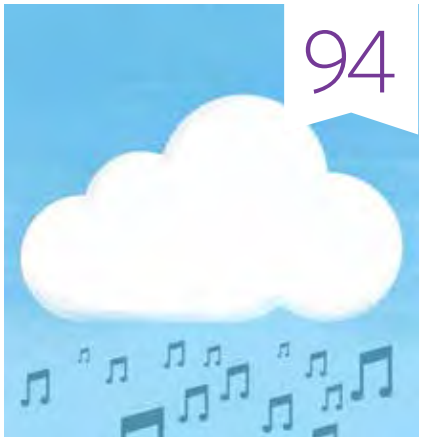

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ISSUE 156 SUMMER 2014

VICTORIAN BAR NEWS

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# Editorial

## A fair vanity

GEORGINA SCHOFF & GEORGINA COSTELLO, EDITORS

Welcome to *Victorian Bar News* edition 156, where we display some of the talents of the Renaissance men and Renaissance women of the Victorian Bar. Among our barristers are poets and painters, multilingual men and women, some singers and some scholars, an abundance of authors and athletes and a rockstar or two (perhaps rockstar is overstating it, but legend of the Bar, Brian Bourke, did once sit next to Ernest Hemmingway on a small plane flight from Cuba to Miami).

In our News and views section, Dr Cliff Pannam QC has brought a well-known old case alive in his case note. Over the page you'll find George Golvan QC's tribute to Dr Pannam, whom he describes as a Renaissance man. James Merralls AO QC, who is profiled in a speech by the Hon Michael McHugh AC QC on page 36, has himself written a scholarly book review which you will find on page 105.

We bring you a new section of the magazine - Bar lore - where we feature photographs of a long lost Owen Dixon brief and continue our series of historical profiles.

Elsewhere in Bar lore, we have extracted from the *Bar News* of 30 years ago an ethics bulletin about tight restrictions on passing out business cards and an article entitled "I put a case on computer". Consider the contrast between that time and this while you read about the contemporary debate on whether court proceedings should be streamed on the web on page 45.

VBN 156 introduces the first of some new regular columns. In our music column, Ed Heerey tunes in to digital radio. In our wine column, Sara Hinchey provides timely tips for summer drinks. Our "first and last cab on the rank" column contains a Q & A with our most senior and junior barristers. If you have any ideas for a new kind of *Bar News* column, please send a note to vbneditors@vicbar.com.au.

The inaugural "first cab" is Peter O'Callaghan QC, the man whose name adorns the Bar's portrait gallery. Beautiful photographs of the gallery opening grace pages 9-13. Justice Crennan (who was, to continue our theme for this edition, described as a "Renaissance woman" by Justice Alan Goldberg in 2003) spoke at the gallery opening.

Mr O'Callaghan has written the obituary for Howard Fox QC, describing him as a barrister "fluent in Latin, Greek and modern languages, including Swahili". Santamaria JA has written the obituary for Ian Denis McIvor, describing him as a man who "read everything and read widely. He knew all of Dickens and all about Dickens."

PHOTO BY PETER BONGIORNO

Back row: Anthony Strahan (Deputy Editor), Denise Bennett, Jesse Rudd, Justin Hannebery, Brad Barr, Maree Norton (Deputy Editor) Front row: Annette Charak, Georgina Schoff QC (Editor), Georgina Costello (Editor), Robert Heath (Deputy Editor)

> “Barristers past and present, who you will read or read about in these pages, remind us of the unique opportunities that life as a member of an independent bar affords us all to be Renaissance men and Renaissance women.”

Our regular columnist, wordwatcher Julian Burnside AO QC, has discovered the Collins Scrabble Dictionary and thrown away his tiles in disgust. His is a must-read article for summer board game players. We are also pleased to publish photos of the launch of former *Bar News* editor's book, *Excursions in the Law* by Peter Heerey.

Michael Wheelahan QC, a great leader of our bar, has penned a thoughtful note on a case which has some notoriety: *Yara v Oswal*, as well as a book review of a weighty defamation text written by Dr Matt Collins QC and the welcome to Justice Beach. The Hon Stephen Charles QC courageously puts the case for a federal anti-corruption body in his article, adding to his earlier article in edition 153 regarding Victoria's IBAC.

In these days of touting and huggery, when so much of our collective energy as a Bar is focused on the need to win work, barristers past and present, who you will read or read about in these pages, remind us of the unique opportunities that life as a member of an independent Bar affords us all to be Renaissance men and Renaissance women.

This edition has been a joy to compile. We thank our excellent team on the editorial committee. We also thank Denise Bennett for her administrative assistance and cheerful efficiency. To Justin Tomlinson, who edited the last three editions, we extend our gratitude.

Finally, it gives us great pleasure, as the first team of Georginas to edit the *Victorian Bar News*, to bring you our cover story on the 10-year milestones of Chief Justice Warren and Chief Justice Bryant. Our courts and our Bar are lead by fine men and women, whose skills were honed here among the collegiate cut and thrust of practice. Enjoy this fair vanity of pages by and about our barristers and please send us correspondence about what you like and don't like reading. After all, you are men and women of letters.

*Georgina Schoff and Georgina Costello, Editors*

# Letters TO THE Editors

PHOTO COURTESY OF JACINTA FORBES SC

## *Thank You!*

The VBN committee thanks all contributors to our summer edition for 2014 and wishes you all a lovely summer vacation.

## *Old school tired*

Ninian Stephen had a only a single year at Scotch? And the other chaps at the Bar still spoke to him? And later, chaps even allowed him to join the Melbourne Club? Quelle horreur!

We learnt this in the *Bar News* Winter edition (*Ninian Stephen at the Victorian Bar*).

Tantalisingly, we also learnt that, as a German-speaking 15-year-old, Stephen had excellent seats at the Nuremberg Rallies. So, what did the now-famous advocate and judge make of seeing arguably history's most famous demagogue perform live? Alas, the *Bar News* moved on to Stephen's early career as an Arthur Rob's delivery boy without telling us.

In Stephen's long and varied career, there surely must be stories more interesting to *Bar News* readers than how he overcame the privations of having attended different private schools to his barrister peers. Even if such trivia was ever interesting or relevant (hard to believe), surely the Bar is not so old school that the *Bar News* should pander to it now.

*Paul Duggan*

*(Grange Rd Kindergarten, class of 1970; Sacred Heart, Sandringham, class of 1978; St Bede's College, class of 1984)*

# With Respect

Of all the places in which a plaintiff, defendant or lawyer might expect to be treated with decency, courtesy and respect, the courtroom should rank first.

Overwhelmingly, that legitimate expectation is fulfilled by judicial officers who regularly discharge their duties conscientiously and with civility.

Regrettably however, there are a handful of judicial officers who do not behave in the discharge of their duties with the courtesy and propriety that distinguishes the vast majority of their brethren.

Just as judges and magistrates discuss with one another the legal practitioners who appear before them, we as practitioners share with one another our experiences of them.

It has become clear in recent times that some young, inexperienced and often female practitioners have been mocked, derided, belittled, bullied, humiliated, intimidated and, in some cases, reduced to tears by a few judges and magistrates who have become notorious for their ill-treatment of those who appear in their courts.

The effect upon those practitioners who have been so treated has often been profound. Self doubt has been exacerbated, fledgling confidence extinguished and some have had their self-esteem so adversely affected that they have entertained, and in some cases pursued, alternative careers.

Like any profession, the legal profession is made up of people whose abilities, experiences and talents vary. Some are more able and experienced than others. Rather than denigrating the less able or less experienced, judges and magistrates ought to be doing their best to nurture, encourage and assist them.

Judicial officers, like members of the legal profession, serve the public. The ill-treatment of practitioners in open court serves only to undermine not only the confidence of a particular client in their own legal representative, but to undermine the public's confidence in the legal profession more generally.

Emotional and psychological fragility amongst our members is not uncommon, yet is often difficult or even impossible to discern. The consequences that such gratuitous insensitivity has the potential to cause does not bear contemplation.

It would go a considerable way to solving the problem if those who are elevated to judicial office took time to remember how hard it might have been for them at times to perform their functions as lawyers. It would perhaps solve the problem altogether if they treated those in their courtroom as they themselves spent their careers as practitioners hoping to be treated.

*Geoffrey Steward*

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## Erratum

Dear Georgina and Justin,

Thank you for the coverage given by you to my article and portrait published in the winter edition of the *Bar News*. I hope it was well accepted by members of the Bar.

Unfortunately there is one error which I failed to pick up in at least six readings of the draft. The correct surname of the artist is Holt. Her full name is Marge Holt.

I have drawn this error to her attention and the suggested rectification is to request its publication in the next issue of the Bar News.

*Frank Walsh*

"The last Bar News looks excellent. Congratulations."
*Meredith Schilling*

"Just a quick note to say well done on the bar news, it looks fantastic, well done. I don't know how you find the time..."
*Andrew Broadfoot*

"Brilliant work on the latest issue of Bar News. The best I can remember reading. I don't know where you find the time!"
*Stewart Maiden*

**Have your Say** Write to the Editors at *Victorian Bar News*, Owen Dixon Chambers, 222 William Street, Melbourne, VIC 3000
or email *vbneditors@vicbar.com.au*

# Chairman's report

WILLIAM ALSTERGREN

In 2014 the Bar Council has sought to position Victorian barristers as the leaders of our profession. We are justly proud of the expertise, professionalism, collegiality and commitment to justice that we find in abundance among Victorian barristers.

A crucial role of the Bar Council is to demonstrate the excellence and value of barristers and to make a good business case for briefing barristers. To this end, I started the year by meeting with most of the major law firms to seek their views about the role of the Bar and the profession generally. After that, I met with solicitors in Melbourne and regional Victoria; and with corporate counsel and government solicitors across Melbourne. I championed barristers at a variety of functions, dinners and CPD sessions including in suburban and regional Victoria and in Malaysia. It was both a privilege and a pleasure to represent our Bar in this way.

This year, the Bar hosted the first whole of legal profession CPD conference in Victoria with the Law Institute of Victoria and the judiciary. Over 300 attendees heard from eminent speakers from across the Bar, the judiciary, law firms, government regulators, in-house counsel and the State Attorney General. The conference was a great success and has created much interest in the Bar and its members from other parts of the legal profession.

The Bar Council enjoys a constructive relationship with Attorneys-General Senator the Hon George Brandis QC and the Hon Robert Clark MP. We are grateful to the Attorneys for their support of and contributions to the Bar, including for their attendance at numerous Bar functions and CPD sessions. Members of the Bar Council have enjoyed meeting with Shadow Attorney-General Martin Pakula MP on a number of occasions. We are also grateful for the support that former Federal Attorney General, Mark Dreyfus QC provides to our Bar.

On November 7, 2014, the Bar officially opened the Owen Dixon Chambers West extension levels 19 to 24, adding 82 new chambers. A large part of the $31 million project was funded by BCL. Edwin Gill retired as CEO and Managing Director of BCL in August. On behalf of the Bar, I thank Ed, Chair of BCL - Michael Wyles QC - and the BCL Board and staff for their work.

The 2014 Bar dinner was again held in the beautiful Myer Mural Hall. It was a "sell out" with 550 in attendance on the night. Honoured guests included the Governor of Victoria, his Excellency the Hon Alex Chernov AC QC, Federal Attorney-General, Senator the Hon George Brandis QC, State Attorney-General the Hon Robert Clark MP, five High Court Justices, the Chief Justice of Victoria and representatives of all our courts. My thanks go to our guest speakers, the Hon Justice Hayne AC and Jeremy Ruskin QC. Each gave very fine speeches that were as entertaining as they were thought provoking. I thank those on the organising committee, the Bar Office, the Bar Band and Bar Choir for helping make this such a memorable event.

Victorian barristers continue to do enormous amounts of pro bono work. The 2014 Pro Bono awards celebration took place on 16 October 2014. During the year the Pro Bono Committee enlisted the support of the clerks to develop a survey for measuring the amount of pro bono work undertaken, its commercial value, type and the source of referral in fee books or their electronic equivalent. I thank Jane Dixon QC and the committee for their fine work and look forward to reading the results of the survey. I thank Nicole Dawson of the Bar Office for her outstanding work as coordinator of the Duty Barristers' Scheme.

During the year, the Bar launched a pilot scheme for the provision of pro bono representation for unrepresented parties seeking leave to appeal to the Court of Appeal. Aimed at assisting the Court of Appeal to clear backlogs, the scheme will provide an opportunity for junior counsel to work closely with senior counsel and senior juniors in higher courts.

The Bar Council has worked hard this year to improve equality at the Bar. We are pursuing a number of projects, including mentoring projects and unconscious bias training. Bar Council recently met with the Victorian Human Rights and Equal Opportunity Commissioner on other ways to enhance equality at the Bar.

I congratulate our *Bar News* Editors, Georgina Costello and Justin Tomlinson and the editorial committee for their two outstanding editions of *Victorian Bar News* while I have been Chairman. The *Victorian Bar News* Committee has now been reorganised with Justin's resignation and the return of Georgina Schoff QC as an editor of this edition. A new app has been added this year for those wishing to read *Bar News* on-line. For those hungry for history, this year we have added to the website past editions of *Victorian Bar News* and annual reports going back to their first publication.

After seven years of outstanding service to the Bar Stephen Hare is retiring. We are grateful to Stephen for all he has done in this time. He will be missed. A national search is underway to find a new CEO. We expect to

> “I championed barristers at a variety of functions, dinners and CPD sessions including in suburban and regional Victoria and in Malaysia. It was both a privilege and a pleasure to represent our Bar in this way.”

announce a new appointment before Christmas to start early in the New Year.

I congratulate my predecessor Fiona McLeod SC for her work as Chair. I congratulate Jim Peters QC on his election as Bar Chairman. I thank the Hon Justice Jonathan Beach who was at our Bar for more than 26 years, the last four as a member of the Bar Council, serving as Honorary Treasurer, Vice-Chairman and at times Acting Chairman.

On behalf of the Bar Council and members I express my thanks to the staff of the Bar Office. They do an enormous amount of work on behalf of members and are the “engine room” for many initiatives and projects. I particularly thank the Bar Council’s excellent Executive Assistant, Denise Bennett. I also thank Ross Nankivell for his support of our court welcomes and farewells, and other functions.

I thank all the members of the Bar Council and especially Vice-Chairmen, Jim Peters QC and Paul Anastassiou QC and Honorary Treasurer David O’Callaghan QC for their support during the year. I have this year relied upon all members of the Bar Council and thank them for their support. I also thank Honorary Secretary, Paul Panayi and Assistant Honorary Secretaries, Matthew Hooper and Barbara Myers for their work in supporting this Bar Council.

Finally, the work of the Bar is heavily dependent on the contribution of many members who volunteer collectively many thousands of hours of work, through the Bar associations, committees and individual effort. Thank you all.

*15 November, 2013*

# From the New Chairman

JIM PETERS

I am delighted to be Chairman of the new Bar Council. I look forward to the next year and meeting the challenges facing our Bar. The primary role of the Bar Council is to facilitate getting work in for the entire Bar. I intend to continue in the initiatives currently underway in this regard. A great deal of work has been done this year in engaging the entire profession, whether they be private firms, in-house counsel or government solicitors, and furthering the understanding of the value in briefing counsel at an early stage.

Counsel should be briefed early and appropriately. The skills, expertise and value that our members bring to the resolution of disputes in courts, tribunals and otherwise is invaluable to clients. Costs are saved if skilful specialist advocates are briefed at an early stage.

I also intend to continue to engage government, the profession and the public in wider issues relating to the rule of law. A matter of concern is the growing absence of junior counsel in criminal matters in the lower courts. The Bar is a most competitive labour market. It is constantly being refreshed with new members who are of exceptional skill and talent. It is in the public interest that government organisations avail themselves of this specialised body of expert advocates for the benefit of those who are particularly vulnerable in the criminal process.

There are a number of important projects which will be completed or implemented in the coming year. They include dealing with coroprate counsel directly, the Indictable Crimes Certificate, which was recently launched, the new constitution and, finally, the appointment of a new CEO. At the time of writing this report, the search for a new CEO is well underway.

The Bar Council has established a working group to review the Readers Course exam. The Readers Course is constantly reviewed to ensure that it meets the needs and objectives of our Bar. The working group is part of that process.

I look forward to the coming year with both optimism and with determination that our Bar Council should continue to promote its members' interests and keep that as its foremost principle.

Finally, I thank the retiring members of the previous Bar Council and welcome those re-elected and newly elected. We look forward to serving the Bar this year. Will Alstergren QC wrote in this column last year that his focus would be on "engaging and strengthening relationships with solicitors, the Courts and the community and working to improve opportunities for barristers". Will has done all that and more by tireless personal effort, working closely with the Bar Council and Bar Office staff. The Bar as a whole has benefited from his efforts. He leaves it in great shape. I feel a great responsibility as successor to such an outstanding and respected Chairman.

# United at last

## The Victorian Bar portrait collection

BY SIOBHÁN RYAN, ART & COLLECTIONS COMMITTEE MEMBER

The list of artists reads like a roll call of Archibald Prize finalists - John Longstaff, Archibald Colquhoun, William Dargie, Ivor Hele, Judy Cassab, Rick Amor and Paul Fitzgerald. Their subjects are just as eminent in their own fields. Depicted are a Prime Minister, three Governors General, seven Justices of the High Court, Attorneys General, State Governors and Justices of the Supreme Court, the Federal Court and the Family Court. All were members of the Victorian Bar. These are the subjects of the Victorian Bar's portrait collection, which now hangs cohesively for the first time in the foyer of the Owen Dixon West building; recently re-named the Peter O'Callaghan QC Gallery.

Many will be familiar with Archibald Colquhoun's glorious full length portrait of Sir Owen Dixon in ceremonial robes, with white gloves, court shoes and black stockinged feet. It has been hanging in the vestibule in the Owen Dixon West foyer along with other portraits including Andrew Sibley's Sir Zelman Cowen, Judy Cassab's Sir Charles Lowe and Peter Churcher's Chief Justice Marilyn Warren. However, the works appeared unconnected, forlorn and at odds with their surrounds until the guiding hand of Carr Design, Jan Minchin of Tolarno Galleries and Mark Chapman of Chapman and Bailey brought the collection to life.

The re-hang has also brought together other works from all corners of the Bar precinct. Some members may see for the first time, the striking painting of Sir John Latham in full wig with lace cuffs and jabot beautifully rendered against a cerise background. This portrait, by Charles Bush, was sitting on the floor in the bar office. Another fine work, a small oil painting of Sir Leo Cussen attributed to Sir John Longstaff, has come from the Neil Forsyth Room; as have the marvellous drawings of Maurice Ashkanasy, Frank Costigan and George Hampel by John Spooner, the celebrated *Age* cartoonist, himself a former lawyer.

> “...by bringing the collection together in the Peter O’Callaghan QC Gallery we will be reminded of the great collegiate spirit of the Victorian Bar and that, in turn, this will inspire future generations to add to the collection.”

Members can nod in passing to the gentle portrait of Sir Douglas Menzies painted by Archibald Colquhoun in 1940 when Sir Douglas was a junior barrister aged just 33. This painting was hanging in Douglas Menzies Chambers for many years and now joins the other works including Colquhoun’s portrait of Sir Owen Dixon painted 26 years later in 1966 and Ivor Hele’s portrait of Sir Douglas’ cousin, the Prime Minister, Sir Robert Menzies.

The Bar has also received timely gifts from the Hon Margaret Lusink, a former justice of the Family Court. One is a portrait of her mother, Joan Rosanove QC painted in London in 1952 by Flora Lion, whose “home front” scenes commissioned during the Great War hang in the Imperial War Museum. The other is Margaret’s own portrait painted around 1975 by Dudley Drew. Both women sat in their wigs and gowns.

Several of the artists represented in the Bar’s collection were Australian official war artists, notably Ivor Hele, William Dargie and Charles Bush and, more recently, Rick Amor and Peter Churcher.

The Bar has commissioned photographic reproductions of the Menzies and Rosanove portraits which now hang in the foyers of Douglas Menzies Chambers and Joan Rosanove Chambers.

The re-hang is an initiative of the Bar’s Art & Collections Committee. Chairman Peter Jopling QC says that the project began several years ago with his realisation that, although the Bar had a number of significant portraits, there was no sense of there being a collection which enabled us to both celebrate and pay our respects to our esteemed colleagues and their contribution to our Bar, the rule of law and the wider community. It is hoped that by bringing the collection together in the Peter O’Callaghan QC Gallery we will be reminded of the great collegiate spirit of the Victorian Bar and that, in turn, this will inspire future generations to add to the collection. To this end, space has been left for future commissions.

The Owen Dixon Chambers West foyer was repainted on the last weekend in August and the installation was completed over two days. The Committee sought advice from Jan Minchin from Tolarno Galleries on the protocols of placement and aesthetics. Jan generously gave her expertise *pro bono*. The re-hang was done by professional installers, Chapman & Bailey. Mark Chapman, who has installed many exhibitions here and overseas, said it was an unusual job because he was hanging portraits from different generations and pieces that were not uniformly presented, such as one might find in a contemporary gallery. However, the space adapted well, even taking into account its potentially difficult granite walls. The new colour, which was selected specifically to offset the paintings to their best advantage, has a harmonising effect, as does the lighting; both of which were selected thanks to the skilful eye of Sue Carr and Dan Cox from Carr Design. In the tradition of the Archibald Prize, we asked the installers Mark, Mark and Martin to nominate their favourite portrait and can report that Andrew Sibley’s portrait of Sir Zelman Cowan won the “Packing Room Prize”.

The official opening of the Peter O’Callaghan QC Gallery and the unveiling of the collection on Wednesday, 8 October was a splendid Bar occasion. The presence of their Excellencies, the Hon Alex Chernov QC, Governor of Victoria and Mrs Chernov, together with Chief Justice Marilyn Warren and Justice Crennan of the High Court and the Hon Senator George Brandis QC, Commonwealth Attorney General and Minister for the Arts added to its significance.

The Bar Chairman, Will Alstergren QC warmly welcomed the guest of honour, Peter O’Callaghan QC and his family, as well as many sitting and retired justices. It was especially pleasing that so many descendants of distinguished Victorian barristers whose portraits now hang in the gallery were also able to attend. Their presence added to the conviviality and esprit de corps of the occasion. Members of the families of Joan Rosanove QC, Sir Arthur Dean, Sir Richard McGarvie and Sir Norman O’Bryan posed for photographs by their parents’ and grandparents’ portraits.

Senator Brandis spoke warmly about the collegiality of the Victorian Bar and the great contribution of members, such as Sir Owen Dixon and Sir Robert Menzies to Australia’s legal and public institutions.

Justice Crennan officially opened the gallery and in returning to Owen Dixon Chambers West where she once had chambers, spoke of her long friendship with Peter O’Callaghan QC. O’Callaghan QC is the Bar’s most senior member, having signed the Roll in 1961. Among his many contributions to the profession was his chairmanship of the Bar Council’s standing committee responsible for administering the construction of Owen Dixon Chambers West. Justice Crennan spoke of his accomplishments in that challenging role and also of his court-craft and his wit. She included one of his jokes in her speech, which he topped with another in reply, of course.

The re-hang of the Collection is complemented by work undertaken by the Art & Collections Committee to establish a dedicated portraits page on the Vicbar website featuring reproductions of the portraits and biographies of the sitters and artists. It is well worth a look to acquaint members with the rich traditions, both legal and artistic, of the Victorian Bar.

The Art and Collections Committee is equally delighted to announce that the Bar has commissioned a portrait of the Hon Michael Black QC, retired Chief Justice of the Federal Court of Australia. The portrait will be painted by Ms Louise Hearman, the winner of the 2014 Moran Portrait Prize. When completed, this new portrait will be hung in the Peter O’Callaghan QC Gallery.

## From the Launch

1. Portraits in the Gallery 2. Peter O'Callaghan QC 3. Michael O'Bryan QC, Norman O'Bryan AM SC and Mrs Margarte O'Bryan in front of the portrait of the Hon Sir Norman O'Bryan 4. Ursula Whitehead with portrait of her father the Hon Sir Arthur Dean (upper right) 5. The granddaughters of Peter O'Callaghan QC 6. The Hon George Brandis QC

## From the Launch

1. Guests at the Launch 2. Bar Chairman William Alstergren QC 3. His Excellency the Hon Alex Chernov AC QC and Neil Brown QC 4. Three generations of O'Callaghans 5. Dr Maggi Ryan and Siobhán Ryan 6. Peter O'Callaghan QC greeting Chief Justice Warren and Justice Crennan looking on 7. Richard McGarvie QC and Michael McGarvie (Legal Services Commissioner) in front of the portrait of the Hon Sir Richard McGarvie 8. The Hon Justice Crennan AC 9. The Hon Peg Lusink AM 10. The Hon Chief Justice Warren AC, the Hon Justice Crennan AC, Peter O'Collaghan QC, His Excellency the Governor Alex Chernov, George Brandis QC AG, Peter Jopling AM QC, Will Alstergren QC


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# Indictable Crime Certificate Committee launch

*Victorian Bar News* is pleased to publish the following speech delivered by the Hon Geoffrey M Eames AM QC at the launch of the Indictable Crime Certificate Committee held on 30 October 2014 at the Essoign Club. GEOFFREY EAMES

Chairman of the Victorian Bar, distinguished guests, ladies and gentlemen.

Thank you Mr Chairman for your introduction.

I welcome you all to the launch of the Indictable Crime Certificate Committee (ICCC).

Unfortunately, due to a clash of events neither Chief Justice Warren nor President Maxwell of the Court of Appeal are able to attend tonight's function, which is a pity because both of them have been enthusiastic supporters of the ICC program.

Notwithstanding the absence of the Chief Justice I want to take the opportunity to publicly express my gratitude for the wonderful leadership and support she provided to the judiciary and to the people of Nauru in response to the undermining of the rule of law in Nauru in January 2014, which resulted in the removal from office of the Resident Magistrate and of myself as Chief Justice.

I acknowledge, too, the support and encouragement I received from the Victorian Bar Council and members of the Bar, not only in their statements of support for the Nauru judiciary in 2014 but throughout my time as Chief Justice since December 2010. Victorian barristers provided pro bono advocacy training and also worked with Nauruan practitioners in providing pro bono legal representation for detainees. I acknowledge, too, the pro bono work performed by Victorian solicitors.

In addition, I thank Chief Judge Rozenes for his constant support, especially in allowing associates from the County Court to provide invaluable assistance both to me as Chief Justice and also by training the Nauruan judicial staff.

All of those responses to the needs of an inexperienced foreign judicial system were very much in the best traditions of the Victorian Bar and judiciary.

The ICC scheme is a positive response to recommendations of the Victorian Law Reform Commission report on Jury Trial Directions, and the accreditation and training programs which it proposed are also in keeping with the best traditions of the Bar, which has long espoused excellence in advocacy.

The new proposals follow on from pioneering advocacy training from people such as George and Felicity Hampel, Bob Kent, John Coldrey, Ian Hill and so many more, over more than 30 years.

The ICC program has much to do with the rule of law. The presumption of innocence means very little if it is defended by an incompetent or under-prepared advocate, just as the protection of the community under the rule of law is not safeguarded by incompetent prosecutors.

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Most barristers who specialise in criminal trial advocacy throughout their career can have the following expectations:

First, and with few exceptions, they will never get rich from criminal work.

Second, their performance as an advocate will be closely scrutinised and occasionally - even frequently - criticised. The criticism will sometimes be unfair or ill-informed. Sometimes, if we are honest with ourselves, the criticism will sting because there is some truth to it. That is something all advocates wish to avoid. Good trial advocates, whatever their experience, are self-critical.

Criminal advocacy presents huge challenges for any practitioner.

Although the Victorian Bar has always encouraged its members to provide assistance and advice to each other, and to share experience, criminal work is often a lonely exercise: late nights of solitary preparation, and difficult tactical choices having to be made on the run.

In no other field are the consequences of poor advocacy so drastic. A visit to a client in the cells following conviction is never pleasant, and is a particularly depressing experience if you know that your performance as an advocate was below the standards you set for yourself. On the other hand, nothing can be more thrilling than to have your client walk out of court, with you, after being acquitted due to your efforts. That possibility is what drives barristers to conduct criminal jury trials.

If you are a prosecutor, the satisfaction comes from knowing that your care and skill ensured that a just outcome was obtained in a fair trial, one that will withstand scrutiny by the Court of Appeal.

“Criminal work is often a lonely exercise: late nights of solitary preparation, and difficult tactical choices having to be made on the run.”

## From the Launch

1. Jacob Fronistas OAM, His Honour Frank Walsh AM QC 2. His Honour Chief Judge Michael Rozenes AO 3. The Hon Justice Elizabeth Hollingworth, The Hon Geoffrey Eames AM QC , The Hon Justice Mark Weinberg 4. Jane Dixon QC, James Peters QC, Nicola Pachinger 5. Kristie Churchill, Ashlee Cannon and Julie Condon 6. The Hon Geoffrey Eames AM QC, The Hon Stephen Charles QC 7. Robert Richter QC 8. Rod Gray and Catharine Sedgwick

The ICC will certify to the public and to the funders that the advocate is competent to conduct such trials and indictable matters (including appeals and bail applications) and to do so efficiently.

The program will have particular value for young and inexperienced advocates, offering support and valuable training, and giving confidence that they are ready to enter the arena, including criminal trials.

The scheme, however, offers support and peer review to all advocates, however many years' experience they have chalked up. Experience is not always valuable; bad habits learned early can be repeated over a lifetime's practice. Likewise, careful and intelligent preparation can substantially overcome a lack of experience.

Whilst the ICC program concerns a declaration of competence, most criminal barristers aspire to excellence, not mere competence, and they recognise that they must not just acquire, but must maintain, knowledge of the complexities of criminal law.

The Committee overseeing this program understands that the certification of competency will quickly lose credibility if the process is nothing more than a rubber stamp for mediocrity.

But the Committee also understands that when there is doubt about an individual's competence many factors will need to be carefully addressed. No one who has practised in criminal law could pretend that they have never made errors that might have cost their client dearly. Hopefully, experience and advocacy training can reduce or eliminate some of the potential for error.

The objective of the Committee is ultimately to protect the community by setting high standards of competence for those who wish to practice in indictable matters. At the same time, the Committee must adopt processes that are both fair to the practitioners and recognise that criminal practice, in common with all legal practice, is not an

## From the Launch

9. Gabrielle Östberg, Jacqueline Stone 10. Diana Price, Astrid Haben-Beer
11. Professor The Hon George Hampel AM QC, Judge Felicity Hampel
12. Sergio Petrovich, Tony Burns, Simon Bright, Will Alstergren QC 13. Peter Morrissey SC
14. Carolyn Burnside, Colin Hillman QC

exact science. Mistakes, even serious errors of judgment, do not necessarily demonstrate that a practitioner is not competent.

The Committee must take seriously all allegations of incompetence, lest the certificate lose its value. But an allegation of incompetence might be uninformed or otherwise unreasonable, even if made by a trial judge.

The combined experience of the members of the Committee should give you confidence that the process will be both fair and appropriately rigorous.

The Committee is very fortunate to have the services of the Honourable Stephen Charles QC as deputy Chair. In determining what rules and procedures the Committee should adopt Stephen will bring his vast experience of the history, traditions and practices of the Victorian Bar, gained as a member of its many committees and as a former Chairman. In addition he brings his broad experience as a foundation member of the Court of Appeal.

Each of the other members of the Committee brings special skills to the task, and their leadership has been endorsed by the members of the Bar who have elected them to the positions that they now hold on the Committee.

The administrative support will be provided by a small but skilled unit comprising Jacqueline Stone and Gabrielle Ostberg.

The Committee will offer support and encouragement to advocates whose performance is below par. In that respect, the Committee will be continuing the fine tradition of mutual support and ongoing advocacy training that has gained an international reputation for the Victorian Bar.

There is much work for the Committee to do before the scheme is underway. We must settle and publish the rules and procedures that will be followed and determine the factors that will justify a certificate of competence being granted, maintained or withdrawn. We must consider appropriate continuing education programs that will be relevant to all practitioners, as well as programs for those who require additional or ongoing support or training.

This is a voluntary scheme and one I hope that all current and aspiring criminal barristers will want to support. Your presence tonight demonstrates that support, for which we are grateful.

I look forward to working with you.

# The French Australian Lawyers Society

## Great company, fine wine and some beautiful music – A Bastille Day treat for Francophile lawyers

AMY BRENNAN

Everyone dining at The French Brasserie on the 18th of July this year was treated to a stirring *a cappella* rendition of Edith Piaf's classic, 'Non, je ne regrette rien'. The singer was the Bar's very own, very talented, Natalie Vogel. Although undoubtedly much appreciated by her wider audience, she was in fact performing to a fortunate group of around 40 lawyers attending a Bastille Day celebratory dinner organised by the French Australian Lawyers Society.

Several other French-speaking or Francophile barristers were in attendance, as were a large number of solicitors. All partook in a delicious three course meal and had the pleasure of sampling some delectable Champagne thanks to the sponsor of the dinner, Champagne house Devaux Cuvee D.

Another multi-talented member of our Bar, Marian Clarkin, gave a very comprehensive and fascinating speech about the history and characteristics of Champagne. In between the music and speeches, those present took great pleasure chatting to each other in a mixture of French and English, with a couple of other languages bandied about for good measure.

The French Australian Lawyers Society has been reinvigorated this year under the stewardship of its current president, also a barrister, Marie Wilkening-Le Brun. The Society has held three functions, all of which have been very well attended and received.

The Society's Melbourne launch function was attended by over 60 lawyers and other legal professionals in May. The Society was lucky enough to have a very special guest attend and speak at the launch, the Honorary French Consul Madame Myriam Boibouvier-Wylie. Madame Boibouvier-Wylie spoke of the importance of a number of co-associations and societies currently active in Melbourne, including the French Chamber of Commerce.

The most recent function, held in August, involved a wine and cheese tasting night at Crockett Chambers.

The Society has members and is active in Melbourne, Sydney and Paris. It will be hosting further social events in Melbourne and Sydney in the near future. It will also be presenting a professional seminar series involving, amongst others, the French Chamber of Commerce and Industry. Those barristers interested in knowing more about or in joining the Society should consult its website at: *french-australian-lawyers.com.*

> "Several other French-speaking or Francophile barristers were in attendance, as were a large number of solicitors."

# Bar v LIV hockey match report

**ANDREW DENTON**

The 31st annual barristers v solicitors hockey match was held on 30 October 2014 at the State Netball Hockey Centre.

The sun was shining and the mood was optimistic at the start of the week, with 19 fresh, healthy players confirmed. Regrettably, due to a series of unfortunate and unexplained events throughout the week, that number (along with the optimism) had dwindled come game time. In the end we took to the field with 12, which number was quickly reduced to 11 following an early injury.

The team was captained by Robert O'Neill, who led from behind all game. His impressive frame and years of experience down back ensured it was difficult for the solicitors to get through on goal. O'Neill was joined in defence by our superstar recruit, Morgan Brown, who produced a game so strong that she snapped her stick in two.

Stuart Wood QC took to the role of coach like a duck to water, patrolling the sideline menacingly in full suit and tie and thick sunglasses. With the game tightly balanced at half time, Coach Wood motivated the troops with the inspirational line "I thought you guys would be 5-0 down by half time. Not to be offensive but, on paper at least, they are a much better team than you." With those words ringing in our ears, the team went on to a gallant defeat of 3-1.

The clerks were well represented with Michael Dever and Ross Gordon providing great targets up forward and applying a heap of pressure to the solicitors' defence; Gordon scored our only goal. As always, Nicholas Tweedie QC was a standout in the midfield, maintaining possession and finding passes where there seemed to be none.

On the whole, it was a great effort by the Bar and the match was approached with great spirit – as were the drinks afterwards. Finally, special mention must go to Judge Burchardt, who made his debut in this event 25 years ago, and is still making an important contribution to the team with his defensive efforts.

The Bar was represented by: Tom Lynch (GK), Morgan Brown, Robert O'Neill, Judge Burchardt, Nicholas Tweedie QC, James Batrouney, Andrew Denton, Alexis Agostino, Michael Dever, Ross Gordon, John Morgan, and Brian Kennedy.

**BACK ROW: Stuart Wood QC, Alexis Agostino, Andrew Denton, Brian Kennedy, Robert O'Neill, Tom Lynch, Nicholas Tweedie QC, James Batrouney FRONT ROW: Michael Dever, Morgan Brown, John Morgan, Judge Burchardt, Ross Gordon, Richard Brear**

PHOTOS COURTESY OF JOHN DEVER

(Left-Right): Lord Neuberger, James Merralls AM QC, Will Alstergren QC, Philip Crutchfield QC, Rodney Garratt QC

# The cost of justice, Pre-Raphaelites, impressionists, Sphinxes and chatterboxes: an evening with Lord Neuberger

On Friday evening, 8 August 2014, the Victorian Bar and the Anglo-Australasian Lawyers Society (AALS) were privileged to host the Right Honourable Lord Neuberger of Abbotsbury, President of the Supreme Court of the United Kingdom.[1] Lord Neuberger was welcomed by Victorian Bar Chairman, Will Alstergren QC, and introduced by AALS Victorian Chapter President, Rodney Garratt QC.

The McPhee Room in Owen Dixon Chambers was filled to overflowing with a broad assortment of judges and counsel as his Lordship addressed the gathering on his chosen topic, "Nuisance and Costs", which stemmed from the United Kingdom Supreme Court's decision this year in the case of *Coventry v Lawrence*.[2] In keeping with what has become a matter of universal concern throughout the common law world, Lord Neuberger highlighted the Court's disquiet as to the legal costs which were incurred by the successful appellants "to establish and enforce their right to live in peace in their home".[3] He mused that a fixed costs regime (similar to that which applies in Germany) might be appropriate in the future to ensure citizens have more affordable access to justice if levels of legal costs, systemically, cannot be better managed.

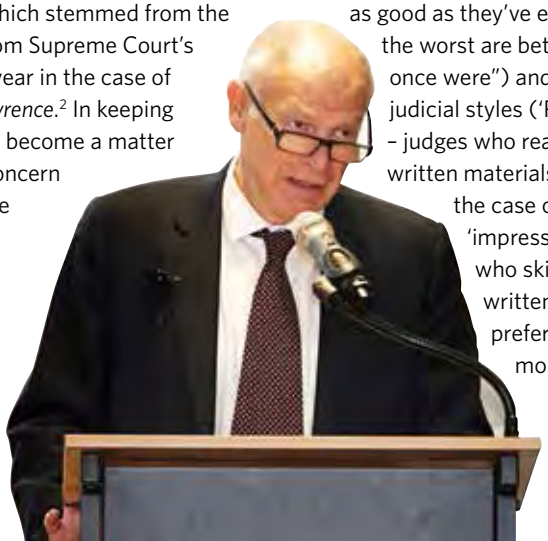
The Q&A session following the address, expertly facilitated by Commbar President, Philip Crutchfield QC, was most entertaining as his Lordship revealed some candid views on advocacy ("nowadays, the best advocates are as good as they've ever been, and the worst are better than they once were") and different judicial styles ('Pre-Raphaelites' – judges who read all of the written materials in detail before the case commences; 'impressionists' – judges who skim over the written arguments, preferring to engage more with the case during oral argument; 'Sphinxes' – judges who barely utter a word during oral argument; and 'chatterboxes' – judges who are overly interventionist). Importantly, Lord Neuberger emphasised that cases are better developed and the court is better assisted during oral argument when "judges don't bully counsel or try to score points, but rather 'push' counsel on their case or argument".

This was Lord Neuberger's second visit to the Victorian Bar, his previous visit being in 2009. He continues to be one of our favourite speakers to Owen Dixon Chambers and both the Victorian Bar and the AALS very much look forward to welcoming again in the future.

1 It is conventional for AALS addresses by distinguished speakers to be conducted under the 'Chatham House Rule'. The above summary of Lord Neuberger's address has been approved for publication by Lord Neuberger.

2 *Coventry v Lawrence* [2014] UKSC 13; *Coventry v Lawrence (No 2)* [2014] UKSC 46.

3 *Coventry v Lawrence (No 2)* at [35].



The Right Honourable Lord Neuberger of Abbotsbury Kt PC


Albert Monichino QC, Bronwyn Lincoln, Prof Doug Jones AO, John Arthur


Albert Monichino QC, Caroline Kenny QC, Karyl Nairn QC, John Arthur


Albert Monichino QC, Dr Gavan Griffith QC, Eugenia Levine

# International commercial arbitration

## Three fire-side chats with prominent international arbitration practitioners

JOHN ARTHUR

In conjunction with the Victorian Bar and Commbar, the Australian Branch of the Chartered Institute of Arbitrators (CIArb) recently hosted a series of three 'fireside chats' with prominent Australian international arbitration practitioners, Ms Karyl Nairn QC, Prof Doug Jones and Dr Gavan Griffith QC.

The first event, which featured Karyl Nairn QC, was held on 30 July at the new Melbourne Commercial Arbitration and Mediation Centre ('MCAMC'), Level 4 of the William Cooper Justice Centre, looking out over the dome of the magnificent Supreme Court building. The event was attended by Justice Croft, global law firm partners, barristers and young lawyers. Ms Nairn QC was joined in conversation by Albert Monichino QC, FCIArb, President of CIArb (Australia) and Caroline Kenny QC, FCIArb. Ms Nairn is global co-head of Skadden Arp International Litigation and Arbitration Group, based in London, and a Fellow of CIArb. In discussing her career, she spoke of her first case in a local court in Western Australia (where she hails from) in the 1980s, where her successful client announced to her after the hearing that "it was just like an episode of LA Law, but without the sex". Ms Nairn spoke with deep understanding of the differences and similarities between litigation and arbitration and the cross-cultural pressures faced by international arbitration practitioners, including the lack of favour in which cross-examination is held in civil law countries. She highlighted the success of Australian practitioners in international commercial arbitration and encouraged local practitioners to look to Asia for work in the field by building links with practitioners and institutions in that region. The panel asked insightful questions, which addressed many of the important issues in international arbitration. Ms Nairn addressed the questions with great knowledge and experience, but also with humour and transparency.

The second event, held at the offices of Herbert Smith Freehills ('HSF') on 28 August, featured Professor Doug Jones AO, one of Australia's leading international arbitrators and practitioners, in conversation with Albert Monichino QC and Bronwyn Lincoln, a partner of HSF who is also on the board of the MCAMC. Professor Jones is a partner with Clayton Utz. Between 2008 and 2014 he was president of the Australian Centre for International Commercial Arbitration (ACICA) and in 2010 served as global president of CIArb (and is presently chairman of its centenary celebrations). He is an author of a leading text on domestic arbitration[1] and holds professorial appointments at two Australian universities. He addressed recent developments in putting Australia on the international arbitration map, including the 2010 amendments to the *International Arbitration Act* 1974 (Cth) and the new uniform national domestic arbitration legislation - the Commercial Arbitration Acts - modelled on the UNCITRAL Model Law. He discussed the importance of the separate states of Australia working together to promote Australia as a hub for international arbitration. He commented on Australia's strengths, its talented legal profession, the facilities available, and noted that "it is a great place to visit". He talked personally about how he got into international arbitration and dispute resolution which

is a "very competitive space", and what an exciting and amazing challenge a practice in international arbitration posed. According to Professor Jones, the key to success in international arbitration is "persistence".

The third and final event in the series was held on 9 October, at the MCAMC. Dr Gavan Griffith QC, a Queen's Counsel at the Victorian Bar of over 30 years standing, prominent international arbitrator and a former solicitor-general of Australia, was joined in conversation by Albert Monichino QC, and Eugenia Levine, also of the Victorian Bar. What ensued was an engaging discussion, characterized by Mr Griffith's typical wit and intelligence, on topical issues in investor-state and international commercial arbitration. The discussion addressed the lively debate in Australia about: the inclusion of investor-state dispute settlement clauses in investment agreements; the growing arbitration market in the Asia Pacific region; the steps that Australian legal practitioners need to take to be competitive in that market; the potential for Australia to develop as a seat for arbitrations involving disputes between Australian and Asian parties, particularly in the resources sector; and the need for courts to refrain from applying conventional common law standards when reviewing and supervising arbitral decisions, and to adopt a non-interventionist approach.

The podcasts of each of these events are available for members of the Bar at: *www.vicbar.com.au/member-resources/cpd-education-resources/recent-cpd-podcasts-papers*.

For those wishing to join CIArb or learn about its activities, go to: *www.ciarb.net.au*.

To mark the Centenary of the CIArb next year, CIArb Australia will conduct its 2015 course in Sydney from 18-26 April 2015. CIArb Australia is now taking enrolments for the course: *www.ciarb.net.au/sites/www.ciarb.net.au/files/files/ciarbdiplomacourse2015flyer.pdf*

*John Arthur is a CIArb Fellow and member of the Victorian Bar was the MC for each of the international arbitration events.*

1 Commercial Arbitration in Australia, Thomson Reuters, 2nd Ed, 2012.



# Copyright: the international agenda

## Dr Francis Gurry addresses members of the profession on the future of copyright in the digital marketplace

CLAIRE CUNLIFFE

On 21 August 2014, CommBar, the Arts Law Centre and the Intellectual Property Society of Australia and New Zealand jointly hosted a presentation by Dr Francis Gurry on *Copyright: The International Agenda*. The Hon Peter Heerey QC chaired the presentation, which was well attended by intellectual property practitioners, including barristers, solicitors and academics.

Since 2008, Dr Gurry has been the director-general of the World Intellectual Property Organisation, headquartered in Geneva. He is also a chair of the United Nations' Committee of Management. Dr Gurry lectured in law at the University of Melbourne before joining WIPO in 1985. His text, *Gurry on Breach of Confidence*, is still the leading publication on the law relating to confidential information.

Dr Gurry suggested that the most significant current issues in copyright all related to the adaptation of copyright to the reality of a global digital content marketplace. Dr Gurry considered that digital technology posed two challenges for creative works. First, "reproducibility": a work created using an enormous amount of skill and labour and cost can be reproduced almost instantaneously, at very low marginal cost and to a very high quality. Second, "escapability": a work which is digitally reproduced and made available on the internet can be accessed anywhere. That is, the internet has revolutionised distribution.

Dr Gurry outlined three phases of response to the digital marketplace. He suggested that initially, the digital marketplace was met with fear by rights holders, who resisted the development of technologies such as MP3 and peer-to-peer software, with the consequence that file sharing technology such as Napster proliferated and litigation ensued. This phase was also marked by the passing of internet treaties by WIPO and national laws which made provision for digital rights management. The international framework for copyright, established by the Rome and Berne conventions, was left largely intact.

Next, Dr Gurry explained that the appearance of legal digital content was a response by rights holders to the digital marketplace, as business models were adapted to the new reality. Initially, this content was based on the systems used in the real world – for example, iTunes allows users to "purchase" a song, although some space-shifting was enabled (that is, it is possible to store the copyright material on more than one device simultaneously – for example, a computer and an iPod – unlike, for example, CDs, which can only be used by one playback device at a time).

Finally, Dr Gurry posited that we are entering a third and more revolutionary phase of adaptation to the digital marketplace, which has moved from a model of ownership to a model of access, using streaming and subscription services such as Netflix and Spotify.

Dr Gurry also discussed exceptions to copyright and their limits, and raised interesting points for discussion relating to educational institutions and libraries (including the vexed question of who or what is an educational institution or a library in the digital age). He discussed some of the possible ways in which the interests of rights holders could be balanced against the needs of developing countries in the digital marketplace.

After a lively question and answer session, the seminar participants enjoyed drinks at the Essoign Club.

The Honourable Peter Heerey AM, QC and Dr Francis Gurry

# Victorian Bar and Law Institute of Victoria conference 2014

## High stakes law in practice and the courts

JESSE J RUDD

The Victorian Bar and the Law Institute of Victoria hosted the inaugural joint conference on Friday 17 October 2014 at the Melbourne Convention and Exhibition Centre. Attendance was solid, as was representation by members of the Bar. The theme of the conference, "high stakes law in practice and the courts", was explored through eight separate panel sessions covering a broad suite of topics. Each session was presented by a panel of experts, including members of the judiciary, barristers, solicitors and corporate counsel.

The Chairman of the Bar, Will Alstergren QC, and the President of the Law Institute of Victoria, Geoff Bowyer, officially opened the conference. Chief Justices Warren and Allsop then delivered the first session. Their Honours provided a judicial perspective on current developments and challenges in conducting litigation in the Supreme and Federal Courts. In confronting the challenges of modern litigation, Chief Justice Warren spoke of a "litigation contract" between the bench, counsel and solicitors, obliging each to cooperate to ensure the proper administration of justice and better outcomes for litigants. Chief Justice Allsop outlined developments in the Federal Court which will see the Court divided into nine "significant areas" under a new "National Court Framework". The goal of the framework is to effectively produce nine national courts, each with expertise in the relevant "significant area".

Next, Justice Judd of the Supreme Court, Allan Myers QC, Caroline Kenny QC, Philip Crutchfield QC, Louise Jenkins (Partner, Allens Linklaters), Chris Fox (Partner, King & Wood Mallesons) and Raechelle Binny (Head of Dispute Resolution, National Australia Bank) presented on cost effective management of litigation. Among other topics, the panel discussed the risks and benefits of offshore legal processing and outsourcing, and the vexed question of oral evidence versus witness statements in commercial cases.

For the day's third session, Justice Jack Forrest of the Supreme Court, David O'Callaghan QC, Michael Wheelahan QC, Roisin Annesley QC and Maryjane Crabtree (Executive Partner, Allens Linklaters) considered the overarching obligations in the *Civil Procedure Act 2010* (Vic). The panel discussed some important recent cases and considered whether the overarching obligations cover new ground for practitioners.

Presenting an Australian and international perspective on arbitration were Justice Middleton of the Federal Court, Justice Croft of the Supreme Court, Albert Monichino QC, Martin Scott QC, Peter Megens (Partner, King & Spalding, Singapore) and Bronwyn Lincoln (Partner, Herbert Smith Freehills). This session explored the challenges and opportunities for Australian practitioners in the arbitration space. From a judicial perspective, Justice Croft emphasised the importance of predictable and competent jurisprudence in ensuring that our jurisdictions attract arbitration work, while Justice Middleton outlined the need for trial judges to resist the parties' attempts to raise every factual and legal issue at the enforcement or judicial review stage of arbitration proceedings. Drawing on his experience as an arbitration practitioner based in Singapore, Peter Megens offered an interesting insight into current arbitration developments in South-East Asia.

Class actions were on the agenda for the first session after lunch. The panel consisted of Justice Jack Forrest of the Supreme Court, Justice Jonathan Beach of the Federal Court, Ross Ray QC, Tim Tobin SC, Nicole Wearne (Partner, Norton Rose Fulbright), Ken Adams (Partner, Herbert Smith Freehills) and Brooke Dellavedova (Principal, Maurice Blackburn Lawyers). The panel outlined some of the unique features of class action litigation, such as expert evidence, largely in the context of the recent Kilmore East bushfire trial. A key issue identified by panellists was the difficulty in assessing quantum at an early stage of class action proceedings.

For the mid-afternoon session, participants were invited to choose between a session on the role of regulators in enforcement and litigation, presented by Wendy Peter (General Counsel, Legal and Economic Division, ACCC), Michael Kingston (Chief Legal Officer, ASIC), Fiona McLeod SC, Justin Brereton, David Ablett (Senior Executive Lawyer, Australian Government Solicitor) and Ross Freeman (Partner, Minter Ellison), and a session on litigation funding, presented by Justice Gordon of the Federal Court, Peter Riordan QC, Samantha Marks QC, David Leggatt (Partner, DLA Piper) and Jason Betts (Partner, Herbert Smith Freehills).

The final seminar of the day was entitled, "the collision of public relations and the law – managing strategic legal and PR objectives", presented by Will Houghton QC, Robert Richter QC, Julian Burnside QC, Leon Zwier (Partner, Arnold Bloch Leibler) and Tony Hargreaves (Partner, Tony Hargreaves & Partners).

Upon completion of the final session, the Hon Robert Clark, Victorian Attorney-General, delivered the closing address.

The conference was a success, both in its content and in the opportunity it presented for participants to meet other members of the profession. Its organisers have set a high standard for the years to come.

Julian Burnside


VBN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# VICTORIAN BAR Pro Bono AWARDS

SALLY BODMAN

The winner of the 2014 Victorian Bar Pro Bono trophy, Brian Walters QC, is one of the many members of our Bar who not only believes strongly in equal access to justice for all Victorians; but who also channels that belief into direct action providing countless hours pro bono to those in our community in need of assistance.

Brian Walters is a deserving winner. For more than thirty years he has consistently given his time to those otherwise unable to have their voices heard. He has represented victims of police misconduct at a protest at the Beverley Uranium Mine in South Australia, fought for human rights principles relating to the Tyler Cassidy Coronial Inquest, lead the team fighting the deportment of Stefan Nystrom who had lived in Australia since he was 25 days old, and defended environmental and peace protestors (including former leader of the Greens Bob Brown, and Neil Smith aka 'Hector the Protector'). These are just a few of his pro bono contributions.

Winners were announced in six award categories at an event held to thank the hundreds of Victorian Bar members who do pro bono work through the Bar's Pro Bono Scheme administered by Justice Connect, the Duty Barristers Scheme and through private connections with community legal centres, community groups and individuals.

This year's event was held amid the Gods, Myths and Mortals at the Hellenic Museum (at the former Royal Mint building). Jane Dixon QC, Chair of the Bar's Pro Bono Committee, welcomed guests and introduced guest speaker the Honourable Ron Merkel QC, a long-term and passionate supporter of the

1. Ron Merkel QC and Aggy Kapatiniak 2. Chair of Pro Bono Committee, Jane Dixon QC 3. Andrew Mansour 4. Tim Goodwin, Georgia Cooley, Megan Tait, Daniel Robinson, Hadi Mazloum 5. Aggy Kapatiniak and John Kelly 6. Ron Merkel QC and William Alstergren QC 7. Ron Merkel QC and Astrid Haben-Beer accepting on behalf of Daniel Aghion 8. John Kelly accepting an award on behalf of Kristen Walker 9. Romesh Kumar, Ben Kelly, Dean Churilov

Scheme, after whom one of the annual awards is named. Merkel spoke about his own personal commitment to levelling the playing field in providing dignified access to legal representation for all, and touched on the highlights of some of his many rewarding experiences in pro bono work over the last few decades.

Each of the award categories recognise the commitment to pro bono at varying levels of seniority and time at the Bar.

**Award recipients for 2014 were:**

» Victorian Bar Pro Bono Trophy: Brian Walters QC for his outstanding pro bono contribution to environmental law and human rights.

» Daniel Pollack Readers Award: Joel Silver for pro bono assistance to consumers in Banking Law and in volunteer work

» Ron Castan AM QC Award: David Yarrow for pro bono assistance in the Muckaty Station litigation in the Northern Territory

» Susan Crennan AC QC Award: Kristen Walker for pro bono assistance in refugee, transgender and environmental issues

» Ron Merkel QC Award: Daniel Aghion for pro bono advice and advocacy for homeless people

» Public Interest/Justice Innovation Award: Jason Pizer QC, Emrys Nekvapil and Fiona Spencer for their work in *Bare v Small*, assisting an African youth who was the subject

The Bar congratulates the winners and nominees of each award and thanks all those who continue to give selflessly of their time. Special thanks also to the Pro Bono Committee for their effort in organising the event, in particular Maya Rozner whose energy and flair was heavily evident in the success of the evening.

News AND Views

# *Bon anniversaire*

## 10 years into the reign of two chief justices

*Victorian Bar News* interviewed Chief Justice Warren of the Supreme Court of Victoria and Chief Justice Bryant of the Family Court of Australia to discuss their 10th anniversaries.

GEORGINA SCHOFF & GEORGINA COSTELLO, EDITORS

Chief Justice Warren's 10th anniversary was actually in November 2013, but she graciously agreed to this joint interview, quickly pointing out that this year, she is helping Chief Justice Bryant to celebrate her 10th. This article is published, in respect of Warren CJ's anniversary, *nunc pro tunc*.

The Honourable Marilyn Warren AC QC was appointed a judge of the Supreme Court in 1998 and became the eleventh Chief Justice of the Supreme Court of Victoria in 2003. Her Honour is also the Lieutenant-Governor of Victoria, Chair of the Judicial College of Victoria, Chair of the Council of Legal Education, and Chair of the Courts Council, Court Services of Victoria. Given Warren CJ's busy workload, it makes sense that she was a champion squash player, who represented the state of Victoria and won the Australian championships three years running.

Warren CJ completed her articles of clerkship as the first female articled clerk in public service in Victoria. After her admission to practice in 1975, she worked as a solicitor in the government sector. Her Honour gained management experience as deputy secretary of the Law Department of Victoria, and was a senior policy adviser to three Attorneys-General of Victoria before she was called to the Victorian Bar in 1985. At the Bar, she practised as a barrister in commercial and administrative law and took silk in 1997.

The Honourable Diana Bryant AO was appointed Chief Justice of the Family Court of Australia on 5 July 2004. Before her appointment, she oversaw the establishment of the Federal Magistrates Court (now the Federal Circuit Court of Australia) as its inaugural Chief Federal Magistrate from 2000 to 2004. Before that appointment, Bryant CJ practised at the Victorian Bar from 1990, where she specialised in family law, particularly at the appellate level. She was appointed a Queen's Counsel in 1997. Born in Perth, she is a third-generation lawyer who graduated with a Bachelor of Laws from the University of Melbourne and a Master of Laws from Monash University. She was a director of Australian Airlines from 1984 to 1989. Her two-state background and experience in governance and advocacy make her an ideal leader of Australia's national Family Court. Bryant CJ is also the patron of Australian Women Lawyers.

By chance, it was Chief Justice Bryant's birthday when *Bar News* interviewed both chief justices in Chief Justice Bryant's sleek,

modern chambers. It is a stylish workspace high up in a corner of the Commonwealth Law Courts building, overlooking Flagstaff Gardens and William Street. Contemporary art hangs on white walls, bright with natural light from the large windows – without a chesterfield in sight. Chief Justice Warren walked up William Street from her chambers in Victoria's historic Supreme Court building to this very contemporary setting to join Chief Justice Bryant for the interview and a cup of tea. We asked both women about the role of chief justice, their experiences so far and their aspirations for their respective courts.

> "Chief Justice Warren walked up William Street from her chambers in Victoria's historic Supreme Court building to this very contemporary setting to join Chief Justice Bryant for the interview and a cup of tea."

According to their Honours, the role of chief justice has two main aspects. The first is to provide leadership in the judicial tasks of hearing and determining cases. This is a well understood function for which a life at the Bar might reasonably be expected to equip a chief justice. The second, equally important, aspect is to administer the work of the court, because a fair, efficient and independent court is essential to the community's confidence in our judiciary and our democracy. A well-functioning court with a reputation for excellence and high morale in turn attracts the high calibre judges required to perform

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judicial work. In this respect, the role of chief justice requires leadership and managerial qualities not necessarily found in barristers. *Bar News* readers might consider that, before appointment as a judge, the managerial experience of many, if not most, barristers is limited to hiring a personal assistant and undertaking volunteer positions on not-for-profit boards and school councils.

During our interview, both women were generous with their time and in their support of each other. Both have faced similar challenges and might justifiably talk of their achievements, yet each preferred to highlight the achievements of the other. It was illuminating to hear their observations; after all, one chief justice is well qualified to comment on the performance of another.

Chief Justice Warren credited Chief Justice Bryant first with winning the admiration and respect of her colleagues; secondly with repositioning the Family Court as a superior court of record with an appellate jurisdiction; and thirdly with building the Court’s reputation both in Australia and internationally.

We note some have observed that before Bryant CJ’s appointment, there was a reluctance to publish judgments, no doubt due to the difficulties posed by section 121 of the *Family Law Act* 1975 (Cth), which prohibits the publication of any account of proceedings that identifies a party. Bryant CJ overcame these difficulties by establishing the court’s Judgments Publication Office, which ensures that judgments are anonymised so that they can be published. According to Warren CJ, Bryant CJ has transformed the court into one that produces a significant body of jurisprudence equal to any superior court.

By working with the Federal Circuit Court to share resources and in case management, a task that is by no means complete, Bryant CJ says that the Family Court has for the first time been able to find its niche as a superior court. Now, the Federal Circuit Court does the bulk of first instance family law work, leaving the appellate and most complex first instance work to the Family Court. Having served as the inaugural Chief Federal Magistrate, Bryant CJ was well placed to facilitate the process of the two courts moving in different directions.

Chief Justice Bryant is particularly enthusiastic about the court’s role at The Hague in relation to international conventions concerning, for example, child abduction and adoption. She enjoys the court’s long-standing relationship with the religious courts in Indonesia, a relationship established early in her time as Chief Justice. This, in turn, has helped foster shared understanding and knowledge between nations and access to justice in Indonesia. Internationally, the Family Court is seen as a leader in its field. With its unique, specialised jurisdiction, it regularly hosts international delegations and is well placed to take a leadership role on issues like child abduction and surrogacy. The Chief Justice is able to lend her authority and reputation to help achieve international outcomes to deal with these issues, as she recently demonstrated when she spoke publicly about the need to act on international surrogacy.

Of Chief Justice Warren’s many achievements, Chief Justice Bryant is particularly impressed by her remarkable feat in bringing about true independence of Victorian courts from the executive arm of government. This has been done through the establishment of Court Services Victoria, an independent statutory body overseen by the Courts Council, which Warren CJ chairs. Bryant CJ explains that a recurring topic of discussion for chief justices in Australia is the difference between the Commonwealth model of independence from government, a “one line budget”, which gives federal courts the independence to decide how to spend their allocation, and the state model which has required their state counterparts to reach financial accommodation with state governments on every spending requirement. Bryant CJ points out that such independence has been seemingly very difficult for state supreme courts to achieve and that only Victoria has done it. She credits this great reform to Chief Justice Warren’s “persistence, determination, brilliant strategy and ability to create confidence in the Court”. The reform faced considerable opposition but now that it has been achieved, Chief Justice Warren is quietly pleased with the smooth transition, which saw the transfer of all the court’s assets and the budget to Court Services Victoria in July this year. This new administrative model will initially demand much of her time but she expects that it will all settle down in the future. This is a remarkable landmark for the judicial arm of government in Victoria.

And then there is the achievement of each Chief Justice in transforming the working life of her court. Chief Justice Bryant observes that being a judge can, in many ways, be a lonely job and the work is relentless. The cases that come before her Court involve the most difficult of circumstances. The judges of the Supreme Court too have to deal on a daily basis with horrific events. Warren CJ resolved early on in her stewardship to achieve “a high

“Warren CJ resolved early on in her stewardship to achieve “a high level of judicial happiness”. Bryant CJ agrees that an important aspect of the role of chief justice is to engender collegiality through the encouragement and support of the judges working in the court.”

level of judicial happiness”. Bryant CJ agrees that an important aspect of the role of chief justice is to engender collegiality through the encouragement and support of the judges working in the court. This task is particularly challenging in the Family Court where the judges are spread across the country. Bryant CJ tackles the problem, in part, by ensuring that she sits on full courts in each registry as often as she can.

The model of leadership that Warren CJ has chosen demonstrates her desired outcomes. Traditionally the role of Chief Justice was that of an autocratic, omnipotent leader. In Chief Justice Warren’s court, a sensible democratic and collegiate model prevails. The President of the Court of Appeal has his responsibilities and the principal judges look after their various Divisions. In this way, responsibility for the conduct of the business of Court is shared between the judges, and the judges themselves are happy. This in turn attracts eminent people to judicial office, the reputation of the Court is enhanced, and the community is better served.

Under Warren CJ, the Supreme Court has also seen a realignment in the nature of its business. The Court increasingly deals with serious corporate crime and, in the common law area, large class action trials. Under the Chief Justice, the Commercial Court has been established, which is a national leader in civil litigation. There has also been exponential growth in environmental law and administrative law proceedings. This growth in the Court’s work might be attributed to a number of factors, not least of which is the community’s confidence in the Court. Her stewardship has seen the replacing of masters with associate justices and the expansion and elevation of their role, together with their involvement in alternative dispute resolution. This is part of the Court’s focus on supporting and assisting parties in resolving their disputes. It has also seen dramatic reform in criminal, and shortly, civil appeals.

Both these women have driven the administrative and structural changes necessary to place their courts in the best possible position for the future. So what challenges and aspirations do they have for the remainder of their tenure? In the case of the Family Court, Chief Justice Bryant identifies the need for separation of the administration of the Federal Circuit Court from the Family Court. She says that whilst the direction the Court is headed in is a good one, it would be nice to end her time as Chief with improved administrative arrangements in place. *Bar News* observes that with her background as a “divorce lawyer”, her Honour is well qualified to lead this disentanglement.

Warren CJ immediately identifies the built environment of the Supreme Court as her next challenge. The Supreme Court of Victoria is housed in a heritage building that is increasingly unsuitable for the conduct of technology-driven litigation. Under Chief Justice Warren, the Court has embraced the opportunities afforded by modern technology to improve access to justice. The court has an interactive website, parts of large class action trials may be viewed remotely via online streaming, and this year the Red Crest electronic filing system was introduced for cases in the Commercial Court. The Supreme Court was the first in Australia to have a Twitter account with thousands of followers, it has hundreds of friends on Facebook, and its judges have been known to ‘blog’.

Warren CJ hopes to see the Bar and other members of the profession bring what power and influence they might have to achieve her goal of a new Supreme Court building for Melbourne. “We have a beautiful Supreme Court building of historic importance,” she says, “but it shouldn’t be an excuse for not providing proper and modern accommodation.”

The role of Chief Justice is terrifically demanding. The performance of the Chief Justice is pivotal in the good standing of a court. In Warren and Bryant CJJ, their courts have found capable leaders, who have improved the administration of justice with panache. While carrying out much hard work, both women have maintained a calm appearance and won great respect from the judges they lead. *Victorian Bar News* congratulates Chief Justices Warren and Bryant on their achievements thus far and wishes them every success in the challenges ahead.

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# Wake up and smell the money: the case for a federal ICAC

STEPHEN CHARLES*

Earlier this year the Prime Minister, asked by a reporter if there ought to be a Commonwealth Anti-corruption Commission, replied "No," saying that he thought Canberra was a "pretty clean polity." It is possible that not many people agree with him, certainly if the *Australian's* front page article (10 October 2014) is correct. That article quoted a survey by Griffith University's Centre for Governance and Public Policy, showing that the Federal Government now ranked third behind state and local government on the crucial issue of trust.

In May this year the Australian Greens leader, Senator Christine Milne, introduced in Parliament a bill to create a national anti-corruption body, saying at the outset that "the Federal government is the only jurisdiction without the infrastructure to confront corruption". Senator Milne continued to make a powerful case for the creation of such a body, it being the third time that the Greens had put before the Federal Parliament a bill to "crack down on public sector corruption and promote integrity in our public institutions" by creating such an office. Unsurprisingly, the bill was once again voted down.

The principal argument in favour of a federal anti-corruption commission can be very shortly stated. Corruption occurs when and where money, power and influence are found and persons pursue them in a criminal or improper way. Each state government now has an anti-corruption body because each controls money, power and influence in great quantity. But by far the largest quantity of each is in the control of the Commonwealth government in Canberra and there is no obvious justification for assuming or asserting that some cleansing wind purifies the air in Canberra and stops abruptly at the outward boundaries of the Australian Capital Territory. In this context it should be noted that the Federal Government each year purchases tens of billions of dollars of goods and services. In and between the years 2006 and 2009 the Defence Department alone spent more than $48 billion. In 2009 there were more than $45.5 billion worth of tenders sought by this department.

Corruption is usually well-hidden, it is difficult to discover and expose, and it needs a body with the powers and bite of the NSW ICAC to achieve this result. And the Commonwealth ought to be an enthusiastic supporter of the creation of such a body since it is a signatory of the United Nations Convention Against Corruption (UNCAC), a member and chair of the G20, and a member since 2013 of the Open Government Partnership. Article 36 of UNCAC requires Australia, as a state party to:

> *"ensure the existence of a body or bodies specialised in combatting corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence … to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies shall have the appropriate training and resources to carry out their tasks." (Emphasis added)*

No such body or system has been established by the Australian government. Instead, the government created a specialised anti-corruption body, the Australian Commission for Law Enforcement Integrity (ACLEI) but initially confined its jurisdiction to the activities of three law enforcement bodies, principally the Federal Police (AFP) and the Australian Crime Commission, and has since added the Australian Customs and Border

> “Accountability Round Table submissions to the Attorney-General’s Department in 2012 noted at least nine examples of corrupt conduct.”

Protection Service, the Australian Transaction Reports Analysis Centre (AUSTRAC), the Crimtrack Agency, and prescribed aspects of the Department of Agriculture. There is now an inquiry underway as to whether ACLEI’s jurisdiction should be extended to cover the whole Department of Agriculture, the Australian Securities and Investments Commission (ASIC), the Attorney-General’s Department and the Australian Taxation Office (ATO). But even if these bodies are brought within ACLEI’s jurisdiction, it will still not have jurisdiction over most public servants, members of parliament, their staff, the judiciary or most federal bodies or persons making decisions or providing services involving the expenditure of public funds in the Commonwealth.

The Office of Integrity Commissioner and ACLEI were established by the *Law Enforcement Integrity Commissioner Act* 2006 (the LEIC Act). The scheme of this Act is to place various bodies under ACLEI’s jurisdiction, and to give ACLEI the primary role of investigating law enforcement-related corruption issues, giving priority to systematic and serious corruption. ACLEI also collects intelligence about corruption in support of the Integrity Commissioner’s functions. The LEIC Act functions, however, by establishing a framework under which the integrity commissioner and the relevant agency heads are to prevent and deal with corrupt conduct jointly and cooperatively. The arrangement accepts that each agency will have set up internal corruption controls and will maintain continuing responsibility for the integrity of its staff members. The LEIC Act then requires the head of an agency in ACLEI’s jurisdiction to notify the integrity commissioner of any information or allegation that raises a corruption issue in that agency. The government’s approach to preventing corruption has therefore been that no single body should be responsible, rather that there should be a range of bodies and governmental initiatives to promote accountability and transparency. The shared responsibility also relies on the obligation imposed on each agency to refer issues involving corruption to the integrity commissioner.

All these issues have repeatedly been taken up by the Accountability Round Table (ART), a non-partisan body of individuals concerned to pursue the achievement of accountability and transparency in government throughout Australia, in a series of submissions to governments at the federal level since at least the start of January 2011. The ART’s concerns are that even with the bodies presently under consideration, the jurisdiction of ACLEI is inadequate, and Australia needs a single national anti-corruption body covering the whole Commonwealth sector. The ART has been concerned that the risk of corruption is continuing to increase exponentially. But most of all the ART seeks to challenge the absence of a single body responsible for investigating Commonwealth corruption. The danger of a multi-body approach with shared responsibility is that it results in no body having ultimate responsibility and each body involved being likely to assume that all is well because there is someone else making sure that nothing corrupt is occurring. Not only does this mean that corruption can fall through the gaps between the various bodies, but also, since the system depends on cooperation between the bodies and their heads, there can be a variety of reasons for the head of one agency not referring a matter to the integrity commissioner. In the ART’s view, its arguments have been made good by the happening of a succession of scandals in the Commonwealth arena, occurring while ACLEI was the only body supposedly in charge of investigating any corruption in that area.

The following instances are merely examples of the misconduct likely to be produced in an environment of money, power and influence. Most of the examples which follow have been contained in submissions made to one or other section of the Commonwealth by the ART since 2010 under the chairmanship of the Hon Tim Smith QC. Many of them were first exposed by investigative teams of the Fairfax newspapers, usually either in *The Age* or *The Sydney Morning Herald*.

First, the Australian Wheat Board (subsequently, AWB Ltd). During the Iraq War, Australia was a party to trade sanctions which limited the sale or supply to Iraq of goods or products. AWB had a statutory monopoly in the export of Australian wheat. It exported wheat to Iraq but to facilitate these transactions it made payments contrary to the trade sanctions. That this was occurring for a lengthy period was the subject of allegations by, inter alia, AWB’s competitors. There was no single body or dedicated system with the responsibility to investigate AWB’s performance in selling wheat to Iraq, and it was only after troops entered Baghdad and documents came to light revealing this practice that a royal commission was established. AWB’s personnel claimed that the practice was well-known to the Australian government. Be that as it may, any internal systems that should have uncovered the practice had failed, and there was, as now, no body with the responsibility to ensure that AWB was abiding by the trade sanctions in operation.

Next, the foreign bribery allegations concerning Note Printing

Australia (NPA) and Securency, two companies which produced and sold bank notes to the Australian government and to overseas governments. Allegations of foreign bribery dating back to 1999 involving NPA arose in 2007. In 2007, the NPA Board became concerned about management's slowness in implementing a request by the Reserve Bank (RBA) that it review and strengthen its policies about the engagement of foreign agents. The deputy governor of the RBA received a written briefing from an NPA employee containing admissions that Malaysian and Nepalese agents of NPA had paid bribes for NPA. The NPA board discussed the issue and decided the matter should be handled internally. These events and the conduct of NPA and Securency had been the subject of a continuing campaign by *The Age*. The NPA Board and the RBA have maintained that the NPA board sought appropriate information and advice, responded appropriately to the information it received and relied on the advice it was given. After 2009, the saga continued with Securency. In May 2009 the RBA became aware of bribery allegations against Securency from reports in *The Age*, which resulted in an AFP investigation. Reports in *The Age* in July 2011 indicated that nine people had been arrested in relation to alleged bribery by Securency in Malaysia, Nigeria and Vietnam. Later two Austrade officials were identified as having facilitated contacts with overseas government officials alleged to be corrupt.

Further reports in *The Age* claimed that the full list of tax haven accounts used between 1999 and 2009 was greater than had been previously reported and raised serious questions about the level of scrutiny applied by the RBA-appointed board directors. More than $30 million was alleged to have been wired by the two companies to accounts in Liechtenstein, Switzerland, Belgium, the Seychelles, the Isle of Man, Guernsey, Jersey, the Bahamas, United Arab Emirates and Hong Kong. *The Age* reported that the Securency Board authorised the payment of more than $18 million to tax havens between May 2006 and September 2009.

ART submissions to the Attorney-General's department in 2012 noted at least nine examples of corrupt conduct involving a range of public agencies including companies closely associated with the RBA, an Assistant Commissioner of Taxation, evidence of corruption of the Defence procurement system, bribery of an ATO inspector, corruption of at least 15 Customs and Border Protection officers and rorting of allowances by employees in the Attorney-General's Department. In May 2012 information was revealed from a top secret Polaris Task Force Report of "rampant corruption" involving customs and quarantine officials, port workers and organised criminals. The Public Services Commissioner's State of the Services Report of 2010/11 indicated that at least 2,120 Australian Public Service (APS) employees were investigated for suspected breaches of the Commonwealth Code of Conduct involving dishonesty, theft (including identity theft), misuse of Commonwealth resources, misuse of information for private gain, misuse of authority or power or conflict of interest.

A *Sydney Morning Herald* investigation led to reports in September 2011 by Linton Besser that there had been over 3,800 internal investigations of APS staff in nine departments and 1,300 in the Department of Defence; in the previous two years 83 internal investigations in the ATO; and in the previous 12 months in 10 agencies, 21 allegations of corruption, 65 of conflicts of interest and 47 cases of fraud. But Mr Besser also found that the AFP concentrated on drug traffic and counter-terrorism and were reluctant to deal with fraud matters, and would only deal with official misconduct which touched on criminality at the top end of the spectrum because it had other priorities.

As recently as September 17, 2014, a man who worked for the Australian Bureau of Statistics pleaded guilty in the Melbourne Magistrate's Court to passing inside information on employment, trade and retail figures moments before they were released to the market to a banker who used the data to make trades on currency markets based on which direction the Australian dollar was expected to move. The scheme was alleged to have reaped $7 million for the banker in illegal foreign exchange trades.

Since 2012, the community has been made aware of the disclosures following the NSW ICAC's investigations into the activities of the former NSW Minister for Mining, Mr Ian Macdonald and the Obeid family and the many recent revelations in ICAC hearings concerning political donations on both sides of the political spectrum in NSW. Some argue that NSW is Australia's most corrupt political jurisdiction, others that the most serious disclosures relate to land use decisions which are not a federal concern. The opposing argument is that the allegations in NSW are investigated because NSW has Australia's most effective anti-corruption system. As Mike Seccombe argued in the *Saturday Paper* in May this year, "the laws in NSW are the most stringent of all, a low declaration threshold ($1,000), tight caps on donations and prohibitions on some donors including property developers …" By contrast, Seccombe said, the federal system is the biggest and weakest of all the nation's electoral funding

> "The Federal system is the biggest and weakest of all the nation's electoral funding regimes."

> "If East Timor's allegations are made good in the Arbitral Tribunal in The Hague, Australia will be stigmatised in the international community as having been guilty of an indefensible fraud."

regimes. There are no prohibitions on any class of donors and no caps on the size of donations or expenditure. Seccombe argued that "the effect of this is to make it all but impossible for an outsider to determine exactly who has given exactly how much to which politician, and to what end."

Political donations are made by many people out of a genuine desire to fund and support the political party of their choice, and without any ulterior motive. The principal problem with political donations is, however, that for many others they are a means to buy access and influence which is not available to the general community. As former Senator Rob Oakeshott put it recently:

> *"The real threat [to Australia's future] is within government itself. It is the increasing corruption of our public decision-making by influence gained through record levels of private donations. The only colour Australia needs to fear is the colour of money in its democracy. Cheque book decision-making is the silent killer of necessary reform."*

Oakeshott in his comment in the *Saturday Paper* of October 18-24 continued:

> *"I saw these "coincidental" donations with my own eyes".*

He then draws attention to the timing and size of donations made by casino interests "when Andrew Wilkie's poker machine legislation was in its eleventh hour". He observes that the "Liberal National Party picked up at least $300,000 just days before" Tony Abbott met those interests to discuss those same issues. Mr Oakeshott goes on to note that Bob Katter's Australian Party received $250,000 when it was discovered, following a private meeting with them, that representatives of the Casino shared Mr Katter's fascination with "Red Ted Theodore".

Mr Oakeshott then, evenhandedly, reminds us that it wasn't just them. Union slush funds directly determine who gets into Parliament for the ALP, and control what decisions are made. It nearly brought down the 43rd Parliament with the intrigue of Craig Thomson.

Mr Oakeshott continued:

> *"Then there was the late Paul Ramsay, one of the biggest LNP's donors, who aggressively opened his pockets when the private health insurance debates were on. Or the various industries – such as alcohol and tobacco – when the tax models or plain packaging were being considered. Famously, it was the coal industry not Tony Abbott who killed the mining and carbon laws, both through direct donations or third-party advertising."*

The amount of money that may be involved in these donations is potentially enormous. Kelvin Thompson in a recent speech in the Federal Parliament referred to the company Australian Water Holdings as a case study in the politics of greed, operating as a funnel for vast amounts of money for political lobbying for both the Labor and Liberal parties. He quoted the NSW ICAC's counsel, Geoffrey Watson, SC as saying in April this year that one of the nation's largest developers had hidden his donations to the NSW Liberal Party via the Free Enterprise Foundation. Donations to this body, he said, were immediately re-donated to the party in a "systematic subversion of the electoral laws". Mr Thompson said that a 2012 Fairfax Media analysis of returns to the Australian Electoral Commission showed in the case of the Victorian Liberal Party, that only a handful of donors were publicly disclosed. A mere $485,000 of the party's total income of $18,500,000 for the election year 2010/11 was sourced to corporate industry or individual donors. There are alleged to be hundreds of "associated entities," businesses, companies unions and foundations, such as the Free Enterprise Foundation, set up to collect money and pass it on to the parties. Similarly there are clubs such as the Treasurer's North Sydney Forum which charge membership fees (up to $22,000 in the case of the North Sydney Forum) to business figures and lobbyists in return for access.

More recently, the special case of the litigation between Australia and East Timor has raised the question of whether the Australian security services should also be subject to greater investigation for improper behaviour. In 2004 the Commonwealth was negotiating with the Democratic Republic of Timor-Leste (East Timor) to share revenues from the oil and gas deposits under the Timor Sea called the Greater Sunrise Field. Since December 2013 East Timor has alleged that during these negotiations ASIS used the cover of Australia's aid program to install listening devices inside the East Timorese Cabinet Room and elsewhere so that Australia could spy on sensitive information. Woodside Petroleum, hoping to exploit the gas fields, was working with the Australian government to secure the best possible deal. The allegation of the solicitor acting for East Timor, Bernard Collaery, is that the director-general of ASIS and his deputy instructed a team of ASIS technicians to travel to East Timor in an elaborate plan, under cover of Australian aid programs relating to the renovation and construction of the Cabinet offices in Dili, to insert listening devices into the wall, which were to

be constructed under the Australian aid program. Mr Collaery alleged that the ASIS operator decided to blow the whistle after learning that a former minister, who had held a relevant ministerial portfolio at the time of the 2004 negotiations, had become an advisor to Woodside Petroleum after his retirement from politics. East Timor then launched a case before an International Arbitral Tribunal in The Hague to have the oil and gas treaty declared void as obtained by fraud. East Timor intended to prove its case by calling as a witness before the Tribunal the ASIS operator who was the former director of all technical operations in ASIS. However officers of ASIO raided the offices of Mr Collaery in Australia, seizing files and electronic material, and the passport of the retired ASIS operator who was to give evidence in The Hague was cancelled.

The Attorney-General, George Brandis QC, has confirmed that he approved the warrants to conduct the raid, saying that ASIO requested the search warrants on the ground that the documents and electronic data in question contained intelligence relating to security matters. Both Mr Brandis and the Prime Minister have defended the raid on Mr Collaery's office and the use of the search warrants as being done in the national interest, and to protect Australia's national security interest. The Government now says that it will not comment on security matters. It would seem, however that the only secrets likely to be disclosed by the ASIS officer would relate to the identity of ASIS officers in any bugging operation and the operational methods used by ASIS for that purpose. It is noteworthy that Australia's response to East Timor's major claim appears not to deny, but rather implicitly to accept, that the bugging operation took place.

If East Timor's allegations are made good in the Arbitral Tribunal in The Hague, Australia will be stigmatised in the international community as having been guilty of an indefensible fraud and grossly unethical activity against East Timor, and having attempted to prevent the fraud being proved in evidence by actions which in ordinary court proceedings would be regarded as a most serious contempt of court. Last month it was alleged that the Australian Government has now asked the AFP to investigate if Mr Collaery and the ASIS agent can be charged with disclosing classified information, supposedly in relation to the revelations that Australia spied on East Timor during sensitive oil and gas treaty talks. This appears to be a further admission by the Australian Government that the allegations of East Timor are justified. If no bugging operation was undertaken by ASIS on Australia's behalf, there would be no classified information to divulge. Even if the raid on Mr Collaery's office is not to be categorised as a contempt of court, ASIO's officers and the Attorney-General's office can only be regarded as having taken part in an attempt to prevent the fraud being proved in the Tribunal. At the very least, the evidence so far available to the public raises serious concerns that would thoroughly justify investigation by an anti-corruption commission with effective powers. The whole affair suggests a prevailing attitude in the senior levels of government and Australia's security services that Canberra "can get away with anything."

The ART's case for the necessity to set up an anti-corruption commission in Canberra argues that the risks of corruption have been increasing in recent years for a variety of reasons. These include the increase in government control of information, the ever increasing need for funding of political campaigns, the methods employed by government and the failure to enact legislation to provide adequate controls and transparency, the commercialisation of government services and projects, the development of lobbying, the inadequacies of any attempt to control that activity and make it transparent in a timely manner, and the failure to stop or control the flow of ministers and their staff to the lobbying industry on retirement from their positions. Combined with these factors there is an increased risk of corruption resulting from the impact on major vested commercial interests of the significant changes that will be needed to address the problems posed by climate change and the exhaustion of natural resources, including energy, water and phosphate.

Relying on cooperation between a range of bodies covering only part of the activities of the Commonwealth was never a satisfactory approach to the prevention of corruption in the federal area, and has been shown to be ineffective. It is essential that there be in place a single independent body with overarching responsibility to expose and prevent corruption.

It is high time that a comprehensive independent integrity system was created for the Commonwealth, incorporating a general purpose Commonwealth anti-corruption agency with educative, research and policy functions and all necessary powers, and which is subject to parliamentary oversight.

"It is high time that a comprehensive independent integrity system was created for the Commonwealth, incorporating a general purpose Commonwealth anti-corruption agency."

*The Hon Stephen Charles QC is a former Judge of the Court of Appeal and Supreme Court of Victoria. He lectures at Melbourne University Law School Master's Course on the law of royal commissions and other public Inquiries. He is an executive member of the Accountability Round Table.

# The James Merralls visiting fellowship in law

On Wednesday 28 May 2014, the Hon Michael McHugh AC QC launched the James Merralls Visiting Fellowship in Law at the Supreme Court library. James Merralls AM QC and the Dean of Melbourne Law School, Professor Carolyn Evans, also made speeches. The Fellowship honours the contribution made by Mr Merralls to the Australian legal profession, in particular through his editorship of the Commonwealth Law Reports for almost 50 years. *Victorian Bar News* is pleased to publish this speech delivered by Michael McHugh.

It is a great honour to be asked to speak in support of the James Merralls Fellowship. Let me begin by thanking all those who have made donations to the Fellowship and encourage those who haven't to pledge tonight to make a significant donation in support of it. Ms Diane Costello will gladly sign you up before you leave the building. Over $400,000 has already been pledged and the aim is to raise $500,000 by the end of 2015, which, as they say, is certainly doable.

The Hon Michael McHugh AC QC

The notion of a Visiting Fellowship is not only a splendid idea with long term benefits for the development of Australian law as well as for the University of Melbourne but, given the extraordinary contribution Jim Merralls has made to the law of Australia, no Australian lawyer is more deserving than he is to have a visiting fellowship identified by his name. We should congratulate those who conceived the idea of creating a visiting scholarship program in the name of James Merralls. It was an inspired decision. Jim has given you the details of the scholarship program and what it seeks to achieve and this relieves me of the task of doing so. It allows me to confine my remarks to the Jim Merralls I know, a much admired and loved lawyer and a true Renaissance man.

Jim Merralls is an erudite and scholarly lawyer like all – well, like most – members of the Victorian Bar. So it has perplexed me as to why I should be asked to speak on this important occasion, because my understanding has long been that Victorian lawyers regard us NSW common lawyers, as Rudyard Kipling might have said, as a "lesser breed" of lawyer, if indeed they regard us as real lawyers at all. I suspect the most likely reason for choosing me to speak this evening is that Jim and I share a passion about horse racing; his interest being in the breeding of horses and mine in their performances on the race track. In other words, he's a breeder; I'm a punter.

I can't remember the time and circumstances in which I first met Jim Merralls, but I remember very clearly when I first became aware of his name. It was on reading a two-part article that he wrote called "Judicial Power Since The Boilermakers' Case: Statutory Discretion and the Quest for Legal Standards", which was published in Volume 32 of the Australian Law Journal in January and February, 1959. It was a brilliant analysis of that power. For many years while I was at the Bar, that article was my bible whenever I had to deal with a question concerning judicial power. I don't know what Jim would think of recent High Court decisions on judicial power, such as *Kable*. I suspect he would not regard them favourably.

I also remember vividly the only first instance case I had against him while I was at the Bar. It was heard by Mr Registrar Marshall in the Federal Conciliation and Arbitration Commission, an unlikely place to find Merralls QC who was more likely to be found debating the application of the rule in *Andrews v Partington* or the extent of federal legislative power. The issue in the arbitration case was whether jockeys were employees and, if not, whether the arbitration power of the constitution extended to independent contractors. The case arose out of an application by a union to amend its eligibility rules. I was appearing for the good guys, the Australian Workers Union, and Jim was appearing for the dark side, the principal Australian Racing Clubs, conservative bodies who were strongly opposed to the

unionisation of jockeys. I suppose in the era of Dyson Heydon's royal commission, the AWU would now be regarded as the dark side. Needless to say, Jim won the case.

As a racing man, it must have given him great pleasure to confer with and call as witnesses well-known trainers and ex-jockeys, such as Jack Purtell, who had won three Melbourne Cups and a Caulfield Cup. In the course of the case, Jim rather reluctantly, I thought, tendered a report on the racing industry which should be compulsory reading for all those, such as Philip Crutchfield, who like to own racehorses. That report showed that, for every dollar an owner invested in owning and training racehorses, on average the owner got back only 22 cents. There is good reason to believe that the only worse recreational investment than buying a racehorse is buying a yacht.

Jim was born in Canberra in 1936. He received part of his early education at The King's School, Parramatta although I would not be so bold as to claim that that NSW institution – where the radio personality, Alan Jones, once taught and Sydney silks, such as Bret Walker, SC studied – was responsible for Jim's later success in life. After his stint at The King's School, Jim acquired a Victorian domicil of choice when his parents moved to Victoria. He completed his secondary education at the Church of England Grammar School. In 1954, he entered the Faculty of Law at the University of Melbourne, winning numerous awards during his course. Jim was on the editorial boards of *Res Judicatae* and the Melbourne University Law Review, which took over the function of the former Journal. He was, therefore, one of the founding members of the Law Review. He was resident Law Tutor at Trinity College for 12 years and was Dean of the College for 18 months.

Jim was admitted as a practitioner on 1 April 1960 and signed the Roll of Counsel on 27 April the same year. He was number 616 on the Roll. Number 617 was that formidable trial lawyer, Neil McPhee, who in his later years was much in demand by Sydney solicitors to the dismay of certain members of the Sydney Bar, particularly those who practised in the defamation field, such as Tom Hughes. In 1960 and 1961, Jim served as the associate to Sir Owen Dixon. That was an experience of which anyone would be proud, and Jim certainly has been proud of it. I doubt if anyone would dispute that Jim's associateship with Chief Justice Dixon has been one of the driving forces of his life and has greatly influenced his view as to how the common law should be developed.

On commencing practice at the Bar, Jim read with the great equity lawyer, Richard Newton, whose unhappy early death deprived the nation of a great judge. Jim took silk in 1974. His practice at the Bar has mainly concerned constitutional matters and cases on the equity side of the court where his services have been in great demand throughout his career. As you would expect from his work as editor of the Commonwealth Law Reports, his cases were prepared and argued meticulously and, unlike most of his New South Wales contemporaries who prepared their cases the night before the hearing, his arguments were prepared well in advance of the hearing date. I once called on him in chambers and seeing a line of law reports on the desk in front of his notebook, innocently asked, "Is this for tomorrow's case?" "No," he replied in a surprised, if not disbelieving, tone, "It's on in a couple of month's time."

In 1960, Jim commenced his long service, now totalling 54 years, with the Commonwealth Law Reports. His name appears as a reporter in the title page to volume 103 of the reports. The CLRs are now up to volume 249. So Jim has been associated with the reporting of 145 volumes of those Reports.

In May 1969, Jim became editor of the CLRs. He is still the editor today and his 45 years of service in that position has passed the 40 years (1895-1935) of Sir Frederick Pollock's editorship of the Law Reports. The reporting of High Court cases in 1969, when Jim became editor, could fairly be described as a mess. On becoming editor, Jim was presented with a number of tea chests of judgments and transcripts of argument in more than 100 cases. As Justice Sundberg said in a speech at the Australian Club in honour of Jim in February 1999:

"Jim's first and daunting task was to get rid of the backlog. This took a long time, but was achieved by the appointment of new and enthusiastic reporters and the pensioning off of old non-performing ones. It took more than 10 years to achieve an acceptable six months turnover between judgment in a case and publication in the Reports."

Justice Sundberg also said that, from the beginning of Jim's role as editor, he insisted "upon a useful but not overburdened head note – in most cases the facts, the decision and the propositions of law for which the case is authority." From the practitioners' viewpoint, the advantages of a concise but comprehensive head note to a case cannot be overstated. In the early 1980s, the New South Wales Bar Council was so concerned with the increasingly lengthy headnotes of the Australian Law Journal Reports that it wrote to the editor declaring, somewhat sarcastically, that usually a quicker understanding of a case could be obtained by reading the main judgment than by reading the head note.

The Commonwealth Law Reports under Jim's editorship are the model which all law reports should strive

James Merralls

> “A little while ago I referred to Jim as a Renaissance man. I used the term in the sense of describing a person who has wide cultural and sporting interests and is expert in several of them.”

to emulate. The present Chief Justice and two former Chief Justices of the High Court have heaped praise on the standard of the Commonwealth Law Reports under Jim’s editorship. In the preface to volume 180 of the Reports, Sir Anthony Mason said that Jim “was largely responsible for the very high standard we have come to expect of the *Reports*.” His praise has been echoed subsequently by Chief Justice Gleeson and Chief Justice French.

As Chief Justice Gleeson has said:

> *“the selection of cases suitable for inclusion in the Commonwealth Law Reports is a primary task of the editor. This is a heavy responsibility. It requires the confidence of the publishers, the subscribers, and, above all, of the Court itself. That confidence is sustained by Mr Merralls’ professional eminence as a barrister, his extensive legal knowledge, and his personal integrity and commitment.”*

A secondary but nevertheless very important task of the editor is to assign a reporter to each judgment. All those who have served as reporters of the Commonwealth Law Reports testify as to how closely Jim has involved himself in the entire process of reporting and editing those Reports. In the speech of Justice Sundberg to which I earlier referred, he said that the edited copies of his “early attempts bore more of the elegant Merralls’ script than of my own typescript.” The citation for the Doctor of Laws (*honoris causa)* that Melbourne University awarded Jim correctly states:

> *“James Merralls leads by example. His meticulous correction and editing of law reporters’ draft reports, together with his own reports being models of concision and clarity, have provided invaluable guidance as well as specialist education to the reporters of the last 40 years, many of whom have gone on to high judicial office.”*

As Chief Justice Gleeson has said, “as to the value of [Jim’s] contribution [to the success of the CLRs] there can be no argument.”

A little while ago I referred to Jim as a Renaissance man. I used the term in the sense of describing a person who has wide cultural and sporting interests and is expert in several of them. It is no doubt true that no one can be a Renaissance man in the true meaning of that term and that more often than not the term is used in an ironic rather than accurate sense. But that said, no one who knows him would deny that Jim has a wide range of interests that go beyond the law. Nor would anybody familiar with the legal profession deny Jim’s expertise in legal matters, but what may surprise some of you is his interest and expertise in such matters as the novel, the cinema, the stage, the musical comedy and the breeding and performance of racehorses.

Between 1959 and 1964, Jim was a regular contributor to one of the best magazines ever published in Australia – Nation, which was an intellectual powerhouse. Contributors included Robert Hughes, later the art critic for Time Magazine and the author of several well-known books; Dr John Bray, the poet who later became Chief Justice of South Australia; Sylvia Lawson, the writer and literary and film critic; Charles Higham, who subsequently established a high reputation as a film critic in the United States; and my old client, the poet and author Max Harris, whom I once defended in a defamation action brought against him by Frank Hardy.

In the years 1959-64, Jim wrote numerous reviews of novels, films, musical comedies and stage plays for Nation. In doing research for this speech, I greatly enjoyed reading them. Someone should consider collecting and publishing them. They are everything that in my opinion a review should be. Views may differ as to what makes a good review, but to my mind a review should have a key theme, disclose a thorough understanding of the work or activity being reviewed, disclose a knowledge of similar works and provide evidence to support its conclusions. It should be analytical, evaluative and where appropriate, critical. By those criteria, Jim’s reviews deserved a First.

His reviews showed an extensive knowledge of the subject and its cultural context, whether it was a stage play, a musical comedy, a novel, a film or a famous author. As might be expected of a person in his early 20s, his views were expressed with self-assurance and confidence. They were invariably hard-hitting and often iconoclastic. The reviews also demonstrated that his knowledge of the theatre and cinema extended beyond Australia and showed a deep understanding of contemporary and historical art forms in England, the United States and in some cases France. How he acquired such knowledge at such an early age is a minor mystery.

No matter how famous the author, playwright, singer or director, Jim’s reviews did not hold back their criticism. Thus, in reviewing JC Williamson’s production of “My Fair Lady”, he wrote of its star:

> *“The 22-year-old Irish actress Bunty Turner is out of her depth as Eliza. She has a sweet singing voice and makes a charming gamin but loses control as Galatea. Where is that ‘beautiful gravity’ which awes the Ambassador’s wife? Miss Turner enters the Embassy Ball looking like a grinning ninny. Where is the ‘pedantic correctness of pronunciation and great beauty of tone’ at Ascot? Miss Turner commits the inexcusable crime of bobbing her head and speaking too quickly.”*

He was critical of Patrick White as a playwright, declaring:

> *"I am not convinced that he has the playwright's faculty to let his characters go so that it is their dramatic relationship that we the audience see before us. Charades are not an art form."*

Of CP Snow's, "The Conscience of the Rich", one of the novels in Snow's "Strangers and Brothers" series, Jim wrote:

> *"The weakness of Snow's method is readily apparent. The novelist has a temptation to write with his eye more on the whole sequence than the part in hand... Sir Charles is apt to forget his function as a storyteller and to write about his themes".*

Inevitably, Jim's trenchant criticisms provoked anger among the victims of his reviews. Some of them were so angry that in earlier times they may have taken a horsewhip to him. Writing of the director, Wal Cherry, Jim said, among many other criticisms:

> *"Tennessee Williams encourages Cherry to indulge to an absurd extent in the high-powered showmanship to which his direction is always prone. His hectic treatment of 'Camino Real' served only to expose the gimcrackery of Williams' worst play, and greater attention to the meaning of the words might have secured at least a modicum of artistry."*

Nation gave Cherry a whole page to respond.

Similarly, the director, Barry Pree, commenced his answer to Jim's criticism of various performances with the words:

> *"This time your drama critic, James Merralls, has gone too far. His summing up of the theatrical scene in Melbourne during 1960 is just plain pathetic!"*

Of course not all Jim's reviews were critical. Thus, in his review of the translated French play, "Dual of Angels" at Her Majesty's Theatre, he wrote:

> *"Robert Helpmann's production achieves as closely as is possible in the English theatre the nice balance between mannered abstraction and reality which is required by the play, and he is given excellent performances by Vivien Leigh and Sally Home as the bad and good angels. Miss Leigh played Paola under Jean-Louis Barrault's direction in the original London production of this translation by Christopher Fry, and the great Frenchman's hand can be detected in her controlled under-playing. There are no bravura passages here but pared feline intensity. The tones and rhythms of her speech cleverly simulate French dramatic style, though her low tones are apt to be lost in the large theatre."*

A true Renaissance man must have an interest and expertise in sport as well as culture. Jim's principal sporting interest has been thoroughbred breeding and racing although he is also a keen follower of cricket and has an encyclopaedic knowledge of all the statistics. As many of you here will know, he was a part owner of Beer Street which won the Caulfield Cup in 1970 at the handsome price of 15/1. But immediately before Beer Street won the Herbert Power Handicap the week before, he was priced at 50/1 for the Caulfield Cup. Acting on Jim's advice, many members of the Bar cleaned up by taking the 50/1. Trinity College celebrated the win that Saturday night with much wine courtesy of the generosity of Jim. Many students at Trinity were also beneficiaries of the 50/1 price including Frank Callaway, who probably had the only bet of his life on Beer Street.

Given his writings for Nation, it should come as no surprise to you that for some years Jim wrote twice-a-year articles for The British Racehorse under the name Tim Whiffler, a poorly bred horse which won the Melbourne Cup in 1867 and was the best horse of his generation. I don't know what attracts writers on breeding to use that pseudonym. The Sydney professional gambler, Arthur Harris, is also a breeding expert and used that name for several years while writing for the Sydney Daily Telegraph. He too is something of a Renaissance man, having written books or monographs on philosophy and Charles Darwin.

For those interested in racing, Jim's articles in The British Racehorse are a joy to read. They contained concise essays on the winners of the leading races run in New South Wales and Victoria during the year. Needless to say, there was a short piece on Beer Street, although no mention was made of Jim's connection with the horse. Part of what Tim Whiffler wrote of Beer Street was:

> *"The Caulfield Cup was won in dashing style by the four-year-old Beer Street (by Lanesborough – Trap by Landau), who made most of the running...Beer Street was bred at Devonport on the north coast of Tasmania by his part owner Dr Michael Wilson...As a three-year-old Beer Street won the Queen Elizabeth Stakes, 10 and ½ furlongs at Launceston in the presence of H.M. The Queen. He is a tough, resolute galloper whose racing style is reminiscent of his paternal great-grandsire..."*

The setting up of the James Merralls Visiting Fellowship is a partial payment of the immense debt that practising lawyers owe this eminent barrister, great Victorian and great Australian. The Australian nation has partly paid this debt by making Jim a Member of the Order of Australia but he deserves more.

I congratulate and thank the University of Melbourne and its Dean for the foresight in agreeing to set up the Fellowship in honour of this great man and lawyer. In conclusion, I would also like to thank Justice Susan Crennan for her assistance in obtaining research materials for this speech.

**VBN notes that in order to endow the Fellowship, a minimum of $500,000 is required. At present, pledges and donations of close to $440,000 have been received. To support the Fellowship contact Kate Barnett, Director of Development, Melbourne Law School on 03 9035 8747.*

The Attorney-General enjoyed a whale-watching trip off the coast of Sydney before The Hague in June 2013

# A whale of a time: Australian advocacy in the International Court of Justice

MARK DREYFUS

After a long legal battle with Japan over its ongoing whaling program in the Southern Ocean, on 31 March this year, the International Court of Justice (the ICJ) delivered a historic and resounding decision in favour of Australia. As Attorney-General, I had the honour of appearing as counsel for Australia during the oral proceedings before the ICJ last year, and I've outlined a few reflections on that unique experience here.

## Background

In 1986 a worldwide moratorium on commercial whaling was negotiated and agreed under the framework of the International Convention for the Regulation of Whaling. Although Japan agreed to be bound by the moratorium, it then continued to kill large numbers of whales in the Antarctic, claiming that it was doing so under an exception to the moratorium that permits whaling for "scientific purposes".

Australia never accepted that Japan's whaling program was for scientific purposes, and maintained that Japan

was in fact continuing its commercial whaling program, concealed in the lab-coat of science. Japan's ongoing whaling program resulted in the slaughter of thousands of whales, and by so flagrantly subverting its legal obligations, it also made a mockery of international law.

For more than 20 years Australia engaged in diplomacy to try to convince Japan to end its whaling program. Yet Japan continued with its whaling program, and so on 31 May 2010 the then Labor Government initiated legal action against Japan in the ICJ.

## Appearing before the ICJ

As the court of nations, there is an expectation that the states appearing before the ICJ will be represented by their most senior legal officers. For common law nations such as Australia, this means that the Attorney-General will usually appear to argue part of the case, and in particular to open and to conclude the oral arguments. Of course, the case was an enormous undertaking that took years to prepare, and so I appeared with a truly excellent team of lawyers and counsel that included Bill Campbell QC (Agent of Australia), the Solicitor-General Justin Gleeson SC, Professor Laurence Boisson de Chazournes, Professors James Crawford SC, Philippe Sands QC and Henry Burmester QC.

The Peace Palace where the ICJ sits has a marvellous history, deeply entwined with the development of international institutions and law. The courtroom is quite grand, even by the standards of our more impressive Australian courtrooms.

The ICJ is a unique institution in which to appear as counsel, and it was a very different experience to appearing before an Australian court. To begin with, the ICJ Bench is made up of 15 permanent judges, who serve nine-year terms. These judges are drawn from the different member states of the Court, and so represent a diverse range of legal and cultural traditions. In addition to the 15 permanent judges, if a nation appearing does not have a national on the Bench, that nation is entitled to appoint an ad hoc judge for the case. This practice would appear to run counter to the assumptions we make in domestic courts about the need for impartiality, and for the appearance of impartiality. However, the ICJ has a unique position in the global legal and political system, and national representation is expected.

Attorney-General and Member for Isaacs Mark Dreyfus QC, in the Peace Palace where the ICJ sits

> "As the court of nations, there is an expectation that the states appearing before the ICJ will be represented by their most senior legal officers."

Because Australia does not currently have a national sitting on the Court (unlike Japan), I nominated Professor Hilary Charlesworth from the Australian National University to be our ad hoc judge in the whaling case. With 16 judges sitting in a single row that runs the length of the court room, maintaining eye contact with the Bench, as I usually try to do, was no easy matter.

Another significant difference from Australian proceedings is that witnesses are not often called in cases before the ICJ. We broke with that practice and called two expert scientific witnesses, whose evidence was integral to our case. Japan responded with an expert scientific witness of its own. With witnesses rarely called, cross-examination is something of a novelty at the ICJ. Justin Gleeson QC put on quite a show for the Court, with an elegant and piercing time-limited cross-examination. It seemed that the judges, particularly those from civil law jurisdictions, were deeply interested in the process.

Another notable feature of appearing before the ICJ is the relatively overt presence of politics. Political commentary was at times entwined with the substantive legal arguments being made. Japan also sent senior political figures to The Hague, some of whom I knew from previous (and much more friendly) international negotiations on climate change. Domestic and international media interest in the case was also constant and intense.


Attorney-General and member for Isaacs Mark Dreyfus QC, second from right, with the Australian legal team at the International Court of Justice, The Hague, L-R, Professor Laurence Boisson de Chazournes , Philippe Sands QC, Henry Burmester QC, Professor James Crawford AC SC, Solicitor-General Justin Gleeson on his right and Bill Campbell QC on his left.

But none of this is to suggest that a case before the ICJ is a primarily political contest. The ICJ is unequivocally a court of law, and it resolves the disputes before it in accordance with the relevant international law. Indeed, I have been to many diplomatic events, and our legal battle with Japan was certainly not one of them. The case was characterised by forceful advocacy from both sides, each intent on winning the case. In this respect at least, the matter did resemble domestic litigation.

## Implications of Australia's victory

Australia's victory against Japan before the ICJ was historic for several reasons. Although Australia has appeared as respondent before the ICJ on several occasions, the whaling case was only the second time Australia has taken a matter to the Court. The other case was brought by Australia in 1974, when Labor Attorney-General Lionel Murphy led legal action against France to bring its nuclear testing program in the Pacific Ocean to an end.

> "The whaling case was only the second time Australia has taken a matter to the Court."

Our victory against Japan was also historic because it was the first time that an international environmental convention has been litigated and enforced in this way. I hope that Australia's bold and pioneering legal action opens the way for other nations to hold to account states that are trying to avoid or subvert their legal responsibilities for our shared environment and resources.

While Australia won convincingly against Japan in the courtroom, it has been my hope that the resolution of this long-running dispute between our nations will now open the way to an even stronger friendship and closer cooperation in the future. However, since the ICJ decision, the Abe Government has indicated to the International Whaling Commission Japan's intention to resume 'scientific' whaling in the Southern Ocean, allegedly in a manner that is consistent with the ICJ's ruling. A number of political and legal implications arise from this disappointing announcement from the Japanese Government. It is now essential that the Australian Government stands firm against any attempt by Japan to circumvent the ICJ's decision, and that Australia continues to strive to uphold our legal victory, our principles, and the international rule of law.

# Well-versed: poetry for Lachie Carter

CAMPBELL THOMSON

## Where is the gold of the wattles last year

**for Lachie Carter after Villon**

Where went the fire between long tanned legs
Where is the chord plucked that then disappears
Where is the King Parrot strobed by the sun
Where is the gold of the wattles last year

Where fell the apt phrase that nailed the appeal
Where is the leader whose words could fight fear
Where is the crest of the weekend's best wave
Where is the gold of the wattles last year

Where is the Blue who screamed over the pack
Where is the jock who says gay is not queer
Where flee the mad shrieks of small kids at play
Where is the gold of the wattles last year

Where's the last stride of the mare in the Cup
Where is the shiver of Bream on a spear
Where flew the quip with the last drop of wine
Where is the gold of the wattles last year.
Where is the gold of the wattles last year?

## This cold morning

**For Lachie Carter after Danny Deever by Kipling**

What is the buzzer sounding for, the pale faced prisoner cried
You'll find out soon, you'll find out soon, the grey haired Tipstaff said
Why do my hands shake like dead leaves, the pale faced prisoner cried
I'll go and see, I'll go and see, the grey haired Tipstaff said

He's sweating and the tie on loan is tight around his neck
The families sitting down the back are in their Sunday best
When the jury has decided one short phrase will fill the room
For they're bringing in a verdict this cold morning.

Why do the lawyers sit so quiet, the pale faced prisoner cried
They're waiting too, they're waiting too, the grey haired Tipstaff said
Why did you call another guard, the pale faced prisoner cried
It's in the rules, it's in the rules, the grey haired Tipstaff said

They have been deliberating for a week without a peep
The Judge's charge was spare and straight and did not give a hint
The dead man's and the prisoner's Mums look in each others' eyes
And they're bringing in the verdict this cold morning.

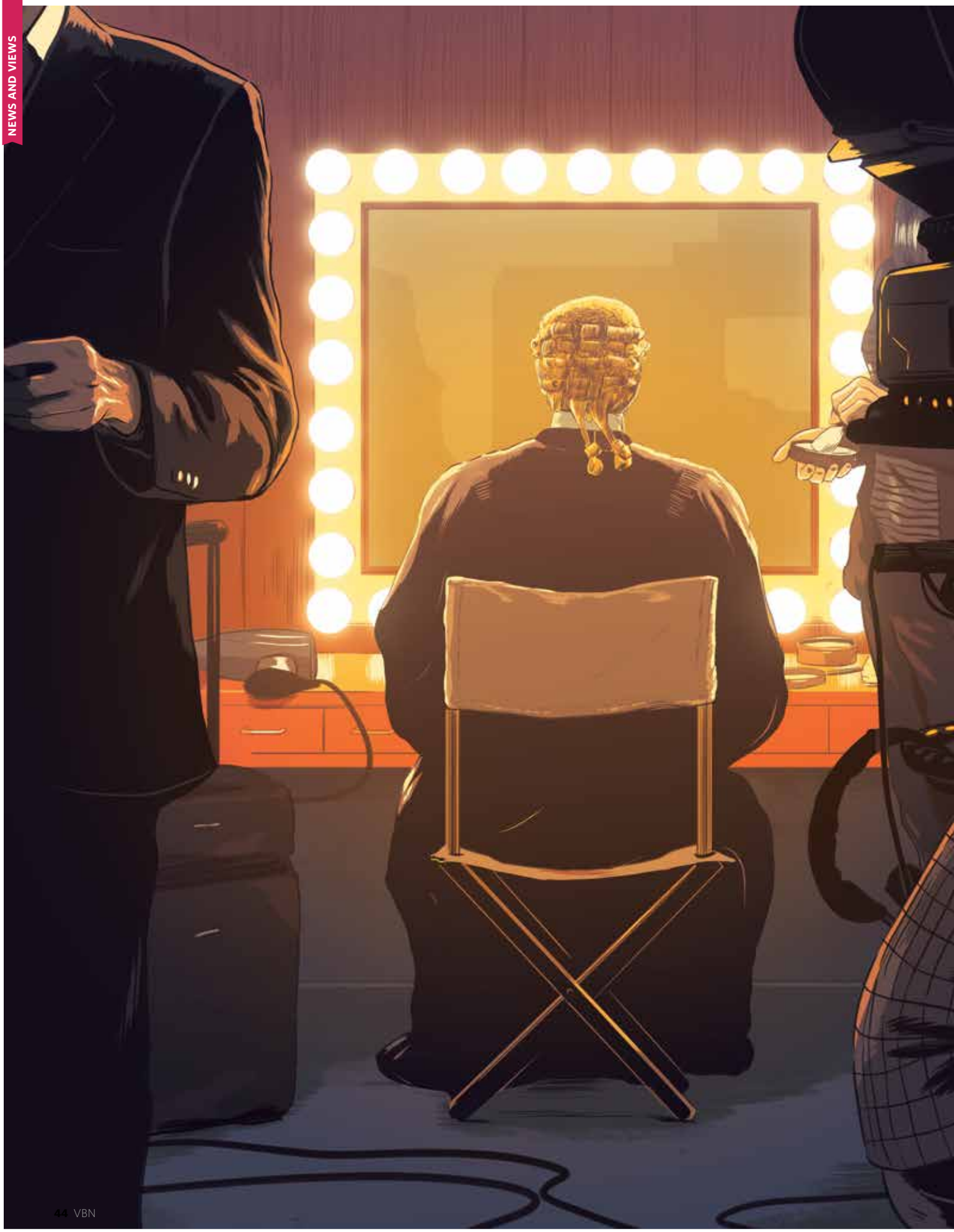
Why won't the jurors look at me, the pale faced prisoner cried
Just stand up straight, just stand up straight, the grey haired Tipstaff said
Why doesn't someone shake their head, the pale faced prisoner cried
You'll get a notice to appeal, the grey haired Tipstaff said

The bookie's clerk sat up the back has tears wet on her cheeks
While down the front the butcher has his hands deep in his jeans
And the foreman screws his notes up tight into a little ball
For they've found a guilty verdict this cold morning.

What do you think I'm looking at, the pale faced prisoner cried
Just ask your brief, just ask your brief, the grey haired Tipstaff said
So can I kiss my Mum goodbye, the pale faced prisoner cried
You cannot touch, you cannot touch, the grey haired Tipstaff said

The prisoner's counsel packs her bag and leaves without a word
And both the Mums are sobbing as they take him down in cuffs
But the Judge is only wondering what's for lunch up in the Swine
With another guilty verdict this cold morning.

*Campbell Thompson has had several poems published in the last year, including in* The Age, The Australian, Overland, Steamer, Cordite, *and* Rabbit *and has a poem currently shortlisted for the* Newcastle Poetry Prize.



# Open justice and the internet

## What should the approach be in Victorian courts?

GEORGINA SCHOFF

> *"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial"* [1]

The Internet is an irresistible force for change, sometimes in unexpected ways. In the past few years it has, with almost no fanfare, completely transformed public access to legal proceedings. One example is the ease with which information about proceedings, including judgments and court documents, may now be obtained from court websites. More fundamentally, however, recent royal commissions have demonstrated that, through the live webcasting of proceedings, we can all 'virtually' be in the court room. Given the apparent success of these and other uses of the technology, it may now be time to examine whether and to what extent court proceedings should be webcast.

Generally speaking, the principle of open justice requires that, except where it is absolutely necessary in the interests of justice, court proceedings are to be conducted publicly and in open view.[2] The fundamental importance of the principle has been recognised by the High Court. In *Russell v Russell*, Gibbs J held: [3]

> *The rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for "publicity is the authentic hallmark of judicial as distinct from administrative procedure."*

The open justice principle has not to date been held to require courts to permit the filming and broadcasting of proceedings. To the contrary, photography is prohibited in Australian courts, save where permission is given. When permission will be given is a matter entirely within the discretion of the court.

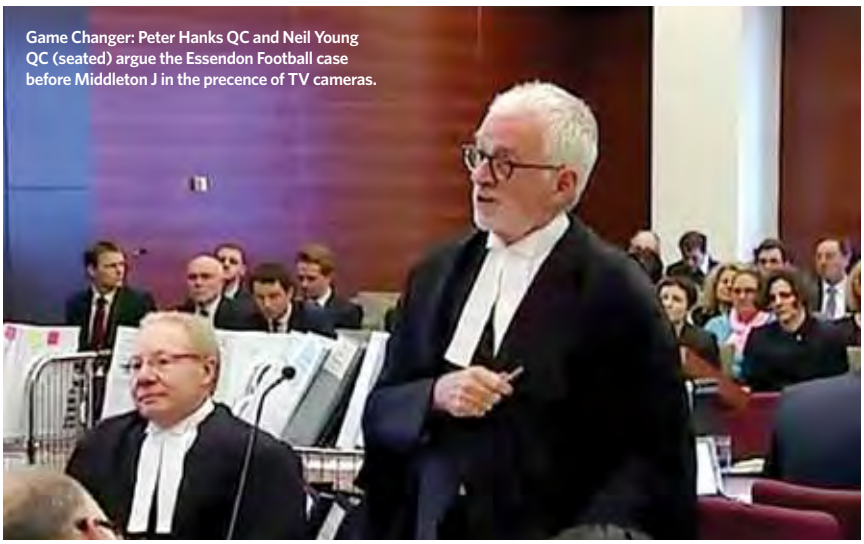
Occasionally, the media has been permitted to film and broadcast the delivery of judgment in a trial that has attracted considerable public interest. However, to broadcast the delivery of reasons for judgment or sentence does not significantly contribute to the openness of court proceedings. After all, the reasons for sentence or judgment of the court have always been published, albeit in writing, and today are readily available to be downloaded from court websites. It is the evidence and submissions that precede judgment which allow the public to understand the judgment, when delivered, and to have a properly informed opinion of our legal system.

The practical reality is that most people (even people with a real interest in the proceedings) do not have the time or inclination to travel to court to observe the proceedings. Nor can members of the public readily obtain a transcript of what occurred. Certainly in Victoria, transcripts of proceedings in our courts are the subject of commercial arrangements and are not freely available. The same is true of proceedings in the Federal Court of Australia.[4] Whilst rulings and judgments may be easily downloaded from court websites or austlii.com.au, members of the public otherwise rely upon reports of proceedings published by the media. The media has historically played an important role

as the eyes and ears of the public[5] and the principle of open justice recognises that nothing ought be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media.[6]

Media reporting of proceedings can, however, often be unsatisfactory. Most of us will have read media reports of cases in which we have been involved that bear little resemblance to what actually occurred in court. This is due to many factors, and one should not underestimate the skill required to condense one day of court proceedings into four or five paragraphs. It is a difficult task for a lawyer, let alone a journalist who might be in quite unfamiliar territory. Whilst there are some conspicuously good reporters who work regularly in Victorian courts, many cases are not covered by experienced court reporters. Then there is the difficulty that every time we read a media report it is necessarily second-hand and will always reflect the editorial decisions of the publisher. The media decides what cases to report, what parts of the proceeding to include in any report, and what prominence to give the report. This all has the effect of filtering the account available to members of the public.

In the past, it has not practically been possible to film and broadcast court proceedings except via the electronic media. Such broadcasts require the presence in court of at least one cameraman and inevitably involve some intrusion in the proceeding. Whilst advances in technology have reduced the disruptive effect of filming for television[7], one can readily think of reasons why it may be undesirable that the filming and subsequent broadcasting of court proceedings be conducted through the media. For instance, the selective broadcasting of parts only of proceedings, sensational promotion of aspects of proceedings and the placement of advertising during broadcasts might all conceivably have an adverse effect on the administration of justice. Such concerns have, in addition to concerns about the intrusive and disruptive effect of filming, largely influenced judges in Australia (and in other common law jurisdictions) to refuse applications to broadcast.



Game Changer: Peter Hanks QC and Neil Young QC (seated) argue the Essendon Football case before Middleton J in the precence of TV cameras.

PHOTO COURTESY OF THE FEDERAL COURT OF AUSTRALIA

However, that view has not been universally supported. In 1994, the Access to Justice Advisory Committee led by Ronald Sackville QC, later a judge of the Federal Court of Australia, (the Sackville Report) recommended that the Federal Court of Australia should consider the establishment of an experimental program to allow the broadcasting of proceedings and encouraged state courts with criminal jury trials to do the same.

That recommendation resulted in the appointment of the Federal Court's Director of Public Information and since that time the Federal Court has cautiously experimented with broadcasting on a case by case basis. In 1995 it allowed the media to film and broadcast mute vision of the opening of a trial and in 1997 it became the first superior court in Australia to permit the media to film and broadcast the delivery of a judgment. Not surprisingly, the judge presiding was Sackville J. In 1998, the Federal Court permitted the first live broadcast of the delivery of a judgment in the proceeding brought by the Maritime Union of Australia against Patrick Corporation.

Most State Supreme Courts have taken similarly cautious steps. The Victorian Supreme Court has, however, been somewhat of a trailblazer. Since about 2007 it has been exploring the possibilities afforded by the internet. Initially it experimented with the webcasting, in real time, of ceremonial sittings in the Banco Court. Since then it has extended its use of the technology to webcast the opening and closing submissions in class action trials that involve large sections of the community. In addition to the 'live stream', podcasts are subsequently available to be downloaded from the Court's website. In the case of proceedings arising from the Kilmore East-Kinglake Bushfire, the technology was utilised to allow the large number of plaintiffs (a class far too large to be accommodated within the Court) to view the proceedings remotely through a secure link paid for by the firm of solicitors acting on their behalf.

The High Court, too, is making use of the technology. Although not streamed live (there is a delay of

"Media reporting of proceedings can, however, often be unsatisfactory."

up to a few days), most appeals can now be watched as a podcast via the Court's website. A single fixed camera at the back of the courtroom affords those watching with a view of the bench only. This is of exceptional benefit to members of the public with an interest in court proceedings, members of the media who wish to report on proceedings and lawyers with a professional interest. Few of us ever have the opportunity to appear in the High Court, nor can we easily 'pop over the road' to watch and learn. However its benefits would be greater if the webcast was in real time.

Webcasting allows those members of the public who cannot come to court to form their own opinions about the proceeding and the evidence based on their observations of what actually occurred, rather than through reports in the media.

Useful insights into what can now be achieved, technically at least, can be gleaned from the recent use of webcasting technology in royal commissions. The Royal Commission into Trade Union Corruption currently being conducted by the Hon Dyson Heydon QC, webcasts all of its proceedings in 'real time'. Members of the public may watch the live webcast via the commission's website. There appear to be three fixed cameras: one films the commissioner; the second films the witness; and the third films counsel and the court room. All three views appear on the screen. Importantly, too, relevant witness statements are uploaded onto the Commission's website promptly following any rulings on admissibility and a transcript of the proceeding is uploaded at the end of each day.

A similar model was adopted by the Victorian Bushfires Royal Commission and is currently employed by the Royal Commission into Institutional Responses to Child Sexual Abuse, although in the later case there are obviously many private sessions that are not webcast.

This model may be compared to the approach more commonly adopted by our courts, which is to broadcast via the media. An example is the *Essendon v ASADA* case[8], a Federal Court proceeding in which there was great public interest, at least here in Victoria. Acknowledging that great public interest, the first instance judge, Middleton J, allowed two ABC cameramen to be present in court to film a directions hearing, and subsequently, the opening arguments, but not the evidence, in the trial. The feed was made available to all media organisations for broadcasting and the media organisations, rather than the court bore the cost of the broadcast.

> "Webcasting allows those members of the public who cannot come to court to form their own opinions about the proceeding and the evidence based on their observations of what actually occurred, rather than through reports in the media."

Significantly for the purpose of the present discussion, the physical presence of the media makes a difference. Throughout the broadcast of the *Essendon v ASADA* hearing the cameras moved from the judge to the barristers and, on occasions, showed close-up images of those in court, including James Hird, a party and witness in the case, and his wife. This licence afforded to the cameramen is in stark contrast to the fixed cameras in the Royal Commission model. Perhaps it was not disruptive, but the close-ups of members of public and witnesses sitting in the body of the court seems to me to be somewhat intrusive, at least in comparison to the fixed camera employed by the Royal Commission. One was aware of the media presence and, inevitably, a certain amount of editorialising occurred.

Interestingly, the public was not permitted to watch a broadcast of the witnesses giving their evidence. Instead, members of the public were required to rely upon accounts given by journalists. Many of these were dedicated sports writers who were, with due respect, completely baffled by the proceeding and how to report it. It seems to me that this is one case where the public would have been well-served by a broadcast of the evidence as well as the submissions. The affidavits were available to be read on the Court's website (after appropriate redactions and some days after the event) and the witnesses were either public servants performing public roles or football personalities with public functions, most of whom had given press conferences in relation to the matter.

In September this year the NSW Parliament passed legislation creating a presumption in favour of permitting the recording and broadcasting of judgments, verdicts and sentencing remarks ("judgment remarks") in criminal and civil trials in the Supreme and District Courts of NSW. The *Courts Legislation Amendments (Broadcasting Judgments) Act* 2014 (NSW) provides that the Court must permit an application to record and broadcast judgment remarks by one or more news media organisations unless certain defined exclusionary grounds exist and it is not reasonably practical to implement measures of recording or broadcasting which will prevent the broadcast of any thing that gives rise to the exclusionary ground. The exclusionary grounds reflect those matters that would otherwise prevent the media from publishing material, for instance, where there is a suppression or non-publication order or where the broadcast would pose a serious risk to the safety of any person identified or would be prejudicial to other criminal proceedings. Further, images that identify jurors, the accused person or a victim or their immediate family may not be recorded.

RATINGS BONANZA: A view from Middleton J's bench

PHOTO COURTESY OF THE FEDERAL COURT OF AUSTRALIA

> "Given the changes that are taking place in other jurisdictions, it may now be time to consider to what extent and by what means our courts in Victoria should permit the publication of recordings and of their own proceedings."

In his second reading speech the NSW Attorney-General said that the bill was subject to thorough consultation with the Chief Justice of NSW and the media to ensure that the legislation would operate to the mutual benefit of each. He commended the bill to the House on the basis that it would enhance the principle of open justice and "recognised the demands of the modern technology-driven age in which we live".

In the UK too, courts have adopted an approach to open justice that involves the media. Proceedings of the Supreme Court of the United Kingdom can be viewed via a 'live' webcast made available by an arrangement between the Supreme Court and Sky News which is accessed via the Sky News website (the Court owns the copyright). Further, last year, the *Crimes and Courts Act 2013* (UK) was amended to enable the 'live' broadcasting of proceedings in the United Kingdom Court of Appeal. A single video-journalist has been employed to oversee the filming and broadcasting and the cost is borne by Sky News, ITN, BBC and the Press Association News Agency. A slight delay in the broadcast (about 70 seconds) enables the video journalist to interrupt the broadcast if something is said which might inadvertently breach some restriction on reporting.

Given the changes that are taking place in other jurisdictions, it may now be time to consider to what extent and by what means our courts in Victoria should permit the publication of recordings and of their own proceedings. For all the reasons discussed above, I think that it is desirable, if possible, that the media not be involved. In the end it may all come down to a question of cost. Although, for example, the Federal Court has some of the necessary infrastructure to live webcast its own proceedings, I understand from my discussions with Mr Bruce Phillips, the Court's Director of Public Information, that live webcasting is not inexpensive. But costs in this area of technology will inevitably fall, and when it becomes cost effective for courts to live webcast their own proceedings, (if it is not already), we ought be in a position to act.

This would be a significant change to the way our courts operate, and there are many factors to consider. The importance of each factor might differ from case to case, and the issues that I raise here are not intended to be exhaustive.[9] Many judges and members of the legal profession express concern about the effect that the knowledge that their evidence may be viewed by a large and unknown audience may have on a witness. Not only may some witnesses be less prepared to give evidence, but it may increase the discomfort associated with the giving of evidence. Others are concerned about the adverse effect upon a witness's privacy. The same concerns are always present when a person who is not a willing participant is required to give evidence; the question is one of degree. And the right to privacy must, in all but the most exceptional cases, give way to the principle of open justice. Pain and humiliation have never been a sufficient basis on which to supress the identity or evidence of a witness.[10] One senior member of our Bar who was recently called as a witness before a royal commission told me:

> *"My experience of giving evidence that was live streamed was that it probably slightly increased my apprehensiveness about giving evidence prior to the event because I was conscious of the fact that my friends, family and colleagues may tune in. If I was to make a hash of it, I would do so in a more public way than would otherwise be the case. I wouldn't overstate the extent to which this added to the stress, but it was probably one factor among many. Once I entered the witness box, however, I literally did not give the issue of live streaming another thought. Once I had engaged in the process of answering questions, I was oblivious to the fact that the proceedings were being broadcast.*
>
> *It is difficult to say whether my experience of the process would be*

*typical of that of a person who is not familiar with the adversarial system and cross-examination etc. I tend to think that most of us are much more focussed on our immediate surroundings (the lawyer asking the questions, the judge/magistrate/ commissioner hearing our evidence and perhaps the people in the gallery) than we are about less immediate factors, such as a camera and the knowledge that the evidence is being broadcast. I also think that most people would probably become quite quickly absorbed in the task of listening to and answering questions. Once absorbed, the mind does not readily permit distracted musings about how we might be playing on tv. I suppose that might be different in situations where a witness is in the box for a day or two, where the natural rhythm of giving evidence over an extended period perhaps permits a little more time for the mind to wander".*

The Sackville Committee observed that studies in the United States had shown that the televising of court proceedings had not had a measurable effect upon the participants.[11] And it should be remembered that the disadvantages associated with court appearances already exist, but the present system leaves it to the mainstream media to decide on whom and how heavily these burdens will fall.

We should also consider the effect that larger audiences might have on our practice as barristers (although this may not be directly relevant to the issue of open justice, it is a matter that will be of concern to members of the Bar). The possibility that one's colleagues are watching your cross-examination from chambers is sure to increase the pressure on counsel. One member of counsel who appeared before the Bushfires Royal Commission complained to me that her mother, watching proceedings on-line from home, kept texting and emailing 'helpful' suggestions and giving her the wind-up as she had a bridge game to get to. I suspect that counsel would soon adjust to this new climate and forget all about the fact that the proceeding is being web-streamed. Indeed, the benefits to the profession of being able to watch and learn without having to give up a morning to attend Court are likely to far outweigh any additional pressures. And there is also the question of the effect that such increased publicity might have on the reputations of individual barristers and the public perception of the role of barristers generally.

If we were to adopt a presumption in favour of the live webcasting of court proceedings, the most important issue to be considered would be to what extent the judge ought have a discretion to disallow the webcast and how that discretion might be exercised. The NSW Act gives us an example of how this key issue might be tackled. There is no reason why current legislative prohibitions upon the identification of certain witnesses or members of the jury ought not, in the first instance, be sufficient. Further, the common law and, more recently, legislation governing suppression orders[12] provide appropriate protections. Whether to allow web-casting of proceedings when there is an order for witnesses out is another issue to be considered. Juries are instructed not to make independent enquiries about cases on the internet and perhaps witnesses could be directed that they were not to view proceedings on line, if such an order were necessary. Delayed webcasting or podcasting might be might another alternative.

There are cases where webcasting will never be appropriate. Obvious examples are proceedings in the Family Court, proceedings involving minors and proceedings where legislation or suppression orders prohibit the identification of witnesses or parties. Nor would it be possible to have a camera that captured images of a jury.[13] But those are all issues that are well settled at law and with which our courts already deal on a daily basis due to media interest in reporting proceedings.

Ultimately it seems to me that the internet provides us with the means to truly realise open justice. Finally, we have the means to inform the public about what goes on in our courts without the filter of the media. In this way, we can strengthen our legal system and the public's confidence in it.

1 Jeremy Bentham's rationale for the open justice principle was adopted by the House of Lords is *Scott v Scott* [1913] A.C. 417, at 447

2 *Scott v Scott* [1913] AC 417 at 477-8 per Lord Shaw of Dunfermiline.

3 *Russell v Russell* (1976) 134 CLR 495 at 520. In Victoria, section 28 of the *Open Courts Act 2013* (Vic) now sets up a presumption in favour of hearing a proceeding in open court to which a court must have regard when determining whether to make an order closing a court to any extent.

4 Transcripts of proceeding before the High Court are freely available on its website.

5 *Attorney- General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 183 per Sir John Donaldson MR, (the Spycatcher case)

6 *Hogan v Hinch* (2011) 243 CLR 506, 532 [22]; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 335 [15].

7 In 1981 the Supreme Court of the United States in *Chandler v Florida* ruled that advances in technology meant that an absolute ban on televising was not justified and that each application to film and broadcast must be judged on its merits: *Chandler v Florida* (1981) 449 US 560; and see generally the excellent article by Daniel Stepniak *'Why Shouldn't Australian Court Proceedings be Televised?"* (1994) *UNSW Law Journal 345*.

8 *Essendon Football Club v CEO of ASADA* [2014] FCA 1019

9 All of these issues, and more, are considered in the Sackville Report and by Stepniak, *Ibid* at fn 7, (although in the different context of broadcasting through the media).

10 *Scott v Scott* [1913] AC 417 at 463 per Lord Atkinson.

11 Stepniak, *ibid* fn 7 at 362.

12 *Open Courts Act* 2013 (Vic)

13 For example, *Juries Act* 1967 (Vic), s. 69; *Family Law Act* 1975 (Cth), s 121(1); *Adoption of Children Act* 1984 (Vic), s. 121(2).

# Legal profession uniform law: regulation of lawyers has changed

MICHAEL McGARVIE

The rules that apply to practicing as a barrister in Victoria are about to change. The Victorian and New South Wales Governments will soon adopt a uniform regulatory regime covering the legal profession in both states. Many aspects of legal regulation will remain unchanged. Other areas will see significant changes to the powers of the regulators and the obligations placed upon lawyers. This article explains the changes with a particular focus on Victorian barristers.

The most recent push for a truly national legal profession regulatory regime began before I was appointed Legal Services Commissioner. In 2009, the Council of Australian Governments (COAG) initiated these reforms with the goal of establishing a single legal profession regulatory regime across Australia to enhance consumer protection, reduce costs and simplify administration. Nearly 5 years later, I am pleased to see this project bearing fruit.

It is true that the reforms are not 'national' – the Legal Profession Uniform Law (Uniform Law) will initially only commence operation in Victoria and New South Wales, home to over 70 percent of Australia's licensed lawyers. I am, however, optimistic that COAG's goals will be largely realised and I hope other jurisdictions will sign up when they see the benefits achieved across our two states.

With commencement pending, the purpose of this article is to help you prepare for legal practice under the Uniform Law by identifying what will change and what will stay the same for Victorian barristers and their clients. This article is not a comprehensive guide to the new regime. Indeed, in the absence of the subordinate legislation (under development at the time of writing), it is impossible to provide definitive guidance beyond the text of the Uniform Law. I encourage you to familiarise yourself with the new legislation and check the Victorian Legal Services Board and Commissioner's website for the latest information.

The subordinate legislation – the Legal Profession Uniform Rules (Uniform Rules) – may be made for any matter that the Uniform Law requires or permits to be specified in the Uniform Rules, or that is necessary or convenient for carrying out or giving effect to the Uniform Law.[1] The breadth of that rule-making provision should be borne in mind when reading the Uniform Law.

## Regulatory Structure

The existing Victorian Board and Commissioner will perform all the operational and regulatory functions required under the Uniform Law.[2] They will operate under the oversight of two new inter-jurisdictional bodies – a Legal Services Council and a Commissioner for Uniform Legal Services Regulation – which will be responsible for setting inter-jurisdictional policy and guidelines. The Victorian Board and Commissioner will also perform functions that are specific to the regulation of the legal profession in Victoria. The delegated model adopted in Victoria will continue, with the option of functions being delegated to the Victorian Bar and the Law Institute by the Victorian Board and Commissioner.[3]

The professional associations will also have a role nominating members of the Legal Services Council[4] and Admissions Committee[5], and developing the Uniform Rules relating to legal practice, legal professional conduct and continuing professional development.[6]

Not all existing regulatory bodies will be retained. The Council of Legal Education and Board of Examiners – responsible for educational requirements and compliance with admission requirements under the *Legal Profession Act 2004* (LPA) – will be replaced by a Victorian Legal Admissions Board. That Board will assess applications for admission to the Victorian Supreme Court and will accredit Victorian law courses and providers of practical legal training.[7]

## What Won't Change for Victorian Barristers

The Uniform Law includes transitional arrangements to minimise the disruption caused when the new legislative regime is adopted. For example, practising certificates granted to barristers under the LPA will continue to have effect.[8] People who are approved clerks immediately before the commencement of the Uniform Law will be taken to be approved clerks for the purposes of the Uniform Law.[9] Contributions to the fidelity fund determined under the LPA will remain payable by approved clerks under the Uniform Law [10] and the terms and conditions of professional indemnity insurance

approved under the LPA will remain approved under the Uniform Law.[11]

Looking beyond the transitional period, the Uniform Law appears to re-affirm a number of the substantive legislative rights, responsibilities, approaches and objectives applied under the LPA.

**Practising Certificates**

Barristers will still lodge their practising certificate applications with the Victorian Board under the Uniform Law if Victoria is their principal place of practice.[12] The Board's delegate for this function may be the Victorian Bar, as it currently is.

Practising certificates granted to barristers will authorise the holder to engage in legal practice as or in the manner of a barrister only.[13] This is a legislative extension (or clarification) of the LPA, which defined barrister as "an Australian legal practitioner who engages in legal practice solely as a barrister".[14]

Barristers will not, however, be precluded from also engaging in legal practice as volunteers at community legal services, or otherwise on a pro bono basis.[15]

**Readers' Course**

Under the current regulatory framework, an Australian lawyer wishing to practise as a barrister in Victoria will generally do so by becoming a member of the Victorian Bar. This requires applicants to complete the Bar readers' course and serve a reading period. These requirements will continue and will be codified under the Uniform Law.

A statutory condition will attach to practising certificates granted to Victorian barristers. Under that condition barristers will need to:

» Undertake and complete, to the satisfaction of the Victorian Bar, a reading program specified in the Uniform Rules or otherwise approved by the Victorian Bar; and
» Read for a period specified by the Victorian Bar with a barrister who is of a class or description specified in the Uniform Rules or otherwise approved by the Victorian Bar and chosen by the barrister undertaking the reading program; and
» Comply with any other requirements specified by the Victorian Bar.[16]

In addition, the Legal Services Board may impose a discretionary condition limiting the practising rights of a barrister until the barrister has complied with the statutory condition.[17]

Once satisfied, the statutory condition need not be complied with again unless the Board otherwise directs.[18]

> "It is important that barristers and approved clerks are aware of new obligations in relation to costs fairness and disclosure."

**Supervised Legal Practice**

Barristers are currently exempt from the requirement that legal practitioners engage only in supervised legal practice until they have completed a certain period of such practice.[19] That exemption is carried across to the Uniform Law.[20]

**Professional Indemnity Insurance**

As for all local lawyers, barristers will still be prohibited from engaging in legal practice in Victoria unless they hold or are covered by an approved professional indemnity insurance policy under the Uniform Law.[21]

Approved policies are those either issued by the Legal Practitioners' Liability Committee, or approved by the Victorian Board in relation to:

» community legal services;
» lawyers engaged in practice for or on behalf of a community legal service;
» corporate or government lawyers who provide pro bono legal services outside a community legal service; or
» Australian-registered foreign lawyers.[22]

**Fidelity Fund Contributions**

Unlike most lawyers applying for a practising certificate, barristers (as well as government and corporate lawyers and any other lawyers who are members of a class specified in the Uniform Rules) will not be required to pay annual contributions to the fidelity fund set by the Victorian Board.[23] Annual contributions will however, remain payable by approved clerks.[24]

**Managed Investment Schemes**

Prohibitions on law practices promoting or operating managed investment schemes will apply (albeit in Victoria after a three year transitional period).[25] Subject to the Uniform Rules or approval granted by the Victorian Board, all law practices will also be prohibited from providing legal services in relation to managed investment schemes where an associate (employee or partner) of the practice has an interest. There will be no transitional period for incorporated legal practices and related entities. They will be prohibited from conducting managed investment schemes from commencement.[26]

The Uniform Law allows for the Legal Services Council to make Uniform Rules which prohibit law practices and related entities from providing specified services or conducting specified businesses.[27]

**Barristers' Clerks**

Currently barristers' clerks may be approved by the Victorian Bar to receive trust money on behalf of barristers.[28] This arrangement is continued under the Uniform Law, and remains restricted to trust money that is provided in advance for future legal services to be provided by barristers.[29]

## What Will Change for Victorian Barristers

**Costs Fairness and Disclosure**

Although they will not apply where the client is a law practice,[30] it is important that barristers and approved clerks are aware of new obligations in relation to costs fairness and disclosure. Legal

> “Miscalculating and overrunning estimated fees will now have significant consequences for lawyers.”

costs must be fair and reasonable, measured against skill, complexity, urgency, quality and instructions. They must be proportionately and reasonably incurred and proportionate and reasonable in amount. [31] The nature, terms and amount of costs must be disclosed in writing. [32]

As under the LPA, the new Uniform Law provides that where matters are not likely to exceed $750 in total costs, law practices are not obliged to provide a client with a costs disclosure document. The Uniform Law does, however, explicitly allow for the new Legal Services Council to change this threshold amount. [33]

The Uniform Law also provides that for matters above $750 but not likely to exceed $3,000, law practices need only make a simplified costs disclosure by providing clients with a standard form instead of a full costs disclosure document. The form itself will be developed by the Legal Services Council and prescribed in the Uniform Rules. [34]

Miscalculating and overrunning estimated fees will now have significant consequences for lawyers. If a law practice has not made a disclosure because the total legal costs were not likely to exceed $750, or if it made a standard disclosure because the costs were not likely to exceed $3,000, and fees overrun the estimate, the law practice must act or risk having their fees reduced (in full or in part). When predicted costs thresholds are breached, the law practice must inform their client in writing of the expected change in costs and make the required disclosure at that point. Failure to comply with the disclosure requirements will void a costs agreement and can amount to misconduct. [35]

In my experience, the earlier in a professional relationship that a client understands exactly where they stand the better. Clients need to know what services their lawyer can provide, how much it will cost, what protections exist over the client’s money and what remedies may be available if those services do not meet the client’s reasonable expectations.

**Government Lawyers**

Every year a number of barristers move from private practice to government legal practice. The Uniform Law creates a new category of practising certificate that will be relevant to those barristers. Government lawyers will have to hold a practising certificate. Accordingly, this group of barristers will need to carry a current certificate whilst working in government.

Unlike the LPA, the Uniform Law will not automatically exempt government lawyers from the requirement to hold a practising certificate. [36] Consequently, most government lawyers practising for government agencies and departments who do not currently hold a practising certificate will need to apply for one and pay the relevant fee.

**Professional Discipline and Dispute Resolution**

The Uniform Law will introduce a number of reforms to allow for more efficient and effective handling of complaints. For example, a complaint may be made *or recorded* in writing[37] to enable the complaint-handling process to start as soon as the initial contact is made with the Victorian Commissioner’s office. It is possible that a small costs dispute, for example, may be resolved ‘on the spot’ by the officer receiving that initial contact.

The Victorian Commissioner is given increased capacity to resolve disputes, deal with complaints and improve outcomes for both lawyers and consumers. The Commissioner can now make binding determinations in consumer matters including:

- cautioning the lawyer;
- requiring an apology from the lawyer;
- requiring the lawyer to redo the work in question at no cost or to waive or reduce the fees for the work;
- requiring the lawyer to undertake training, education counselling or be supervised; or
- ordering the lawyer to pay compensation up to $25,000 where such a loss results from the lawyer’s conduct. [38]

These powers are discretionary in each case. A dispute can still be taken to VCAT if it cannot be resolved first by the Commissioner.[39] Ultimately the Costs Court could also be considered in relation to costs disputes, but that is a more expensive option for consumers where costs are less than $100,000.

To further assist in the resolution of disputes, the Victorian Commissioner will be able to order mediation, and may close a complaint if the complainant does not participate in good faith. [40]

The jurisdiction of the Victorian Commissioner over costs disputes has also been increased. The Commissioner will be empowered to deal with costs disputes where the bill is less than $100,000 (or more if the amount in dispute is less than $10,000) [41], and will be able to determine the costs payable where the disputed proportion of the legal costs is less than $10,000. [42]

Complainants will also no longer have to lodge money that equals the amount of the disputed legal costs with the Victorian Commissioner. This will mean that the dispute resolution process may begin as soon as a complainant makes contact with the Commissioner’s office.

To further enhance the complaint-handling process, staff investigating complaints will have more investigation tools such as options for search warrants and the power to enter premises. [43] The existing obligations on lawyers to

produce documents, provide written information and to cooperate with the investigator are maintained. [44]

## The Next Steps

As well as ensuring that the Victorian Board and Commissioner are prepared for the commencement of the Uniform Law in Victoria, my staff and I are undertaking an educational campaign to engage with individuals and groups with an interest in the legal profession. This will be done in conjunction with the courts, the Victorian Bar and the Law Institute of Victoria. This engagement will continue to develop into a collaborative process involving all areas of the Victorian legal profession and consumers of legal services across the State.

The Victorian Board and Commissioner's website will continue to be refreshed with detailed information on the Uniform Law and bulletins and fact sheets will be published for barristers, solicitors and consumers explaining how the changes will affect them. We will also continue to work closely with our New South Wales colleagues, the new inter-jurisdictional bodies and the professional associations to ensure that, as the Uniform Law and Uniform Rules are implemented, there will be minimal disruption to both your own practice and to client services.

Once underway, there will be a significant responsibility on all of us to make the new scheme work, deliver efficiencies and harmonise regulation. The early success we achieve with uniform regulation in Victoria and NSW will provide the acid test for its perceived value to the rest of the country. Consumers and lawyers alike are entitled to hope that by this uniform scheme the goal of a single, nationwide system of regulating lawyers becomes a reality.

## More information

For more information about the application of the Uniform Law in Victoria contact:

- Victorian Legal Services Board and Commissioner
- Website: http://www.lsbc.vic.gov.au/news/legal-profession-uniform-law/
- Phone: (03) 9679 8001
- Email: admin@lsbc.vic.gov.au

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1. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 419.
2. *Legal Profession Uniform Law Application Act 2014* s 10.
3. *Legal Profession Uniform Law Application Act 2014* ss 44, 56.
4. *Legal Profession Uniform Law Application Act 2014* sch 1 sch 1 cl 2.
5. *Legal Profession Uniform Law Application Act 2014* sch 1 sch 1 cl 21.
6. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 427.
7. *Legal Profession Uniform Law Application Act 2014* s 10 and sch 1 part 2.2.
8. *Legal Profession Uniform Law Application Act 2014* s 168 and sch 1 sch 4 cl 12.
9. *Legal Profession Uniform Law Application Act 2014* s 171.
10. *Legal Profession Uniform Law Application Act 2014* s 174(2).
11. *Legal Profession Uniform Law Application Act 2014* s 176.
12. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 44.
13. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 47.
14. *Legal Profession Act 2004* s 1.2.1.
15. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 47(5).
16. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 50(1).
17. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 50(2).
18. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 50(3).
19. *Legal Profession Act 2004* s 2.4.18(5)(a).
20. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 49(3).
21. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 211.
22. *Legal Profession Uniform Law Application Act 2014* s 13.
23. *Legal Profession Uniform Law Application Act 2014* s 73 and sch 1 cl 225.
24. *Legal Profession Uniform Law Application Act 2014* s 128.
25. *Legal Profession Uniform Law Application Act 2014* s 170 and sch 1 cl 258.
26. *Legal Profession Uniform Law Application Act 2014* s 170.
27. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 258.
28. *Legal Profession Act 2004* s 3.3.70.
29. *Legal Profession Uniform Law Application Act 2014* s 88 and sch 1 cl 133.
30. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 170.
31. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 172.
32. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 174.
33. *Legal Profession Uniform Law Application Act 2014* sch 1 s 174, sch 4 cl 18.
34. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 174.
35. *Legal Profession Uniform Law Application Act 2014* sch 1 cls 174, 178.
36. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 10.
37. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 267.
38. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 290.
39. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 300.
40. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 288.
41. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 291.
42. *Legal Profession Uniform Law Application Act 2014* sch 1 cl 292.
43. *Legal Profession Uniform Law Application Act 2014* sch 1 part 7.3.
44. *Legal Profession Uniform Law Application Act 2014* sch 1 chapter 7.

# Commercial arbitration in Asia

## Is the Victorian Bar camping out?

GEORGINA SCHOFF*

Earlier this year, the Chief Justice of the Federal Court, the Hon Justice Allsop, addressed the Victorian Bar about current developments in the Federal Court. Towards the end of his address, and by way of aside, he observed that the Australian Bars may have fallen behind when it comes to engaging in commercial arbitration. His Honour observed that the Australian Bars, including in particular the Bars of Victoria and New South Wales, should be taking a leadership role in Asia. He wondered how many of those in the room could talk authoritatively about the "New York Convention" or the "Model Law" and queried whether those who want to be serious commercial litigators in this region but are not participating in international commercial arbitration are "camping out".

This is not the first time such a suggestion has been made.

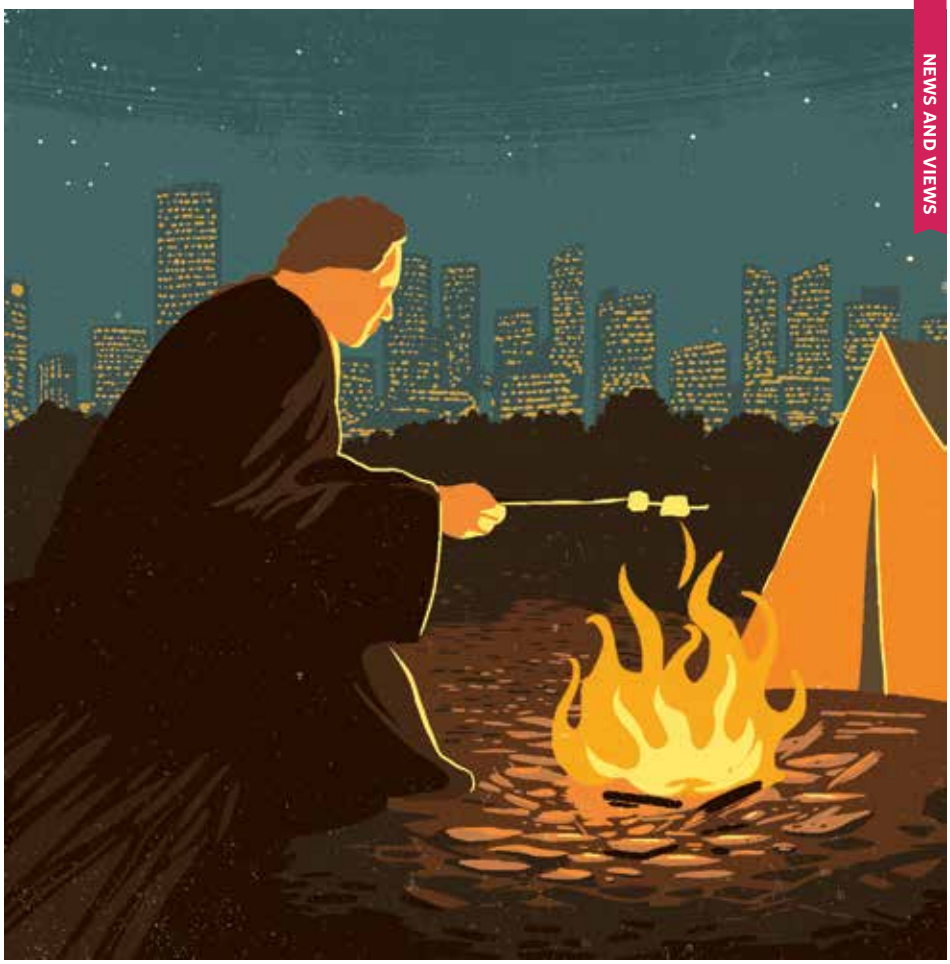
A senior member of our Bar who practises as an international investment disputes arbitrator is Gavan Griffith QC. In 1985, as Solicitor-General and Australian delegate to the United Nations Committee on International Trade Law (UNCITRAL) at Vienna, he helped draft parts of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). We asked Griffith whether, when it comes to international commercial arbitration, the Victorian Bar is camping out. His answer was a resounding "yes". Some months ago, Griffith says, he enquired by email of a senior commercial silk whether he could suggest names of young counsel who may be interested in appointment as secretary to ICC, PCA or ICSID[1] tribunals. The silk replied that he was happy to help, but was unfamiliar with the acronyms. Mr Griffith despairs that these acronyms are the "patios" of too few counsel, let alone their professional playing ground.

While a few Australians have been appointed to arbitral tribunals sitting off-shore, including Mr Griffith, Professor Doug Jones, Dr Michael Pryles, and latterly, Murray Gleeson QC and Jim Spigelman QC, it remains unusual for members of our Bar to be appointed arbitrators in international commercial arbitrations, whether in Australia or elsewhere.

Mr Griffith observes that this is in contrast to the English Bar, where sets of chambers maintain an active presence, almost to our shores, and have achieved almost a monopoly in appearance work in arbitral disputes throughout the Asian region, particularly in Hong Kong and Singapore. In September this year, Thirty Nine Essex Street Chambers and the Kuala Lumpur Regional Centre for Arbitration co-hosted the soft opening of KLRCA's impressive new premises at Bangunan Sulaiman, in Kuala Lumpur, where those English chambers have opened a base. The event was followed by the International Malaysia Law Conference, which he notes had limited Australian participation, albeit with welcome support of our Bar Council.

How then to address these concerns, and what are all these acronyms?

Albert Monichino QC is the current president of the Australian branch of the Chartered Institute of Arbitrators (CIArb). Established in London in 1915, it now has 13,000 members in 120 countries. CIArb Australia, as one of CIArb's 40 branches, organises training courses



> “How then to address these concerns, and what are all these acronyms?”

and educational events and, in particular, enables members of the profession to become accredited arbitrators. Many members of the Bar will have attended the three fireside chats held this year, which are the subject of another article in this edition and which explored the issues raised by the Chief Justice.

Mr Monichino notes that the Convention on the Recognition and Enforcement of Foreign Awards made in New York on 10 June 1958 (the New York Convention) and the Model Law are the twin pillars which underlie the international commercial arbitration system. The New York Convention deals with enforcement of foreign arbitration agreements as well as the recognition and enforcement of foreign awards. One hundred and forty-nine countries (including most of Australia’s neighbours in the Asia-Pacific) have acceded to this treaty. In essence, an arbitral award rendered in a New York Convention country is enforceable in another New York Convention country, subject to a number of limited grounds for resisting enforcement. Notably, those grounds do not include either error of law or error of fact. As a result, a foreign arbitral award is more easily enforceable than a foreign court judgment.

By contrast, the Model Law, promulgated by UNCITRAL in 1985, is a template arbitral law that may be adopted by nation states. It was designed to promote harmonisation of arbitral law around the world, and thus embodies a hybrid consensus between common law and civil law procedures. The Model Law reflects the twin philosophies of minimum court intervention and party autonomy. Although it is designed for international arbitration, it may also be adopted to regulate domestic arbitration. A nation state may adopt it in whole or in part, or amend or supplement it, as it sees fit. The Model Law is the backbone of the domestic and international arbitral legislative regimes in Australia. Sixty-seven countries have adopted the Model Law and, as such, are commonly referred to as ‘Model Law countries’. They include Singapore, Malaysia and Hong Kong.

Like the New York Convention, the Model Law deals with the enforcement of arbitration agreements and arbitration awards. It also deals with other matters, such as the conduct of arbitration and the setting aside of arbitral awards by the court at the seat of the arbitration. The grounds for setting aside mirror the limited grounds for resisting enforcement in the New York Convention.

John Arthur, a member of our Bar and a Fellow of CIArb, points out that international commercial arbitration is recognised as the preferred method for resolving transnational commercial disputes. It is seen as offering many advantages over litigation. Mr Arthur explains that these include:

- neutrality – where disputing parties come from different countries and each is distrustful of the other’s legal system;
- privacy and confidentiality – parties are able to avoid an open court hearing with its attendant press coverage and, in some countries, government scrutiny;
- simplicity and flexibility in procedure – parties are free to choose the procedures that will apply to the arbitration, subject to their arbitration agreement and the lex arbitri, and are not bound by ‘one-size fits all’ court rules;
- an “internationally recognised harmonised procedural jurisprudence” – combining the best practices of both the civil and common law systems, taking into account diffuse cultural and legal

Jo Delaney (special counsel, Baker & McKenzie), Julie Soars, Caroline Kenny QC, Albert Monachino QC, Profesor Janet Walker (CIArb General Academic Advisor) and Sandrah Foda (NSW Bar)

backgrounds and philosophies;
- expedition – the parties are not required to queue up with all the others waiting to be heard in national courts;
- the ability to choose the 'judge';
- party autonomy – giving the parties control of the dispute resolution process and its procedure; and
- finally, and perhaps most importantly, transnational enforceability of awards.

These perceived advantages are integral to the success of international commercial arbitration. Mr Arthur stresses an important qualification: for any arbitration process to be effective, it must be supported by at least two bodies of national, or local, laws: first, the lex arbitri, which gives legal force and effect to the process of the arbitration; and secondly, national laws which enact or legislate for the enforcement mechanisms of the New York Convention.

For arbitrations conducted in Australia, the *International Arbitration Act 1974* (Cth.) provides those mechanisms and gives the Model Law the force of law in Australia. However, for many barristers representing Australian clients involved in an international commercial arbitration, the arbitration will be conducted outside Australia – probably in Asia.

Caroline Kenny QC, who is also a Fellow of CIArb, the Chair of CIArb Australia's Education Committee and the Convenor of its busy Victorian chapter, says that arbitration has grown exponentially in the past ten years in Asia, especially in China, Hong Kong, Singapore and India. In her view, Australian practitioners lag behind those from North America and Britain in recognising and taking advantage of the opportunities in these emerging markets. She says we need to adopt a united Australian approach in seeking out the work in those markets and in attracting work to Australia. Expanding the Australian profile in international arbitration abroad should be the aim of all the Australian Bars and the Australian Bar Association.

Ms Kenny's views, like those of Chief Justice Allsop, are shared by other leading practitioners in the field. Recently, at one of CIArb's events at the new Melbourne Commercial Arbitration and Mediation Centre, Karyl Nairn QC, an Australian and prominent international arbitration practitioner, commented that there are enormous opportunities for Australians in Asia but first Australians must raise their profiles. Prof Doug Jones AO made similar comments in another recent CIArb event held in Melbourne at Herbert Smith Freehills.[2] Similarly, Dr Michael Pryles, also an Australian and the foundation President of the Court of Arbitration in Singapore (an organ of the enormously successful SIAC) and previously Chairman of the SIAC Board of Directors, has often spoken of the need for Australians to become better known in Asia. Ms Kenny says that:

> *...we should heed that advice and make a united effort to establish a profile for Australian practitioners overseas. After all, we have much to offer as counsel, arbitrators and also as a venue for arbitration. We are close to Asia, not as expensive as our competitors (with some well-known exceptions), our lawyers are among the best trained in the world and we embrace the Rule of Law. For this generation and the next, we should not miss the opportunity to establish a presence in the growing arbitration markets abroad.*

"For many barristers representing Australian clients involved in an international commercial arbitration, the arbitration will be conducted outside Australia – probably in Asia."

Euginia Levine of our Bar points out that one area that presents Australian practitioners with particular opportunities is "investor-state" arbitration, a field of arbitration involving the resolution of disputes between foreign investors and national governments. Foreign investors are ordinarily granted the right to bring arbitral proceedings against the government pursuant to investor-state dispute settlement (ISDS) clauses in bilateral investment treaties (BITs) and free trade agreements. While the previous federal government was opposed to ISDS clauses, the current Australian government has announced that it will consider including ISDSs in free trade agreements on a case-by-case basis.[3]

The inclusion of ISDS provisions in trade deals and the growth in cross-border investments has led to a significant increase in investor-state arbitrations involving Australian parties. One high-profile example is the ongoing arbitration between Philip Morris and Australia concerning Australia's tobacco plain packaging legislation, the first ever investment arbitration brought against the Australian government under a BIT.

Australian investors also have several ongoing arbitrations running against foreign governments, including the governments of India and Pakistan. The involvement of Australian parties and issues in these arbitrations presents distinct opportunities for Australian practitioners. For example, in one recent investor-state arbitration between an Australian company, White Industries, and the government of India, the Australian investor retained an all-Australian legal team. The investor obtained a favourable investor-state award after establishing that the Indian court system did not provide it with an effective means of protecting its legal rights (in contravention of the protection offered in the relevant BIT), having regard to its lengthy unsuccessful attempts to enforce an ICC award against an Indian party before the Indian courts.

"In one recent investor-state arbitration between an Australian company, White Industries, and the government of India, the Australian investor retained an all-Australian legal team."

How can members of our Bar who are interested in doing so raise their profile and become involved in this growing area of dispute resolution? Ms Kenny points to Fellowship in CIArb, which is readily recognised in the global arbitration community in a way that fellowship of a local arbitration organisation is not. Fellowship in CIArb signifies a standard of proficiency in international arbitration and an affiliation with the oldest and most prestigious arbitration and ADR professional membership organisation in the world.

The Chair of the Victorian Bar's International Arbitration Committee, Martin Scott QC, has a further suggestion. He says that:

> *Acquiring knowledge is the first step but what is really required is a collaborative structured engagement by members of the independent Bars rather than an ad hoc individual approach, which is mostly what happens at the moment. The English and New Zealand Bars have done this by individual sets of chambers setting up in Singapore as a base for the region. This is at the least seen as a tangible commitment to dispute resolution in Asia and immediately raises a profile. Whatever else came from such an undertaking it would go a long way to dispelling the impression that Australian barristers are disengaged and inward-looking, which is a persistent comment at the highest levels in the profession overseas.*

Scott shares the view that commercial dispute resolution is undergoing an irrevocable shift to international arbitration because of globalisation and is concerned that the implications for commercial practice here have not been fully appreciated, if at all, by many:

> *I think an opportunity is passing us by and a threat is being dangerously ignored. A regional set-up would act as both a focal point and bridge, both of which are badly needed. The issue is not so much expertise. I see the issue as an inaccurate perception of our expertise and skills. The internationalisation of the firms as they follow clients has contributed to this because we are not front of mind often enough to be accurately evaluated.*

Some say it gently and some are more forceful. But the international arbitration heavyweights in this country all agree that Australia is lagging as a centre for serious commercial litigation. And the reason is simple. Australian practitioners' involvement in commercial arbitration, particularly in Asia, is limited. To catch up with their regional competitors, members of the Victorian Bar and their peers at the other Australian Bars need to adopt a united approach in building a strong permanent arbitration presence across our region. Only then will the image be dispelled of a Bar that is "camping out" when it comes to international commercial arbitration.

1. International Chamber of Commerce; Permanent Court of Arbitration; International Centre for Settlement of Investment Disputes
2. The podcasts of both CIArb events are available to members on the VicBar website *Recent CPD Podcasts & Papers.*
3. Mr Griffith QC recommends the paper on ISDS clauses delivered by Chief Justice French to the Australian Judges Conference in Darwin this year: *http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcjo9jul14.pdf*

* *The author is certainly camping out and could not have compiled this article without the considerable assistance of many of those identified.*

# Dr Cliff Pannam QC: advocate, teacher, scholar, friend

GEORGE GOLVAN

*Intoxicated by the blossom*
*I stay*
*Leaning on the balcony*
*Its scent*
*Blends with and intensifies*
*My cup of wine*
*Li Qingzhao* – from *Meandering River* (1128)
*Translated by Clifford Pannam*

Dr Clifford L. Pannam QC (usually known as Cliff) who relinquished his chambers at the end of June 2014, but will continue in practise as a barrister, is generally regarded as one of the great advocates of the Victorian Bar of the past half-century. Cliff is of paternal Greek origin and includes amongst his relatives Charlie Pannam, Alby Pannam, Ron Richards and Lou Richards – all of whom had illustrious careers with the Collingwood Football Club. The Pannam/Richards dynasty made Collingwood the only football club to have been captained by three generations of the one family.

Cliff's passions were less sporting and more academic in inclination. Cliff attended Princes Hill Central School and later Melbourne High School. He graduated from the University of Melbourne Law School in 1958 with 1st class honours, coming second in his class to the late Neil McPhee QC. He subsequently studied at the University of Illinois (LLM) and Columbia University (New York) (JSD). On his return to Australia he was appointed by Melbourne Law School as a Senior Lecturer in Law (1963-1965) and Reader in Law (1966-1968). In 1965 he spent a year as a Thayer Fellow at the Harvard Law School. He was as an outstanding teacher. Dr Ian Hardingham QC recalls his experience as a law student in a class taught by Cliff, who used the Socratic method of teaching, which was said to encourage critical thinking via an interactive dialogue between teacher and students utilising a classroom environment characterised by "productive discomfort". Ian recalls that the class, which included such future legal luminaries as the High Court's Justice Hayne, was in "fear and trepidation" of being included in the dialogue, and Cliff did not hesitate to "tear strips off" those who were not adequately prepared. But Ian essentially remembers Cliff as "a great teacher" and subsequently "a wonderful colleague" when they were both on the teaching staff at Melbourne Law School.

Cliff's career at the Victorian Bar has been no less distinguished. He signed the Bar Roll on 8 April, 1967 (the only person to sign the Roll on that day) and read with W. E. (Bill) Paterson (later QC). He took silk on 23 November 1976, after a mere nine years as a junior, which appears to have been somewhat of a swift progression to achieving silk, bettered only by Norman O'Bryan AM SC, who took silk seven years after signing the Bar Roll. (Justice Crennan of the High Court also took silk after nine years, having, however previously practised at the NSW Bar.) Others who took silk in the same intake included Paul Mullaly, Peter Rendit, Michael O'Sullivan, George Hampel, Howard Fox, Patrick Dalton, John Winneke, John Lyons and Keith Marks. Cliff Pannam was the junior silk.

He has always been a formidable and charismatic advocate. One fellow silk recites that, after hearing Cliff open his client's case, he "felt like clapping and cheering" even though he was on the other side. The Hon Julie Dodds-Streeton QC, before whom Cliff appeared, describes him as an outstanding advocate, with 'superb intellectual qualities and unequalled legal scholarship, who had the intellectual self-confidence to abandon his lesser points'.

Colleagues describe Cliff as fair and generous. One opponent remembers that, after appearing against Cliff in a hard fought trial, Cliff took him out for lunch in his Rolls Royce to one of his favourite Asian restaurants. Cliff held court each Friday at the Flower Drum, enjoying the hospitality of his good friend and legendary restaurateur, the late Gilbert Lau.

The Hon Alan Goldberg QC has appreciated Cliff's hospitality at the annual Boxing Day cricket matches. A team comprising the cream of the Bar, selected by Cliff and including such handy cricketers as the Hon Ron Merkel QC, the late Henry Jolson QC, Neil Young QC, the Hon Ray Finkelstein QC (in slips) and Cliff, who had reasonable skills as a high school opening bat, would play a local side from Riddells Creek, occasionally led by the artist Clifton Pugh, at the picturesque Mt Macedon Sports Oval. Ample quantities of fine food and refreshments followed, provided by Cliff.

In addition to his career at the Bar, Cliff has had a lifelong fascination with horses and horse racing, a general interest in Australian history, a continuing

**“His love of China led him to learn Mandarin when he was over the age of 50. He is the author of some splendid translations of Mandarin poetry...”**

interest in China and its language, food and history, as well as an interest in his Greek heritage which has taken him back to Greece on numerous occasions.

Cliff’s involvement with China commenced when as a young teacher at the Melbourne Law School in 1964, the then Dean, Professor Zelman Cowen, asked whether, in conjunction with Professor Guest of Cambridge University, he would travel to Hong Kong to advise the British Colonial Office as to whether funds should be provided to establish a new law school in Hong Kong. He spent some seven or eight months in Hong Kong, where he also taught in the Extra-Mural Studies Department of Hong Kong University, which was then offering a course to qualify local students for the University of London external LLB. degree.

During his stay in Hong Kong, Cliff formed many close friendships and managed to visit Guangzhou (Canton) in Mao’s China, a year before the start of the Cultural Revolution. His love of China led him to learn Mandarin when he was over the age of 50. He is the author of some splendid translations of Mandarin poetry, including a book of the lyric poems of Li Qingzhao (1084-mid 1150’s), the most famous female poet in Chinese history, entitled *Music from a Jade Flute: the ci poems of Li Qingzhao*.

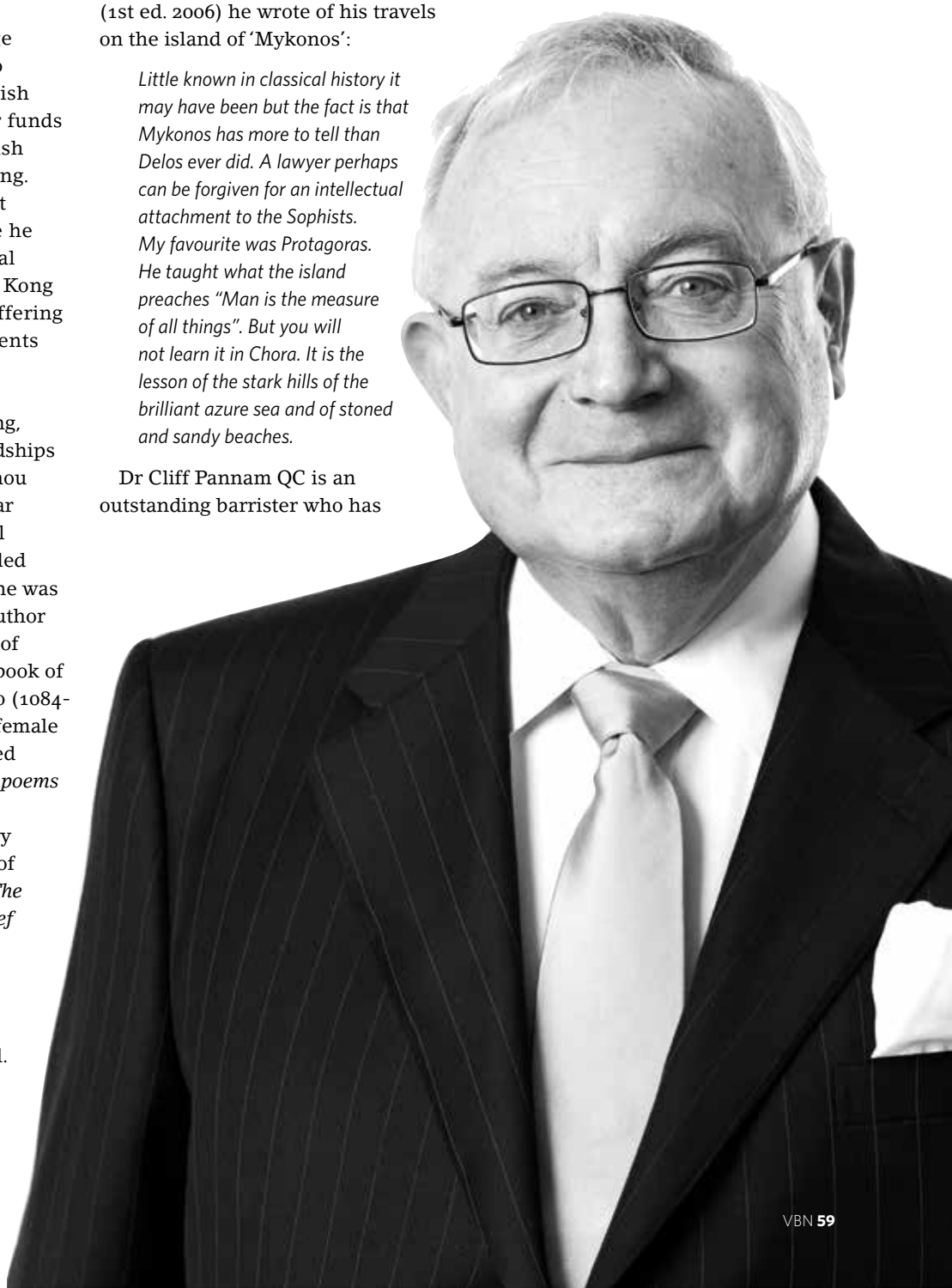
His love of Australian history led to the publication in 1992 of his book: *Sir William’s Muse: The Literary Works of the First Chief Justice of Victoria, Sir William a’Beckett*.

His love of horses resulted in publication of his treatise: *The Horse and the Law* (3rd ed. 2004). He has also authored or co-authored a number of leading legal texts, including *Cases and Materials on Contracts* by R. S. McGarvie, C. L. Pannam and P. J. Hocker and *The Law of Money Lenders in Australia and New Zealand*.

Cliff has also written, in his elegant style, several books of essays and poems reflecting the variety of his extraordinary range of interests and travels. In his book, *Of Greece and China and a Few Australian Things* (1st ed. 2006) he wrote of his travels on the island of ‘Mykonos’:

> *Little known in classical history it may have been but the fact is that Mykonos has more to tell than Delos ever did. A lawyer perhaps can be forgiven for an intellectual attachment to the Sophists. My favourite was Protagoras. He taught what the island preaches “Man is the measure of all things”. But you will not learn it in Chora. It is the lesson of the stark hills of the brilliant azure sea and of stoned and sandy beaches.*

Dr Cliff Pannam QC is an outstanding barrister who has enriched the law with his brilliant advocacy. He has appeared in numerous contested and significant cases in the High Court, the Federal Court and the Victorian Supreme Court. His appearances in the High Court include *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, *Legione v Hateley* (1983) 152 CLR 406, *Commonwealth Bank of Australia Ltd* ▸



*v Amadio* (1983) 151 CLR 447 and *Giannarelli v Wraith* (1988) 165 CLR 543.

He also appeared in a number of cases heard by the Judicial Committee of the Privy Council: see for example *Scholefield Goodman and Sons Ltd v Zyngier* [1986] AC 562 and *Chase Securities Ltd v GSH Finance Pty Ltd* [1989] 1 NZLR 481. In his final appearance before the Privy Council, his opponent was the recently ennobled English Silk, Lord Alexander QC, who had the reputation for being the finest advocate in England. In an article entitled "An Appearance", Cliff described Alexander's performance as "dazzling… although his delivery was more than a little rich and fruity for Australian tastes".[1] It was not one of Cliff's forensic successes, and he was not assisted by the fact that "Lord Templeton made it absolutely clear from the outset that that he could not even begin to understand how the rival view could be put".

> "The Hon Julie Dodds-Streeton QC, before whom Cliff appeared, describes him as an outstanding advocate, with 'superb intellectual qualities and unequalled legal scholarship, who had the intellectual self-confidence to abandon his lesser points'."

Cliff's legal knowledge in the areas of commercial, property, corporate and securities and arbitration law are second to none. He has also developed a specialised practice in the areas of horse ownership and horse related activities, frequently advising and acting for racing bodies.

Cliff Pannam QC has had a huge impact on the Victorian Bar. His colleagues remain in awe of his forensic skills and breadth of legal knowledge. He gives his time and advice generously to colleagues. He was a tremendous mentor to his readers, many of whom acted as his juniors or sought his valued advice from time to time. Such advice was always freely given, with a comment such as: "there is a recent article about this in the 2005 *Law Quarterly Review*".

Cliff is a modern Renaissance man, who made his way in life without a silver spoon in his mouth. Cliff's contribution to the camaraderie of the Bar and the diverse intellectual passions of this polymath have enriched us.

1 *Victorian Bar News*, Autumn 1989

# Musings ON THE CASE OF THE chimney sweep's boy

CLIFF PANNAM

There must be very few lawyers who do not recall from their student days the very old case of the chimney sweep's boy and the jewel which he had found. Tersely reported by Sir John Strange in 1722, more of whom later, it was as follows[1]:

**Armory vers. Delamirie**
In Middlesex coram Pratt CJ

"The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.
2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.
3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the

> "The decision itself is still much cited and relied upon"

> measure of their damages: which they accordingly did."

The common law action in the case for trover involved a claim for damages being the value of personal property which had been wrongfully taken or retained. The name was derived from the old French – *trouvère* – meaning "a find". In pleading the cause of action there was a non-rebuttable fictitious allegation that the defendant's finding of the personal property in question was accidental.[2] We now know the cause of action as being one for the tort of conversion.

The 'water' of a gemstone refers to its clarity or transparency and its brilliance or lustre.

The decision itself is still much cited and relied upon, in particular in relation to its third point. The first two are now trite. As to the third, it is still an important principle in the assessment of damages. Handley JA of the New South Wales Court of Appeal, with whom Mason P and Beazley JA agreed, encapsulated it as follows:

> *"In my judgment the Court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, and resolving doubtful questions against the party whose actions have made accurate determinations so problematic."*[3]

So from 1722 until today, almost 400 years later, the third principle has remained alive and well; and simply reflects common sense. But now let us leave the legal principles which were the substance of the Lord Chief Justice's decision, important though they were, and look more closely at the people involved in the case.

First, the plaintiff. It is a great mystery as to how, and in what circumstances, a mere chimney sweep's boy came to be the plaintiff in an important damages action heard before the Lord Chief Justice of England and a civil jury in the Court of King's Bench in 1722. Who was the plaintiff – this boy named Amory? The fact is that we know nothing of him. But we do know that chimney-climbing boys were on the lowest rung of the social and employment ladder. Their tasks were dangerous and extremely hazardous to health; for this they were paid a pittance.[4] How on earth did young Amory become the plaintiff in this proceeding? Who paid the lawyers who represented him their fees? If they were not paid, what caused them to be involved?

Second, the defendant. The reporter, Sir John Strange, made an error in naming him as "Delamirie". In fact he was Paul de Lamerie, who was a famous London silversmith. Indeed, he is regarded as the finest and best eighteenth-century English silversmith.

We have three examples of his work in the National Gallery of Victoria: two superbly engraved waiter trays; and an elegant candlestick holder with a snuffer and wick-trimming scissors.

However, to understand him better, it is necessary to know something of the law relating to silversmiths in his day. Since the fourteenth century, there had developed in England a system designed to ensure that the production of silverware works of all kinds were authentic. Perhaps the very first example of government-regulated consumer protection! Gold and silver were too soft to meet the artistic needs of craftsmen so, in order to make them stronger, they were alloyed with other metals like nickel and copper. It was decreed that in order to qualify as sterling silver at least 925 parts per 1000 were required to be of silver.

To police this system, the Worshipful Company of Goldsmiths was established by a charter granted by King Henry III in 1327. From the fifteenth century, all London silversmiths were required to bring their silver works to Goldsmiths' Hall to have them checked so as to ensure that they met the sterling silver standard.

In de Lamerie's time at Goldsmiths' Hall, there was an assay office that checked every silverware piece that was submitted, and, for present purposes, physically marked the pieces with three different marks: the marks of the assay office; the mark evidencing the fact that the piece met the sterling silver standard; and the maker's mark. This process, with variations, has long enabled us to trace the provenance of English works in silver; it has also given us the word "hallmark".

But there was a tax involved in this process. In de Lamerie's time a duty of six pence per ounce was charged on all assayed silver items. This was regarded by the craftsmen as an unfair and exorbitant tax upon their business.

Now back to Paul de Lamerie. We now know a good deal about him. A detailed biography was written by P.A.S. Phillips in 1935. In addition, there are two quite brilliant catalogue introductions to important recent exhibitions of his work written by Susan Hare and Ellenor Alcorn.[5]

He was born in 1688 in what is now the Netherlands. His father was a minor French Huguenot nobleman and soldier, who followed William of Orange to England in 1689. The family lived in London in a house in Soho. In 1703, De Lamerie became the apprentice of a London goldsmith, Pierre Platel, who was also of Huguenot origin. Soho, and the Strand where Platel carried on his business, were in those days the centre of London's refugee Huguenot community. In fact the predominant language spoken in the area was French. They had fled persecution because of their Protestant faith.

De Lamerie ended his apprenticeship in 1711. He registered his maker's mark at Goldsmiths' Hall in 1713 at which time he commenced his own business. He seems to have spent the two years in between

selling expensive pieces of silverware to the rich and famous. His business involved the sale of jewellery as well as articles crafted from silver or gold. However, the main part of the business was constituted by the design and crafting of fine silver articles.

Paul de Lamerie became the most prolific silversmith of his time. There was a very good reason why this was so. He employed large numbers of skilled creative silversmiths, mostly foreign-born Huguenots, who worked anonymously, i.e.without personal marks. It seems that they created most of the great Rococo pieces for which de Lamerie is famous and to which he applied his personal maker's mark. The story and evidence relating to this side of his business was the subject of a travelling international exhibition of a large number of his silver pieces which were displayed at the Powerhouse Museum in Sydney in April/May, 2008. The name given to the exhibition neatly encapsulated its subject: "*Beyond the Maker's Mark*"[6]. This activity would not have endeared de Lamerie to his rival silversmiths. This is reflected in the many times he was disciplined by the Worshipful Company of Goldsmiths for complaints that he had passed off as his own silver pieces made by others. For example, in 1715 he was found to have "… caused foreigners' work and got ye same toucht at ye Hall". We would now describe his conduct as serious passing off or misleading and deceptive conduct.

Then again, de Lamerie showed a general cavalier attitude to the authority of the Company of Goldsmiths. Its records reveal a string of complaints made against him by other silversmiths, almost all English. In 1714 he was fined £20 for selling silver works which were not hallmarked and thus on which no duty had been paid. He was found guilty of the same conduct again in both 1716 and 1717. On the latter occasion the complaint against him was:

> *… for making and selling Great quantities of Large [silver] plate which he doth not bring to Goldsmiths' Hall to be mark't according to law.*

In fact, a very large number of the surviving pieces of de Lamerie's silverware only bear his maker's mark and not the assay office or purity hallmark. The scale of this activity can be illustrated by the fact that most of the vast collection of de Lamerie's silver once owned by the Russian Imperial family only carries his maker's mark. But all of this does not seem to have affected the spectacular success of his business, counting as it did among its customers the aristocracy of England and most of Europe. Indeed, as early as 1717 he was generally referred to as "the King's Silversmith". Also, he was to become one of the four senior Wardens of the Company of Goldsmiths who controlled its affairs. This was no doubt as a result of the incredible size of his business.

In this latter respect, our own Geelong-born Stuart Devlin went one better, becoming the Company's Prime Warden in 1996/7. Devlin has been described by a former Crown Jeweller to the Queen, David V Thomas, as:

> *… the greatest designer in gold and silver since the incomparable Paul de Lamerie in the eighteenth century.*

We are all fortunate enough to carry with us examples of Devlin's work. Back in 1984 he designed our first decimal coinage. I especially love the water rippling over a platypus on the 20-cent coin, creating a marvellous three-dimensional image.

Finally, to return to the case of the chimney sweep's boy. It seems clear to me that there were any number of rival English silversmiths who would have financed Armory's claim in order to embarrass de Lamerie. He was falsely applying his maker's mark to the work of others and he was also selling unmarked silver pieces upon which no duty had been paid. He was the ideal target as he had quickly become the leading Huguenot silversmith in London. It has been estimated that around this time there were some 40 Huguenot silversmith members of

**"What is clear, however, is that in some way the case was organised or financed by de Lamerie's business rivals."**

the Goldsmiths' Company.[7] They were resented by the English silversmiths, who were constantly making complaints about their business practices to the Company. Its records show that a considerable amount of time was taken up investigating those complaints.

It may even be speculated that Armory's appearance in de Lamerie's shop with the jewel was a well-planned setup, organised by one or more of his English business rivals. The whole affair seems contrived. An impecunious, young (and dirty), ill-clad chimney sweep suddenly appears in one of London's finest jewellery and silverware shops with a valuable piece of jewellery and enquires what it is and what it is worth. One would have thought that he was in great danger of being reported to the authorities and charged with theft of the jewellery from one of the houses in which he cleaned the chimneys. Surely Amory would have taken it to some nefarious rogue dealer, rather than to de Lamerie's shop?

Furthermore, how would a poor, illiterate, uneducated, young chimney sweep have ever been able to retain an attorney and counsel to take his case against de Lamerie to the Court of King's Bench?

The detail as to how it all came about will never be known. What is clear, however, is that in some way the case was organised or financed by de Lamerie's business rivals.

That is all we know about the case but there is a curious and humorous footnote, or rather side note, to the case. The reporter, Sir John Strange KC, was a respected and successful barrister, who was to hold high office as the Master of the Rolls between 1750 and his death in 1754. He was buried in the Rolls Chapel and it is said that on his grave was engraved the epitaph:

*Here lies an honest lawyer*
*– that is Strange.*[8]

1 (1722) 1 Strange 505, 93 ER 664.

2 Cooper v Chitty (1756) 1 Burr. 36.

3 McCartney & Ors v Orica Investments Pty Ltd [2011] NSWCA 337 at para 148 et seq; and, LJP Investments Pty Ltd v Howard Chia Investment Pty Ltd (No 2) (2004) 216 CLR 388 at para [74].

4 See generally: Benita Cullingford, British Chimney Sweeps: Five Centuries of Chimney Sweeping (2001).

5 Both are available on the web: Susan's, by searching for her name and "Paul de Lamerie: At the Sign of the Golden Ball"; Ellenor's, by searching for her name and "Beyond The Maker's Mark: Paul de Lamerie Silver in the Cahn Collection". This was an international travelling exhibition in 2008.

6 See: note 5 above.

7 The Grove Encyclopaedia of the Decorative Arts, vol 1, p 54 (2006).

8 This appears on p 131 of the marvellously titled – Epitaphiana: or, The curiosities of churchyard literature, being a miscellaneous collection of epitaphs etc (1875).

BAR Lore


# Owen Dixon the Barrister – No Case too Small

ROBERT HEATH

Sir Owen Dixon is rightly recognised as the towering figure in the history of the Victorian Bar. His achievements and appointments are well known. He signed the Roll of counsel on 13 June 1910; he took silk on 2 March 1922; he became an Acting Justice of the Supreme Court of Victoria in 1926; and he was the Chief Justice of the High Court of Australia between 1952 and 1964.

But what about Dixon's early years as a barrister? How quickly did he progress? For how long did he trek through the foothills in order to reach the summit? Did he remain on the summit?

Philip Ayers in *Owen Dixon* sheds some valuable light on Dixon's first few years at the Victorian Bar. In writing this excellent biography, Ayers examined Dixon's 1911 diary at the back of which there was a list headed 'Fees 1910'. According to Ayers, this list shows that Dixon earned 113 guineas in that year – about one-third of which stemmed from his student coaching activities. The list suggests that Dixon earned no fees in September 1910.[1]

However, the law reports show that Dixon's fortunes changed swiftly in 1911 and 1912. In late 1911, Dixon's uncle briefed him to argue a case in the High Court of

Australia.[2] It was a complex case; a related proceeding had reached the Privy Council.[3] It is significant that J E Dixon did not brief a silk to lead Dixon in this case.

In 1912, Dixon argued a pleading point before Justice Hood of the Supreme Court of Victoria.[4] As far as I can see, it is the first reported decision of the Supreme Court in which Dixon featured. He persuaded Hood J to strike out parts of the defence. The report does not show whether Dixon's opponent, Hayden Starke, was responsible for drawing the pleading the subject of the successful strike out application.

Dixon's High Court practice began to grow in 1914. In late September that year, he was Schutt's junior in a trade mark infringement appeal relating to 'Australite' gas burners.[5] But his practice in that jurisdiction took off in the next few years – volumes 20 to 23 of the *Commonwealth Law Reports* tell the story.[6] If you have appeared in Court Room 1 at 450 Little Bourke Street, Melbourne, you should be able to picture Dixon appearing at the bar table in some of these reported cases.[7] It is a testament to Dixon's talent that, in the *Federated Engine Drivers'* case, Blake & Riggall briefed Dixon with a junior to represent a substantial trading corporation.

In light of this meteoric rise, and with knowledge of Dixon's subsequent achievements, it is tempting to conclude that he practised exclusively in courts of superior jurisdiction from about 1914 or 1915. It is difficult to imagine Dixon appearing in the Court of Petty Sessions. One draft letter in his personal papers bolsters this conclusion. The draft letter contains this statement: "I did not practise in the Criminal Courts and it was only by chance that I was ever there." [8]

In June 2014, Bill Gillies of the Victorian Bar received a telephone call from Jeff Thornton, one of the partners of the firm named SLM Law. That firm has offices in Colac, Apollo Bay, Cobden and Camperdown. SLM Law incorporates the practice of a now-defunct firm named Buckland & Nevett. For over 100 years, Buckland & Nevett had an office in the Victorian town of Camperdown. Jeff Thornton told Gillies that SLM Law had uncovered some of Buckland & Nevett's old files and briefs, including briefs to Owen Dixon. He sent a selection of these papers to Gillies.

One of these briefs relates to the private prosecution of a sheep stealing case in the Court of Petty Sessions at Camperdown. The informants were the owners of the stolen sheep. They alleged that a drover named Lewis Wollard had stolen sheep from numerous properties around Camperdown.

Counsel's instructors acted for the aggrieved owners of the sheep. The memorandum to counsel states as follows:

> *"The accused Lewis Wollard is a drover living at Camperdown, and he has been unemployed for six months prior to his arrest droving sheep [that] belong to Mr Ross of Avoca in and around Camperdown.*
>
> *...*
>
> *Sheep stealing is rife in the district and has been for years and certain persons living in and about Gnotuk have always been suspected of the losses. The accused has been associated with these suspected individuals."*

The brief contains 11 witness statements and numerous other documents. One of the statements depicts the ear markings used on the sheep in one owner's flock. This was a case in which the informants' solicitors had marshalled a substantial amount of circumstantial evidence.

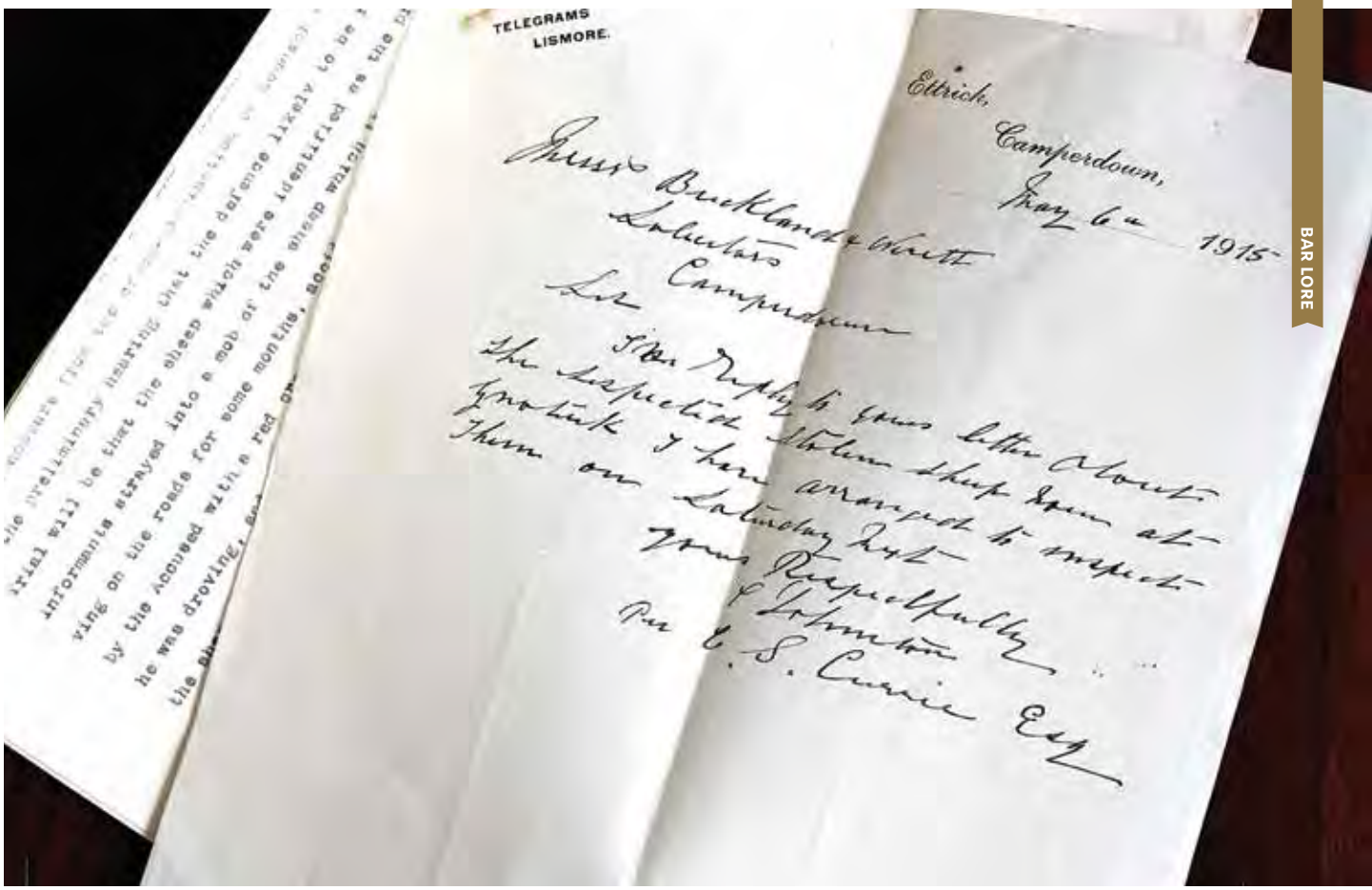
In advance of a conference at Selborne Chambers on 5 May 1915, Dixon sent a short and clearly worded memorandum of advice to Blake & Riggall. The Melbourne firm was Buckland & Nevett's town agent. In this memorandum, Dixon expressed the view that it was "undesirable" to lay a charge against Wollard under s. 40 of the *Police Offences Act 1912* (Vic) "as suggested". This position concerned the unexplained possession of stolen property. This advice was based on the following grounds:

> *"It would or might give the magistrates an idea that the larceny charge was weaker than it apparently is and in any event on the evidence before me it would seem that when the sheep were first suspected to be stolen they were in Lews' possession and not Wollard's. This would be fatal under the decision in Brown v Schiffman 16 ALR 633. "*

This advice reflects forensic judgment and a good working knowledge of the criminal law – an area outside Dixon's normal areas of practice. The decision of Hodges J in *Brown v Schiffman* [1911] VLR 133 still governs the determination of unlawful possession charges in Victoria. In order to sustain a conviction, the prosecutor must show contemporaneity of actual possession and reasonable suspicion by the investigating police.[9]

The memorandum then deals with the question of evidence. It states as follows:

> *"The two points upon which the case for the prosecution should be supported by further evidence if it is procurable are (1) The identity of the sheep (2) The exclusion of the possibility of them becoming accidentally mixed with those the accused had in his charge.*
>
> *As to (1) . It should be a matter of little difficulty to get evidence from those working for the informants which would corroborate the informants' identification. In sheep stealing cases it is impossible to get too much of this class of testimony.*
>
> *As to (2). If the police have not already done so it seems to me that Wollard's movements during April should be investigated closely. This is work which the Police should be able to carry out. If it can be shown that he passed or was in the vicinity of the informant's*




**“Dixon did not reject this sheep stealing brief as being too small or unimportant.”**

*property upon which the sheep were and that the number of sheep he was driving was not so great that strangers would get in without being noticed at the time, his statement that ‘he picked up some on the roads’ etc. would be given a more incriminating turn. Facts suggesting that he must have known where the sheep came from are very important because even if they got in his flock accidentally to appropriate them (as he said he did) with that knowledge would amount to larceny.*

*The security of the fences and the likelihood of the sheep getting on to the roads should be shown if possible.”*

The advice on the second point brings to mind a passage from the High Court’s decision in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5-6:

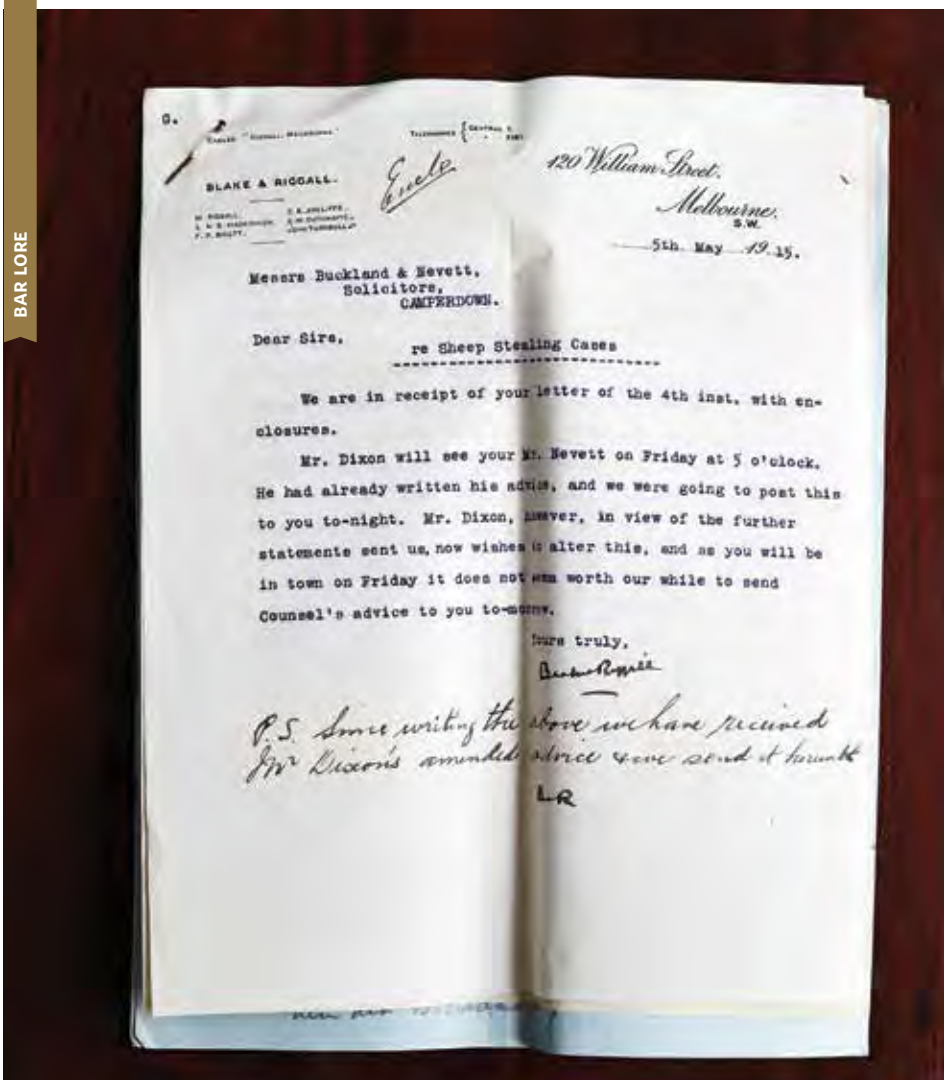
*“Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged.”*

It is likely that Dixon had a hand in writing these reasons of the Court. He would have brought his knowledge to bear on this task; and, as this 1915 brief shows, such knowledge did not stem exclusively from books. Dixon had “real world” experience in preparing and assessing criminal cases. The language of the memorandum – “In sheep stealing cases it is impossible to get too much of this class of testimony” – suggests that Dixon worked on more than one theft case of this sort.

Dixon did not reject this sheep stealing brief as being too small or unimportant. Notwithstanding Dixon’s subsequent statement that he did not practise in the criminal courts, the memorandum reflects a keen appreciation of evidentiary issues likely to bear on the criminal prosecution for alleged sheep stealing. Why did he take this brief? No doubt, he respected the cab rank principle. Perhaps he was happy to take the brief because another supporter, Blake & Riggall, was involved as the town agent. It is also likely that Dixon well understood that good work sometimes came from unlikely sources.

Lee Aitken dealt with this last concept in an address he gave to students in the NSW Bar readers’ course.[10] In light of Dixon’s acceptance of this brief, one passage stands out.[11] It reads as follows (footnotes omitted):

*“Do not think that the case is too small, or too big. Sarjeant Ballantine gave advice to the beginner many years ago: ‘Never return anything at the Bar –*



G.

BLAKE & RIGGALL.

Encls.

120 William Street.
Melbourne.
S.W.

5th May 1919.

Messrs Buckland & Nevett,
Solicitors,
CAMPERDOWN.

Dear Sirs,

re Sheep Stealing Cases

We are in receipt of your letter of the 4th inst. with enclosures.

Mr. Dixon will see your Mr. Nevett on Friday at 5 o'clock. He had already written his advice, and we were going to post this to you to-night. Mr. Dixon, however, in view of the further statements sent us, now wishes to alter this, and as you will be in town on Friday it does not seem worth our while to send Counsel's advice to you to-morrow.

Yours truly,

P.S. Since writing the above we have received Mr Dixon's amended advice & we send it herewith

LR

*I never do!' Lord Hewett had a motto: 'Do not neglect the day of the little fishes.'*

*...*

*Do not think that you need to be briefed by a big firm to have 'quality' work – to begin, all work which gets you into court and on your feet before any tribunal at all is good work. Secondly, a large firm has no monopoly on large private clients – a kind man in Double Bay running a one-man practice sent me several times to the High Court for 'anchor clients' on more harum-scarum cases than I have seen in a lifetime. Thirdly, as any experienced advocate knows, there is absolutely no correlation at all between the monetary scale of the matter and the legal complexity involved in it."*

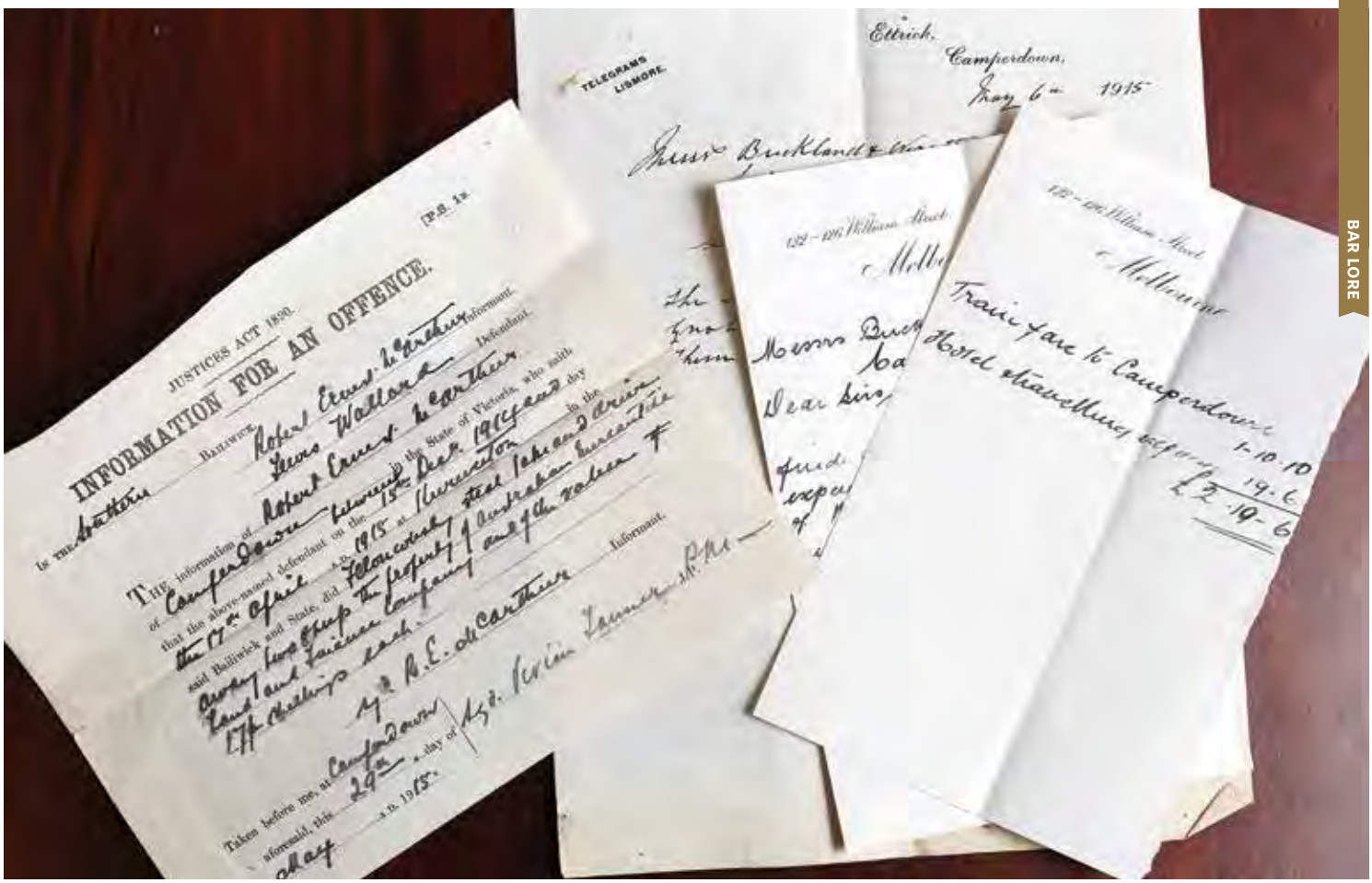
If Dixon took this brief with an eye on future work, this strategy was successful. The papers suggest that, over the next 10 to 15 years, Buckland & Nevett regularly sought Dixon's counsel. In particular, two briefs show that Buckland & Nevett entrusted Dixon to provide advice in relation to the affairs of the Camperdown Cheese & Butter Factory Ltd. Adopting the language of Aitken, it is likely that this company was one of the firm's "anchor clients".

The first of these briefs was sent to Dixon in late 1919. It relates to the company's discharge of washings into a drain for which the Shire of Hampden was responsible. In summary, Buckland & Nevett wanted to know whether the company's drainage system exposed the company to liability.

A few days before Christmas, Dixon sent a handwritten memorandum of advice to his instructing solicitors. In order to convey the style and flavour of Dixon's advice, I have set out below some key passages from this memorandum:

> *"I have given careful consideration to the very confused legislation relevant to this case. Apart from statutory provisions the Company could not, I think, be prevented from continuing the discharge of its washings as at present unless there was thus created a condition so offensive as to amount to a nuisance at common law.*
>
> *...*
>
> *The matter is however governed by two statutory provisions. The first does not operate to alter the criterion of liability but imposes penal consequences for infringement. It is section 280 of the Health Act 1915. This combined with sec. 279(6) would expose the Company to fine upon summary conviction but in my opinion the essential ingredient in the offence is the same as that which I have stated for the common law nuisance.*
>
> *The other statutory provision is that referred to in the case viz. sec. 300. ... The second part of section 300 in my opinion causes the Company real & serious difficulty.*
>
> *...*
>
> *It follows that if the Council form an honest opinion & give it appropriate expression that the Company is doing what tends to the stoppage of the drain, the Company may be restrained from continuing its present system."*

The memorandum cuts through the difficulties with which Dixon had been presented. The solicitors and the client received unambiguous answers to the posed questions. It also conveys the distinct impression that, having given sustained consideration to all relevant matters, Dixon proceeded to write his advice without the benefit of producing written drafts. The memorandum does not repeat slavishly the relevant statutory provisions. Nor does it include passages from reported cases. Rather




the document alludes to such things, and such allusions buttress rather than smother the crisply expressed opinions. Almost one century after the brief was returned, and knowing the course of Dixon's career, it is a privilege to read this memorandum.

The second of these briefs was sent to Dixon KC in early 1928. It related to a Supreme Court proceeding in which the same "anchor client" was the defendant. The dispute involved the plaintiffs' entitlement to bonus payments in circumstances where one plaintiff had admitted supplying dairy products to companies other than the Camperdown Cheese & Butter Factory Ltd.

In this brief, the firm asked Dixon to do as follows: (1) advise whether inspection of certain documents should be given; (2) settle the form of proposed resolutions of the company; (3) draft interrogatories; and (4) "indicate lines of defence". The back sheet indicates that Dixon was required to tackle these tasks without the help of a junior.

From the modern perspective, bearing in mind Dixon's legacy in the form of reported decisions, it is very easy to overlook the concept that he may have worked on matters in the Court of Petty Sessions at Camperdown. It is also easy to overlook the concept that, following his brief period as an Acting Justice of the Supreme Court, Dixon KC could have been called upon to draft interrogatories from scratch. These papers provide a good reminder of two things. First, if the matter falls within counsel's expertise, the cab rank rule applies. Second, for any advocate (including those destined for greatness), no brief is too small.

1 Philip Ayers, *Owen Dixon*, The Miegunyah Press, 2003, p 17.

2 *Cock v Aitken* (1911) 13 CLR 461.

3 *Smith v Cock* [1911] AC 317.

4 *Gill v Colonial Mutual Life Assurance Society Ltd* [1912] VLR 146.

5 *Remington v The Welsbach Light Company of Australasia Ltd* (1914) 19 CLR 237.

6 See the following decisions: *Green v Worley* (1915) 20 CLR 418 (junior to Macfarlane); *Glenn v The Federal Commissioner of Land Tax* (1915) 20 CLR 490 (junior to Starke); *Craine v Soden* (1916) 21 CLR 268 (junior to Schutt); *Federated Engine Drivers' and Firemen's Association of Australasia v The Colonial Sugar Refining Company Ltd & Ors* (1916) 22 CLR 103 (leading Stanley R. Lewis); *The Welsbach Light Company of Australasia Ltd v The Commonwealth of Australia* (1916) 22 CLR 268 (junior to Mann); and *Stemp v The Australian Glass Manufacturers Company Ltd* (1917) 23 CLR 226 (junior to Mann).

7 Robert Heath, *450 Little Bourke Street, Melbourne* (1999) 73 ALJ 124.

8 Philip Ayers, *Owen Dixon*, The Miegunyah Press, 2003, p 22.

9 See *DPP v Pastras* [2005] VSC 59 at [20] per Bongiorno J – "The situation described by Hodges J in *Brown v Schiffman* is still the case in Victoria when a charge of unlawful possession is before a Court".

10 Lee Aitken, *'Analysing a judgment' or, how to develop a practice* (2007) 30 Australian Bar Review 114.

11 Lee Aitken, ibid, p. 118.

# A Step Back in Time

**This year the Victorian Bar has uploaded all past editions of *Victorian Bar News* onto its website.**

First published in 1971, *Victorian Bar News* provides an interesting, and at times whimsical, means of seeing just how far we have come as a Bar. The following extracts from the Spring 1984 edition illustrate this. For instance, this year our Bar Council is to be congratulated in its effort to market and promote the Bar. In 1984 for the first time members were permitted to publish posed photographs, but only in association with the publication of a learned article! Business cards and "with compliments" slips were permitted, but not for touting purposes. Particularly apt, is the article announcing the Bar Council's commitment to build new chambers (then unnamed) which we now know as Owen Dixon Chambers West.

*From the 1984 Spring edition of Victorian Bar News:*

## BAR COUNCIL REPORT

**ETHICS**

(a) Photographs for publication

The rulings concerning photographs for publication (which appear at P 86 of Gowan's The Victorian Bar) were amended by adding a sub-rule (d) That sub-rule is in the following terms -

*"(d) Subject to the limits provided by sub-rules (b) (i) and (ii) and (c), a barrister may permit a posed photograph of himself to be published in association with the publication of a learned article or address by him"*

That ruling was made following a request made by the Editor of the Law Institute Journal for photographs of contributors who were members of the Bar. The Law Institute has been advised by the Chairman of the Bar Council that -

(i) the Bar rulings have been amended so as to permit a posed head and shoulders photograph of a barrister (against a plain featureless background) to be published in association with a learned article by that barrister in a publication such as the Law Institute Journal;

(ii) the above amendment does not however permit a photograph to be published of a contributor of case notes or book reviews or the like and remains subject to the general rules against touting and obtaining undue personal publicity;

(iii) the Bar rulings do not prohibit the use of photographs of barristers engaged in public activities

(b) Business cards and with compliments slips

The Bar Council has resolved that Counsel may use business cards of normal size and style bearing name, qualifications, business address and telephone number and "barrister" or "QC". The card may not be distributed generally but may be supplied to a witness, client or solicitor where necessary. Counsel may also for normal purposes use a "with compliments" slip bearing the above information. A business card or "with compliments" slip should not be used in any circumstances which could constitute or could appear to constitute touting.

*From page 15 of the same edition:*

## THE NEW BUILDING - A POSITIVE STEP

Lawyers are reported to be conservative. Barristers more than most. Nothing we delight in more than a fond rehearsal of past triumphs. In our centenary year this delight has verged upon self indulgence. And for those who will attend the Centenary Dinner with spouse and companion, this indulgence will approach licence.

In this year the most tangible indication of the confidence which the Bar has in itself and its future has been its commitment to the new building on the ABC site. In 1975 the Accommodation Committee of the Bar Council predicted a Bar of 800 members in 1984. It is now nearly 1000. Despite the forebodings of many, it is still seen as an attractive calling for over 70 young lawyers per annum. There is every prospect that it will continue to be so.

In 1961 when there were some 200 in active practice, Owen Dixon Chambers was completed. In 1968 when the number had grown to 280, four more floors were added.

On 13th August 1975 a General Meeting of the Bar adopted a recommendation that the Bar be housed in one building. Since that date successive Bar Councils have sought to implement this policy in various ways.

**1975:** The favoured proposal was to erect a building at 544 Lonsdale Street in conjunction with North Rock Development at a cost of $23.5m.

**1977:** Attention turned to 500 Bourke Street. The Bar was to take a long lease from the National Bank.

**1978:** The Bar rejected a proposal to purchase the Goldsborough Mort Building.

**1979:** A General Meeting ratified the purchase of the ABC site.

**1981:** Bar Council resolved:

*"If a new building is erected on the ABC site it will be the policy of the Bar Council that in the allocation of rooms in the Building there be, as far as practicable, the same distribution amongst barristers on each floor as there is at the Bar generally."*

**1982:** Barristers Chambers Ltd takes a lease over part of 200 Queen Street and establishes Aickin Chambers.

**1983:** A group of some 20 barristers purchase and refurbish Seabrook Chambers. Meanwhile, the ABC Subcommittee chaired by O'Callaghan QC had been seeking proposals for the development of the ABC site. Earlier this year the Bar Council resolved to recommend to Barristers' Chambers Ltd, that it accept the proposal of Leighton Contractors and merchant bankers, Schroder·Darling to erect a twenty storey building. The proposal is outlined in *Bar News* Autumn Edition 1984. The Contracts were signed on Friday 7th September,

The contracts provide for Leighton to design and construct a building to a standard equivalent to that of 200 Queen Street. It will be completed in stages so that the Bar will take possession progressively in 1986.

The facade of the new building graces the cover of this edition. The floor layout has been determined following an analysis of the responses to the recent questionnaire. From time to time the Bar will be consulted as to other features of the project so that the end result as far as possible meets the special requirements of the majority of barristers.

The new building, as yet unnamed will soon be seen growing behind the County Court building, a visible monument to the vision and enterprise of the Bar. Like Owen Dixon Chambers, which was commenced before any but a few among us were in practice, the new building will provide for the Bar of the future a secure investment and a home for years to come.

The Bar has and will have much cause to be grateful for the efforts of the members of the ABC Sub-committee over the past few years: O'Callaghan QC, Liddell QC, Chernov QC, Webster, Gunst and Isles.

*Spring, 1984*

# I put a trial on computer (and vice-versa)

***David Ross***

"You've got to understand" said Langslow to the man in the computer shop, "that you're dealing with a couple of blokes with fingers like clubs".

We had been briefed to appear for an accused man facing drug conspiracy charges. The committal had lasted many days. Twenty three witnesses had been called before the magistrate. The Crown had given us notice of their intention to call an additional eighty witnesses.

When I first came into the matter the brief was delivered in boxes. Part of the crown allegation was that the accused had made money out of his activities. That explained the box full of papers dealing with financial matters. Some of the witnesses had already given evidence before a Royal Commission. We expected that we might get access to some of that material. The reading was going to take weeks. The issues were complex. The prospect was daunting. The mere volume of the paper was intimidating.

That's how we found our way into the comuputer shop. "There must be a way of putting this on a computer" I had insisted. So the two of us with fingers like clubs were talking to the computer gentleman. We told him that we wanted to put a court case on computer. "Ah yes", he said "we've just done a programme for a man in a greengrocer's shop who wants to know what to order".

"Perhaps that's not quite it", we said.

"We've just done a programme for a woman who runs a book store so she can tell at any given moment what stock she has. Unfortunately she doesn't know how to use it".

We walked out an hour or so later. I had by then hired an Osborne personal computer with what were said to be floppy disks, a printer, an extra V.D.U. which is computer talk for a T.V. set and assorted boxes of paper, file covers, cables and some other odds and ends. "Don't worry" said the man, "there's a book of instructions that we'll send along with it".

Conversations with well meaning friends had caused me to believe that I wanted a computer with what they call a Data Base II Programme. The man in the shop agreed. "That is just what you need" he said confidently.

So it was that at the end of the day I surveyed the brief I did not understand while sitting behind a machine I could not use. I looked up the book of instructions. If I put in certain floppy discs I would then be able to start the Data Base Training Course I was told. I put the discs in and pressed the buttons. Lights flashed, wheels whirred and printing came on the screen.

Slowly and painfully it took one through a simple course which seemed to be aimed at how to develop a mailing system of names. Of course you never know when you will want a list of people whose letter boxes you want to have filled with junk I can think of a few people right now. I wonder if the computer can arrange to have wet newspapers blowing across their gardens as well.

I kept at that machine day and night. I punched information into it and sometimes got it back I used it at Chambers. I took it home and used it there. I took it up to Macedon to Langslow's weekender that he calls his Farm.

What I wanted from the machine was an indexing system. I wanted to be able to call up what different people said about different things, when events were said to have taken place, who referred to what exhibits, what counts pieces of evidence related to, and above all where in the transcript all this was to be found.

Slowly the sort of system I wanted emerged. Just as slowly emerged a routine for extracting the information we wanted indexed.

Can you imagine a page of transcript with these headings, WITNESS PERSON ISSUE PAGE DATE EXHIBIT COUNT. At the end of each day we would get to work on that day's transcript. Let's suppose that a witness was talking about another person doing some- thing with some exhibit, or as was more usual meeting another witness to do some heroin deal. If it appeared on the transcript at page 1297 and occurred on 16.8.78, that might be entered as: SCOTT WILSON HDEAL 1297 780816 - 2.

So each event, each incident, found itself in a line of information.

After a time we found that the actual keying of the information into the computer was taking our fingers like clubs a very long time indeed. It was then that great good fortune brought us a young lady with the skill to do it for us, and a machine of her own at home. We would write out the index and she would key it in. She charged us by the hour, and very moderately at that.

We finished up with a pretty good index. Overall there is no doubt that it was a time saver. I tested the time element one night in this way. I indexed the transcript using a card system. Time: 2½ hours. Indexing for the computer. Time: 1¼ hours.

The big advantage of the computer index is its capacity to retrieve information. For instance, once we needed to find out everything that had been said on the subject of dealings in hashish oil. The computer turned up the pages in the transcript where it had been referred to in seconds. What's more, it could do combinations. You could ask the computer the question, Did Scott and Wilson meet in Sydney in 1977 If the information had previously been keyed in it would again give you the reference in seconds.

Warning: Rubbish in, rubbish out. What you put into the machine must be correct, it must be something you will want, and it must be capable of retrieval. Otherwise you've wasted your time.

## The German Dog Principle

I began to see the computer as having the qualities of a highly intelligent dog which understood only German commands. If you spoke fluent German, then no problems. If you didn't then you must learn enough German to induce it to obey you. A slight mispronunciation would have as its only result a blank look. If you tried to force the issue it would bark back "boot error", "unknown command", "B dogs error on A" or similar strange things.

Let me warn you. Life with a highly intelligent dog which understands only German is not always plain sailing.

## The Pie Bag Syndrome

Lest you think that to use a computer is simply to press a button whereupon all the answers come out, let me recount to you the following. One lunchtime Langslow and I were in my chambers. It had been a difficult morning and promised to be a more difficult afternoon with a witness who had given us little joy. Lunch had been a pie from a bag, coffee from a styrofoam cup, and the air was thick with cigar smoke. (Later on we found that the computer was allergic to cigar smoke. That explained some of its obstinacy; and when we did find that out we smoked all the more just to spite it.) We asked the computer lots of questions about what others had said this witness had been up to. It provided us with good information on the screen. Time was short. The essence had to be noted quickly. A pie bag was the nearest paper to hand so the jottings were done on it. We trooped off to court.

Not too long afterwards, it began to emerge that what we had noted over lunch was becoming vital. Then came what must have seemed an incongruous spectacle. Thousands of dollars of sophisticated equipment had been put to use, and here was counsel cross-examining holding a pie bag in his hand. At that moment the pie bag was the world.

## Conclusion

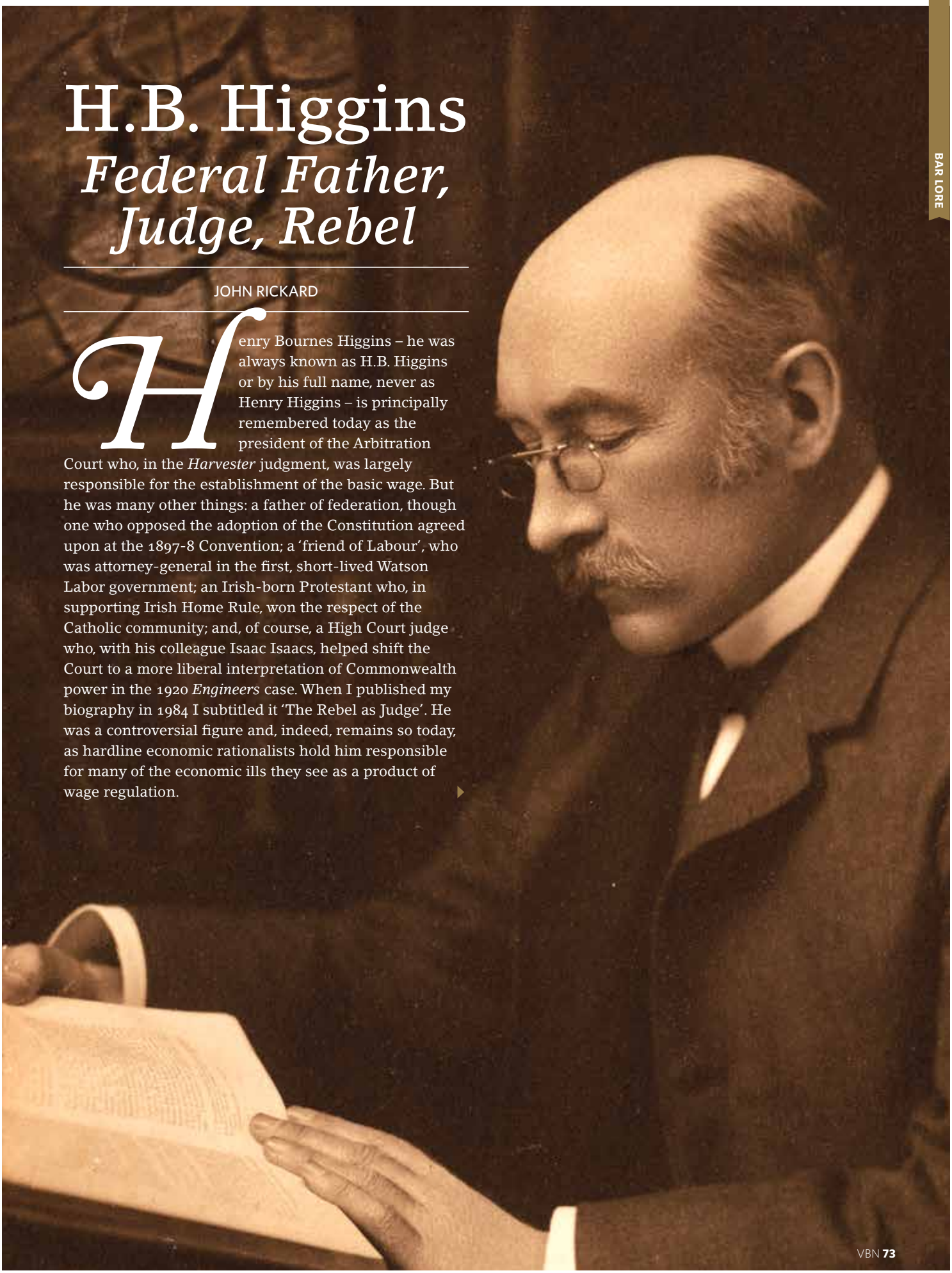
Computers are flighty little jobs. But when put to good use they can save you countless hours. If all goes well it means you only have to read the transcript once. Those who have been in long trials without a computer will probably admit to reading the whole transcript at least half a dozen times.

I should add that the accused was convicted. I blame the computer for that, of course. If there is a successful appeal that will be to the credit of his counsel.

# H.B. Higgins
## *Federal Father, Judge, Rebel*

JOHN RICKARD

Henry Bournes Higgins – he was always known as H.B. Higgins or by his full name, never as Henry Higgins – is principally remembered today as the president of the Arbitration Court who, in the *Harvester* judgment, was largely responsible for the establishment of the basic wage. But he was many other things: a father of federation, though one who opposed the adoption of the Constitution agreed upon at the 1897-8 Convention; a 'friend of Labour', who was attorney-general in the first, short-lived Watson Labor government; an Irish-born Protestant who, in supporting Irish Home Rule, won the respect of the Catholic community; and, of course, a High Court judge who, with his colleague Isaac Isaacs, helped shift the Court to a more liberal interpretation of Commonwealth power in the 1920 *Engineers* case. When I published my biography in 1984 I subtitled it 'The Rebel as Judge'. He was a controversial figure and, indeed, remains so today, as hardline economic rationalists hold him responsible for many of the economic ills they see as a product of wage regulation.



H.B. Higgins and wife, Mary Alice

> “Victoria was opening up the possibility of a career he could only have dreamed of in Ireland.”

Higgins was born in 1851 at Newtownards, a town 16 kilometers east of Belfast in what was later to become Northern Ireland. His father, John, was a Wesleyan preacher, and the family got used to moving from town to town every few years as required by the Wesleyan circuit system. As nonconformists, Wesleyans had difficulty identifying with the Anglo-Protestant Ascendancy represented by the Church of Ireland, while at the same time regarding the world of the Catholic Irish majority as Popish foreign territory.

Henry’s strong, determined mother, Anne, was largely responsible for bringing up six sons and two daughters in frugal circumstances. Henry appeared to be a “delicate” child, and at a time when the death of children was common, this meant that he was the particular focus of his mother’s care and attention. He developed a crippling stammer, which, as an adult, he would learn to control, though his speech would always bear traces of it. For some years he was, along with his elder brother James, educated at the Wesleyan Connexional School in Dublin, a rather grim institution which did provide the rudiments of a classical education. There was, of course, no question of a university education, and Henry found employment in a drapery warehouse in Belfast, a city he came to dislike, and then, more happily, in a Dublin furniture warehouse.

His brother James had been a bit of a rebel at school and an embarrassment to his devout father; at the tender age of 17 James, with the approval of his parents, emigrated to the United States. In the wake of the 1840s potato famine, emigration was always in the minds of Irish people, and it is possible that his parents regarded James as the advance party for their own migration to America. Sadly, in New York James came down with consumption, and after little more than six months in the New World, thin and weak, he was back in the arms of his family. He survived another two years, but it was his death that triggered the Higgins family’s emigration. Concerned about the health of her other children, Anne consulted an eminent Dublin physician who recommended migration to the warmer and drier climate of Victoria. So urgent did emigration now seem that Anne departed with six of her children in November 1869, leaving her husband to complete his term on his current circuit, together with their son John, to follow seven months later.

The Higginses were impressed by the prosperous vitality of the community they encountered in Melbourne – Wesleyans seemed opulent by the petit-bourgeois standards of the small sect they were used to in Ireland – but Henry found difficulty in gaining the kind of commercial employment he was familiar with. Although he had always professed “a very great aversion to teaching of any kind” (no doubt his stammer was an inhibiting factor), Henry could see the opportunities that teaching might open up. And indeed, initially winning a position as a junior teacher in a private school, within a year he had gained the common schools teachers’ certificate and had passed the matriculation examination. In March 1871 he won the university exhibition in classics. Victoria was opening up the possibility of a career he could only have dreamed of in Ireland.

Melbourne University was barely 20 years old and still a very small community, but it was not without its academic luminaries. Higgins was much influenced by W.E. Hearn, professor of history and political economy, a man of wide learning who was a witty and engaging lecturer. He introduced Higgins to J.S. Mill, Herbert Spencer, Comte, Grote and contemporary liberal thought generally. Higgins was also becoming more sociable in this stimulating environment and his friends included Alfred Deakin, Alexander Sutherland (later, journalist and headmaster) and Richard Hodgson (later, a controversial psychical researcher). Alfred Deakin’s sister Catherine recalled them as “a brilliant quartet”. Privately, Higgins was agonizing

over his religious faith, particularly the doctrine of hell and eternal damnation, and was beginning a shift away from the narrow Wesleyanism of his father.

While studying, Higgins was still teaching and tutoring in his spare time in order to mobilize an income. He also found time to take elocution lessons to help him master the stammer, which he considered essential if, on completing his law studies, he were to be called to the Bar. Nevertheless, when he began his career as a barrister in 1876 he chose equity, reasoning that "I might succeed in laborious work, but that I could hardly succeed in addressing juries". During his first lean years he continued tutoring, his pupils including the two elder sons of *Age* proprietor David Syme. With help from F.W. Holroyd, with whom he was reading in chambers, and Thomas à Beckett, he was soon doing quite well; indeed it is remarkable how quickly he acquired the perquisites of wealth and position. In 1883 he purchased for £1,200 one and a half acres on Glenferrie Road on which he built Doona, by colonial standards a mansion. (Doona, alas, was demolished many years ago.) Later, he was to acquire the Heronswood estate at Dromana as his country house. (And Heronswood does survive.) When à Beckett went to the bench in 1886, he clearly expected Higgins to be his successor at the equity bar, and indicated that he might look forward to an annual income in the order of £5,000, a considerable sum, particularly at a time when there was no income tax.

And Higgins did succeed. He was always capable of hard work, while his reluctance to compromise contributed to his popularity with clients. He was a stern presence in court and it was said that "he was always ready to compromise – on the basis of judgment for the full amount with costs!". Outside the court he was, however, good company, and, with the confidence that came with success, was now showing a very Irish flair for conversation and argument. With friends he went on vigorous walking tours in Victoria, Tasmania and New Zealand; he even found time to work on a selection he had acquired in Gippsland. There was now no sign of the "delicate" child he had been in Ireland.

In 1885 he married Mary Alice, daughter of George Morrison, principal of Geelong College, and sister of George Ernest, later known as "Chinese" Morrison. A week after the ceremony the couple left on a year-long world tour. Less that a year after their return May Alice gave birth to their only child, Mervyn. The 17 years since he had arrived in Melbourne as a shy, 18 year old youth, uncertain of his future, had seen a remarkable transformation in his and his family's fortunes.

At university Higgins had already shown interest in public affairs and was active in the Debating Society, which had been formed under the influence of C.H. Pearson, the writer and founding headmaster of Presbyterian Ladies' College, who has been described as "the outstanding intellectual of the Australian colonies". Although a loyal imperialist, Higgins became a supporter of Irish Home Rule, an unpopular cause at this time in England and Australia, and when the Irish nationalists John and William Redmond visited the colonies in 1883 he agreed to appear on the platform with the speakers, a public act of some bravery. It was enough to rule out admission to the Melbourne Club. This was the beginning of Higgins's unusual relationship with the local Catholic community which came to regard the Irish-born Protestant as a friend.

Higgins's cautiousness in financial matters made him resistant to the speculative spirit which characterized the 1880s, so that he survived the collapse of the boom and the following bank crashes relatively unscathed. But it was in this changed economic environment that he began to give serious consideration to a political career. In 1891 he consulted Deakin, who had first entered the Victorian parliament in 1878, about a possible candidacy, and after some deliberation decided to offer himself in 1892 for the two-member constituency of Geelong, clearly hoping that the Morrison connection would be to his advantage. Higgins had started out as a conventional, laissez-faire liberal, but he knew that he would have to adapt to the protectionism which, with the help of Syme's *Age*, had become the prevailing Victorian policy. He supported a land tax and, with the government struggling to deal with a mounting deficit, regarded an income tax, although "hateful", as inevitable. But however sensible his policies, his coming from Melbourne, which Geelong tended to blame for the depression, was not in his favour. He polled respectably, but fell well short of the two successful candidates. Two years, later, however, when economic conditions were even worse and Higgins was better known in Geelong, he was elected to the Legislative Assembly.

Higgins took his place alongside Deakin as a supporter the new government led by George Turner, which was to be in office for five years, during which time restoring Victoria's finances was the dominant concern. One important reform, however, which was to be significant for Higgins's career, was the 1896 Factories Act, which saw the first tentative venture into wage regulation. Higgins, faced with what he called "the social problem" (unemployment, sweating, poverty), modified his laissez-faire liberalism and began to accept the need for a greater role for the state.

That Higgins made an impression in his first parliament is borne out by his surprising success in 1897 in being elected as one of Victoria's ten delegates to the Australasian Federal Convention of 1897-9 which was to frame the Commonwealth Constitution. He had fought an energetic campaign, addressing meetings not only in Melbourne and Geelong, but in country towns across Victoria. More significant, perhaps,

was that the *Age* included him in its preferred list, all of whom were elected.

From the beginning Higgins was cautious about federation, refusing to accept the majority view that only a federation along American lines was feasible. Federation was "a mere word" and a "mere question of a mode of government". Although not a unificationist, he did see federation as "unification for certain purposes", and once those purposes had been defined he saw no reason for the Senate being a States' House, ignoring the likelihood that the smaller colonies would not join the federation without some such guarantee. Higgins was, however, an active and constructive member of the Convention and his name is associated with two sections of the Constitution: section 51.xxxv which provide for "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State", and section 116, guaranteeing the secular nature of the Commonwealth, which Higgins felt was required once "Almighty God" had been inserted in the preamble.

When in 1899 it was time to put the Constitution to the voters, Higgins found he could not recommend its adoption. He believed that the Constitution was not democratic enough, particularly opposing the equal representation of the States in the Senate. He also was concerned about what he saw as the rigidity of the Constitution, and he foresaw that amending it might prove difficult. He suspected that conservatives regarded a written constitution as a bulwark against change. He was one of only two delegates who opposed the adoption of the Constitution.

This was the beginning of his reputation as a perverse rebel, which was soon cemented when he was one of only 13 members of the Legislative Assembly who opposed the offer of a contingent to support Britain in the South African war. As imperialist fervour was whipped up, Higgins found himself in an uncomfortable position when he faced the Geelong electors in 1900. At his first campaign meeting he was asked why he had opposed the despatch of troops to South Africa. Higgins, in other respects an imperialist, without a hesitation, responded, "Because I regard the war as unnecessary and unjust". There was uproar, and suddenly many in the crowd were waving Union Jacks which they had conveniently brought with them, soon accompanied by a lusty singing of the National Anthem. He lost the election.

Undeterred, Higgins redirected his political ambitions to the new federal sphere with the proclamation of the Commonwealth in 1901. Although he had alienated the electors of Geelong, his determined espousal of progressive causes had made him popular with radicals inside and beyond the labour movement. He stood in the liberal interest for the working-class electorate of North Melbourne, and with the tacit support of the infant Labor Party (which he was never to join), was duly elected. In 1904 the Deakin government, seeking to enact a modest Arbitration Bill, faced a Labor amendment to extend its provision to State railway workers, a move influenced by the harsh suppression of the 1903 Victorian railway workers' strike. When the House of Representatives passed the amendment, Deakin resigned, and the first federal Labor government was formed under J.C. Watson, who asked Higgins to be his Attorney-General. Higgins, a stickler for etiquette, consulted Deakin before accepting the offer. "The poor fellows need encouragement," he told Deakin. After less than four months, the Watson Government was in turn ejected. But the Arbitration Bill finally passed.

That cordial relations were maintained through these political crises is evident in Deakin appointing Higgins, along with Attorney-General Isaac Isaacs, to the High Court in 1906. Higgins was also to take over the presidency of the new Arbitration Court which R.E. O'Connor was eager to shed. This was a task Higgins was happy to accept, and in his first case in 1907 he handed down the celebrated *Harvester* judgment, in which he enshrined the rights of the worker "as a human being in a civilized community", entitled to marry and raise a family. Although the legislation under which he made this award was later declared unconstitutional by the High Court (Higgins and Isaacs dissenting) Higgins continued to apply the principles of *Harvester* in subsequent cases. Trade unions were soon seeking to bring their industrial disputes under the Court's jurisdiction in preference to the State authorities. Employer groups, on the other hand, became increasingly hostile, particularly when, in 1909, in a case involving B.H.P. he refused to lower the minimum wage in the face of the company's threat to close the mine.

The Higgins Court was soon attracting international attention as contributing to the reputation Australia and New Zealand were acquiring as "a social laboratory for the world". Higgins contributed to this in articles published in the *Harvard Law Review*, which he later brought together in *A New Province for Law and Order* (1922). However, the industrial strife that started to fester during the First World War tested Higgins's patience, and he came to distrust Prime Minister W.M. ("Billy") Hughes, who he saw as bypassing the Court in ill-advised attempts to fast-track the settlement of

"The Higgins Court was soon attracting international attention as contributing to the reputation Australia and New Zealand were acquiring as "a social laboratory for the world""

disputes. The High Court did not help matters when in *Alexander* it declared that section 72 of the Constitution required that judges be appointed for life, and that while the Arbitration Act purported to bestow judicial power on the Arbitration Court, the president, being appointed for a seven-year term, could not exercise it. Unhappy with legislation providing for special tribunals, Higgins in 1920 gave notice of his resignation as president of the Court. One of his last cases before giving up the presidency in 1921 was *Timber Workers*, in which he granted the 44-hour week, justifying it in terms of the workers' right to share in the fruits of new technology.

If the War had damaged the reputation of industrial arbitration, it had left its mark on Higgins in a more personal sense. As their only child, Mervyn had been the focus of his parents' love and devotion. Educated at Melbourne Grammar, Ormond College and Balliol College, Oxford, where he had more success as a rower than as a scholar, Mervyn had dutifully followed his father into the law. Henry and Mary Alice were travelling in England when war broke out, and while they were abroad Mervyn enlisted. He survived Gallipoli, but was killed at Magdhaba, Egypt, in 1916. "My grief has condemned me to hard labour for the rest of my life," Higgins wrote.

During his Arbitration Court years Higgins had only joined his brothers sitting on the High Court in constitutional cases, but when in 1920 he referred *Engineers* to the Court its membership was very different to the pre-war bench, particularly with the departure of Griffith in 1919 and the recent death of Barton. When a precocious young barrister by the name of Robert Menzies irritated the bench by laboriously trying to negotiate his way around the contentious doctrine of the immunity of instrumentalities, the Court stopped him and decided to permit counsel to challenge any earlier decision; and ultimately, by five to one, it effectively overruled that doctrine and the doctrine of reserved powers.

> "Higgins was a man of wide cultural interests. His training in the classics stayed with him."

Higgins and Isaacs often appeared to be in alliance, but although they respected each other they were never close. Higgins was not a centralist in quite the sense that Isaacs was. Higgins was sympathetic in interpretation of legislation whether it was Commonwealth *or* State: he thought the Court should be reluctant to find either invalid. He also had a greater concern for human rights, and was much more cautious than Isaacs in his interpretation of the defence and immigration powers. He nearly always wrote his own judgments, as he did in *Engineers*, while Isaacs wrote the majority judgment which Sawer has described as "one of the worst written and organized in Australian judicial history". Higgins's judgment, on the other hand, was, according to Zines, "much clearer and more precise".

Higgins was a man of wide cultural interests. His training in the classics stayed with him. While a judge, he amused himself making his own translation of the Aeschylus *Prometheus Bound*. He had a particular love of poetry, Browning and Whitman being his favourites. He served on the Melbourne University Council 1887-1923, in the course of which he donated £1,000 for a poetry scholarship.

After the death of Mervyn, Higgins turned more to his niece Nettie and nephew Esmonde, the children of his younger brother John. Nettie, a writer herself, married the novelist Vance Palmer, and they did much to keep him in touch with developments in Australian literature. He supported both Nettie and Esmonde, often financially, in their endeavours. Esmonde served in the AIF, and at the end of the War in France, with his uncle's assistance, went to Balliol College, Oxford, to read History. While in England he became a Communist and a harsh critic of the industrial arbitration system to which his uncle had devoted so much of his life, but Higgins did his best to maintain a civilized debate with his rebellious nephew.

Higgins's concern about the fate of Ireland remained with him all his life, and when he travelled abroad a visit to his native land was usually included. He maintained contacts with Irish nationalist leaders, and although concerned about the rise of Sinn Fein, never regarded it as beyond the pale. When he visited Ireland in 1924, in the wake of the Civil War, he followed with interest the Gaelic Revival. There was some surprise, nevertheless, on his death that his will was dominated by a £20,000 bequest to the Royal Irish Academy to assist research into Irish language and literature.

He died at Heronswood on 13 January 1929, with Mary Alice and his sister Ina by his side. His colleague on the bench, Frank Gavan Duffy, summed up many of the tributes when he described him as "a man of the most sterling integrity and kindliest nature". The Trades Hall Council flew the flag at half-mast. Soon after his death Mary Alice commissioned Nettie to write the memoir, *Henry Bournes Higgins,* published in 1931.

As for Higgins's legacy, however much argued about, changed, modified and renamed, industrial arbitration is still with us.

*John Rickard is an adjunct professor at Monash University. His biography,* H.B. Higgins: The Rebel as Judge, *was the* Age *non-fiction book of the year for 1984. He has written widely in Australian cultural history and biography, and his publications include* A Family Romance: The Deakins at Home *and* Australia: A Cultural History, *for which he is currently preparing a new edition. In 1997-8 he was the visiting professor of Australian Studies at Harvard University.*

# 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 September 30, 2014.*



# Back of the lift

## Silence all stand

### Federal Court *of* Australia

### The Honourable Justice Beach

*Bar Roll No 2183*

On 30 June 2014 Jonathan Beach QC was sworn in as a judge of the Federal Court of Australia and was welcomed to the Court by the profession.

His Honour holds degrees in law, science, and has a Master of Arts, from the University of Melbourne. He was admitted to practise in 1984, and was called to the Bar in 1987 where he read with Ross Robson, as Robson J then was. His Honour had two readers: Dan Star and Bernard Quinn.

As a junior he quickly developed a busy practice in commercial law, and was in great demand. The late 1980s and the 1990s were busy times at the commercial bar. The collapse of a number of financial institutions including the Tricontinental merchant bank gave rise to many legal challenges. His appearance for the former Managing Director of Tricontinental as junior to Merkel QC in *Johns v Australian Securities Commission* (1993) 178 CLR 408, was the first of many appearances in leading appeals in the High Court. Seventeen years later, Merkel QC and Beach QC appeared together again, this time for the successful appellant in *Osland v Secretary of the Department of Justice (No 2)* (2010) 241 CLR 320.

His Honour was at the forefront of representative proceedings in this state, including *Dagi v BHP* (the Ok Tedi case) and the *Nixon v Philip Morris* group proceeding. He took silk in 1999 at the age of 39 and, as silk, his Honour's practice bloomed. He was briefed for parties in complex royalty disputes, insolvency cases, and in leading competition cases. More class actions followed, including the *Mobil* litigation, the Longford litigation, *Ryan v Graham Barclay Oysters*, the *Timbercorp Securities* litigation and, most recently, the Black Saturday bushfires litigation, which was the last major case in which his Honour appeared. Class action litigation inevitably led him to the common law. His Honour's mastery of evidence and legal principle set new standards in common law practice. Having commenced at the Bar acting in the most complex commercial causes, his career as a barrister ended at the conclusion of the most complex common law trial that the Supreme Court has heard.

His Honour served the interests of the Bar generously and with distinction. He served as a trustee of the Bar Superannuation Fund, as a director of Barristers Chambers Ltd, a member of a number of Bar committees, and as a member of the Bar Council, including holding the office of Treasurer and, at the time of his appointment, Senior Vice Chairman. At His Honour's welcome, the Chairman of the Bar, Will Alstergren QC, reflecting the sentiments of all those who have known him, said:

> *You have been a wonderful member of our Bar, a brilliant lawyer and advocate. You have supported and been an inspiration to young barristers and solicitors. The*

*Victorian Bar is truly delighted at your appointment. You would have been an outstanding Chairman but you will make an even better judge of this Court.*

MICHAEL WHEELAHAN

## Supreme Court *of* Victoria

The Victorian Bar congratulates Justices of Appeal Kyrou and Ferguson on their elevation to the Court of Appeal

## The Honourable Justice Cameron

To be the partner in charge of the Melbourne office of one of Australia's pre-eminent law firms requires extraordinary hard work and dedication, intellectual rigour, clear thinking and people management skills. Justice Cameron now brings those skills to the Supreme Court on her appointment as a Judge on 12 August 2014. Her Honour's skill and judgment, forged at the litigation coalface at Mallesons, will lead to every success as a Judge of the Supreme Court.

Her Honour was born in Woomera in the Australian outback in the 1960s. At the time, Woomera was a hub of innovation and excellence and deeply involved in the Mercury and Gemini space programs. That is to say, her Honour grew up in a place where they did in fact practise "rocket science"!

After graduating from MacRobertson Girls' High School, her Honour took an interest in philosophy, politics, English literature and law and graduated from the University of Melbourne with degrees in Arts and Law.

Her Honour began her legal career as an articled clerk at Mallesons Stephen Jaques and, working on the Bond litigation, immediately developed a taste for large, complex disputes. Admitted to practice on 2 April 1990, her Honour was appointed a Senior Associate four years later. By this time, her Honour's ability to run large scale litigation was evident and as a Senior Associate her Honour had carriage of the multimillion dollar Olympic Airways case (*Olympic Airways SA v Alysandratos* [1998] VSC 31) instructing Peter Hayes QC, which litigation included court sittings in a hotel ballroom in Athens, Greece!

In 1999, after a short nine years in practice, her Honour was appointed a partner of Mallesons where she continued to establish a very successful litigation practice. Her Honour was acknowledged by her peers as one of Australia's Best Lawyers in the Australian Financial Review in 2012, 2013 and 2014.

Success in commercial practice is, however, only half of her story. Justice Cameron is also a great contributor to the legal and wider community. Her Honour has served as a member of the Supreme Court Board of Examiners since 2007. Service on the Board is voluntary and her Honour's work demonstrates a real commitment to the administration of justice in Victoria. In addition, her Honour is a past Chairman of the Salvation Army Territorial Advisory Board (Australian Southern Territory), with an annual operating budget of approximately $363 million available for the provision of social services in Victoria, South Australia, Western Australia and the Northern Territory. There is no doubt that her Honour has made a real difference to those less fortunate.

It has been said that her Honour's advice to junior solicitors was "know the facts – win the case", advice those appearing before her Honour should now keep carefully in mind. We at the Bar welcome Justice Cameron and wish her Honour every success in her new role.

ADAM ROLLNIK

## The Honourable Justice Christopher Beale

*Bar Roll No. 2290*

On 2 September 2014 Christopher William Beale was appointed a judge of the Supreme Court of Victoria after 24 years practice at the Bar.

His Honour was educated at St Kevin's College and in 1984 graduated from Melbourne University with degrees in Arts and Law with Honours. His education gave him a love of poetry, theatre and debating. He served articles under Graeme Johnson at Arthur Robinson & Hedderwicks. After 18 months, his Honour embarked on life as a duty lawyer with the Legal Aid Commission, where he remained for two years.

His Honour came to the Bar in September 1988 and read with Roy Punshon, now Judge Punshon of the County Court. He quickly established a busy criminal law practice, well supported by his former legal aid colleagues. A detour in 1990 saw his Honour spend two years in Sydney as a Jesuit novice. He returned to the Bar and was soon to meet Madeline Taylor. Their marriage one scorching hot February day in 1995 led in due course to a Tarago sized family and to his Honour becoming an even more determined and hard working advocate.

Between 2002 and 2006, his Honour combined his busy practice with teaching criminal law at Monash. For many years he always appeared for the defence, but the prosecution was not to be outwitted and began to brief him frequently, including in the Court of Appeal.

In 2007 his Honour was appointed a Crown Prosecutor and remained in that position for four years. In addition to the usual responsibilities, his Honour was allocated prosecutions raising human rights issues, appearing in the leading case of *R v Momcilovic*. In 2009 he was assigned to teach Uniform Evidence Law and ensure prosecutors and the profession were ready for its commencement in Victoria in 2010. This led to many appearances in the Court of Appeal as novel criminal interlocutory appeals enabled new evidence and procedure laws to be tested.

In April 2011 his Honour returned to private practice at the Bar. He resumed defence work and was frequently briefed by State and Commonwealth

Public Prosecutions offices, including in significant people smuggling litigation, and by the Office of Police Integrity. In 2012 he took silk. Thereafter His Honour was keenly sought after by Worksafe to appear in OH&S prosecutions. His appeal practice continued to thrive. He served on the Committee of the Criminal Bar Association, taught in the Readers Course and had three readers.

This short history of His Honour's working life so far perhaps hints at the man now appointed to the Bench. His outstanding personal qualities are known to many at the Bar. His Honour is generous, loyal, patient, determined and good humoured. The Bar applauds his appointment, wishes him the best in his new role and trusts that he will ensure his golf handicap remains below ten!

NICK BATTEN

## The Honourable Justice Michael McDonald

*Bar Roll No 2351*

It should not be too risky to venture that there have been very few Victorian judges with a close connection to Kangaroo Island; even fewer would have also worked at one time or another in a factory and as a garbage collector and truck driver.

To that supposed tiny number may now be added Michael Phillip McDonald, who was appointed to the Supreme Court of Victoria on 16 September 2014.

Practising as a barrister for more than 25 years (nine as a silk), his Honour was widely acknowledged as a leader in employment, industrial and workplace relations law and also practised extensively in sports law.

His Honour appeared regularly at first instance and in appeals in the Supreme Court of Victoria, the Federal Court and the Fair Work Commission, as well as before the High Court, where he appeared in the landmark Patricks' Waterfront Dispute and the CFMEU Dispute, among other cases. Recently his Honour has acted in high profile industrial litigation involving Grocon and Toyota.

His Honour's independence and integrity is testified to by a former leading counsel who describes him – in a good way – as "challenging" and "confident". His Honour's capacity for work under extreme pressure is illustrated by the Patricks case, which was dealt with in only one intense month: from the initial injunction application before a judge of the Federal Court leading ultimately to the Full High Court appeal.

Educated at school by the Christian Brothers, his Honour attended the University of Melbourne, graduating in Arts and Law and later completing a Master of Laws degree.

His Honour did articles at Phillips, Fox & Masel and acted as an advocate for public service associations in the Australian Conciliation and Arbitration Commission before joining the Bar.

At the Bar, his Honour read with Tony North (now the Honourable Justice North of the Federal Court) and had three readers: Tim Jacobs, Rohan Millar and Patrick Wheelahan.

While Australian football and cricket have suffered the loss of a once promising schoolboy, the law has gained the respected services of his Honour.

The Bar wishes Justice McDonald a long, satisfying and distinguished career in his new role and the author adds his wish that his Honour will enjoy many pleasant interludes off the coast of South Australia with his proud family, wife Rae and children, Tamara, Jack and Raphael.

GARRY FITZGERALD

# Magistrates' Court of Victoria

## His Honour Magistrate Robinson

*Bar Roll No 3717*

On 1 July 2014 the Governor in Council appointed Gregory Stuart Robinson to the Magistrates' Court of Victoria. Magistrate Robinson, who read with Stephen McLeish SC, now Solicitor-General for the State of Victoria, had over a decade's experience at the Bar. His practice was a broad one. It included not only criminal work but also industrial relations and administrative law matters and, in particular, extensive commercial work. His commercial practice spanned all manner of cases, including, in his later years as counsel, large and complex taxation disputes, in which he was known by those who led him for his prodigious work ethic and his unflappable demeanour. He was also a member of the Migration and Refugee Review Tribunals for some years.

Magistrate Robinson had chambers on level 22 of Aickin Chambers for a number of years, which he shared with close friends. He is much missed on the floor. He is a figure of some stature and gravitas, whose dry wit and self-deprecating sense of humour lie behind a serious visage and penetrating gaze. There would seem little doubt that those who appear before him will experience a real presence from the Bench, whilst at the same time absolute fairness and impeccable courtesy.

Outside the law his interests are many and varied. He is a qualified pilot and has a great love of flying, having travelled extensively throughout outback Australia under his own captaincy. With a family background from the western districts of Victoria, he has always had an affinity with rural areas, notwithstanding that he may at first appear a quintessentially urban figure. He loves nothing more than to retreat from metropolitan Melbourne to his residence in nearby country Victoria, to tend to his farming activities. But he is a figure of some contrast, for, despite his protestations that he is a private and retiring individual, he is wonderful company in any social gathering, possessed of a great sense of humour and always an interesting conversationalist, well-versed in many fields.

Magistrate Robinson's appointment brings significant commercial expertise to the Magistrates' Court of Victoria, and is to be commended in all respects. All

who know him congratulate him upon it, and extend their best wishes for his judicial career.

DAVID BATT

## His Honour Magistrate Bourke

*Bar Roll No 3692*

Timothy Bourke was appointed to the Magistracy on 21 October 2014. His Honour was educated at St Joseph's College, Geelong finishing his HSC in 1986. Like his magistrate father Owen before him, his Honour began his legal career as a Clerk of Courts. His Honour then progressed to being a Registrar of the Magistrates' Court, and thereafter was appointed as the first State Co-ordinating Registrar. His Honour also worked as a Deputy Registrar of the County Court and a Deputy Prothonotary of the Supreme Court.

Whilst working at the Magistrates' Court, his Honour completed his LLB from Deakin University part-time. In 2001, his Honour left the Court and completed his Articles at Wilmoth Field Warne, where he worked for a further three years across the general commercial law field. In 2004, his Honour signed the Bar Roll having read with Justin O'Bryan, himself with a wide commercial law practice.

Over his 10 ½ years at the Bar, his Honour appeared in both criminal and civil matters across all courts. It is little known that his Honour never lost in the High Court of Australia. Since 2010, he has sat as a Tribunal member of the VFL Tribunal.

Some members may not know that his Honour played Australian Rules Football for the Geelong Football Club. He is known to, when discussing his football career, point out that between he and his brother Damian, they played in 129 senior games, two State games, accumulated 44 Brownlow votes and captained Geelong for three seasons. The truth is that during the heydays of 1989 and 1990, his Honour won three games and lost two! Despite this short career, no one would deny his Honour the claim of playing next to Ablett Snr, Couch, Bews, Stoneham, Hocking and Brownless etc.!

Having been traded to North Melbourne by then Geelong coach Malcolm Blight at the end of 1991, his Honour was cut from North Melbourne's list in March 1992. On 11 March 1992, the Canberra Times in an article headed 'Clubs dump key players', cast the delisting this way "…and North Melbourne ruckman Tim Bourke were among notable Australian Football League players dumped yesterday by their clubs…" That is indeed high praise for a player of five senior games!

Outside of work, his Honour is the consummate family man who enjoys spending quality time with his wife Jo and their three children, and living a humble life in the true Edmund Rice tradition.

Combined with his many and varied roles in the courts over the years and his wide experience in practice at the Bar, his Honour's is a popular and welcome appointment. His Honour can only be regarded as an eminently qualified and suitable addition to the Magistrates' Court of Victoria.

PAUL ADAMI

# Vale

## Ann Rosemary Shorten

*Bar Roll No 2402*

Dr Ann Rosemary Shorten was a lifetime learner. She was also a rarity for her time: a woman from a working- class family, who began her adult life in the 1950s in pursuit of education and professional life ahead of marriage and family.

Ann McGrath matriculated and was awarded a teacher's scholarship to study teaching at the University of Melbourne. Graduating with an arts degree and a diploma of education, she began teaching in country Victoria. When she met her husband, William Robert Shorten, Ann was in her early 30s and had established a career as an educator, teaching university-level history in Townsville. The couple met on a cruise to Japan – Bill senior was the ship's second engineer. After the church wedding, they celebrated their nuptials on the ship. Less than two years later, the couple welcomed their twin sons, Bill and Rob.

Teaching and learning remained constants in Ann's life, as she earned first a Bachelor's degree and then a Master's degree in education. While raising her boys, Ann completed a doctorate in education and rose to the rank of senior lecturer. Professor Alan Gregory AM, former Sub-Dean and now Adjunct Professor in the Monash Faculty of Education, described Ann as "a brilliant scholar", "an outstanding historian", and one who "did much in the faculty to further the cause of women".

Ever the learner, Ann Shorten later undertook a law degree at Monash University. In 1985, the year her sons both began their law degrees, she graduated with first class honours in law, winning the Supreme Court Prize and the Flos Greig Memorial Prize.

Ann took the Leo Cussen practical training course and began the Bar Readers' course in September 1989. After reading with the late Michael Kiernan, she practised at the Bar for six years. With Professor Ian Ramsay, she co-authored

the leading Butterworths text, *Education & the Law* (1996).

Ann's death in April this year came as a shock to the family. Bill, now leader of the Federal Opposition, and his brother, Rob, a banker turned financial consultant, delivered a joint emotional eulogy, honouring their mother's life-long commitment to the pursuit of education. Bill said his mother's life was an inspiration, that she had been a giant influence on who he is and how he values education.

"She taught me that teaching shouldn't be denigrated; that we ask a lot of teachers and they give a lot back."

Ann's dedication to education and law will long be remembered. In 2009, the Australian & New Zealand Education Law Association, in which Ann had been a driving force, established the annual Ann Shorten Doctoral Award for the best thesis in education law research. In 2012, Ann was honoured as the first Life Member of the Association. The honour reflects with striking brilliance the life Ann led, a life committed to her own learning and the education of others.

ANNETTE CHARAK

## Howard William Fox QC

*Bar Roll No 586*

Over the years, the Victorian Bar has been home to many singular characters. Howard William Fox QC was certainly one of them.

Howard signed the Roll of counsel in 1958, took Silk in 1976, retired on 16 April 2004, and died on 16 April 2014.

Howard was born in 1925 and lived in Melbourne until he moved to Adelaide with his parents. He was educated at Prince Alfred College and obtained from the University of Melbourne a Degree in Arts majoring in Classics. His consummate knowledge of, and devotion to, the Classics remained with Howard all his life.

Howard lived in London between 1948 and 1954. He supported himself by working as a teacher and immersed himself in the social and artistic life of London and Europe.

Howard graduated with an LLB from the University of Melbourne in 1958 and read with Nubert Stabey (later a County Court Judge). He supported himself through law school while working as a proofreader at *The Argus*.

Howard was essentially a common lawyer. He practised extensively in the workers' compensation jurisdiction, and his predominant practice was industrial and motor vehicle negligence cases.

Howard was a great advocate with a deep mellifluous cultured voice, a master in adducing evidence in chief, a coruscating cross-examiner, and a brilliant persuader of judge or jury.

Howard was elected to the Bar Council in September 1987 and was Chairman and member of the Ethics Committee from 1987 to 1989. Howard was one of the Bar appointees to the Victorian Legal Aid Committee from 1979 to 1981, covering the extended transition of legal aid from that Committee to the Victorian Legal Aid Commission. He also served on the Bar Supreme Court Practice and Procedure Committee, Contingencies Fees Committee and Workers Compensation Committee.

He read widely and was fluent in Latin, Greek and modern languages, including Swahili.

Howard had a great knowledge and love of music, unsurprisingly because one brother was a member of the Royal Philharmonic Orchestra, another brother was with the D'Oyly Carte and two more siblings played for many years with leading orchestras.

He travelled widely in England and Europe, and most of all in Africa and Ethiopia. There Howard met and became a friend of Sir Wilfred Thesiger, the explorer and author, "whose mystic vision rejected the modern technological world in favour of the tribes people of Africa and the Arabian deserts".[1]

Howard regularly visited the Serengeti Plain in North Tanzania and South Western Kenya, and Ethiopia. The Serengeti hosts the largest mammal migration in the world and Howard waxed lyrical in recounting these migrating animals crossing the Grumeti and Mara Rivers, filled with hungry crocodiles.

The passion of Howard's sporting life was as a yachtsman. He was a member of the Royal Melbourne Yacht Squadron for many years before 1974, when he joined the Royal Yacht Club of Victoria. He sailed a number of yachts and, as was said by a past Commodore of the RYCV, "Howard's yachts were always well maintained and respected for their racing performances, as Howard was for his ability as a yachtsman". Howard sailed in a number of the famous Sydney to Hobart and Melbourne to Hobart yacht races.

As proficient as he was on the water, Howard, in earlier years, was also an enthusiastic and competent glider pilot.

On his retirement, Howard settled in Kerang to enjoy the confluence of the rivers and many lakes of the region, making it the destination of thousands of water birds.

He was a remarkable personality, a bon vivant and brilliant conversationalist, who in earlier times would have been seen as a "Renaissance man": cultured, knowledgeable, educated and proficient in a wide range of fields. He is sadly missed.

Howard is survived by a former wife, Jennifer, whose solicitude and care sustained Howard in his later years. Howard's children of his marriage to Lois Weste (deceased), Josephine and Matthew, of whom he was intensely proud, also survive him.

PETER O'CALLAGHAN

1 Michael Asher, "Obituary: Sir William Thesiger", The Guardian, 28 August 2003.

## Rebecca Thomas

*Bar Roll No 4639*

Rebecca Lauren Thomas died on 5 July 2014. She was only 26 years old.

Rebecca was born in Kuala Lumpur, Malaysia, on 24 October 1987. She completed the International Baccalaureate at the International School in Kuala Lumpur in 2005. Her father, Tommy Thomas, is admitted as a barrister of the Middle Temple in London and is a prominent advocate in Malaysia. As her father had done before her, Rebecca initially decided to study in England, enrolling in a politics course at the University of Warwick. However, she did not like the course (nor the cold) and soon returned home to arrange, instead, to follow in the footsteps of her mother Sherry, who had studied as an undergraduate in Melbourne.

In 2007, Rebecca enrolled in law at the University of Melbourne, taking up residence in Ormond College. There, Rebecca met her partner, Seamus Wiltshire, with whom she lived in St Kilda at the time of her death.

Rebecca began work at Gadens as a law clerk in February 2011. In her last semester she worked two to three days per week. She also wrote and acted in the 2011 Monash Law Comedy Revue. Despite these commitments, Rebecca graduated with an honours degree.

After graduating from the Leo Cussen Centre for Law, Rebecca was admitted to practice in February 2012. Upon admission, she was employed by Gadens and placed in the banking and finance group. In that role she got very early exposure to litigation, and she loved it. She quickly resolved to sit the Bar's entrance exam. She passed it on her first attempt.

Rebecca came to the Bar in September 2013 and read with Sam Hay. She signed the Bar Roll on her 26th birthday, securing a place on Gordon and Jackson's list.

Rebecca very quickly established a general commercial practice. She was briefed by Gadens and started to build a stable of other solicitors who were impressed by her work ethic and the depth of her legal analysis. In the short time she was a barrister, she appeared unled in the Supreme Court on numerous occasions and, in February 2014, as junior counsel in the Court of Appeal.

Rebecca had a mischievous wit and was warm, kind and boundlessly generous. She was genuinely interested in those around her and quickly became a unifying presence in her chambers group, who feel her absence keenly. She was, to the last, a contributor. She will be sorely missed by Tommy, Sherry, her younger sisters Hannah and Sarah, her loving partner Seamus, and by her friends and colleagues at the Bar and at Gadens.

SAM HAY

## Adrian Michael Munro

*Bar Roll No. 3793*

On 27 July 2014, Adrian Munro died at the Alfred Hospital, Melbourne, with his partner Kate at his side. He was diagnosed with multiple myeloma in February 2013. He was only 42 years of age.

Adrian lived in Macedon, with Kate and their three children Samuel, Matilda (Tilly) and Ainslie. With Mount Macedon as the backdrop to his home, he enjoyed rural life and had many community interests.

Adrian was a member of the Victorian Bar from May 2005, having read with Robert Williams. He was educated at Melbourne High School, and later graduated from Monash University in Arts/Law. He was admitted to practise in 2002 after serving articles with David Moody at Slater and Gordon.

At Melbourne High School Adrian had an eclectic range of interests, including acting and debating. He was particularly interested in all things aeronautical and was a keen member of the Air Cadets. After school, he gave serious thought to becoming a professional actor and to enrolling at the National Institute for Dramatic Arts, however, he decided upon a military career and enrolled at the Military Academy, Duntroon, for Army Officer training. In later years he maintained his interest in acting through his membership of the Players Group in Macedon.

Military training was followed by his studies at Monash (full time), whilst continuing to work as a residential care worker with Intellectual Disability Services. His time at Monash saw him represent Monash in an international moot held in Vienna, and on exchange at Washington University where he acted as junior counsel in felony jury trials.

After graduating from Monash and serving articles, he worked as a solicitor with Gill, Kane and Brophy and also as a duty lawyer in the Sunshine office of Victoria Legal Aid, where he was very well regarded. He met his partner Kate at that office.

Adrian also served as ministerial adviser to the Minister for Tourism and Major Events in the State ALP government.

After commencing at the Victoria Bar Adrian typically worked in areas where he believed he could make a difference to people's lives. He accepted briefs in criminal matters and was regularly briefed by the OPP. In later years he worked extensively in the Children's Court where the Department of Human Services frequently briefed him. Adrian appeared in the Court of Appeal, without a leader and, memorably, began his address by knocking an entire jug of water over his brief. He bravely pressed on while mopping madly, and won the day for his client. He was a firm believer in solid preparation, and had an indefatigable determination to do his best no matter what his brief.

It was typical of Adrian that he faced any set back with good humour and without complaint. His attitude was particularly evident during the course of his illness. Despite considerable physical difficulty, he continued to accept briefs up until the last weeks of his life and to give up his precious time in the Bar readers' course as an instructor. When asked how he was able to remain so calm and focused in the face of his illness, he would smile and simply remark that, *"it is what it is"*.

Adrian was universally well regarded by his colleagues, amongst whom he had a solid reputation for fair dealing and genuine concern. His well-honed understanding of the duties of counsel, and willingness to help others with advice made him popular.

Adrian was also a dedicated supporter of the Richmond Football Club. It says something of the immense regard in which he was held by friends, colleagues and family that, at his funeral, even Collingwood supporters sang the Richmond Football Club song to the rafters.

Adrian's partner Kate and their three children survive him. He will be missed by all those who loved and knew him.

HIS FRIENDS

## Ian Dennis McIvor

*Bar Roll No 1060*

On 12 August 2014, Ian Dennis McIvor died after a long illness. He was 73.

Ian was admitted to practice on 1 May 1973. On 6 June 1973, he began reading with Frank Vincent and, on 28 June 1973, he signed the Bar Roll. He remained in active practice until 1 June 2010, when he transferred to the List of Retired Counsel.

Ian was born in 1940. His father had been in the militia, but joined the regular army as soon as war broke out. He served in the Western Desert. After the war he remained with his army and was later posted to Balcombe Barracks at Mount Martha. In 1958, he was killed leaving Ian's mother, of whom Ian was very proud, to raise six children.

Ian's last school was Frankston High School. He got to 15 and left: only "bludgers" (he recalled) continued at school after Intermediate. He went to work with TAA and, after seven years, sat for an exam that would give him permanence in the public service. It involved doing an IQ test. At the time, his boss was Bob Jolly who was a solicitor at TAA. It seems that Ian was the only person to complete the test and to get all the answers right. This time the boot was on the other foot: Jolly accused him of being a "bludger" and told him to go to Taylors and enrol in five Leaving subjects. Jolly told him that Taylors would say that he couldn't do it. "Just ignore them. Next year you must enrol in four Matric subjects." Jolly was right: Ian got all his Leaving subjects and, then, got first class honours in each of his Matric subjects.

He enrolled in Commerce at Melbourne University, and hated it. He failed his first year. He was encouraged to try Law as the Latin requirement had been dropped. His lecturers included Arthur Turner and John Feltham. In his second year, he was able to finance himself by his winnings on the dogs. But, then, the money ran out. By this time, Bob Jolly was working for Conzinc Riotinto of Australia. Within a week, Ian was working in Bougainville. He came back to Melbourne in 1967 and resumed full time studies in the Law School.

Ian was quite a bit older than other undergraduates, of whom I was one. He was naturally a man of the Left and became chairman of Students for a Democratic Society. We debated each other frequently. He had a sharp eye for the forces of darkness wherever they lurked. He would remind me of who it was that had persecuted Galileo, who it was that had split the Labor Party, what a pack of ratbags occupied Princes Park at Carlton and what terrible things they had done over the years to the good people at Brunswick Street. We became close friends.

He read everything and read widely. He knew all of Dickens and all about Dickens. After he moved from Fitzroy to the Dandenongs, he caught the train into chambers each day from Ferntree Gully, his head deep in some book. Ian was a great conversationalist and an inveterate controversialist. He was deeply compassionate, above all for the workers and the battlers and the sufferers.

After doing some workers compensation and some family law, he eventually worked exclusively in crime. He was defence counsel by preference, but did his duty and would prosecute when asked. He was involved in some noteworthy cases and some of the stories which are told by his contemporaries could be hair-raising.

He was unwell for a long time before he died. He dealt with his increasing weakness with nobility and fortitude. He enriched the lives of all who knew him. His friends will miss him greatly.

Farewell dear Ian.

JOSEPH SANTAMARIA

## Dr John Emmerson QC

*Bar Roll No 1246*

Before I came to the Bar, I had heard of the brilliant Dr John McLaren Emmerson QC, physicist, Oxford scholar (New College) and barrister (since 1976). A giant in intellectual property law; a pioneer for scientists to become lawyers.

When I was first briefed as John's junior in a biotech case, more than 20 years ago, I was both excited and terrified. I sat in his room in Latham Chambers, in a circle with others, my books teetering on my lap, in awe. A question was asked and John put his hands together, as if in prayer, then gently tapped his fingers together. We held our breath until he cleared his throat and answered, with simplicity and clarity. He was never wrong.

The first time I was alone with him, he looked at me curiously and asked me a question to which I (mistakenly) thought I gave a reasonable answer. He then fixed on me with a devilish glint in his eyes, asking a long series of questions, until I saw the correct answer for myself. His relentless logic taught me to think more clearly. From that day on, I was his biggest fan.

The next case we worked on together was the Oxford University Press trademark case – very fitting, as OUP published his own book on nuclear physics. I visited John at his Toorak flat, where I learned of his passion for rare leather-bound books and marble chess board floors.

Later, we worked on the celebrated patent case for Astra Pharmaceuticals over five years. We travelled together to Sweden, which, although not his favourite destination, was close enough to London to be acceptable. John was an orthodox lawyer, applying the law in a sensible way, leading Astra to prevail in the High Court. His performance in the High Court was magnificent.

In a case we did for Merck, the client considered John the best cross-examiner he had seen in any country in the world.

John was a teacher and companion to many. In more recent years, I turned to him for answers to problems that eluded me. He was very generous with his time. By then, he had a new sanctuary in Park Road, South Yarra, with lovely gardens and libraries, a perfect place for him to ponder, as well as at level 31, Aickin Chambers.

John was truly the cleverest, most logical, humorous, entertaining and delightful man I have ever known.

John epitomized the best qualities of the Bar. He was a gifted writer of legal argument, simple and elegant; his oral addresses were perfect. He showed that intellectual rigour makes a great barrister. He never ran points he did not believe in. He was always a perfect gentleman, treating everyone with respect and kindness and regarded women as equals in our profession. He was a humble man, never arrogant, rude or aggressive.

John loved life. He loved literature and opera. He loved to play bridge. He loved to travel to London to visit his family. He loved lunches with colleagues. He loved to walk.

As Ralph Waldo Emerson (after whom John was affectionately called Waldo) said:

"Few people know how to take a walk. The qualifications are endurance, plain clothes, old shoes, an eye for nature, good humor, vast curiosity, good speech, good silence and nothing too much".

This describes John perfectly – but he always wore a suit, tie, hat, overcoat and patent leather shoes, and carried a briefcase with an umbrella and newspaper in it, even when climbing Ayers Rock.

I can see John now, raising his glass of Campari and soda, as he did on the eve of a hearing, saying "Confusion to the enemy"!

Farewell Dearest John. It was an honour and a privilege to know you. There will never be anyone like you.

KATRINA HOWARD

## His Honour Judge Fagan

*Bar Roll No 670*

Judge Warren Fagan's career was not only distinguished by his service and achievements in the law. Following his matriculation at the age of 15 he became a barber. He was named Apprentice of the Year and received his award from the Lieutenant Governor, Sir Charles Lowe.

Years later, in 2012, in recognition of many years as head of Alliance Française Melbourne and of the Australian Federation of Alliances Françaises, Judge Fagan was made a Chevalier in the Order of the Légion d'Honneur.

The breadth of Judge Fagan's legal practice was remarkable. Administrative law was his specialty but his practice extended to planning and local government and environmental law; criminal law; commercial law and common law, including personal injuries. One of his clients won a then record damages of £5,000 in a breach of promise case.

According to his friend Peter Heerey AM QC, Warren was a leader in the arcane sub-sub-genre of Health Act prosecutions. The Act provided that inspectors should take a sample of the suspect product, divide it into three parts, give one part to the shopkeeper, send another part off for analysis and keep the third part. With his slow throaty drawl, Warren was able to expose imperfections in the performance of this complex ritual. As a result, many a purveyor of dodgy mince was able to walk free.

Long before the creation of the

VCAT empire, Warren appeared frequently before the Town Planning Appeals Tribunal, along with such notables as Garth Buckner QC, Tony Hooper QC and the inventor of the written submission, Kenneth H Gifford QC.

Judge Fagan was number 670 on the Roll of Counsel. He had five readers and served on numerous Bar, Court and Government committees. The "Fagan Report", prepared during his tenure as chair of a Criminal Bar Association committee, led to major reforms, including the establishment of an independent Criminal Trials Listing Directorate.

Judge Fagan practised for more than 20 years (nearly six of those years as Silk). He then served as a judge of the County Court for more than 20 years, in every area of the Court's jurisdiction, including in long and complex criminal trials. As Deputy President, then President, of the Administrative Appeals Tribunal, Judge Fagan contributed to the development of the law of freedom of information.

Vale, Judge Fagan.

VBN

## Thomas Lee Mees

*Bar Roll No 687*

I spent many years of my barristerial life practising in the workers' compensation jurisdiction and residing on the 8th floor of ODC East. So did Tom Mees. There was a difference. When I was nervously fumbling through my first briefs, Tom was already a giant of the jurisdiction. Even I can say that Tom had the untidiest chambers known to man. In his room were bits of old motorcycles, form guides, rubbish of all description and approximately ten thousand respondents' briefs scattered on the floor. Tom's chambers may have been disorganised, but his mind was the opposite. His knowledge of compensation law was encyclopaedic. And if you could find your way into his room, he was always only too happy to give his advice in the best tradition of the Bar. However, once he entered the precincts of the compensation board, it was a different matter. Mees is an Irish name, and all the pugilism of the fighting Irish would emerge. The niceties of the law would be lost in Tom's love of a fight. Some of his battles with the leader of the compensation bar, Ted Hill, were of epic proportions.

Tom Mees was a flight lieutenant in the RAAF when he commenced his law degree at the University of Melbourne. He did his articles with Maurice Blackburn & Co, probably the last time he acted on the workers' side. He went to the Bar, on Foley's list, where he remained for some 31 years. When I first encountered Tom, he was deep into motorcycles, even competing in some races. Those were the days when he was a ferociously intimidating opponent in the corridors and hearing rooms.

Then, virtually overnight, he switched to racehorses, a passion which would remain with him for the rest of his life. The first winner he owned was Breadeater, which he raced with Lil Cooney, wife of Barney. Later he and Lyn Boyes SC raced Diwali, a grand national winner and one of our greatest steeplechasers. Ultimately Tom moved on to breeding and training, hobbies which he pursued with great passion. Strangely, when Tom changed from racing motorbikes to horses, he mellowed somewhat. He became, if anything, an even more formidable foe. His knowledge and court-craft, always powerful, took over from the fireworks. Tom Mees retired from active practice in 1994. I doubt if he ever came to terms with the mysteries of the Accident Compensation Act. He was a true legend of the workers' compensation jurisdiction. His name will always be etched indelibly in the memories of all who practised "compo" in its golden era.

JOHN BOWMAN

## Gonged!

### Sydney Peace Prize

**Julian Burnside AO QC** has been selected to receive the 2014 Sydney Peace Prize. The prize was awarded at the 2014 City of Sydney Peace Prize Lecture, to be given by Julian Burnside at Sydney Town Hall on Wednesday, 5 November.

### Queen's Birthday Honours 2014

**The Hon Philip Damien Cummins AM**
For significant service to the judiciary and to the law, to criminal justice and legal reform, to education, and to professional associations.

**The Hon Chief Justice Thomas Frederick Bathurst AC**
For eminent service to the judiciary and to the law, to the development of the legal profession, particularly through the implementation of uniform national rules of conduct, and to the community of New South Wales.

### Other Awards

Congratulations to **Sharon Burchell** who was awarded the Junior Counsel Award in the *Lawyers Weekly* Women in Law Award on Friday, 17 October.

# Victorian Bar readers

## September 2014

**BACK ROW:** James Anderson, Myles Tehan, Luke Howson, Paul Smallwood, Robert Boadle, Gerard O'Shea, Brian Kennedy, Matthew Minucci, Rahmin de Kretser, Martin Garrett, Jonathan Miller **MIDDLE ROW:** Wendy Pollock, Catherine Dermody, Craig Sidebottom, Timothy Maxwell, Lachlan Allan, Elenie Nikou, Ellen Grant, Natalie Hickey, Michael Freedman, Brett O'Sullivan, Julia Watson, Lucy Line, Jessica Clark, Rachel Chrapot **SEATED:** Ben Gauntlett, Bridgette Kildea, Morgan Brown, Georgina Connelly, Steven Sinen, Rachael Avuti, Evelyn Tadros, Brooke Hutchins, Carmelina Spitaleri, Holly Renwick
**FRONT ROW:** Christopher Tran, Justin Hooper, Adam Baker, Daniel Nguyen, Raymond Ternes

# Victorian Bar council

## 2014-2015

**STANDING ROW:** Matthew Hooper, Michael Wheelahan QC, Michelle Quigley QC, Sam Hay, Michelle Sharpe, Daniel Crennan (Assistant Honorary Treasurer), Emma Peppler, Barbara Myers (Assistant Honorary Secretary), Stewart Maiden, Elizabeth McKinnon, Karen Argiropoulos, Paul Panayi (Honorary Secretary), Christopher Winneke, Suzanne Kirton, Daniel Bongiorno
**SEATED L-R:** Matthew Collins QC, Samantha Marks QC, David O'Callaghan QC (Junior Vice-Chairman), Jim Peters QC (Chairman), Paul Anastassiou QC (Senior Vice-Chairman), Jennifer Batrouney QC (Honorary Treasurer), Greg Lyon QC **ABSENT:** Paul Holdenson QC

# Captain Jack Batten

ANNETTE CHARAK & ANDREW DONALD

When Jack Batten was admitted to the legal profession in 1975, he was still glowing from the 1974 football season. That year, the University Blacks team was full of young stars. As the VAFA season progressed, the young team grew in cheek and stature, luckily finishing fourth (in a final four). Jack Batten, a dashing half forward flanker, captained the team. Riding on a wave of supreme confidence, the Blacks defeated St Bernards and Coburg to set up a grand final against the then powerhouse of the competition, Ormond. The Blacks prevented Ormond from taking a fourth consecutive A Grade flag, recording a stirring victory by 14 points.

For 40 years, Jack remained the captain of the last Blacks' A Grade premiership team, which assumed legendary status among the cognoscenti at the University Oval.

This year, the Blacks' A Grade premiership drought was broken when they returned to the top of the Association tree with a hard-fought win over a determined Collegians' team. After the final siren sounded, Jack presented the A-Grade premiership medals to the players in the Blacks' team. Like his father 40 years ago, Nick "Ninja" Batten starred in the Blacks' 2014 win, which was a cause of great satisfaction for Jack. Nick, who is a law graduate working at Minter Ellison, is not the only next generation Batten to play for the Blacks. Nick and his brothers, David and Luke, have all been strong contributors to the recent life and times of the Blacks, making the Batten name synonymous with University Blacks, and reinforcing Jack's close ties to the club. On most Saturdays for the last ten or so winters Jack has been seen roaming numerous football grounds around Melbourne proffering sage (and generally unambiguous) advice to coaches and supporters alike.

The Bar has been another constant in Jack's life. For almost 35 of the Blacks' 40 years in the wilderness, Jack has been a member of our Bar. That tradition too has been passed to the next generation, with his daughter, Fiona Batten, signing the roll in 2012.

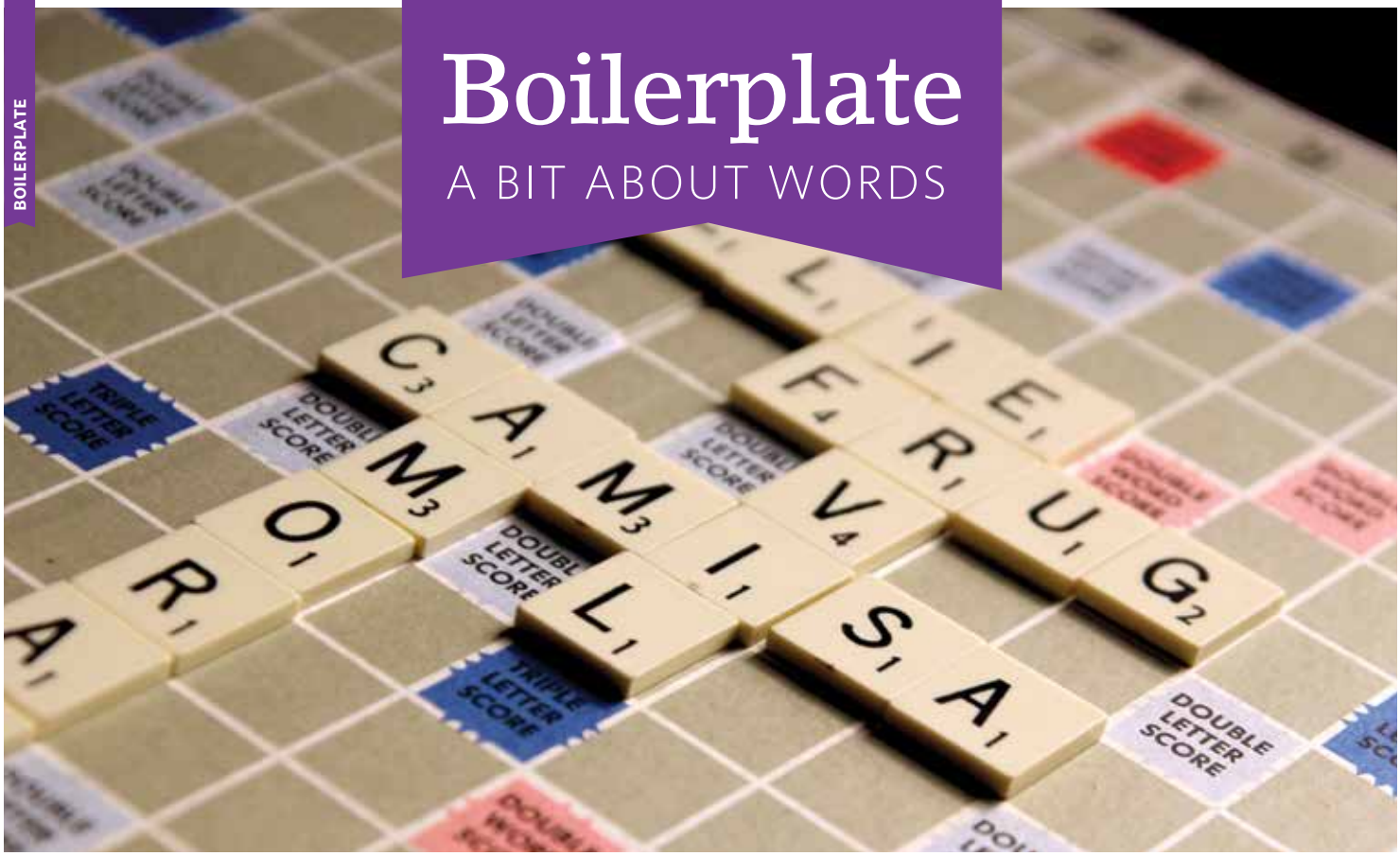
No doubt, a future generation of Battens will rise up to further entrench the Batten name at the Bar, but more importantly, lead the Blacks again to the Promised Land of premiership glory.

Jack Batten with his sons Luke, Nick and David.

PHOTOS COURTESY OF JETTE BAGGS-SARGOOD

# Boilerplate

## A BIT ABOUT WORDS




PHOTOGRAPH BY GUY SHIELD/THE SLATTERY MEDIA GROUP

# Scrabble

JULIAN BURNSIDE

Summer holidays open the way to all sorts of pastimes. Scrabble is a favourite family game, and it now infests the internet in the form of a game called Words with Friends. It is a seductive little app for the iPad which looks like Scrabble, but has its bonus squares arranged differently, presumably for patent or copyright reasons.

Having been lured into the torments of both games, I was powerfully reminded of two things. First, Scrabble has nothing to do with an interest in words, any more than Sudoku is about mathematics. Scrabble is all about tactics and point-scoring; same for Words with Friends.

The second thing is that English has an astounding array of obscure words. Most people with an interest in language know this, but we are rarely reminded of the fact so forcefully as when pitted against a Scrabble opponent whose only objective is to guess their way through every possible permutation of their letters.

Scrabble was invented in 1938 by an American architect, Alfred Butts. Ten years later James Brunot bought the rights to the game in exchange for a royalty on every copy sold. Butts (or his estate) must have done well out of it: about 150 million copies of the game have been sold, and versions of it exist in 29 different languages.

Since the key objective of Scrabble is to get the best score from even the most unpromising letters, the dedicated player naturally resorts to some very odd words. For a person who enjoys words, the only pleasure in this is to discover for the first time some of the weirdest fauna in the jungle of English.

The Collins Scrabble Dictionary is the instrument by which this dubious activity is put to the test. It presents itself as authoritative, and conscientiously displays the trademark ™ symbol every time it uses the word Scrabble™. It contains every word said to be a legitimate Scrabble word, and gives very brief definitions.

So, *Amorance* is defined as the "condition of being in love". OED 2 does not recognise the word. Neither does Webster's 3rd edition. The 3rd edition of Webster is the most interesting, but was highly controversial when it was published in 1961 because it moved from prescriptive to descriptive. Earlier editions had declared what words meant; the 3rd edition instead acknowledged the meaning attributed to words by actual people, nodding to the essentially democratic nature of language. From the 3rd edition, Webster accepted that words mean what we agree them to mean.

Apparently the Collins people have taken this process one stage further, to the point of acknowledging words which no one uses, no one recognises and which neither the Oxford nor the Webster has come across, but which are a useful expedient for Scrabble fanatics.

*Camisa* is defined as "a smock", which actually makes sense (cf French *chemise*) and is recognised by Webster 3rd. But OED 2 again stands aloof: the nearest hit is *camisado*, which it defines as "A night attack; originally one in which the attacking party wore shirts over their armour as a means of mutual recognition", which is obviously connected to *camisa*, and is quite useful to know, because the added *do* means an extra three points.

*Daud* is shown in Collins and also in OED 2 and Webster 3rd. But Collins defines it as "a lump or chunk of something", whereas OED 2 and Webster 3rd both define it as a dialectical variant of *dad*. As a father, I was troubled by the thought that I might be described as a lump or chunk. But both OED 2 and Webster 3rd tell you that the *dad* which can also be rendered as *daud* is a verb, and means "to shake with knocking or beating". Neither of my preferred dictionaries acknowledges *daud* as a noun.

*Ervil* is defined as "a type of vetch". *Vetch* is defined as "a climbing plant with a beanlike fruit used as fodder". OED2 does not recognise *ervil*, although its entry for *vetch* agrees with the Collins. And for devotees of Scrabble, *vetchy* is also legitimate: "Composed of, abounding in, vetches".

Whoever uses *jeelie*, or *maungy*? Certainly not the compilers of OED 2 or Webster. And who recalls *mackle* (a blur in printing)? Who knew that an *omov* is a system of "one person, one vote"? Only in desperation is it necessary to know that *oot* is Scottish dialectical for *out* – not the preposition *out*, but the obsolete form of *ought/aught*. And even if you knew that, it is astonishing to learn that the Collins permits an apparent plural: *oots*. That is odd because it is not a noun, and not even the verb *ought* with some idiomatic conjugation. It is a misspelling of *ort*, which is a variant of *ord*, which is an obsolete word meaning either "beginning", or "the pointy end of something". Sadly, the Collins does not take us on this ramble through obsolete Scottish arcana: *oots* cross-refers to *oot*, which cross-refers to *out*, which it defines as "denoting movement or distance away from" – the standard preposition. Now it is true that the Collins confines itself to one volume, so it is necessarily spartan in its explanations. But its (indirect) definition of *oots* is not only confusing, it is plainly wrong: I never before met a preposition which took a plural.

> "Frug is a word I was blissfully innocent of, and likewise, fugle."

*Frug* is a word I was blissfully innocent of, and likewise *fugle*. I probably should have known *frug*: it is a dance which had a brief appearance in the 1960s, but dancing was not really my thing. To *fugle* is to act the part of the *fugleman*: "A soldier especially expert and well drilled, formerly placed in front of a regiment or company as an example or model to the others in their exercises". Clearly useful words, at least for a person playing Scrabble. Nearby, the Collins has *fugly*. OED 2 recognises this also, and helpfully explains that it was originally Australian military slang and means, as most of us know, "a very ugly person". The Collins agrees, but editorialises: "offensive word for very ugly". Webster 3rd adopts a frosty silence: it does not recognise *fugly* at all.

Collins makes arch observations about some words, noting several words as "taboo words" but nevertheless allowing them to be played. In this regard, its standards look a little old-fashioned (in contrast to its racy willingness to allow all manner of doubtful words into play). While it defines *arsehole* (and *asshole*), *bugger* and *bloody* without comment or criticism, it baulks at *shit* as "taboo", and likewise a few other easily predictable words. This delicacy extends to *forfex*, which it defines modestly as "a pair of pincers, esp the terminal appendages of an earwig". OED 2 is a little less oblique: "A pair of anal organs, which open or shut transversely, and cross each other". While both the entomological and etymological enlightenment is interesting, for a Scrabble player it is a terrific word because F is worth 4 points and X is worth 8 points.

And this is the problem with Scrabble: it is all too easy to lose interest in what the words mean and become concerned principally for their value. A player interested in words will strive to recognise available words in the tiles on their rack, and feel pleased to discover *outside* (8) or *aunties* (7) or *suited* (7) in their jumble of letters. How disappointing then that short words like *zax* (19 – variant of *sax*: a tool for cutting slates) or *coxy* (16 – variant of *cocksy*: self-important, saucy) or *zoa* (12 – plural of zoon: an organism scientifically regarded as a complete animal) or *oyez* (16; at least we all know that one) are worth much more than the cleverly selected words. And when the skilled player manages to place high-value letters on a double- or triple-letter square, the difference is magnified.

I plan to avoid the lure of Scrabble this summer. I no longer want to spend idle time being seduced into a frenzy of debasing the language by trying to maximise the score. Too soon, and not surprisingly, the score for each word becomes the object of the game.

Scrabble is not a game for people keen on words: it is a game for people keen on winning. That is probably why so many lawyers love it. But don't play it with the 20-volume Oxford at your elbow: it is far too limited.

# RED BAG BLUE BAG

## Red Bag

Dear Sage Silk,

I need your advice urgently.

A firm whose briefs I'd love to receive just offered me a case in an area of law I know nothing about, in a court where I have never appeared.

Should I say yes or no?

The firm is one of those Collins Street firms who actually send you a folder with a memorandum in it and all the documents indexed, rather than that email attaching a backsheet spelling my name wrong and stating the wrong clerk, soon to be followed by a slow and incomplete drip-feed of emailed PDF attachments, none of which contain the instructions I need.

I must admit that I received this brief after meeting the solicitor at a networking event where a silk introduced me to the solicitor and told her she should brief me.

If I say no, that great firm might not ask me again. Plus, I really need the fees to pay my chambers rent and my mortgage. My partner was made redundant recently and I'm the breadwinner for my household at the moment. Something just settled last week that was about to go to trial and I'm a bit short of work. This brief looks like one that will run for months and the client can afford to pay my full rate.

If I say yes, I fear that I won't know what I don't know, and I might act negligently or look stupid. If I mess up the case, the client could be obliged to pay $1 million in damages. If I do say yes, who could I ask to help me? If I ask other barristers how to do it, they might realise the extent of my ignorance.

What should I do?

Yours sincerely,
Hungry Junior Barrister

## Blue Bag

Dear Hungry Junior Barrister,

You will continue to remain hungry and junior if you allow fear of the unknown to prevent you from jumping into the deep end. I disagree with your premise; there is no such thing as a discrete "area of law" about which you know nothing. You will come to learn (and thereby become a sage barrister) that law is organic and cannot be compartmentalised. Practice at the bar for a young barrister is a journey: enjoy the journey by looking out of the window and stopping at all of the delightful places along the way to the gaining of wisdom.

A barrister has a particular set of skills among which are the following: being able to stay up late at night reading a new brief; accepting challenges presented by novel cases; and, applying research skills to gain an understanding of an unfamiliar area of law. When in doubt, read a textbook. After all, isn't that what law school taught you to do? Furthermore, you can always ask another counsel for advice and guidance. You will find that the "open door" policy of the Bar is there to fill any gaps in your knowledge. You have both a mentor and a senior mentor; they can be your first reference points. Thereafter, there are over a thousand barristers at the Victorian Bar who are able to provide you with assistance.

Part of the joy of being a barrister is that you will not know where your practice will lead you. Do not become fearful of the challenge. Your legal skill in research and advocacy will enable you to act across a wide field of

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practice areas. Avoid being type-cast and specialising too early in your practice. Take as your model that legend of the bar, Jeffrey Sher QC, who whilst practising, was able to apply his legal research, advocacy, instinct and other skills to apparently disparate areas such as complex commercial litigation, crime, family and constitutional law.

On a more mundane level, don't worry about being sued for negligence; remember that we barristers have a wide immunity from suit.

So enjoy the challenge, earn the quids, pay the mortgage, gain a reputation as a barrister able to take on cases across a wide field and enjoy the journey.

Yours Sincerely,
Very Sage Silk

# CABS ON THE RANK

## FIRST CAB

### Peter O'Callaghan QC

*Bar Roll No. 622*
*(signed the Bar Roll 1 February 1961)*

**Five words my mum would use to describe me are:**
Peter is a good boy.

**The person (real or fictional) who most inspired my decision to come to the Bar is:**
Dr Mark O'Brien of Horsham who not only inspired but coerced me into studying law.

**A case I studied at law school and will never forget is:**
*Hibbert v McKiernan* (1948) 1 All ER 860 because it dealt with a subject then and now dear to my heart, lost or abandoned golf balls.

**The biggest advantage/ disadvantage of life as a barrister is:**
Biggest advantage – Many.
Disadvantage – None.

**If I weren't a barrister I would be:**
Retired.

**Paper or electronic court books?**
50 plus years with paper, but I now go with the electronic flow.

**Best coffee in the legal precinct?**
18th Floor of West, which is the only place I drink coffee in the precinct.

**The best decision I ever made was:**
To have my late wife Jennifer agree to marry me.

**Martha Costello or Clive Reader?**
Neither appeals. I only watched Silk long enough to see its lack of authenticity, credibility and reality. I prefer watching replays of Rumpole (generally authentic) and "Wanda" (very funny).

## LAST CAB

### Georgia Berlic

*Bar Roll No. 4687*
*(signed the Bar Roll 1 May 2014)*

**Five words my mum would use to describe me are:**
Brilliant, loyal, tenacious, vivacious, and charismatic. I am an only child so there was a bit of a "cult of the personality"-type thing growing up.

**The person (real or fictional) who most inspired my decision to come to the Bar is:**
Judge Kennedy, who inspired me to come to the Bar young and taught me the value of early starts.

**A case I studied at law school and will never forget is:**
*Al-Kateb v Godwin & Ors* (2004) 219 CLR 562 because of Gleeson CJ's judgment.

**The biggest advantage/ disadvantage of life as a barrister is:**
The biggest advantage is collegiality.
The biggest disadvantage is the potential for isolation.

**If I weren't a barrister I would be:**
A writer.

**Paper or electronic court books?**
Electronic.

**Best coffee in the legal precinct?**
Patricia.

**The best decision I ever made was ...**
Coming to the Bar.

**Martha Costello or Clive Reader?**
Martha Costello because of her crisp white shirts and high ideals.

THE MUSIC COLUMN

# Let's get digital

ED HEEREY

Chaos is good – if you can control it.

Such is the predicament of today's music lover. Any teenager with an iMac can record a full album. Outside the highly commercial pop sphere, record labels are effectively redundant and no longer provide the filtering process of selecting and promoting interesting new material. With so much unclassified material recorded and spewed forth onto the internet, what do you grab onto when you are drowning in an ocean of choice?

The answer surprisingly few seem to know is internet radio, which gives you access not only to every existing analogue and digital radio station worldwide but also to a plethora of internet-only stations with playlists carefully curated by musical cognoscenti in every corner of the globe. It's all there for you to explore, and easier than you might think - and not only FREE, but also LEGAL!

Where do you start? I like "TUNEIN RADIO", an app which you can download for free on your phone from the app-store. This lets you browse every radio station in the world on your phone; search by station name or by genre or location – Melbourne, Moscow, Mombasa and anywhere in between.

Listen on your headphones (great on the tram) or connect your phone to your hi-fi at home by cable or bluetooth. All too hard? Drop by JB or Dick Smith and pick up a basic speaker with a dock for your phone. Robert's your mother's brother. Personal tip – set up in the kitchen and crank it when you do the dishes.

Next question – what station?

Start your search with **Double J**. Only launched this year, Double J is the grown-up version of the ABC's Triple J "youth network", fronted by Gen-X luminaries such as Karen Leng (ex 3RRR) and Myf Warhurst. With minimal chat and a broad range of old and new tracks aimed at a greying hipster audience, it is nice to see our taxes so well spent. Let's hope it survives the right-wingers' jihad against the ABC.

In a similar vein is **8Radio** from Dublin, run by some devoted Irish music nuts spending many rainy days indoors listening far and wide for new and classic alternative stuff. Also from Dublin is **Frission** – good for ethereal, relaxed electronica.

Those in the know love **Radio Paradise**, a legendary labour of love founded by Bill and Rebecca Goldsmith in their home in Paradise, a town in rural northern California.

My Sunday morning fave is Chicago's **Great Golden Grooves Classic R&B** – something like a Gold104 for Motown veterans. Like many internet radio stations, this one lets you easily download a copy of any song as you hear it, which has allowed me to discover and capture some obscure R&B gems which I only knew from hip-hop samples, eg Cymande's *Bra* sampled by late 1980s hip-hop pioneers De La Soul.

**Koffee** is based in Sydney but does special broadcasts from the seminal Seminyak beach bar Ku De Ta: close your eyes and think cocktails on the day bed. A fave of my good wife.

A party starter is **GotRadio MashUps**. Ever wondered what would happen if you played Madonna and the Sex Pistols at the same time? How about Snoop Dogg with Led Zepplin? Find out with 24-hr mash-ups - bizarrely disparate songs mixed on top of each other.

If you really want to freshen your mix, check out the cool cats in Japan who run a station named **CREATIVE FREEDOM** (yep, capitals) with the breathless tagline "A creative media for visionaries". These dudes take their creativity SERIOUSLY. In one tram-ride to work you can expect an unclassifiable spread of ambient electronica, shoe-gazer indie jangle pop, 70s reggae, southern bluegrass and who knows what else.

So, get onto internet radio and take advantage of the hard work of all these cutting-edge music experts around the globe busily finding the best new and old music for you – and let me know if you hit a rich vein.

FOOD & DRINK

# Hinchey on wine (and related topics)

## The Independent Wine Store - a Rye Wine gem, just in time for summer

**Independent Wine Store Rye**
2117 Point Nepean Rd, Rye, Victoria
Ph 03 59854346
**Opening hours over summer:**
Monday to Thursday 10am-8pm
Friday and Saturday 10am-9pm
Sunday 10am till 7pm
*www.winestorerye.au*
sales@winestorerye.com.au

Food and wine is in Angela Strickland's blood. She has lived and breathed hospitality since her teens. It led her to pursue her dream of owning her own wine shop - the dream of a truly independent operation, focused on the quality of the wines it sells, and the value for money which those wines provide for customers: which is why it is bloody lucky for me and other devotees of the Mornington Peninsula, that Angela decided to pursue her dream in Rye, opening the Independent Wine Store in June 2013, to great acclaim from locals and visitors alike.

The Independent Wine Store, has an outstanding array of red and white wines, all tasted and chosen by Angela for their varietal character and value for money. The range is diverse, reflecting Angela's personal tastes and her desire to showcase smaller, family owned producers. There is an exceptional array of European wines (from French Burgundies to German Rieslings) as well as an excellent selection of top quality Aussie wine labels, including the Independent Wine Store's own IWS label: great value 2013 Mornington Peninsula Pinot and 2013 Clare Valley Riesling.

On my first foray into the shop last year, I was very excited to find "grower" champagnes in stock (Egly Ouriet, De Sousa & Agrapart), as well as competitive prices on the mainstream champagnes such as Mumm, Veuve and Moët. Also available is an array of local and fully imported beers, cider and an interesting range of premium spirits (think "Delord" Armagnac, Lillet, Vedrenne "Le Gin", Cachaca white rum from Brazil, a selection of whiskies from across the world, Japanese Sake and a must for every freezer over summer - Limoncello).

In the fridge you will also find delicious deli items including a range of quality cheeses like locally sourced Red Hill Cheese and a selection from Will Studd; beautiful prosciutto and; Piper St Food Co pates and terrines.

The Independent Wine Store has an on premises licence and doubles as a chic wine bar serving coffee and sweet treats throughout the day and selling wines by the bottle (corkage $5) as well as a changing selection by the glass into the early evening, along with an array of tasting platters and bar snacks for those with a beer or cider craving.

Look out for tastings each Saturday during summer, regular wine dinners (the most recent dinner was a fantastic collaboration with Bannockburn Winery, featuring winemaker Michael Glover), and other fabulous food based events at the shop.

Asked about her plans for the future, Angela says that she is keen to keep expanding the range of wines on offer, always focusing on quality and value for money.

Beyond that? "I still have a wish list a mile long", she says with a smile.

Can't wait to see what's next then!

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# Thirty Eight Chairs

SCHWEINHAXETTE

**Thirty Eight Chairs**
4A Bond St, South Yarra
Ph 9827 5553
www.thirtyeightchairs.com.au

'Ciao bella' and a kiss on both cheeks – this is the greeting I get when I walk into Thirty Eight Chairs. Take away the English one hears at the tables, and you would think you'd just landed smack bang in Italy. Thirty Eight Chairs is just that – an all-day, small, buzzing Italian bar/locanda where the all–Italian staff banter in Italian as they move adeptly in the small space, greeting customers as friends and explaining the ever-changing specials with that irrepressible Italian love of food and wine – ahhh….la dolce vita. Owner Gino hails from the Amalfi Coast and he has carved out his 'bella Italia' in the heart of South Yarra. The interior is so Italian – a small but welcoming space, a central bar stocked with neatly lined mainly Italian bottles and aperitivi, a red Italian meat-slicer, stylish wooden tables, and of course an Italian coffee machine.

It's a cold Thursday night in August and the place is full. Service is swift and when offered a drink we both opt for Italian whites from the succinct very Italian-leaning wine list. I enjoy a Salina Bianco, an Inzolia Catarratto blend from the Aeolian Islands, him a Pinot Grigio from north eastern Italy. Both hit the spot. We quickly move onto food. The antipasti offerings and the primi piatti are designed to share. We do just that and promptly arrives the olive calde miste – warm marinated olives with extra virgin olive oil and house made bread, and a carpaccio di tonno (tuna carpaccio). The tuna is so fresh, it is almost sweet. Gino then suggests one of the specials hailing from the Amalfi coast – diavoletta gratinato al forno con pepperonata – 'diavoletta' is a female devil - no doubt an allusion to the spicy peperonata in this dish, a delicious baked bread cake. Magnifico!

With our appetites well and truly whetted, we are onto mains. The starters are generous in size, but I still have plenty of appetito. My partner chooses the char-grilled veal rack with rocket, parmesan and balsamic vincotto and I decide on one of the daily specials - Paccheri con Vongole e Melanzane arrostita - a large tubed pasta originating from Campania and Calabria served with clams and roasted eggplants. Both are delicious. To complement the veal my partner downs a glass of Nebbiolo from Piedmont, I choose another Salina Bianco which is perfect with the clams – the Aeolian Islands are just off the north-eastern coast of Sicily so this white is perfect with my southern Italian-inspired paccheri.

It's now almost 10pm but the place is still buzzing. As some earlier diners leave, more arrive. There doesn't seem to be a table empty. We suddenly notice it's someone's birthday - the dim lights are further dimmed, happy birthday in Italian is played through the sound system and the waiters serenade the birthday girl tambourine in hand, singing 'tanti augeri a te'. May sound tacky, but nothing tacky about it at all. Just another friendly touch in this local locanda. We are offered desserts but all we can manage is a quick espresso to finish. We leave as we arrive – with a 'ciao' and I get a kiss on each cheek. We agree that we have found our little bit of Italy.

CASENOTE

# Yara Australia Pty Ltd v Oswal [2013] VSCA 337

MICHAEL WHEELAHAN

## Introduction

In *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 the Court of Appeal exercised powers of sanction under the *Civil Procedure Act 2010* (Vic) by making orders that –

- the solicitors for the applicants indemnify the applicants for 50% of the respondent's costs incurred as a consequence of the unnecessary or excessive content of the application books; and
- the applicants' solicitors be disallowed recovery from the applicants of 50% of the costs related to the preparation of the application books and costs incidental thereto.

Before considering the issues and the Court's reasons in *Yara Australia Pty Ltd v Oswal,* it is necessary to essay some background.

## Overarching purpose

Section 7(1) of the *Civil Procedure Act* prescribes an overarching purpose –

**7 Overarching purpose**

(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The overarching purpose is not substantially different from the fetter under Rule 1.14 on the exercise of powers under the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**the Rules**) –[1]

**1.14 Exercise of power**

(1) In exercising any power under these Rules the Court—

(a) shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined;

(b) may give any direction or impose any term or condition it thinks fit.

The effect of s 8 of the *Civil Procedure Act* is that the overarching purpose operates as a mandatory relevant consideration in connection with the exercise of all relevant powers of the Court, whether they be powers under the Act, or under the Rules or inherent or implied powers, or common law powers or practices of the court –

**8 Court to give effect to overarching purpose**

(1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—

(a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

(b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or

(c) arise from or are derived from the common law or any procedural rules or practices of the court.

The general terms of the overarching purpose are given additional content by s 9 of the Act, which requires a court to have regard to the following objects in making any order, or giving any direction in a civil proceeding –

- the just determination of the civil proceeding;
- the public interest in the early settlement of disputes by agreement between parties;
- the efficient conduct of the business of the court;
- the efficient use of judicial and administrative resources;
- minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for—
  - the fair and just determination of the real issues in dispute; and
  - the preparation of the case for trial;
- the timely determination of the civil proceeding;
- dealing with a civil proceeding in a manner proportionate to the complexity or importance of the issues in dispute and the amount in dispute.

## Overarching obligations

The concept of overarching purpose that underlies the exercise of powers by a court is complemented by a number of obligations that are owed by parties, practitioners, litigation funders, insurers and expert witnesses. These obligations are referred to in the Act by the defined term "overarching obligations". The particular overarching obligations found in the *Civil Procedure Act* include obligations –

- to act honestly (s 17);
- not to make any claim or response to a claim which is frivolous, vexatious, an abuse of process, or does not have a proper basis (s 18);

- not to take any step in connection with any claim or response to any claim in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding (s 19);
- to cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding (s 20);
- not, in respect of a civil proceeding, to engage in conduct which is misleading or deceptive or likely to mislead or deceive (s 21);
- to use reasonable endeavours to resolve a dispute by agreement (s 22);
- to use reasonable endeavours to –
  - resolve by agreement any issues in dispute which can be resolved in that way; and
  - narrow the scope of the remaining issues in dispute (s 23);
- to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate (s 24);
- to use reasonable endeavours in connection with the civil proceeding to act promptly and to minimise delay (s 25);
- to disclose the existence of documents which are critical to the resolution of the dispute (s 26).

The overarching obligations are wide-ranging and omnipresent. All of the overarching obligations are expressed at a high level of abstraction, with the consequence that the question whether in a particular case any of them has been breached will likely involve questions of fact, degree and value judgment.

The overarching obligations may be enforced by making remedial orders under ss 28 and 29 of the *Civil Procedure Act*. The power under s 29 to make remedial orders is broad, in that it is not limited to making pecuniary orders against parties or practitioners.

The idea that legal practitioners owe duties to the Court in the conduct of civil litigation is not new.[2] In *Myers v Elman* Lord Atkin stated[3] –

> *From time immemorial judges have exercised over solicitors, using that phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the Court itself. Rules are disobeyed, false statements are made to the Court or to the parties by which the course of justice is either perverted or delayed. The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties whether they be carrying on the profession alone or as a firm.*

And in *Gianarelli v Wraith4* it was recognised that counsel have a duty to assist the court in the speedy and efficient administration of justice. To this end, duties of honesty and integrity attend practise at the Bar, and underlie many of the Bar's *Practice Rules*.[5] Counsel's duty to the court may not always accord with the lay client's interests, as observed by Lord Reid in *Rondel v Worsley6* –

> *[A]s an officer of the court concerned in the administration of justice [counsel] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.*

In March 2008 the Victorian Law Reform Commission published its report, *Civil Justice Review*. This Report was the precursor to the enactment of the *Civil Procedure Act*, which is the legislative response to the recommendations made in the Report. There are three relevant features of the recommendations in the Report for present purposes –

- the Report advocated cultural and behavioural change in the conduct of civil litigation in Victoria;[7]
- in order to bring about cultural and behavioural change, the Report recommended the statutory prescription of a number of overriding obligations, including a paramount duty to the Court to further the administration of justice, and a number of more specific obligations;[8] and
- in order to ensure compliance, there should be a broad range of sanctions and remedies available to the court to deal with nonconforming behaviour.[9]

> **"The courts' general jurisdiction as to costs under *Judicature Act* Rules has long permitted apportionment of costs, or special orders as to costs against parties who advance hopeless claims or defences, or who waste court time."**

In proposing sanctions and remedies, the Law Reform Commission was aware of the vices of "satellite litigation" to which sanctions and remedies for alleged breaches could give rise. In 1994, the English Court of Appeal in *Ridehalgh v Horsefield10* had observed that the wasted costs jurisdiction[11] was giving rise to a new branch of legal activity, calling to mind Dickens's searing observation in *Bleak House* –

> *The one great principle of English law is, to make business for itself... Viewed in this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it.*

To address the vice of "satellite litigation" the Commission proposed that any application for sanctions or remedies by a party or a person with a sufficient interest would require leave of the Court. However, no requirement for leave made its way into the relevant provisions of the Act.

## Existing authorities

The courts' general jurisdiction as to costs under *Judicature Act* Rules has long permitted apportionment of costs, or special orders as to costs

> “...it may be tempting, after the litigation is over, after the tumult and the shouting dies, for victorious parties to seek to “have a little hanging”. In addition to the other considerations referred to above, a court should be especially mindful to make all due allowances for the exigencies of litigation, and to not judge the conduct of litigation in hindsight.”

against parties who advance hopeless claims or defences, or who waste court time[12]. The *Civil Procedure Act* informs the court's general discretion as to costs so as specifically to permit contravention of the overarching obligations to be taken into account as a relevant consideration.

The existence of the power to make pecuniary orders against practitioners or other non-parties to the litigation, and the exercise of those powers, are different matters. It is one thing to make special orders as to costs against parties to litigation. Liability for costs is an ordinary incident of litigation to which parties are exposed. However, when the Court entertains making orders against practitioners, additional considerations are relevant.

The powers to make remedial orders under ss 28 and 29 of the *Civil Procedure Act* are discretionary. However, the discretions are not unfettered. They are at least fettered by the consideration that they must be exercised judicially, and they are also fettered by the *Civil Procedure Act* itself, and in particular, the overarching objective in s 7 that, by reason of s 8, is a mandatory relevant consideration. The overarching objective in s 7 directs attention to considerations of justice, which must include fairness. Section 7 also directs attention to the real issues in dispute, rather than the promotion of satellite disputes, and to avoiding the additional time and cost liable to result from satellite disputes.

The existence of powers of the Court to make orders against practitioners for costs, or to disallow costs, is not new either.[13] Statutory powers to make such orders have been described as confirming the ancient jurisdiction of the court to exercise control over its own officers.[14] Statutory powers have existed under r 63.23 of the Rules, and cognate rules, for many years. There is a body of case law that has considered the particular problems that arise when a Court entertains an application for orders directed at practitioners acting for parties in civil litigation. The authorities can therefore provide valuable guidance to the exercise of powers under the *Civil Procedure Act* because, as Rix LJ stated in a different context in *Scott v The Copenhagen Reinsurance Co (UK) Ltd 15* –

> *Although, like the judge, I am diffident about the direct help which previous authority can lend to a unique factual situation, it is the insight of the common law that wisdom can be drawn from previous examinations of similar problems.*

Justice, fairness, efficiency, and attention to the real issues in dispute suggest that the following guidance offered by the authorities is relevant to the potential exercise against legal practitioners of the discretionary powers under ss 28 and 29 of the *Civil Procedure Act*.

First, the jurisdiction to make personal costs orders against practitioners falls to be exercised with care and discretion and only in clear cases.[16] That is for reasons including that the practitioner's duties to the court and to the client could be distorted by the threat of personal liability to other parties, which might result in access to justice being impeded.[17] Another reason for acting only in clear cases is that, as observed above, the normative standards fixed by the content of the overarching obligations under the *Civil Procedure Act* are expressed in broad, abstract terms, and apply to an environment where the position in which legal practitioners find themselves is not always clear-cut. The prospect of applications based upon alleged departure from generally expressed norms based upon colourable allegations of procedural transgression is liable to lead to uncertainty and injustice, both at a specific and a general level.

Secondly, parties and their practitioners ought not make threats against other practitioners with the object or effect of brow-beating them into abandoning part of their client's case. Such threats might even amount to a contempt of court.[18] Threats made to practitioners of personal liability for costs during the course of litigation may undermine the objectivity required of those professional advisers.[19]

Thirdly, sanctions against practitioners for contravention of the overarching obligations have a penal character to them.[20] Allegations against practitioners involving dereliction of duty, including breach of the overarching obligations, may involve or have the appearance of involving serious charges, and give rise to the risk of injury to professional reputation. Accordingly, justice requires that a practitioner faced with the threat of personal sanction or liability has a full and fair opportunity to answer any complaint against the practitioner or application for a remedy.[21] When the court itself is proposing an order against a practitioner, procedural fairness requires that the court give fair particulars of what it is that the court is concerned to investigate.[22]

Fourthly, the threat of a personal liability by a practitioner gives rise to the risk of a conflict of interest

between the practitioner and the client. At the very least, there may be the risk of a conflict of pecuniary interest. When such conflicts arise, separate representation or advice is often necessary. Applications, or the threat of application under the *Civil Procedure Act* for remedies against practitioners are therefore liable to drive a wedge between the practitioner and the client.[23]

Fifthly, in meeting any complaint, a practitioner may be hampered by his or her duty of confidentiality to the client, and in such circumstances the practitioner should be given the benefit of any doubt.[24]

Finally, costs orders against practitioners should not become a back door means of recovering costs not otherwise recoverable against that practitioner's client.[25]

Many of these considerations address the prospect that the remedy becomes greater than the disease.[26] The threat or pursuit of applications against practitioners may be antithetical to the overarching objective prescribed by s 7 the *Civil Procedure Act*. And the threat, and pursuit of remedies against practitioners may, of themselves, give rise to breaches of one or more of the overarching obligations under the *Civil Procedure Act*.

Furthermore, it may be tempting, after the litigation is over, after the tumult and the shouting dies,[27] for victorious parties to seek to "have a little hanging".[28] In addition to the other considerations referred to above, a court should be especially mindful to make all due allowances for the exigencies of litigation,[29] and to not judge the conduct of litigation in hindsight.[30]

## Yara Australia Pty Ltd v Oswal

In *Yara Australia Pty Ltd v Oswal* the Court of Appeal heard an application for leave to appeal an order of a judge setting aside an order of an associate judge that the respondent give security for costs. The Court of Appeal dismissed the application for leave to appeal on 20 June 2013.

Upon delivering its reasons for judgment dismissing the application for leave to appeal, the Court of its own motion declined to pronounce orders, and directed that the parties file written submissions directed to whether the parties had failed to meet their overarching obligations under the *Civil Procedure Act* to ensure that legal costs are reasonable and proportionate.

In making the above directions, the Court directed attention to the following matters –

- the nature of the application;
- the issues that were raised before the judge below;
- the amount of security that was being sought (some $87,000);
- the level of legal representation that was engaged;
- the material actually relied upon in the course of submissions, and
- the number of volumes of the appeal book.

Following the delivery of judgment, the Court caused an email to be sent to the practitioners for the parties in the following terms –

> *Dear parties,*
>
> *The Court made the following directions on 19 June 2013:*
>
> *The Court directs that:*
>
> 1. *The parties make submissions addressing the following question:*
>
> *Whether or not any of the parties in this matter have failed to meet their overarching obligations to ensure that costs are reasonable and proportionate, pursuant to the* Civil Procedure Act 2010.
>
> 2. *The applicants file further written submissions of no more than six pages and file any further material upon which they seek to rely by 4 pm on 8 July 2013.*
>
> 3. *The respondents file written submissions in reply of no more than six pages and file any further material upon which they seek to rely by 4pm on 22 July 2013.*
>
> *Thank you for your assistance.*

At this point, the Court of Appeal did not in terms suggest that the legal practitioners for the parties were at risk of personal costs orders or sanctions.

After receiving written submissions from the parties, the Court of Appeal then delivered a second set of reasons for judgment on 27 November 2013. In those reasons, the Court essayed some principles said to attach to the exercise of the Court's powers under s 29 of the *Civil Procedure Act*. In particular, the Court stated –

> *[20] The Court's powers under s 29 of the Act include the power to sanction legal practitioners and parties for a contravention of their obligations as the heading to Part 2.4 indicates.31 In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of disputes. Through them, Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations. A sanction which redistributes*

"The abstract nature of the overarching obligations requires that any alleged contravention be the subject of sufficiently precise particulars. These rights are basic, and are supported by High Court authority of general application. Nothing in any of the provisions of the *Civil Procedure Act* undermines or dilutes those rights."

*that burden may have the effect of compensating a party. It may take the form of a costs order against a practitioner, an order that requires the practitioner to share the burden of a costs order made against their client or an order which deprives the practitioner of costs to which they would otherwise be entitled. The Act is clearly designed to influence the culture of litigation through the imposition of sanctions on those who do not observe their obligations. Moreover, the power to sanction is not confined to cases of incompetence or improper conduct by a legal practitioner. Where there is a failure by the practitioner, whether solicitor or counsel, to use reasonable endeavours to comply with the overarching obligations, it will be no answer that the practitioner acted upon the explicit and informed instructions of the client. A sanction may be imposed where, contrary to s 13(3)(b), the legal practitioner acts on the instruction of his or her client in breach of the overarching obligations.*

*[21] … In our view, the enactment of s 29 together with s 28(2) imbues the Court with broad disciplinary powers that may be reflected in the costs orders that are made. The Court is given a powerful mechanism to exert greater control over the conduct of parties and their legal representatives, and thus over the process of civil litigation and the use of its own limited resources.*

The Court then ventured the following observation –

*[23] It is therefore somewhat surprising that despite the length of time the Act has been in force, the scope of the sanction provisions in the Act for a failure to comply with the overarching obligations has been under-utilised.*

The Court then gave the following explanation –

*[25] The explanation for the under-utilisation of the provisions of the Act lies in part in a false perception that these provisions and the overarching obligations do not affect any material change to the Rules and the inherent jurisdiction of the Court.*[32] *…*

The Court then gave its imprimatur to courts embarking on own-motion inquiries with a view to imposing sanctions –

*[27] Yet as we have observed, sanctions imposed for a breach of any overarching provisions have been a rarity at first instance. When no party invites the court to determine whether there has been a breach of the Act, there may be a judicial disinclination to embark upon such an own-motion inquiry for fear that inquiry as to a potential breach may be time consuming and may require the introduction of material that was not before the court as part of the proceeding. Such fears cannot relieve judges of their responsibilities. But we would not wish it to be thought that a judicial officer at first instance must undertake a substantial inquiry when considering whether there has been a contravention of the Act. As the sanction for a breach will usually lie in an appropriate costs order, a judge may at the conclusion of the reasons for judgment immediately invite oral submissions as to why there should not be a finding that the Act was contravened. The judge may in a relatively brief way deal with that issue in providing succinct reasons for a finding that there has been a breach of the Act and how that finding affects the orders for costs that are to be pronounced.*

There were two features of the case that the Court then considered. The first feature was the level of representation in the application. On that topic, the Court stated –

*[28] In order to comply with the particular overarching obligation in s 24, the legal practitioners — solicitors and counsel — who act for or on behalf of a party or who are asked to so act, must always give careful consideration to the level and the extent of the representation that is necessary for a party in a proceeding. Even where a party provides informed instructions to their legal practitioners that they wish particular counsel to be briefed, the legal practitioners who act on their behalf have an overriding duty to consider whether, having regard to the matters set out in s 24 and any other relevant circumstances, the engagement of particular counsel will contravene the Act. There will be proceedings in which the complexity or importance of the issues and the amount in dispute will not justify the engagement of counsel of particular seniority or will not justify the engagement of more than one counsel.*

Having set out these observations, the Court then determined that it could not be said that the engagement of three counsel by one of the parties and the costs incurred thereby were not reasonable and proportionate.

However, the Court determined that the content of the application books was too voluminous, containing material that was repetitious or excessive, which was the second feature of the case that attracted the Court's interest.

The Court then indicated at [59] of its reasons that it would hear from the parties as to what orders it should pronounce, and proposed that orders might be made including –

» that the solicitor-client costs which each legal practitioner may seek to recover from their client not include a percentage of the costs of the preparation of the application books; and
» the legal practitioners for the applicants pay a portion of the respondents' costs of the applications that are related to the preparation for the hearing.

It is not apparent from the Court's reasons that any further submissions were made to the Court before the orders set out at the commencement of this note were made.

## Some observations

Because of the way the issues that were identified by the Court of Appeal unfolded, no occasion arose

> “Before the parties or a court embark upon a distracting, time-consuming and possibly costly process directed to possible sanctions against legal practitioners, the *Civil Procedure Act* requires the parties and the court to consider whether the objectives of the Act might be better served in another way.”

to consider in detail the particular problems that may attach to applications for costs or sanctions against legal practitioners. None of the leading cases counselling caution when contemplating orders against legal practitioners, or identifying the reasons why caution is warranted, was the subject of consideration by the Court. The Court’s reasons therefore do not appear to discriminate between applications for orders against parties, and applications for orders against legal practitioners, to which additional considerations may be relevant.

The Court’s suggestion at [27] that, at the conclusion of a hearing, a judge might immediately invite oral submissions in relation to sanctions, has to accommodate the separate interests that legal practitioners and their clients might have in such an application. Counsel for a party might well have a conflict in addressing such an application if it were to be suggested that counsel, or the instructing solicitors, might personally be the subject of a sanction.

The decision of the Court in *Yara* should not be understood as denying the relevance of the many considerations, including caution, to which the authorities refer when courts have considered exercising discretionary powers to make personal costs orders, or to impose sanctions, against legal practitioners acting for parties in civil litigation. The generally-expressed “call to arms” in paragraph [27] of the Court’s reasons for judgment does not engage with many of the recognised problems to which applications for costs or sanctions against legal practitioners give rise. The relevance of those considerations is supported by at least the overarching objective in s 7 of the *Civil Procedure Act*, and is informed by the statutory considerations in s 9 of the Act. What weight is to be given to those factors will be a matter for a court called upon to exercise the discretionary powers of sanction.

The abstract nature of the overarching obligations requires that any alleged contravention be the subject of sufficiently precise particulars. These rights are basic, and are supported by High Court authority of general application. Nothing in any of the provisions of the *Civil Procedure Act* undermines or dilutes those rights. In *Yara,* the Court of Appeal gave notice at [59] of its written reasons of the orders it was contemplating, before inviting further submissions. Therefore, the reasons of the Court in *Yara*, particularly at [27], should not be understood as affecting the rights of legal practitioners to procedural fairness, including adequate particulars, separate representation if that is necessary, and a right to a reasonable hearing.

The prospect of the liberal imposition of sanctions under the *Civil Procedure Act* may encourage personal attacks on the conduct of practitioners, resulting in unnecessary time being spent on collateral issues. This would be unfortunate, as such attacks can be antithetical to the overarching obligation in s 20 of the Act that practitioners and parties should co-operate. A focus on sanctions is liable to divert attention from the just and efficient resolution of the real issues in dispute in civil litigation.[33] Experience shows us that procedurally, much more is achieved through co-operation than antagonism.

A sound approach to the question whether the discretionary powers under ss 28 and 29 of the *Civil Procedure Act* should be exercised so as to impose sanctions on legal practitioners for breach of the high level, abstract standards of conduct prescribed by the Act, is one of restraint. The discretion should be exercised only in clear cases so as not to encourage colourable allegations by parties against practitioners, or satellite litigation.[34] Before the parties or a court embark upon a distracting, time-consuming and possibly costly process directed to possible sanctions against legal practitioners, the *Civil Procedure Act* requires the parties and the court to consider whether the objectives of the Act might be better served in another way.

## Conclusions

The *Civil Procedure Act* is a good servant, but is likely to be a bad master. To counsel caution in relation to the imposition of sanctions against practitioners is not only sound as a matter of principle, but will likely enhance the objectives of the *Civil Procedure Act*, and in particular the overarching purpose to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

## Post script – insurance

Under clause 5.8 of the 2014/15 Legal Practitioners Liability Committee policy for barristers there is a deterrent excess of $8,000 for any order as to costs made against an insured as a non-party to a proceeding.

Furthermore, by clause 15 of the policy, there is an indemnity back to the insurer –

15. **Non-party costs order**
    The Practitioner will indemnify the Insurer against each amount paid or payable by the Insurer in respect of any order for costs made

against the Practitioner as a non-party to a proceeding, to the extent that the order is based on –

(a) the Practitioner having a financial interest in the outcome of the proceeding, including an interest in whether or to what extent the Practitioner's fees will be paid; and/or

(b) the Practitioner having engaged in conduct knowingly or recklessly in breach of the Practitioner's duty to the court or tribunal, including having advanced a claim or defence found to have had no real prospect of success.

Any pecuniary order against a practitioner based upon a finding of knowing or reckless breach of the overarching obligations may engage the indemnity back provision, with significant financial consequences for the barrister.

1 See, *Trevor Roller Shutter Service Pty Ltd v Crowe* (2011) 31 VR 249 at 260-1 [43] (Warren CJ, Nettle and Ashley JJA).

2 *Director of Consumer Affairs Victoria v Scully & Ors (No 2)* [2011] VSC 239 at [22] (Hargrave J).

3 [1940] AC 282 at 302.

4 *Gianarelli v Wraith* (1988) 165 CLR 543 at 556 (Mason CJ) and at 578 (Brennan J).

5 See, for example Rules 16, 17, 34 and 35.

6 [1969] 1 AC 191 at 227.

7 See p 204.

8 See p 150.

9 See p 151.

10 [1994] Ch 205 at 225-6. See also, *Medcalf v Mardell* [2003] 1 AC 120 at 144 [57] (Lord Hobhouse).

11 In Victoria, the "wasted costs jurisdiction" is found in *Supreme Court (General Civil Procedure) Rules 2005*, r 63.23 and corresponding rules of other courts.

12 *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 at [7]–[8] (Harper J), and the cases cited therein.

13 See: *In re Jones* (1870) LR 6 Ch App 497 at 499 (Lord Hatherley LC); *Myers v Elman* [1940] AC 282 at 290 (Viscount Maugham).

14 *Orchard v Seeboard* [1987] 1 QB 565 at 569 (Donaldson MR).

15 [2003] Lloyd's Rep IR 696 at [33].

16 *Orchard v Seeboard* at 572 (Donaldson MR); *De Souza v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 41 FCR 544 at 547 (French J); *Re Bendeich* (1994) 53 FCR 422 at 426 (Drummond J); *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383 at 389 [11] (Hill J); *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 166 [43]; *Money Tree Management Services Pty Ltd and Institute of Taxation Research v Deputy Commissioner of Taxation (No 3)* (2000) 45 ATR 262 at 270 [28] (Debelle J); *Gitsham v Suncorp Metway Insurance Ltd* [2002] QCA 416 at [8] (White J); *Medcalf v Mardell* [2003] 1 AC 120 at 143 [56] (Lord Hobhouse); *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at 320-1 [92] (McColl JA); *Bechara T/As Bechara and Co v Atie* [2005] NSWCA 268 at [40] (McColl JA); *Re the Black Stump Enterprises Pty Ltd and Associated Companies (No 2)* [2006] NSWCA 60 at [8] and [9] (Young CJ in Eq); *K Muc Trading as G H Healey and Co Sydney v Descaretes Pty Ltd* [2006] NSWCA 69 at [84] (Ipp JA); *Hooker v Gilling (No 2)* [2007] NSWCA 214 at [36] (McColl JA); *Kelly v Jowett* (2009) 76 NSWLR 405 at 418 [60] (McColl JA).

17 *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383 at 389 (Hill J).

18 *Orchard v Seeboard* at 580 (Dillon LJ); *Re Bendeich* (1994) 53 FCR 422 at 427 (Drummond J); *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 166 [43]; *Medcalf v Mardell* [2003] 1 AC 120 at 144 [58] (Lord Hobhouse).

19 *Orchard v Seeboard* at 577.

20 *Medcalf v Mardell* [2003] 1 AC 120 at 143 [56] (Lord Hobhouse).

21 *Orchard v Seeboard* at 572 (Donaldson MR); *Ridehalgh v Horsefield* at 226; *Lemoto v Able Technical Pty Ltd* at 321 [92] (McColl JA).

22 *Shire of Gibsorne v King* [1995] 1 VR 103 at 106 (Tadgell J).

23 The idea that such applications may "drive a wedge" between practitioner and client was the subject of submissions on behalf of the Law Society in *Ridehalgh v Horsefield* [1994] Ch 205, reported at 213.

24 *Orchard v Seeboard* at 572 (Donaldson MR); *Medcalf v Mardell* [2003] 1 AC 120 at 145 [59] (Lord Hobhouse); *Lemoto v Able Technical Pty Ltd* at 321 [92] (McColl JA); *Ashby v Slipper* (2014) 219 FCR 322 at [144] (Mansfield and Gilmour JJ).

25 *Ridehalgh v Horsefield* at 226.

26 *Ridehalgh v Horsefield* at 226.

27 Kipling, *Recessional*, alluded to in *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 89 [241] (Heydon J).

28 See, *Minister for Home Affairs v Zentai* (2012) 246 CLR 213 at 243 [75] (Heydon J); often attributed to Prince Felix Schwarzenberg of Austria, "Mercy by all means … mercy is a very good thing. But first let us have a little hanging".

29 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at 320-1 [92] (McColl JA).

30 In the context of liability for negligence, see: *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 at 337-8 [18] (Gummow J); *New South Wales v Fahy* (2007) 232 CLR 486 at 505 [57] (Gummow and Hayne JJ); *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 438 [31].

31 As per s 36(1)(a) of the *Interpretation of Legislation Act* 1984 , s 36(1)(a), headings form part of the Act. Any heading must give way to clear and unambiguous words in the provision, but it nonetheless forms part of the interpretative process. See *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) 67 CLR 1, 16.

32 See for example *Octagon Inc v Hewitt & Anor (No 2)* [2011] VSC 373, [48]. See also r 63.23 of the Rules and s 24 of the *Supreme Court Act 1986* (Vic). As to the Court's inherent jurisdiction, see *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169; *Myers v Elman* [1940] AC 282; and *Knight v FP Special Assets* (1992) 174 CLR 178.

33 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at 328 [126] (McColl JA).

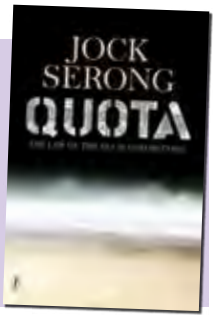
34 See in particular, *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at 320-2 (McColl JA) and the cases cited therein, and see the cautionary language of the Court in *Ridehalgh v Horsefield* [1994] Ch 205 at 225-6 and 238-9.

BOOK REVIEWS

# Quota: A barrister's seachange

PAUL DUGGAN

***Quota*** by Justin Serong Text Publishing, Melbourne, 2014




Justin "Jock" Serong left the Victorian Bar in 2004 but his debut novel shows he hasn't forgotten us.

His book, *Quota*, was released in June.

Its hero is a criminal barrister, Charlie Jardim. We meet Jardim in the throes of an unhappy streak which includes a contempt conviction from his least favourite magistrate and being dumped by his solicitor-fiancé. And from there on, life for Jardim, both inside Court and out, gets even more interesting.

Jardim walks to chambers (a word his fiancé despises) past meat wagons full of remand prisoners queuing in the Lonsdale St clearway. And then into the lift with fresh obituaries about two colleagues whose heart and liver respectively have quit in disgust.

(We haven't even made it into Jardim's chambers for the first time and it sounds familiar already, doesn't it?)

Waiting for Jardim in chambers is an unexpected brief in a murder trial. The white ribbon suggests Jardim's fees are looking secure but it soon emerges that the prospects of a conviction are anything but.

The Crown's star witness, the victim's brother, is fitful in his co-operation. And that makes him look effusive by comparison with the rest of his small seaside town.

And therein lies an excellent story.

In echoes of Serong's six year career as a barrister (which included a junior brief in the Silk-Miller murder prosecution), chapters of the story variously take the form of police interview transcripts, formal witness statements and newspaper accounts of the trial.

Is an ex-barrister's novel written this way too much like barristers' actual work to be leisure reading for current lawyers?

No. I shared chambers briefly with Serong. He was a great lawyer but his extraordinary range of interests and travels meant that the tremendous entertainment (and education) I received as his chambers-mate ranged far beyond the law.

So it is with *Quota*.

Much of the story is set in the Supreme Court and its Melbourne environs but the actual murder happens on an abalone boat just off a fictional south west Victorian town. Between Justice Williams' court in William Street and the Southern Ocean lies a lot of rich material for Serong to work with.

Serong has lived in Port Fairy since he left the Bar. It seems nothing in that part of the world has escaped his attentive eye. From the range of decrepit locals in the one pub town's single pub to the marram grass and kelp beds swaying above and below the nearby waves, there is the unmistakeable sense that Serong knows his material. Murder trials, tumble-down pubs, snorkelling for crayfish, DHS child removal applications – Serong has dived into them all at some stage of his varied career.

And it shows. His descriptions of people and places are sometimes almost annoyingly evocative – there is often a nagging sense that, say, you've been to that very beach which in the book is named Gawleys or you have been opposed to the silk nicknamed "The Basque" but, irritatingly, you can't quite pinpoint the real life names of either.

Ditto with Serong's dialogues. In and outside work, we've all met defendants, witnesses and hangers-on who speak with the colour of Serong's outsiders and policemen who talk (and mistype) in the wooden tones of Serong's police.

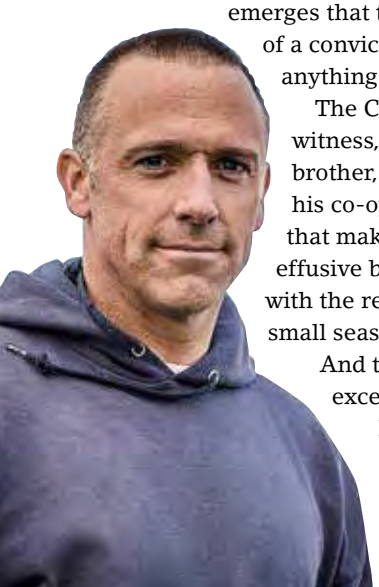
Without giving away the story, Jardim ultimately makes it back from both the Supreme Court and south west Victoria exhausted but ready for his next brief. Rumpole's career spanned 16 novels. Maybe like Rumpole, Charlie Jardim will be back again down the track.

An encore or two by the fictional Jardim certainly seems more likely than a real life return by Serong the barrister.

Serong, wife Lilly (incidentally daughter of Arthur Adams QC) and their four children have lived in Port Fairy for ten years now. For most of that time, Serong was writing on the side while a solicitor at Maddens in Warrnambool but last year he completed his seachange by leaving the law completely.

Between surfs, he now writes professionally full time.

Apart from fiction, he is working on a film project, editing the new journal *Great Ocean Quarterly*, contributing to surf magazines and writing freelance general copy and journalism.



Justin "Jock" Serong

# Superior Courts compared

J D MERRALLS

More than thirty years ago, Alan Paterson as a young lecturer at the University of Edinburgh wrote a study of the House of Lords as a judicial body, which was published under the title of *The Law Lords*. In 2008, prompted, he says, by the impending demise of the House of Lords and its replacement by the Supreme Court, he returned to the task of "describing, analysing and explaining" how appellate decision-making in the United Kingdom's top court works. *The Law Lords* was not the first study of the judicial House of Lords. It was preceded in 1979 by Robert Stevens' massive *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* and in 1972 by Blom-Cooper and Drewry's *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (rev ed 2009). Unlike those works, *The Law Lords* depended to a great extent upon interviews conducted by the author with counsel and Law Lords themselves. It was a study of the dynamics of the House from the inside rather than an account of its judicial work.

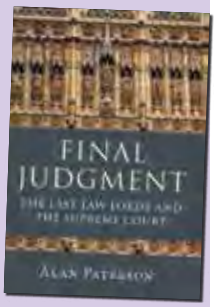
Professor Paterson has carried this technique to a new level in *Final Judgment*. He appears to have maintained a close connection with many Law Lords in the years between writing the two books and to have won their respect for his discretion. *Final Judgment* is enlivened by many quotations from conversations, both attributed and anonymous.

The work began as a study of the last years of the House of Lords in comparison with its judicial functions in earlier periods, but, because of the duration of the task, it finished as both that and a comparison of the House and its successor. Professor Paterson has adopted as his method the study of what he calls "the dialogues that the judges engage in when making judicial decisions". Those "dialogues" are between bench and bar, between the Law Lords and Justices themselves, between the Supreme Court and the Court of Appeal, with academics, with courts overseas, especially the European Court of Human Rights in Strasbourg, with the Scottish courts, with judicial assistants, with Parliament and with the Executive. The author concedes that the word dialogue is an imprecise description of the exchange or interaction between the courts and their members and the others whose influence he has identified, but he has adopted it as a generic term of convenience.

Perhaps the most interesting sections of the book concern the internal dynamics of the House and the Court. The author notes as a significant change between the two the development of a collegial relationship between the Justices. He attributes this to many causes, some adventitious, such as the geographical relationship of their rooms, some systemic, such as a greater emphasis on written submissions and the limitation of the length of oral argument, others intentional, depending in particular upon the manner in which the task of judgment-writing is distributed amongst the Justices and attitudes to the pros and cons of individual judgments and the writing of separate concurrences and dissents. Many of these matters will be familiar to observers of the practices of the High Court of Australia.

As in Australia and, as the author notes, in the Supreme Court of the United States, the influence of the senior judges is an important factor. This is not new in Britain. The author demonstrates that not since Viscount Simonds had the Lord Chancellor a significant role in the judicial activities of the House of Lords. Viscount Radcliffe, Lord Reid, Lord Wilberforce, Lord Diplock and Lord Bingham, in their different ways, set the direction of the House. The assessment of the approaches of those acknowledged leaders, and even of Lord Atkin before them, though mainly intended for comparison with those of the Presidents of the Supreme Court, does reveal the dangers of generalisation. The comparison of the methods of the domineering Diplock, usually first off the block with written reasons, sometimes written before argument, with those of the cautious, reserved Radcliffe is most interesting. Professor Paterson quotes Lord Wilberforce, like Radcliffe a Fellow of All Souls, in saying that Lord Radcliffe "who was perhaps our most intellectually brilliant judge" did not have the power to persuade his colleagues.

***Final Judgment: The Last Law Lords and the Supreme Court*** by Alan Paterson, Hart Publishing, Oxford and Portland, Oregon 2013




Law Lords and Justices are assigned to groups which the author dubs tacticians or lobbyists and team-workers. The influence on decisions of those whom he regards as members of each group is examined in detail. Individuals who would generally be regarded as leaders of the House or the Court are, perhaps surprisingly, found in each group. Lords Hoffmann and Bingham are compared:

> *Unlike Lord Hoffmann, who usually sought to exercise task leadership by circulating his judgment at a very early stage in an attempt to influence his colleagues, Lord Bingham produced his 30 manuscript pages a weekend, because that was how he liked to*

> “Some recent judgments of the Court have drawn substantially on Australian material. Others have concerned matters upon which there were direct Australian decisions.”

> *work – he wanted to get the thing off his desk before he was into another case. He was congenitally incapable of sitting on an opinion unless it was a truly exceptional case … Although he recognised that it was sometimes a weakness, he had a great reluctance to revisit an opinion which he had circulated some time before. If he was writing what he thought was to be the leading opinion he would entertain his colleagues' requests for tweaks here or dropping a phrase there. But if he was not, he was reluctant to comment on others' opinions even when he thought they were misconceived – because he considered judicial independence involved independence from one's colleagues.*

Lord Bingham is described neither as a tactician nor as an intentional consensus-builder. His approach appears to have been very much like that of Chief Justice Gleeson in the High Court. It is not hard to find counterparts of Lords Diplock and Hoffmann in Australia too.

In this respect Professor Paterson attributes a Binghamite approach to the present intellectual leaders of the Supreme Court, the President Lord Neuberger and Lord Sumption, but he recognises differences in their attitudes to judgment-writing, with the President encouraging collaborative team-working and the pursuit of single judgments and Lord Sumption a more individualistic approach. (Lord Sumption is quoted as dividing appellate judges into “parsons”, who instinctively look at issues in moral terms, “pragmatic realists”, who have an eye to the consequences, and “analysts”, who focus relentlessly on legal principle.)

The frequency of joint judgments – which theoretically were impossible in the House of Lords when judgments were speeches – is recognised as one of the major changes in the new regime. English practice has always been to avoid a multiplicity of judgments in criminal cases, with the lead judgment being adopted by other members of the tribunal, dissent or qualification being suppressed in the cause of clarity. This convention has been retained in the Supreme Court. But there are now a number of judgment structures. A major difference between the practice of the Supreme Court and that of the High Court of Australia is that the authorship, single or joint, of collective judgments is acknowledged. Another difference is that one judgment is usually recognised as the “lead” judgment, and the unnecessary duplication of facts and quoted extracts from statutes, which are a blight on the High Court's judgments, is avoided. Professor Paterson mentions instances of where what was originally intended to be the lead – and, hence, the majority – judgment has become a dissenting or minority concurring judgment after the circulation of drafts, yet the statement of facts has remained moored where it began. The advantages and disadvantages of the new system are examined at length. The author suggests that fewer dissents and concurrences in return for more single judgments means that there may be more judgments devised by a committee and more compromise. He quotes the late Lord Rodger of Earlsferry:

> *If the powers that be have their way, and the new Supreme Court of the United Kingdom adopts more single judgments, then there will be less scope in future for humour or indeed for any other expressions of the judge's individuality. By definition, the author of a composite judgment is not writing just for himself and will alter his voice accordingly … the much touted efficiency savings of a single judgment will be dearly bought if, as a result, we lose individual hallmark contributions of [the] quality [of Lords Macnaghten, Wilberforce and Bingham.]*

Lord Rodger was writing in 2009, at the time of the transition. It is probably true that his fears were unfounded. The presence of such strong-minded Justices as Lords Phillips, Hope, Walker, Mance, Neuberger, Collins, Dyson and Sumption has provided a counterweight to anodyne single judgments. The contributions of Lord Rodger himself are greatly missed.

Other “dialogues” of House and Court are also of interest to Australian readers. Towards the end of the life of the judicial House of Lords, a small group of “judicial assistants” was introduced. The cramped space available for them kept the members to four and they were allocated to the senior Law Lords. Lord Hoffmann, although a former Oxford don, chose never to have an assistant. He, like Sir Wilfred Fullagar and Sir Frank Kitto in the High Court, did his own preparation and research. With the availability of better accommodation in the Supreme Court building, the number of assistants increased. Though their functions in some ways resemble those of clerks to Justices in the United States Supreme Court and associates of Justices of the High Court, the position was not consciously modelled on either. Their principal functions appear to be to prepare memoranda of cases for which permission to appeal is sought and “to research points of law or fact, drawing on databases, academic literature and perhaps foreign authorities” for cases. Professor Paterson notes that not all Law Lords or Justices have been computer literate.

The qualification “perhaps” attached to the drawing on foreign authorities is justified by reference to the judgments of both House and Court. References to Australian cases, though increasing, are still haphazard, depending upon the industry of counsel and judicial assistants. Some recent judgments of the Court have drawn substantially

on Australian material. Others have concerned matters upon which there were direct Australian decisions, which have not been mentioned. British judges are perhaps more averse than their Australian counterparts to referring to cases and other materials that are not mentioned in argument.

Most of the Justices admit to using assistants as sounding boards for ideas, though Professor Paterson records that the relationship with individual Justices is so personal that it varies not only between Justices but between years and the same Justice. "So much depends on the strengths of the assistant and the working habits of the Justices." The role of the judicial assistants is said to be "continuing to evolve", but not to the extent that they are emulating their transatlantic counterparts in writing drafts of judgments. Dyson Heydon and Richard Posner are quoted as warning against the dangers of the combination of high academic intelligence and the overconfidence of youth. For his part, Lord Sumption is recorded as saying, "The rule is that they don't draft judgments for us. They don't see a draft judgment of ours until after we have written it."

The dialogue with Luxembourg and Strasbourg has presented another set of problems. With the accession of the United Kingdom to the European Union, on points of European Union law, the decisions of the European Court of Justice are paramount. Judgments of British courts are often at two levels, first deciding cases in accordance with domestic law and then deciding whether that judgment is consistent with European Union law. The incorporation of the European Convention of Human Rights into British domestic law through the *Human Rights Act* 1998 and the *Scotland Act* 1998 left open the extent to which British final courts could refuse to follow the interpretation given to the Convention by the European Court of Human Rights at Strasbourg. Professor Paterson notes a change between the attitude of the House of Lords under Lord Bingham when "Strasbourg was bound to win" and that of the Supreme Court under Lord Neuberger articulated in *Manchester City Council* v *Pinnock* [2011] 2 AC 104 at 125 [48]:

> *This court is not bound to follow every decision of the European Court . . . as it would destroy the ability of the court to engage in the constructive dialogue with the European Court which is of value to the development of Convention law . . . Of course, we should usually follow a clear and constant line of decisions by the European Court . . . But we are not actually bound to do so or (in theory at least) to follow a decision of Grand Chamber.*

The superimposition of European over domestic law has also led to tensions in dialogue between the Court and the Executive. The Court has had to decide the extent, if any, to which its decisions reflecting European law are capable of being overridden by executive or parliamentary action. This is especially so where European imperative has led to the assumption by the Court of responsibility for matters traditionally regarded as non-justiciable. Professor Paterson quotes Lord Sumption, a trenchant critic of the Court of Human Rights:

> *The Human Rights Convention does create an accountability problem by transferring a number of decisions which are by their nature political to judges in circumstances where judges are rightly not accountable to anyone for what they decide, and in circumstances where the result is incapable of amendment in practical terms.*[1]

There are lessons for Australia here too.

Associated with the intrusion of Europe are changes in the types of cases coming to the highest court. Professor Paterson has compiled tables showing a decline in conventional "lawyers' law" and an increase in cases involving matters loosely categorised as human rights – anti-discrimination, privacy, immigration and asylum, deportation and detention – many of which require decision-making different in kind from traditional judicial work and calling for initiatives in approach. The Court's treatment of assisted suicide in *R (Nicklinson)* v *Ministry of Justice* [2014] 3 WLR 200, which was decided after the publication of *Final Judgment,* provides a graphic example of the new types of case and of the differing reactions of judges to the new problems in decision-making. Professor Paterson relates the change in character of the cases to the increased prevalence of dissent and changes of opinion in the course of judgment writing. Similar trends can be observed in the High Court of Australia without the incubus of Europe.

Professor Paterson regards it as significant that the appointment process to the Supreme Court has been taken largely out of political hands and given to committees in which senior judges predominate. He asks whether now it is the guardians who are guarding themselves. But he sets his sights against the adoption of a system resembling United States confirmation hearings. He would prefer "greater transparency in the judicial appointments process with fewer statutory consultations and perhaps some form of post-appointment parliamentary consultation". The suggestion is not elaborated.

It is perhaps not surprising that, as a Scot, Professor Paterson reveals his special admiration for his fellow countrymen in the highest courts. Apart from Lord Bingham, Lords Reid, Hope and Rodger – exemplars of principle over precedent – are clearly his favourites. Lord Hope has contributed a fine foreword, which should encourage those in the common law world who are interested in how ultimate appellate courts work to read the book with appreciation.

1. Lord Sumption's views were elaborated in a brilliant address entitled "The Limits of Law" given in Kuala Lumpur in November 2013 after the publication of *Final Judgment.* www.supremecourt.uk/news/speeches.html.

# Collins goes global

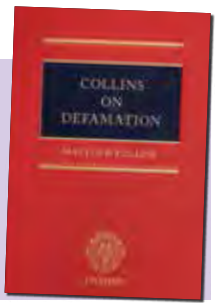
MICHAEL WHEELAHAN

In 2007, Justice David Ipp AO, writing extra-judicially, described the law of defamation as, "the Galapagos Islands Division of the law of torts", having evolved all on its own, and having created legal forms and practices unknown anywhere else.[1] In a world of globalisation, isolated places are under threat. In common law countries there are challenges that confront the laws of defamation because modern communications do not observe jurisdictional boundaries, and publications take on new forms, including publications by internet search engines that are the product of automatic web crawling, with no human input other than the search terms employed by the reader. Issues of this nature were identified by Dr Matthew Collins QC in his first book, *The Law of Defamation and the Internet* (2001)[2], at a time when the legal treatment of publications using new technologies was in its infancy, and at a time when, in our globalised world, each state and territory of Australia had its own laws concerning actionable defamation.

Much has happened since Dr Collins's first book in 2001. From 2006 each of the states and territories of Australia adopted uniform defamation legislation. That legislation was a compromise that married together the common law that largely prevailed in Victoria and South Australia with many features of the New South Wales defamation legislation, adapted to co-exist with the common law, and with other reforms that were new to all jurisdictions. However, much more extensive reforms have occurred in England. London had been regarded as the libel capital of the world, and as such was perceived as a centre of libel tourism, being a forum for foreign plaintiffs seeking to take advantage of England's strict libel laws.[3] Such was the threat posed to US First Amendment freedom of speech by judgments in libel actions in English courts that US courts declined to enforce their judgments.[4] More recently, the US Congress enacted a law restricting the recognition of foreign judgments in libel actions against providers of interactive computer services.[5]

Following, and perhaps notwithstanding, the findings of the Leveson Inquiry into the press, the UK Parliament enacted the *Defamation Act 2013*. The reforms to English law effected by this Act are extensive. The gist of the reforms is to effect an alteration in the balance struck by English defamation law to give greater weight to freedom of expression. The English Act[6] does this by, among other things, enacting a number of new statutory defences, some of which have been inspired by corresponding Australian laws.

In the Foreword to *Collins on Defamation* Lord Lester of Herne Hill observes that the book is perfectly timed to coincide with the coming into force of the new Act. The book is a substantial and thorough work on the laws of defamation in England and Wales. In writing the book, which is a first edition, Dr Collins enjoyed the benefit of viewing the English laws of defamation afresh and in light of the new Act, untied to any earlier works. Dr Collins was also able to employ the wisdom that Australian legislation and case law can bring to several of the new statutory defences. Through his experience in writing his previous works on *The Law of Defamation and the Internet*, and his extensive experience in modern practice, Dr Collins is well equipped to write a book for the current age which, from its inception, is framed around modern means of communication.




***Collins on Defamation,*** by Matthew Collins, Oxford University Press, 2014

A refreshing feature of Dr Collins's text is the insight that the mind of an experienced practitioner in this specialised area can bring to legal problems. Dr Collins's work is not an uncritical treatise on the laws of defamation. It is replete with astute observation and commentary. An example is Dr Collins's commentary at [8.36] and [8.37] on the operation of the *Polly Peck*[7] form of pleading in Australia, and in particular the consequences to the practice of defamation of the form of pleading sanctioned by the Victorian Court of Appeal in *David Syme & Co Ltd v Hore-Lacy*.[8] Dr Collins suggests that Australian courts have taken a wrong turn in adopting the permissible variant approach to the pleading of alternate imputations by defendants, the reasons for which Dr Collins develops. Passages in the text such as these will provoke debate, but their inclusion invites thoughtful analysis.

Because some of the new English statutory defences, namely contextual truth and honest opinion, have been inspired by pre-existing Australian

> "The book is a substantial and thorough work on the laws of defamation in England and Wales."

laws, Dr Collins has been able to bring the Australian experience to bear on the likely interpretation and operation of those provisions, thus giving the book a feel of familiarity to an Australian reader. The text is extensively footnoted, which is a most desirable feature of a text on a topic concerning legal forms and practices unknown anywhere else. But more importantly, the extensive footnoting is a valuable resource to a practitioner seeking to explore some of the more obscure bays and coves of this isolated legal place.

*Collins on Defamation* is no small achievement, and has every sign of being the first of many editions to come, as new laws are interpreted, new legal problems arise, and the case law develops.

1. Ipp, *Themes in the Law of Torts*, (2007) 81 ALJ 609, 615.
2. Now in its third edition (2010).
3. See, for example, *Berezovsky v Michaels [2000] 1 WLR 1004; Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946.
4. *Telnikoff v Matusevich* 347 Md 561 (1997).
5. *Securing the Protection of our Enduring and Established Constitutional Heritage Act* (2010).
6. The Act in its entirety applies only to England and Wales.
7. *Polly Peck (Holdings) plc v Trelford* [1986] 1 QB 1000.
8. (2000) 1 VR 667.

# Payment claims in the building industry

JEREMY TWIGG

After a slow take up in Victoria, the security of payment legislation is now commonly used in this State by the construction industry to recover payment for construction work and related goods and services. The take up by the industry was perhaps quicker in NSW, where the corresponding legislation has been in operation for longer.

Despite the legislatures' obvious intention to make recovery of payments in the construction industry expeditious and efficient, security of payments practice is decidedly difficult and complicated. In his forward to Mr Wilson's text, Justice Digby describes succinctly the attributes of the work in providing an understanding of the operation of the Acts -

> *"In the somewhat complex and difficult area of Security of Payment practice, Jeffrey Wilson's excellent work provides a most accessible reference to important current jurisprudence informing an understanding of the New South Wales and Victorian Acts and fills a major gap by providing a substantial and practical text in the area."*

Although the Acts were very similar when they commenced operation, the State legislatures have amended the Acts significantly to overcome some of the initial teething problems exposed through litigation arising out of the Acts. The amendments have resulted in NSW and Victoria following different paths in order to solve these problems.

The Security of Payment Acts in NSW and Victoria contain certain similar provisions but each has a distinct approach to the calculation of progress payments and their recovery. Case law recognises and highlights some of the differences, as well as the similarities, which adds to the complexity of practice in this area. In my opinion, Mr Wilson has approached the very large and complex task of annotating the NSW and Victorian Acts in a logical and concise manner.

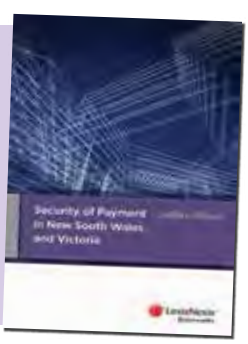
Mr Wilson has managed the complexity caused by the amendments to the Acts in two ways. First, in Chapter two he sets out a comparative table between the legislation in NSW and Victoria (before and after their amendments commencing on 30 March 2007) presenting a very clear matrix of the Acts' differences and their amendments. Secondly, in Chapter three (the heart of the work) Mr Wilson sets out the principles from decided cases directly behind the text of the legislation, rather than separately from it, as has been done in another annotation to the Acts. The relevant issue is highlighted/emboldened in a topic heading underneath each section. Mr Wilson then explains succinctly the effect of the case law on the operation of that section of the Act.

The remaining text is comprehensive, addressing the effect of other Commonwealth and State legislation on the Security of Payments Acts.

In my opinion, Mr Wilson's annotation is superior to other annotations of these Acts both because of its presentation and the lucid interpretation of case law applicable to the Acts. Another bonus is that the text is contained in a handy, slim volume. Clearly, Mr Wilson has adopted an approach based on quality over quantity.

I will be using Mr Wilson's text – both in and out of the courtroom – when I am considering the Security of Payments legislation.

***Security of Payment in New South Wales and Victoria***
by Jeffrey Wilson, LexisNexis Butterworths - Australia 2014



# Excursions in the law

ROSS MACAW

Excursions are meant to be fun, as well as thought provoking, and these are.

As is well known to those who appeared before him and have read his judgments, Peter Heerey refreshingly thought it unnecessary to exclude a sense of humour from his judicial work.

This collection of papers includes critiques of the performance of influential lawyers and politicians including Sir Owen Dixon, Justice Antonin Scalia, Judge Richard Posner and Abraham Lincoln.

There are notes on significant cases, serious reflections on the way in which judges and justice systems operate (and should operate) and an examination of whether Australia would be well-served by a Bill of Rights.

The pieces on Andrew Inglis Clark and the Orr case remind us of the strength of the Tasmanian influence.

But the figures, cases and occasions are chosen as often as not because they have attracted the author's keen eye for human weakness and the absurd.

There is some history and a "Little Lore" about the Victorian Bar and an account of an appearance before the Privy Council ("The thought crosses one's mind that, trying to be as objective as one can, there is much to be said for the retention of appeals to the Privy Council").

A love affair with the Bard is confirmed. There is an account of the Merchant of Venice by reference to the Elizabethan forerunner of the Australian Consumer Law.

There are some mild rebukes for abusers of the English language.

Then there is some poetry. The author frankly acknowledges his view that poetry should rhyme. It is not clear if he agrees with this reviewer that rhyming is not only a necessary but a sufficient condition of poetry.


***Excursions in the Law,***
by Peter Heerey

## From the launch

On 16 September 2014, barristers and friends of The Hon Peter Heerey AM QC gathered in the Essoign Club to launch his book Excursions in the Law. Jeremy Ruskin QC and the Hon James Gobbo AC QC both entertained attendees with rousing speeches about Mr Heerey and his book. *Victorian Bar News* is proud to publish these photographs of the launch of this book, penned by our own former VBN editor. We also bring you a book review by Ross McCaw. We note that the book is the perfect stocking filler, just in time for Christmas, and we're sure Mr Heerey will sign a copy for you if you give him a call. EDS.

# Legal friends of the Melbourne Recital Centre

## Some harmony among lawyers

MEREDITH SCHILLING AND HANNAH PELKA-CAVEN
(VOLUNTEER, MELBOURNE RECITAL CENTRE)

The establishment of the group "Legal Friends of Melbourne Recital Centre", reflects the important place of music in the lives of many lawyers, and enables them to share their musical interests at concerts and events while providing the essential support the Centre needs to bring the world's best musicians to Melbourne.

This new initiative brings together members of the legal profession to support the Melbourne Recital Centre and its world-standard music program. The group was launched on October 7 2014 with an event on stage in the Centre's inspiring Elisabeth Murdoch Hall.

Each year, the group will support a special artistic project at the Centre, building a strong connection between members of the legal profession and this unique venue, which is widely regarded as Melbourne's best place to hear and share great music of all kinds.

The founding members of the group are the Hon David Byrne QC, George Golvan QC, Peter Murdoch QC, Meredith Schilling, Ingrid Braun and Elizabeth O'Keeffe. They were joined at the launch by many distinguished members of the legal profession, including the Hon Alan Goldberg AO QC, Justice Gordon, the Hon Hartley Hansen QC and Mrs Hansen and Associate Justice Lansdowne. Guests were treated to a selection of Schubert art songs performed by bass baritone Nick Dinopolos, accompanied by pianist Andrea Katz of Songmakers Australia.

Melbourne Recital Centre CEO, Mary Vallentine AO, paid tribute to the group whose first project will see the gifted British pianist Malcolm Martineau and superb Austrian baritone Florian Boesch perform the great Schubert song cycles in July 2015, as part of the Centre's Great Performers series. "This three-concert series presenting the very best of the vocal arts is a significant financial undertaking for the Centre that simply would not happen without philanthropic support," she said. "We are delighted that so many members of the legal profession have joined together with us to make it possible."

In preparation for the Schubert concert series, the Legal Friends are planning a Schubert Song Cycles Study Day for early next year, which will be generously hosted at the Macedon home of Peter Murdoch QC and Helen Murdoch. The group is also working to build its membership so that ambitious artistic projects for 2016 and beyond can be realised.

*Further information about the Legal Friends of the Melbourne Recital Centre can be obtained from Jacqueline Williams, Philanthropy Manager of the Melbourne Recital Centre on ph. 9207 2653.*

ILLUSTRATION COURTESY OF GUY SHIELD/THE SLATTERY MEDIA GROUP

# VERBATIM

Have you heard something interesting or amusing in court?
Send in the transcript extract to *vbneditors@vicbar.com.au*

## Full Court of the Federal Court; 13 May 2014

*PTTEP Australasia (Ashmore Cartier) Pty Ltd v FCT*

**Stephen Sharpley QC**

**MR SHARPLEY:** Well, I mean as a general rule in our tax system we don't recalculate to net present values. I mean we operate on the face value of something. The High Court has said this a few times.

**PAGONE J:** Well, I'm not sure that's absolutely completely right, right throughout the Tax Act.

**MR SHARPLEY:** Well, there may be provisions that gross up or discount...

**PAGONE J:** Additional securities, for example – the whole division there. Division 16A.

**MR SHARPLEY:** Your Honour has a huge advantage over me in regard to old provisions

## County Court of Victoria (Melbourne)

*Toth v Southern Health and Secure Parking Pty Limited*

**Before Her Honour Judge Cohen, 5 June 2014**

**HER HONOUR:**... the issue about Mr Byrne's fees will simply be the costs are to include the reasonable costs for Mr Byrne's attendance at court to give evidence be fixed at $2,500.

**DYSON HORE-LACY SC:** Would Your Honour use the word certified?

**HER HONOUR:** Do I have to use that word?

**MR HORE-LACY:** No, Your Honour doesn't, but it just sounds a little bit more judgery than "fixed".

**HER HONOUR:** Never let it be said I don't want to sound more Judge like.

**PETER MURDOCH QC:** I think the word was judger-ish, Your Honour.

**MR HORE-LACY:** It's a new word for the dictionary. It's not the same as judicial, it's being like a Judge.

**HER HONOUR:** In light of that creation of specific description I had better use the word "certify" that it is reasonable for Mr Byrne's fees for attendance at court as a witness be fixed at $2,500.

## Supreme Court of Victoria, 20 October 2014.

*Boral Resources & Ors v CFMEU, unreported decision of Derham AsJ ,*

Senior Counsel was left wondering whether his Honour was suggesting that she was able to make the hopeless and implausible sound plausible by dint of her erudition...or not:

> *" The argument advanced by the defendant, although unsuccessful, could not be said to be without substance. It relied, albeit in a technical way, on the operation of the Rules.* ***It had, in addition, an air of technical substance made more plausible by the erudite submissions of the Senior Counsel for the defendant. I tend to agree that mature consideration of the point shows it to have been hopeless****, but I am not persuaded that this should have been known to the defendant's advisors at the outset. Experience tells that some apparently difficult points sometimes succeed."*

## Supreme Court of Victoria, 30 September 2014

*Djordjevic v Expoconti & Ors*

**Before Cavanough J,**

**MR MOULDS:** Are you the partner of the plaintiff in this matter, Mark Djordjevic?

**WITNESS:** Yes.

**MR MOULDS:** What year did you first meet Mark, Ms Allerton?

**WITNESS:** In Year 2006.

**MR MOULDS:** And what were you working as at that time?

**WITNESS:** I was a beauty therapist.

**MR MOULDS:** And where were you working?

**WITNESS:** Brazilian Butterfly.*

**...**

**MR MOULDS:** And where was the Brazilian Barbecue?

**WITNESS:** Brazilian Butterfly? It was on Bridge Road in Richmond.

**HIS HONOUR:** I don't think they'd barbecue their customers if they can avoid it, Mr Moulds?

**...**

**MR MOULDS:** It's all a question of methodology. It sounds painful.

*** Editors' note:** Brazilian Butterfly is a chain of beauty salons specialising in waxing and laser hair removal.

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CHAMPAGNE POMMERY REIMS-FRANCE

THE ART OF CHAMPAGNE SINCE 1836