ISSUE 158 SUMMER 2015/16

VICTORIAN BAR NEWS

New Kidd on the block

Meet the new Chief Judge of the County Court

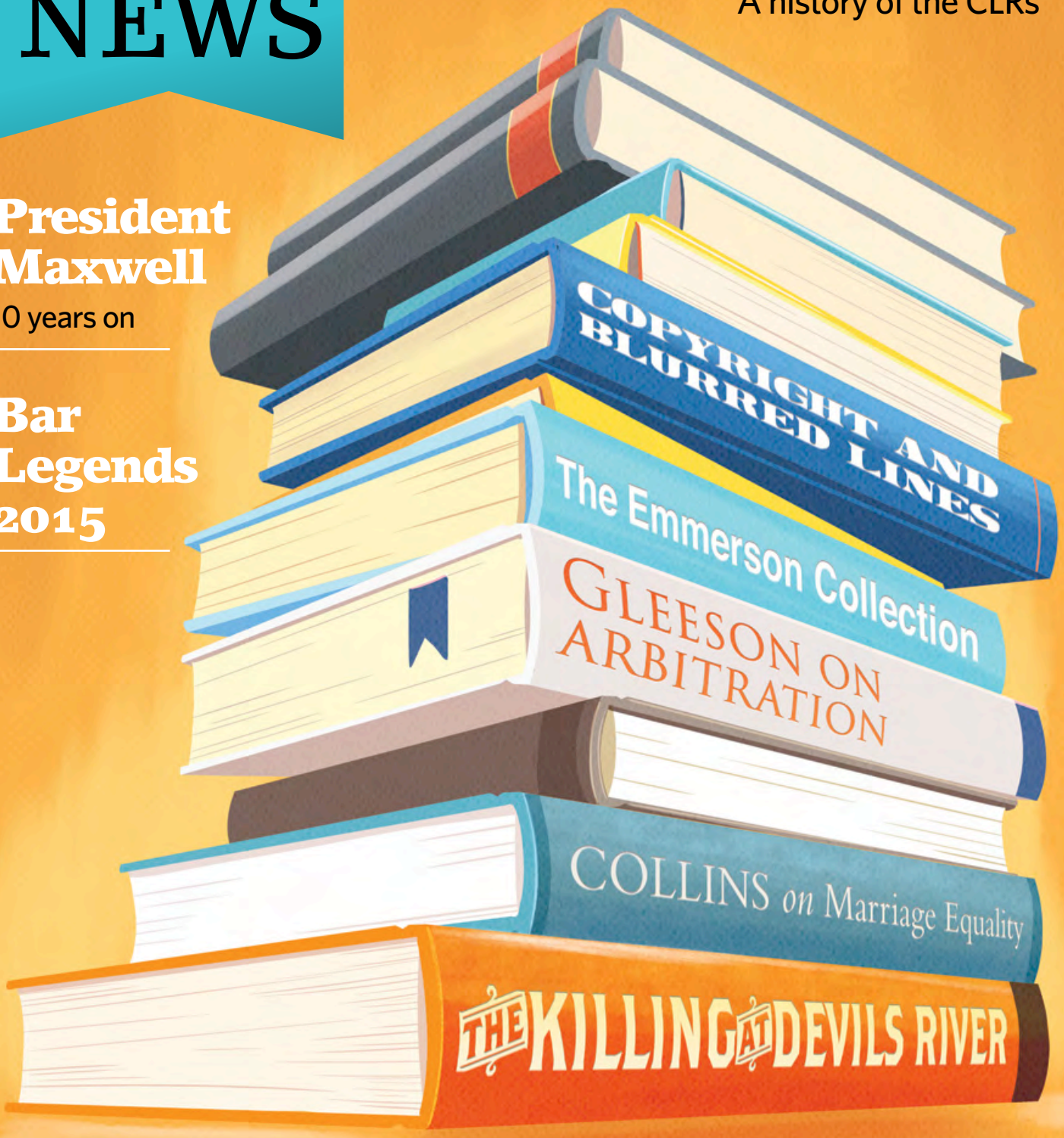
Reporting the law

A history of the CLRs

President Maxwell

10 years on

Bar Legends 2015



New Silks: Read all about them on page 104

VICTORIAN BAR

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ISSUE 158 SUMMER 2015/16

VICTORIAN BAR NEWS

18

24

54

64

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ISSUE 158 SUMMER 2015/16
VICTORIAN BAR NEWS

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Editorial

Lost and found

GEORGINA SCHOFF & GEORGINA COSTELLO, EDITORS

The late and much loved Dr John Emmerson QC bequeathed his valuable collection of rare books and manuscripts to the State Library. Quite apart from the texts themselves, what is intriguing about Dr Emmerson's collection is how he went about amassing it. On page 18 of this issue Will Houghton reveals how Dr Emmerson brought his methodical scientific mind to the task of hunting down magnificent 15th to 18th Century books.

Few people are as studied in the art of arranging collected pieces of writing as James Merralls QC. As editor of the Commonwealth Law Reports for 45 years, Merralls knows how to compile. On page 80 Merralls gives us a human face to the otherwise austere 254 volumes which comprise the CLRs.

In each *Victorian Bar News*, Siobhan Ryan writes a column about one work in the Bar's portrait collection. In the last issue of *VBN*, she wrote about a portrait of Sir Isaac Isaacs by Percy White. The way the Bar acquired the painting, the way the High Court acquired a long lost version of the same painting and the role of the artist's grandson in both acquisitions is a remarkable story. In this issue, a letter to the editors from Jeff Sher QC gives us a glimpse at the luck sometimes required to add a lost treasure to a collection.

Emmerson went about collecting items in a planned way. The CLRs is a collection predictable in its form of compilation (if not in its content). While the Bar's acquisition of portraits is somewhat based on planned commissions, other pieces are generously and unpredictably donated. And so it is with *Victorian Bar News*. There are pieces we commissioned for this issue, such as: an interview with newly appointed County Court Chief Judge Peter Kidd; a reflection about former Chief Judge of the County Court, Michael Rozenes; and Dr Matt Collins QC's powerful essay on marriage equality.

> "The theme that emerged is "books and collections"."

But other pieces in this issue came along in a more serendipitous manner. In her diary in 1925, Virginia Wolf said, "Arrange whatever pieces come your way." It has been a delight for us to arrange the writing and photos that came our way for this issue.

The theme that emerged is "books and collections". In addition to the Emmerson Collection, this issue covers: developments in the Bar Library, including the donation of the Heerey Collection; the launch of the 5th edition of Pizer's Annotated VCAT Act; a review by the Hon Julie Dodds-Streeton QC of a new book concerning Insolvent Investments that is the product of a collaboration between many members of Commbar; and the new silks questionnaire, in which we couldn't resist asking them what book they will be reading this summer.

We hope you enjoy this collection of writing. Don't worry, we've peppered the issue with photos of barristers to keep you turning the pages. We hope you find yourself - or a dear friend or likeable colleague - somewhere in here.

A story of coincidences

Dear Georgina and Georgina

To my surprise this morning I found in my mail the latest edition of the *Bar News*. It was a surprise for two reasons.

Firstly, despite a number of attempts to get on the mailing list, I rarely receive a copy.

Secondly, because it contained a photo of a small portrait of Sir Isaac Isaacs which I had donated to the Bar not long after I signed the Roll.

The article failed to mention my gift and speculated, incorrectly, about its provenance. It also got the artist's name wrong.

When my maternal grandfather fled Eastern Europe, like many Jews, on arrival in England he anglicised his name to "Percy" White.

He never called himself "Percival"; nor did anyone else.

He met and married my grandmother in Manchester where my mother was born.

After the First World War, he immigrated to Australia with his family and settled in Melbourne where he lived the rest of his life.

I went to the Bar in 1961. I knew of the portrait of Sir Isaac and that it had been used by Zelman Cowen, (as he then was), as the frontispiece of his biography of Sir Isaac.

However, I had never seen the original. I asked my grandfather to paint a copy of the original for me to hang in my new chambers in Owen Dixon. (Neither East or West as ODC was more than adequate to house the Bar). He did so. I recall I paid either 12 or 15 guineas for it.

It hung in my chambers for some years and was seen by many including Frank Costigan QC who became the Chairman of the Bar Council.

He had a Chairman's room which was short on decoration.

Frank threw out some broad hints as to how well the painting would look in the Chairman's room whilst lamenting that the Bar did not have a painting of one of its most famous sons.

I took the hint and donated my painting of Sir Isaac to the Bar. I thought the painting had a plaque attached to it which acknowledged my sacrifice. The Bar's copy was not painted at the same time as the original; nor was it a study.

The original had disappeared. Its whereabouts were unknown and my copy was either painted from memory, or, more likely, a photo of the frontispiece to Cowen's book.

> “It was, indeed, the original Percy White portrait of Sir Isaac Isaacs.”

However, this is not the end of the story about the original painting which hangs in one of the courtrooms at the High Court in Canberra.

That it is there is a story of coincidences.

One day, not long after the new High Court building was opened, I received a telephone call from Frank Jones, the High Court Registrar.

Sir Garfield Barwick, the Chief Justice, knew of the portrait of Sir Isaac from the book and wanted to locate it with a view to acquiring it for the Court. Somehow, Frank knew I was related to the artist. (He never disclosed how he knew).

Frank asked me if I could locate the original. I said I would try and try I did. I asked everyone I could think of if they knew where it was. Despite considerable effort over many weeks I was unsuccessful.

I reported my failure to Frank whereupon Sir Garfield commissioned an artist to paint a copy.

Some considerable time later I was briefed by Trevor Cohen to act for a young Jewish boy in a claim for damages arising from a motor car accident. He had effectively lost the use of all his limbs.

The case was settled and the parents of the boy were very pleased with the result and invited Trevor and me to their home for dinner. I did not usually accept such invitations and, so far as I knew, neither did Trevor.

We discussed what to do and, because this was such a rare and sad case, and because we did not want to disappoint the boy, we accepted.

During the meal the boy told us of how he was painting by holding the brush in his mouth. I said that my grandfather had been an artist and mentioned his name.

Whereupon, Trevor said that he knew of a Jewish sporting club (Maccabi or Judean), which had a painting by Percy White hanging in their clubrooms. He thought it was of Sir Isaac Isaacs.

The next day, with Trevor, I went to the clubrooms. It was, indeed, the original Percy White portrait of Sir Isaac Isaacs.

I rang Frank Jones and told him that the painting had been located. Shortly thereafter Sir Garfield came to Melbourne, went to the clubrooms and confirmed that he wanted the painting for the Court.

The club donated the painting to the Court where it now hangs. A plaque acknowledging the donation is affixed to it.

The Court in return gave the club the copy which had been commissioned.

Sorry for the length of this missive. Could you ensure that I continue to receive copies of the Bar News.

I’m still alive, and reasonably well.

Regards
Jeff Sher

Winner takes all

I congratulate our new Bar Council on their election. It has never been an easy feat, and that remains so under our new electronic system.

Yet, while multiple roles are available in three categories, this does not lead to, as might be expected at first glance, a diverse representation. That is because a peculiar aspect of the old “strike-out” system remains: members have multiple votes. If, for example, we have three vacancies in Category D, and 151 of 300 members vote the same way, then the preferences of the remainder lead to nothing.

While it might be said this system is essential to the characteristic stability of our Bar, of which our interstate colleagues are so envious, it defeats the purpose of having multiple positions. I cannot imagine that members consider a “winner takes all” outcome to be fair, or satisfactory, particularly when our numbers are so great.

The Bar Council should be elected on the simple principle of “one vote, one value,” and I call on our new representatives to make this change a hallmark of their term.

Joel A Silver

Honouring our own

Dear Schoff and Costello, GG,

May I, as a one-time member of the Victorian Bar and past contributor to *Victorian Bar News*, express my dismay at the omission by the Editorial Committee to note the appointment of a member of the Victorian Bar to one of the highest judicial positions in the world: Sir John Walsh of Brannagh, Duke de Ronceray, has this year been appointed as Chief Justice of the International Tribunal for Natural Justice and nary a word of recognition from the official journal of the Victorian Bar. The silence is deafening!

Sir John’s appointment is of further noteworthiness in that he has accepted the office at an age when other holders of high judicial office are compulsorily and prematurely “pensioned off” after attaining that age specified as statutory senility. In this, the sprightly soon-to-be 76 year young Sir John sets an example for those who, like him, are selflessly determined to continue to serve mankind despite their age and his appointment shows a possible avenue for others to accomplish this.

When I was a contributor to VBN it was then recognized and highly regarded as a journal of record. I am confident that the editors and the Editorial Committee will redress this unfortunate and regrettable lapse and I look forward to reading in your pages a description of the high honour paid to Sir John as the Victorian Bar’s most honoured guest at the next Bar Dinner.

Yours respectfully,
Malcolm Park

Back in the day

Dear Gina and Georgie,
Congrats on a superb issue.

A minor point. While my friend Angela Nordlinger deserves the Pommery for the best letter (under former editors it might have been a discounted Jacob's Creek) I would mention that the full time academic career of Gerard Nash QC commenced well before 1962. Indeed in 1958 he was lecturing in Equity at the University of Tasmania and among his students was one who went on to become an acknowledged master of that field of the law. Modesty forbids me from providing further detail.

There is an article on Bands (p136) which unaccountably omits any mention of Louis Armstrong, Benny Goodman, Graeme Bell etc etc.

Kind regards
Peter Heerey (father of the more famous Ed)

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*

Caption Competition

"Buddy's left Hawthorn. Nonsense!"
Anthony Kelly, QC

"The blind leading the blind"
David Curtain QC

"LOL LMAO NSFW QC" Tiphanie Acreman

Stephen to Jeremy: "How do I phone you?"
Richard Brear

"Please all judges with landlines and pens, Admit that the I-phone is better than them, And the Apple watch is better again." Natalie Vogel

Kaye to Ruskin: "And can you wear it as a shoe?"
Michael Pearce SC

"What? ... you don't have to print emails to read them?"
Robert Igram

"Ruskin, are you telling me you'll give me this mobile, if I became your friend on facebook?"
Nick Green QC

Daniel Robinson

"Beware of the knives in the napkin"
Kate Beattie

The Victorian Bar News Committee invited readers to submit captions for this curious photograph of Justice Kaye and Jeremy Ruskin QC, who appear to be studying, with great concentration, an iphone. The competition was originally conceived as a vehicle to enable David Curtain QC (who took the photo) an opportunity to publish it to the world at large, together with his caption "the Blind Leading the Blind". The editors had somewhat rashly promised him that he would win the competition. However, our readers took up the challenge with such obvious delight and enthusiasm that we have decided instead to judge the entries on their merits. The decision as to which of your ridiculous entries merits a bottle of Pommery has been a difficult one, but there can only be one winner. AND THE WINNER IS: Georgie Coleman — and not just because her name is Georgie. PS. We are giving Curtain a bottle of Pommery too, because we love his photo and his caption.

Georgina Schoff and Georgina Costello

President's Report

PAUL ANASTASSIOU

I am delighted to be the President of the new Bar Council. I pay tribute to Jim Peters QC for his leadership and for his focus on initiatives that increase work for our members. I also pay tribute to the members of the Bar Council who either retired or were not elected. The 2015 Bar Council was cohesive, dedicated and effective. I look forward to working with the new Bar Council and have no doubt that it will exhibit the same qualities as last year's Bar Council.

I am delighted that women are represented on the new Bar Council in numbers that exceed, in each category, the ratio of women to men in the corresponding cohort at the Victorian Bar. This is a step on the way to eliminating the anachronistic perception of the Bar as a male club. The perception will not however be fully erased until the Bar, and importantly the opportunities for all members to succeed, is truly gender blind. The recent initiative by Commbar for the equitable briefing of women in commercial cases is a significant step forward.

The new Bar Council will continue to focus on increasing work for our members. The direct briefing pilot with IAG will be used as the model to reach out to other major corporations. The Bar Council is also considering new ways to market the Bar to solicitors and directly to corporations and to provide new opportunities for members of the Bar to reach a wider audience.

Over the last two years the Bar Council has engaged more directly with solicitors by bringing them together with our members at various events and dinners. The new Bar Council will continue this program and build upon it in order to strengthen and broaden the relationship between the Bar and solicitors.

The strength of our Bar lies also in its contribution to the wider community. The Bar has an extremely proud history of pro bono assistance and the Bar Council will continue to encourage and support the excellent work of our members in undertaking pro bono work.

There will be a renewed focus this year upon access to justice as the Victorian Government has recently announced a wide-ranging review in relation to this important issue. The Bar Council will contribute constructively to this review. The launch of the direct access portal in November in relation to summary criminal matters is a significant step in providing more affordable access to expert representation and contributes to improving access to justice. The new Bar Council will support this important initiative and examine ways in which the portal may be expanded to other practice areas.

I look forward to working with our new CEO, Sarah Fregon, who has embraced the challenges of her role with skill, energy and dedication.

Jim Peters QC wrote in this column last year, referring to Will Alstergren QC: "The Bar as a whole has benefited from his efforts. He leaves it in great shape." I echo those remarks in relation to Jim Peters' contribution as President and I shall strive to attain the high standard of leadership set by him.

> "The strength of our Bar lies also in its contribution to the wider community."

From the outgoing President

JAMES WS PETERS

In 2015, the Bar Council engaged the profession, government and the wider public to promote the importance of the Bar to the administration of justice. As Justice Pat Keane said recently at the ABA Conference in Boston, "it is essential to our democracy that the Bar survives: it is a pillar of the third branch of Government".[1]

The commercialisation of some solicitors firms has led to a business model whereby the importance of maximising funds under supervision to ensure personal reward overrides the imperative of briefing counsel early and the interests of the client. The Courts have spoken on many occasions, extrajudicially, of the difficulties that have arisen with this approach. Cases are not prepared as efficiently or economically. Adjournments are needed. Costs are wasted. These practices also undermine the strength and vibrancy of the Bar.

The focus over the past year was to explain to clients, including government, that it was in their interest to ensure quick, economic and fair trials by engaging counsel early. Those steps bore significant fruit this year.

In October we announced a pilot with Insurance Australia Group to brief counsel directly through corporate counsel. This public recognition of the value in utilising the Bar's services is part of wider moves afoot. Direct briefing by in-house counsel is now becoming more widespread and popular amongst in-house teams who are subject to budgetary constraints.[2] Clients now understand that the Bar is cost effective and provides practical solutions if engaged at an early time. It is only with pressure from clients that the practice of some firms in failing to brief counsel until the last minute will alter.

The importance of a thriving criminal bar cannot be underestimated. Until recently, the criminal bar has suffered reduction in fees and work from Legal Aid and loss of work due to the increasing number of firms doing in-house advocacy. I have spoken on a number of occasions this year about the Bar's economic value and quality standards being unmatchable in criminal law.

We engaged in a constructive fashion with Legal Aid. The recent PWC Report[3] emphasised the value of the independent bar as opposed to an in-house model of employee solicitors.

Also, BarristerCONNECT, the first online direct access portal for Barristers in Australia was launched. It provides rapid access to barristers in criminal matters before the city, suburban and regional Magistrates Courts. It is a great initiative in the digital age to facilitate the briefing of junior counsel.

Internally, this year's Bar Dinner was again a magnificent occasion. The strength of our Bar was on show with both the Federal and State Attorneys-General and Shadow Attorneys-General attending. Also attending were Chief Justices Warren, Allsop and Bathurst with other heads of jurisdiction. Wonderful speeches were delivered by Justice Gordon of the High Court and Stephen O'Meara QC. That almost a quarter of our Bar were able to gather to celebrate on one occasion speaks volumes about the Victorian Bar as a collective group.

Similarly the CPD Conference was a standout affair where the Bar, the Judiciary and Government were represented at the highest level.

The Commbar's Equitable Briefing Policy was recently launched by Chief Justice Allsop of the Federal Court and Chief Justice Warren and President Maxwell of our Supreme Court. We take great pride in leading the independent bars in this country in driving gender diversity in a practical way, focusing on outcomes.

It has been a good year for BCL. Some of the experiments with private floors outside of BCL have ended. Significant numbers of barristers have returned to the BCL fold. There is enormous value to our members in being able to lease premises on 30 day terms without key money. It reduces barriers to entry and promotes a meritocracy where the able can come regardless of lack of resources. This is not the case in other states. I congratulate BCL.

Our Bar is very fortunate that it is collegiate. This year we have spoken with one voice. It has led to significant achievements in terms of dealing with the government, the public and others. It also led to the TPD Life Insurance Scheme ensuring a minimal level of Life and TPD cover protection for members and their families.

The growth of Bar Associations: Commbar; the Tax Bar; Criminal Bar; Compensation Bar; Common law; Children's Court; and Family Law, provide a focus for their members and serve their interests well. Nevertheless, we must also be alert to the risk of fragmentation. If our efforts to build work for the entire Bar are to yield fruit, they must be collective and channelled through Bar Council. Our advocates practise in a number of different areas, not limited to one association. Due to the excellent leadership of the Bar Associations and their collegiate and cooperative approach with Bar Council, our efforts and goals remain common. However, we risk the dilution

of effort and lack of a common approach in promoting the interests of all of our members if the current high level of cooperation does not continue.

Significant inroads were made into the difficult task of streamlining the Bar office's operations and curtailing unnecessary expenditure. The Bar office continues to refocus its efforts toward business development initiatives maximising the benefit to the entire Bar. One of the most important initiatives this year was the appointment of Sarah Fregon as our new CEO. Sarah brings a high level of discipline and transparency to the operations of the Bar office. Her experience in corporate law has enabled the Bar to undertake several initiatives, including a much closer connection with corporate clients. Sarah's appointment has been a great success.

The Executive of the Bar Council this year was harmonious and functioned extremely well. I thank Paul Anastassiou QC, David O'Callaghan, Jennifer Batrouney QC and Samantha Marks QC. Their support and hard work in effecting further change was invaluable. The Bar Council has enjoyed an excellent year of constructive discussion and focus on key objectives for the benefit of its members. All members of the Bar Council have contributed. I also thank them for their support as I thank Honorary Secretary Paul Panayi and Assistant Honorary Secretary Barbara Myers.

A number of members left the Bar Council this year. Michael Wheelahan QC provided enormous leadership and direction on the Bar Council and I congratulate him for his service of four years. I also thank Michelle Sharpe, Elizabeth McKinnon, Stewart Maiden, Matthew Hooper and Emma Peppler for their contribution.

I congratulate Will Alstergren QC who commenced many of the projects of this year. I also congratulate Paul Anastassiou QC on his election as Bar President and wish him and the new Bar Council well.

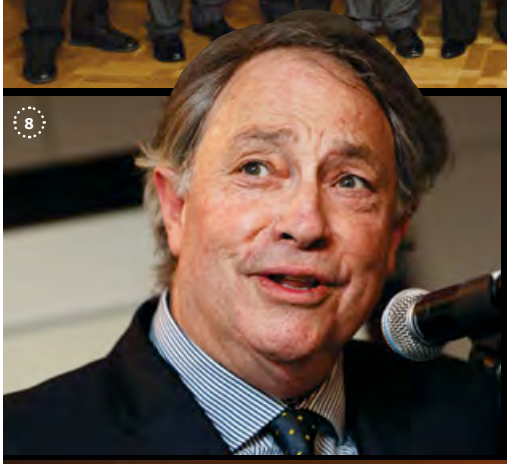
"I have enjoyed every minute of the privilege of being President this year. My thanks to all."

It has been no surprise to me that all members of the Bar are willing to assist in any initiatives for the collective benefit. Ours is an extraordinary institution, the strength of which is that our members, who are in day to day competition, take so much care to assist each other. I have enjoyed every minute of the privilege of being President this year. My thanks to all.

1 Welcome Address to the 2015 Australian Bar Association Conference, Boston, Massachussets, USA, 7 July 2015. Justice of the High Court of Australia.

2 Felicity Nelson; *"In-house teams bypass "noise in the middle"* with direct briefing" on Lawyers Weekly (18 November 2015); http://www.lawyersweekly.com.au/news/17528-in-house-teams-bypass-noise-in-the-middle-with-direct-briefing.

3 Victorian Bar Media Release; "The Victorian Bar calls for further action following the release of PWC's Report into the delivery of legal services"; (13 October 2015); https://www.vicbar.com.au/GetFile.ashx?file=GeneralFiles%2f20151013+PwC+Report+on+VLA+funding+and+service+delivery.pdf



1. Michael Cahill, Sandip Mukerjea, Brind Zichy-Woinarski QC, Campbell Thompson, Daniel Gurvich, Dion Fahey, Tom Warner, Andrew Denton and Tim Grace 2. John Valiotis, Brian Collis QC, Katharine Gladman, and Daniel Nguyen 3. The 2015 Legends: Dyson Hore-Lacy SC, Richard Boaden, Brind Zichy-Woinarski QC, Ian Hardingham QC, Noel Ackman QC, Stanley Spittle, Peter Rattray QC, Robin Gorton QC, Brian Collis QC, Arthur Adams QC and Remy van de Wiel QC (absent: Clive Rosen) 4. Anastasia Smietanka, Josephine Croci and the Hon Justice Kirsty MacMillan 5. Ian Hardingham QC, Julie Davis 6. Rosemary and Stanley Spittle 7. Dan Crennan 8. The Hon. Justice Terry Forest 9.Tim North QC; Jim Peters QC, Fleur Shand and Mary Anne Hartley QC 10. Julia Frederico and Peter Rattray QC 11. Josephine Croci, Anastasia Smietanka and John Richards QC. 12. the Hon Justice Kate MacMillan

AROUND Town

Victorian Bar legends

A dinner to celebrate the 2015 Victorian Bar Legends

The Victorian Bar Legends Award was inaugurated in 1998 by a former Chairman of the Bar, Hartog Berkeley QC and Peter Jopling AM QC in recognition of the fact that there was an ever-increasing number of barristers who either elected not to or were not asked to cross the drawbridge to a judicial or equivalent office and who had made a significant contribution to the welfare of the Bar and the integrity of our profession.

These criteria continue to be applied by the Awards Committee.

The current Awards Committee comprises Peter Jopling AM QC, Paul Anastassiou QC, James Mighell QC, Wendy Harris QC and Rowena Orr QC. It is the Committee's practice to invite a member of the judiciary to induct the Legends into the Legends' Hall of Fame at the dinner that is held to celebrate the appointments of the living Legends.

It is also the Committee's practice to inform the Bar Council of the nominees for election to the status of Legend prior to the publication of the list.

In 2014 the Committee secured funds from the Bar Council to erect a Legends Honour Board that is located on the ground floor of Owen Dixon Chambers East in the vicinity of Dever's office.

To date the following barristers have been inducted as Victorian Bar Legends:

1998 Victorian Bar Legends:

SEK Hulme QC
Neil McPhee QC
Paul Guest QC
Michael Dowling QC
Jack Keenan QC
Brendan Murphy QC
Brian Bourke
Mary Baczynski

2003 Victorian Bar Legends:

Jeffrey Sher QC
Douglas Meagher QC
Jack Fajgenbaum QC
Susan Crennan AC QC
Hartog Berkeley QC
George Beaumont QC
Gerry Nash QC
Max Perry

2012 Victorian Bar Legends:

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

On 13 August 2015, the Bar celebrated the induction of the fourth intake of Bar Legends.

A dinner was held in the Essoign Club, which was attended by the cream of the Victorian Bar and Judiciary.

Our President, Jim Peters QC, was the MC, reflecting the great support for the Legends event from the Bar Council.

In a very amusing speech, which at times took on the appearance of a roast, Justice Terry Forrest introduced the Legends. His Honour was able to not only highlight their individual career achievements, which are substantial, but also identify a number of lesser known matters that contribute to them each being true characters of the Bar.

Dyson Hore-Lacy SC responded on behalf of the Legends, suggesting recognition of barristers should be expanded to acknowledge achievements in different categories, something like the Logies, but to be called "The Terry's". Dyson noted that if they introduced Legends of the Supreme Court, then Justice Terry Forrest would surely be the first one chosen; and ahead of his brother, Jack!

The induction of Bar Legends has become one of the hallmark events of the Victorian Bar, which reflects the wonderful camaraderie and solidarity that we enjoy and provides a platform to acknowledge the achievements of a number of more senior members of our Bar.

Congratulations to the 2015 Bar Legends –

Brind Zichy-Woinarski QC
Robin Gorton QC
Peter Rattray QC
Brian Collis QC
Noel Ackman QC
Arthur Adams QC
Dyson Hore-Lacy SC
Ian Hardingham QC
Remy van de Wiel QC
Stanley Spittle
Clive Rosen
Richard Boaden

Launch of the National Courts and Tribunals Academy

FIONA MCLEOD

It is a matter of ongoing concern to members of the legal profession that Australian courts and tribunals are increasingly required to manage more with less and to respond to constant undesirable pressures to adopt economic models in the delivery of justice.

That the workload of Australian courts and tribunals is ever-increasing is beyond doubt, as the most recent Australian Government Productivity Commission Report on Government Services 2015 attests.

In light of these ever-increasing demands, courts and tribunals have been working diligently to innovate, to be more resourceful and to work more efficiently - with commendable results.

However, the reality is that without appropriate increases in funding, there is only so much courts and tribunals have been able to do and will be able to do – unless something else changes.

It is with great enthusiasm that I can report that something has changed.

On 15 October, the Governor-General Sir Peter Cosgrove and the Chief Justice Marilyn Warren launched the Victoria University Sir Zelman Cowen Centre National Courts and Tribunals Academy.

The Academy, the only one of its type in the country, will work with Australian courts and tribunals nationwide to improve the way courts and tribunals are managed, administered and staffed in all areas, excluding the judiciary. Through research, education and training, the Academy will augment and support the very good work already being done by courts and tribunals in these areas.

The Academy will assist in the development, implementation and embedding of world's-best management practice within Australian courts and tribunals across all areas of non-judicial work including governance, strategy, people management, leadership, innovation, IT, budgeting, finance and risk management.

By further modernising the way courts and tribunals are managed and administered, they will be much better placed to deal with increasing demands on their limited resources.

As all members of the profession know, technology is a particularly significant challenge for courts and tribunals at a time of increased demand, increased volumes of work and particularly in regards to mega-litigation. Lawyers, their clients (particularly large organisations and businesses), governments and others increasingly expect courts and tribunals to be as technologically advanced as they are. This presents significant challenges for court and tribunal administrators in terms of running existing IT systems and sourcing and implementing new IT systems. This is but one area in which the new Academy, through research, training of court and tribunal staff, consultancy and thought-leadership, will provide much-welcomed expertise and assistance.

The ground-breaking difference in the approach the Academy will take is to focus on the work done by the managers, administrators and other support staff of our courts and tribunals. The education, training and developmental needs of the judiciary are already well met by organisations including the Judicial College of Victoria and the Australasian Institute of Judicial Administration, but up until now there has not been a body in Victoria whose key focus is the management and administration of courts and tribunals.

As of next year, court and tribunal staff will not only be able to take advantage of one-off tailored educational services and training, they will also be able to enrol in the Graduate Diploma in Court and Tribunal Management. This recognised formal qualification will provide the next generation of court and tribunal staff with a stronger career pathway and direction than is currently the case. It should also lead to more highly skilled staff in courts and tribunals and increase retention of staff into the future.

While the Academy is based in Melbourne at the Victoria University College of Law and Justice Sir Zelman Cowen Centre, its reach will be national and international.

On the national level, there is widespread judicial and other enthusiasm for the Academy. Letters of support have been received from the Supreme Court of Victoria, the Court of Appeal, the Australasian Court Administrators Group (which represents numerous courts and tribunals Australia-wide and in New Zealand), the Judicial College of Victoria, Court Services Victoria and the Australasian Institute of Judicial Administration. The County Court has already seconded a senior member of staff to the Academy to assist in ensuring it meets the needs of courts and tribunals.

Internationally, Memoranda of Understanding have been signed with the National Center for State Courts in the USA and the Research Institute on Judicial Systems in Italy. Negotiations are underway for international linkages with other institutions across North America and Europe.

While the Sir Zelman Cowen Centre is to be congratulated for developing and launching the Academy, it is appropriate to acknowledge the key role the Chief Justice played in creating a new legal landscape in Victoria which called out for just such a body as the Academy.

Mounting concerns by Victorian courts in recent years that government was encroaching on the independence and operations of the courts, thereby threatening the separation of powers and judicial independence, led to the introduction of the Courts Services Victoria Act 2014, which established Court Services Victoria. The Chief Justice was at the forefront of this work.

The establishment of the independent statutory authority Court Services Victoria on 1 July 2014 heralded a new era of independence for Victoria's courts. From that day, judicial services became independent of the executive arm of government and Victoria's courts and tribunals became accountable directly to parliament.

With this newfound independence from government, courts and tribunals in Victoria found themselves in need of ways to further develop the skill level and experience of their non-judicial staff in areas including administration and management. This need was a key motivating element in the development of the Academy.

Speaking at the launch of the Academy, the Chief Justice said the introduction of Court Services Victoria as well as other factors including changing complexity in the law and the increase in demand for courts and tribunals had led to the development of a need which had to be met. The Chief Justice also identified the new Academy as having a key role to play in the meeting of this need.

> "The Academy, the only one of its type in the country, will work with Australian courts and tribunals nationwide"

"This need is improved professionalism and knowledge for those who work within the jurisdictions and those who interact with the courts such as government departments," the Chief Justice said.

"This is where the Courts and Tribunals Academy will play a very relevant role. The timing of the Academy's launch is perfect.

"It is highly desirable that court administrators understand the different context of courts and tribunals; their purpose in our democratic society. So too, do those who fund the courts and tribunals – government departments – and those who come to the courts – police, legal aid agencies and the like – benefit from understanding why we have courts and tribunals, what they do and how they are best supported.

"Victoria University and the Sir Zelman Cowen Centre are to be congratulated on their vision in the establishment of the Courts and Tribunals Academy. The Academy will assist in the elevation of court administration skills and knowledge and encourage creative and innovative ways to facilitate access to justice, particularly through local and international connections.

"The Academy has a fine future ahead. I wish it every success in the exciting and innovative times ahead."

As a member of the Sir Zelman Cowen Centre Advisory Board, I too believe the Academy has a fine future ahead, a future which will contribute strongly to the ongoing improvement of the management and administration of our courts and tribunals as they move towards world's-best practice standards. The positive flow-on effects of this to members of the profession, their clients and the overall administration of justice has the potential to be significant and long-lasting.

Fiona McLeod SC is a member of the Victorian Bar, President of the ABA and a member of the Sir Zelman Cowen Centre Advisory Board.

The Hon Chief Justice Marilyn Warren AC; the Governor-General, His Excellency General the Hon Sir Peter Cosgrove AK MC (Retd) ; the Vice-Chancellor and President of Victoria University, Professor Peter Dawkins; and the Hon Nicola Roxon, Adjunct Professor and Chair of the Sir Zelman Cowen Centre

From stateless to head of state

The following speech was delivered by David J O'Callaghan QC on the occasion of a dinner held by the Victorian Bar on 11 June 2015 to honour his Excellency the Honourable Alex Chernov AC QC on his imminent retirement as the 29th Governor of Victoria

Your Excellency, Mrs Chernov, your Honours, distinguished guests, ladies and gentlemen:

On the 8th of June 1949 - two young boys arrived with their mother at Princes Pier on the MS *Fairsea*. This was the first of many trips the vessel made under a contract between the Australian Government and the International Refugee Organisation.

The MS *Fairsea* was a converted escort aircraft carrier. It had no cabins, just triple-decked, cramped bunks - and had left Genoa, on the 11th of May that year on its maiden voyage to Australia via the Suez Canal with almost 1,900 European migrants crammed aboard.

Like many migrants who arrived after the Second World War, the two boys and their mother were stateless. In their case, they were on the last stage of their years-long escape from persecution by the communists in Russia – persecution which included the murder of the mother's husband, the boys' father, by the Red Army after the Russians had recaptured Lithuania in 1940.

From Princes Pier, the boys and their mother were packed off to the Bonegilla Migrant Camp in northern Victoria, where they were met by the army personnel who ran it. It was a grim and isolated place, previously used as an army camp, then used to house what were then officially called "displaced persons".

Like the hundreds of thousands of other refugees who arrived in this country in the late 1940s and early 1950s, neither the boys, nor their mother, spoke a word of English.

One of those two boys was an 11-year-old. His name was Alex Chernov.

The day after the *Fairsea* berthed at Station Pier, and the Chernovs headed off to the delights of the Bonegilla camp, the lead headline in *The Argus*, Melbourne's main daily newspaper, thundered: "**Red Supporters in Migrant Ship**".

The story, in the Thursday June 9, 1949 edition, a copy of which I have due to the wonders of Mr Google, continued:

> ***'Actually Russians'***
>
> *Count Pongracz, who is from Hungary, said: 'More than 900 of these people came from the Ukraine, and are actually Russians. During the trip many became drunk, and then showed their true character and political affiliations.*
>
> *'Whether they will make good Australians I would not like to say.'*

"Tonight's celebration is to recognise Alex's indefatigable and selfless service to our Bar and to the people of this State."

1. Jim Peters QC, Sally Ninham, the Hon Alex Chernov AC QC, Elizabeth Chernov, Paul Anastassiou QC, Sarah Fregon. 2. The Hon Alex Chernov AC, QC 3. The Hon E. W. (Bill) Gillard QC, Elizabeth Chernov, the Hon Alex Chernov AC QC, William Alstergren QC

'The remaining passengers are Latvians, Estonians, Lithuanians, Hungarians, and Jugoslavs. All come from countries where Communism is rife.'

Escaped in 1948

Count Pongracz escaped from Hungary in 1948 after having experienced both German and Russian occupations. His wife was formerly Miss Bettina Mary Gill, a cousin of Mrs Winston Churchill.

Mr Oppenheim revealed that shortly before the Fairsea left Genoa a well-known communist, who had embarked as a migrant, was taken off by police and told that his papers had been cancelled. It was possible other Communists were aboard. Victorian security police met the Fairsea and inspected the migrants, very few of whom can speak English.

I suspect that Count ("Whether they will make good Australians I would not like to say") Pongracz would have been moderately surprised to know that over the next few decades one of the displaced persons on that boat would in turn become a brilliant student at Melbourne High School and then Melbourne University, one of the finest barristers *and* judges of his or any generation, President of the Law Council of Australia, Treasurer and then Vice President of the ABA, President of the Motor Sports Appeal Court, Deputy Chancellor of Melbourne University, Chancellor of Melbourne University and a Companion in the General Division of the Order of Australia.

That the stateless boy would one day become head of state would, I suspect, have rendered the good Count speechless – which, in light of the nature of his reported observations, may well have been a good thing.

[Before I leave *The Argus*, the front page also records that one OJ Gillard of Counsel, instructed by Maurice Blackburn and Co, had obtained a record payout of £12,488 against the SEC on behalf of a council worker who had suffered severe electric shock due to the SEC's negligence.]

The purpose of tonight's celebration is to recognise Alex's indefatigable and selfless service to our Bar and to the people of this State.

He is a remarkable and much loved man and the Bar rejoices in being able to celebrate - together with Elizabeth - his contribution to our Bar, a contribution which began from the time he signed the Bar Roll in 1968 and which continues to this day.

Many in this room know, although the young crew over there on table seven may not know, that his Excellency was a 14-term member of the Victorian Bar Council, serving continuously from 1971 until the expiration of his 18-month term as Chairman in 1986.

His Excellency read with Sir Daryl Dawson. He had many readers, including ▸

No. 32,064 MELBOURNE, THURSDAY, JUNE 9, 1949 16 PAGES PRICE 2d.

Many Australians in Honours List

TWO VICTORIANS CREATED KNIGHTS

SIR EDMUND HERRING, Chief Justice and Lieutenant-Governor, is advanced to a higher grade of knighthood, and two new Victorian knights are created in the King's birthday honours list announced last night.

The new Knights Bachelor are Sir Gordon Keith Snow, prominent Melbourne business man, and Sir Thomas Maltby, Speaker of the Legislative Assembly.

Sir Edmund Herring, KBE, now becomes a Knight Commander of the Order of St Michael and St George.

All three recipients are returned soldiers.

No other Australian knighthoods were conferred.

Minor honours conferred on the recommendation of the Victorian Government were:

CMG (Commander of the Order of St Michael and St George).

Mr Norman Charles Harris, chairman of the Railways Commissioners.

CBE (Commander of the British Empire).

Mrs Mary Dora Daly, OBE, president of the Catholic Welfare Organisation.

Lady Angliss, wife of Sir William Angliss, MLC.

OBE (Order of the British Empire).

Mr Frank Arthur Jenkins, secretary of the Municipal Association of Victoria.

Miss Agnes Morgan, matron of Prince Henry's Hospital.

Cr John James Young,

Sir Edmund Herring, KCMG

Petrol talk by Premiers unlikely

The definite opposition of Mr Hanlon, Premier of Queensland, to petrol rationing by the States seems likely to kill any hope of a special Premiers' conference to discuss rationing.

It had been suggested that Mr McGirr (NSW), as senior Premier, would call all State Premiers together.

Mr Hanlon said last night that on legal advice he considered that the States could not ration petrol. A Premiers' conference would be useless.

"Talks futile"

"What is the use of Premiers meeting if one of them stands out," he said, and added that in a telephone conversation with Mr McGirr yesterday, Mr McGirr had agreed that unless all States were agreeable to undertake petrol rationing, a conference would be futile.

"I have told Mr Chifley

Sea horse!

Bombay (AAP)

An unbroken Australian horse which jumped into the sea from a ship near Bombay on Sunday and struck out for land through mountainous monsoon waves, was found safe yesterday on a rocky islet.

£50,000 TOORAK MANSION SOLD

Whernside, 24 Albany rd, the home of Lady Fraser, has been sold for use as a private residence at an undisclosed price.

The mansion, which has 26 main rooms, was built about 60 years ago, and later was modernised by the late Sir Colin Fraser. It stands on about 1¾ acres of land, with a frontage of 323ft to Albany rd and a depth of 263ft.

The property was in the market for sale at about £50,000, and its purchase was considered by the State Government as a Government House for the Duke of Gloucester when he was appointed Governor-General.

K. Gardner and Leng Pty Ltd and Baillieu Allard Pty Ltd were the agents in the sale.

£12,488 VERDICT FOR LINEMAN

Record damages in

'RED SUPPORTERS' I MIGRANT SHIP

Official doubts thorough screenin

HALF of the 1,894 displaced persons who reached here yesterda the migrant ship Fairsea had shown "very Communistic s pathies" on the voyage, said Count Francis Pongracz, a passenge

Mr A. Oppenheim, International Refugee Organisation officer, who travelled as adviser to the migrants, said there was a danger of Communists arriving on such ships because the political screening of passengers before they embarked was not as thorough as it should be.

"Actually Russians"

Count Pongracz, who is from Hungary, said: "More than 900 of these people come from the Ukraine, and are actually Russians. During the trip many became drunk, and then showed their true character and political affiliations.

"Whether they will make good Australians I would not like to say.

"The remaining passengers are Latvians, Estonians, Lithuanians, Hungarians, and Yugoslavs. All come from countries where Communism is rife."

Escaped in 1948

Count Pongracz escaped from Hungary in 1948 after having experienced both German and Russian occupations. His wife was formerly Miss Bettina Mary Gill, a cousin of Mrs Winston Churchill.

Mr Oppenheim revealed that shortly before the

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Victorian security
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Nearly 3,000 migrant
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McKenna, Federal H
Minister, had stated

> "One of the displaced persons would become one of the finest barristers and judges of his or any generation."

Justice Clyde Croft, Justice Tim Ginnane, Greg Davies QC, Magistrate Barry Braun, Neal Chamings and Ian Duffy, most of whom are here tonight.

Alex took silk in 1980, only 12 years after signing the Bar Roll.

He also served on so many committees and in so many official capacities, to serve the members of our Bar, that I cannot name them all, this side of midnight at least. To take but some, however – he served six terms on the Ethics Committee, five on the accommodation policy committee, five terms as a director of BCL, 13 terms on the Law Reform Committee, three on the Readers' Course committee and two on the past practising Chairmen's Committee. In between times he with Bob Brooking authored 'Brooking and Chernov: Tenancy Law and Practice'.

His Excellency's contemporaries at the Bar ranked among the genuine legends of their time, and included three people in particular who cannot be here - the one and only JE Barnard QC, Jack (later Justice) Hedigan and the late Frank Costigan QC. Like Alex, they too were giants of our Bar, all men who, in different ways, displayed enormous courage when called on to do so.

All of us who have ever held a junior brief are acutely aware of the possibility that, one day, at any moment, we will be called on to step into the shoes of our leader, should she or he become unavailable, whether through illness or some other cause, good or otherwise.

Members of our Bar must not, and we do not, masquerade as counsel, if I may adopt with respect that superb turn of phrase recently and quite rightly adopted by Betty King in observations her Honour made about the refusal or inability of a lawyer employed and briefed by VLA to appear as junior to another member of VLA's chambers, to undertake the role of counsel when the later became ill.

But I digress.

Stepping into the shoes of our leader is one thing, but very few, if any of us have entered a court room as a spectator and ended up as lead counsel at the bar table. His Excellency is one such person.

On November 13th 1984, when he was the Vice Chairman of the Bar, Chernov QC, along with many other members of counsel, had wandered over to the Banco Court to attend the welcome of the latest judge, John Harber Phillips, who later became the Chief Justice. The task of welcoming a new Supreme Court judge usually falls to the Chairman of the Bar. He was away interstate that week, and McPhee QC had been deputed to appear. As the minutes before 10am, the appointed hour, approached, Mr Miles for the Law Institute was comfortably

> “His ability to do so was, and is, the product of the seemingly boundless optimism that informs Alex’s world view”

ensconced in his spot at the Bar Table, but still no McPhee.

I should say for the benefit of the younger barristers on table seven, that this was long before the days when helpful associates or tipstaves would enquire “is everybody ready?” before the tap on the door, the cry of “all Stand” and the judge’s appearance from behind the blue curtain. And long before mobile phones, needless to say.

So, seconds before the clock struck 10, Vice Chairman Chernov leapt to his feet and took the seat immediately behind the lectern at the bar table, next to the unsuspecting Mr Miles. On the stroke of 10, it was “all stand”, JH Phillips J emerged, opened the court and, equally unsuspectingly, said his very first words as a judge: “Mr Chernov?”

I know that because we have had unearthed, through the efforts of Ross Nankivell, a long-lost copy of the transcript of that welcome.

As the learned judge looked down and uttered his first judicial words, Chernov got to his feet and delivered the following:

May it please Your Honour. On behalf of the Bar, may I welcome Your Honour to your appointment to this Court at a time, Your Honour, when it is of significance to the community that the Court is staffed by people who have had a wide range of experience, not only in the practice of the law, but in the administration of it.

Your Honour, this is in many ways an historic occasion, not only for Your Honour, but for myself. (What degree of irony attached to the word “historic” we will never know for sure!) And I can perhaps convey to Your Honour the apologies of our Chairman, who is interstate.

Your Honour has been renowned as a leader at the Bar, particularly the Criminal Bar, and Your Honour was the first member of the Criminal Bar to take silk and to take leadership in developing the Criminal Bar, and it is because of Your Honour’s efforts that the Criminal Bar recognises that it is in the position it is today.

Your Honour has served on the Bar Council for many years and has given Your Honour’s time willingly to the services of the Bar and to the law.

Your Honour has been involved over many years in developing matters of common interest to lawyers and the administrators of the law.

Your Honour, as we know, led the defence in the Azaria trial, which received publicity not only here, but overseas, and Your Honour has set up a Department of the Director of Public Prosecutions in a way which has enabled this State to have the administration of the criminal law handled by people who are independent of the Public Service.

Your Honour, on behalf of the Bar, we welcome you to the Bench and wish Your Honour a fruitful time on it.

If Your Honour pleases.

So you see that it was seamless. It was leadership personified.

In McPhee’s defence, I should add that he had not done a runner, nor had he forgotten. He had believed the welcome to be scheduled to start at 10.15, at which time he entered an emptying Banco Court, welcomes being much shorter affairs in those days!

As a barrister, Alex turned arriving at the death knell, not a minute early, not a minute late, into an art form.

His *need* to do so was the result of what we would now call a 24/7 work cycle. His *ability* to do so was, and is, the product of the seemingly boundless optimism that informs Alex’s world view.

Peter Jopling tells the story of sitting in a plane at Bangkok airport with Elizabeth. Peter and Elizabeth had flown from Melbourne and had changed planes to fly to Europe. Alex had for some days prior been at a meeting of Law Asia or some such thing and was to join Elizabeth and Peter on the flight to Europe. The minutes ticked by and Peter became more and more anxious. Elizabeth assured Peter that there was no need to fret. And sure enough, just as the aircraft door was being closed, Alex slipped through the slowly narrowing opening, cool as a cucumber, and said “Joppers, you look like a nervous wreck.”

Even in his capacity as Governor, Alex has continued to work in and for the best interests of the Bar. Most recently, the establishment of a multi-faith opening of the legal year at Government House was a triumph and would never have happened but for the Governor’s vision, determination and relentless hard work.

All barristers, all of us, would be shadows of ourselves without the help and support of those who love us. In Alex’s case, of course, that includes in particular his late grandmother and mother, his children and most especially Elizabeth, who honours us by her presence tonight. We all know the price that others pay for our successes. If you will permit me, I will in that regard read just briefly Alex’s own words at his farewell:

I know that I will be shot for saying this later but I think it is appropriate, if not essential, I get this off my chest in public. The most invaluable assistance and friendship given to me during my time on the bench, and before, has come from Elizabeth. She has been my best friend and wife of over 42 years (now 49 years) and no words could adequately thank her for her love and support which, mercifully, injected some reality into my life. I just do not know how she has put up with me… but I am very grateful that she did…

For those of us privileged to have known Alex, his transition from student to barrister, to silk, to the Court and then to Government House was a natural and, in hindsight, an inevitable one.

Thank you all for joining us tonight to honour and celebrate Alex’s contribution to the Victorian Bar. He is truly a hero and an exemplar of our great institution.


food&desire.

A passion for books

Launch of the John Emmerson Collection on 14 July 2015 at the State Library of Victoria. WILL HOUGHTON

Those who were privileged to have known the late Dr John Emmerson QC, or to have seen him in court, had the rather odd experience of being transported back in time to another era where courtesy and good manners reigned supreme.

"Emmo", as he was affectionately known to his many friends and acquaintances, had that rare talent when addressing a court or cross-examining a witness, of completely disarming the judge or the witness with charm and courtesy. His style and delivery foretold a bygone era.

A completely different historical era was opened up to guests on 14 July 2015, at the launch of the John Emmerson Collection comprising more than 5,000 rare printed books. John Emmerson assiduously collected the books and manuscripts over more than 40 years. The historical area favoured by John was the period in the history of England spanning the 15th to 18th centuries. John's particular interest, however, was the English Civil War and the reign of Charles I. His collection has at its centre a magnificent gathering of books dealing with this period.

John Emmerson came to the law late in life. He was a brilliant student at the University of Melbourne and went on to Oxford where he gained his D.Phil in nuclear physics in 1964. He became a Fellow of New College before returning to Melbourne in the 1970s.

At this point, John changed careers and commenced his law degree at the University of Melbourne, from which he graduated with the Supreme Court Prize in 1974.

A career at the Bar beckoned and John quickly excelled in his chosen field of intellectual property including that difficult area of patents law. He became a leader of the Bar in that area and took silk after only nine years call.

John began collecting rare books whilst still a student at Oxford. It became one of the enduring passions of his life. Upon his death last year aged 76, John's family donated this extensive collection to the State Library of Victoria in accordance with his wishes. The collection is valued conservatively at between $5-7 million. In addition, John endowed a bequest of $1.3 million to help preserve, catalogue and expand the collection and fund scholarships in the future.

In an article published posthumously in *The Book Collector* (volume 63, number 3, Autumn 2014), John described how he started his book collecting career. He was a young don in residence at New College when he was invited to dinner at the home of a fellow don. His host and the other guests were all book collectors or married to book collectors and the talk naturally turned to antiquarian books. John recounted a visit to a country church near Oxford where he came across an old Book of Common Prayer which contained a reference to King Charles I. This sparked an interest in the historical events surrounding the trial and execution of Charles I.

Shortly after this dinner, John's colleague at New College told him that Christie's were auctioning another set of the contemporary news books describing the trial and execution of Charles I. John bought five bound tracts at that auction on 23 October 1968. After that, he was hooked. He visited country booksellers with friends, he made acquaintances with antiquarian book dealers and placed himself on the mailing lists of many antiquarian book catalogues.

John found that his scientific training was useful when he devised a pilot study before embarking seriously upon collecting. At that time, a common form of collecting would be to choose an author, form a collection of the works of that author and then write a bibliography or at least a study of that author based on his or her own collection. John early-on realised that this model had several shortcomings. The putative collector might choose an author but it could not be known with any certainty whether one would be able to obtain the books written by that author in all their different editions. John knew of several collectors who had diligently collected a favoured author over many years but still failed to make a complete collection.

As John put it:

> *The question for me was whether it was still possible to devise a collecting strategy that would allow me to continue collecting the seventeenth-century English books that had fired my enthusiasm in the first place but without running into dead ends of the kind lamented by some of the earlier generation book collectors. I was working in*

> “John also realised early on that book collecting was not only about technique but was also about the development of the collector’s taste”

experimental science at the time and as an experimental scientist I thought that the convenient place to start was to make a pilot study. I would choose an author and see how satisfactory a collection of early editions of his works I could make in a reasonable time at a reasonable price. I set the reasonable time as about a year and the reasonable price at £10 per book, which was then roughly the price of a new nuclear physics textbook. This may seem an odd choice, but it was a sum that I was used to spending on books.

John chose an author, John Goodman, and one of his books, *A Winter – Evening Conference Between Neighbours*. He learnt from his researches in the Bodleian library that it was an agreeable little book in dialogue form that went through 10 editions between 1684 and 1713. He then set about collecting the different editions.

Shortly, John found an eighth edition (1700) in a bookshop in Chelsea then, a few weeks later, a third edition from another antiquarian bookshop near the Royal Institution. A ninth edition followed from Blackwell’s in Oxford.

At the end of a year-and-a-half, John had acquired the first three editions of *A Winter – Evening Conference* together with the eighth and ninth editions but he saw no copies at all of that book until August 1982 when he bought the 10th edition. He realised that he had fallen into the same trap as earlier collectors in choosing an author who was also popular with other collectors. As John said:

Even without the distorting effect of rival collectors, the first few acquisitions in an author collection are much easier to find than later acquisitions. I knew this from elementary mathematics.

John’s methodical research taught him that completeness in a collection did not necessarily lead to happiness. The hunt could still be enjoyable. The critical step in collection-building was putting each item into its bibliographical context and this did not necessarily require completeness. He decided upon a more flexible approach.

Consequently, John proceeded to make a number of small collections that put books into their bibliographical context and illustrated the variety of printings and later histories of particular authors or particular works. However, he did not feel compelled to make the collections complete. The valuable lesson he had learnt was that it was not merely marginally easier but much easier to form a respectable but incomplete collection of a particular author or title than to form a complete collection.

John also realised early-on that book collecting was not only about technique but was also about the development of the collector’s taste. In February 1969, he went to the sale of the library of Sir Daniel Fleming (1633-1701) and was much taken with the condition of the books which took him straight back to the seventeenth century. He bought three of the books in that collection. He then researched the life of Sir Daniel having discovered that his papers had been preserved at Oxford and published in three volumes by the Oxford Historical Society. He continued to collect books from that collection for many years as and when they became available.

The voyage of discovery that John embarked upon in those early years gave

him joy and satisfaction throughout his life. By the end of 1969, John said:

> *I was in almost ideal circumstances for someone who wanted to collect books on a modest budget. I was living in rooms in New College, a short walk down New College Lane to the Bodleian, which had most of the important bibliographies and other reference works available on open shelves. Catalogues arrived by the morning post and mine were beside my plate at the breakfast table. There was a telephone conveniently placed if urgent action was required. In less urgent cases, if a book seemed potentially interesting, I could always examine the Bodleian copy to make sure.*

As Nicolas Barker, editor of *The Book Collector* noted in John's obituary, his collection is marked by its breadth and distinction.

> *Although fine bindings interested him less than provenance, the combination brought him others besides the dedication copy of The Penitent Pardoned, such as the second edition of Hobbes's* Leviathan *in red morocco with the arms of John Sheffield, Duke of Buckingham, and, finest of all, Hooker's* Laws of Ecclesiastical Politie *(1635) in an embroidered binding, probably once Queen Henrietta Maria's. He had all the folio editions of* The Anatomy of Melancholy *in contemporary bindings. John Evelyn was another favourite, especially the copy of Robert Boyle's* Memoirs for the Natural History of Humane Blood *(1683/4) presented to Evelyn at a meeting of the Royal Society on 27 February 1684, and noted by him in his Diary. He took in all the poetry and prose of the century, especially Vaughan, Waller and Dryden, Jeremy Taylor and Thomas Browne. Only last year he bought Sir Thomas Vyner's copies of the first edition of* Pseudodoxia Epidemica *and the 1688 folio* Paradise Lost *with Medina's plates that had found their way to New South Wales, adding a fine set of Dampier's* New Voyage Round the World *(1697) only weeks before he died. All these grew to fill the fine old house in Park Street, South Yarra, in which he lived.*

At the launch of John's collection, attendees were privileged to be shown some of the more valuable works by the skilled curators at the State Library.

These included the Bible owned by William Juxon (1582 – 1683), who was the Bishop of London whom accompanied Charles I to the scaffold where the Bishop performed last rites, as well as a 1684 journal of the High Court of Justice recording the trial of King Charles I, at which he was found guilty on 26 January 1649 and sentenced to death. Other works include the final speech of King Charles I delivered just prior to his execution on 30 January 1649.

This extraordinarily generous donation is a true mark of John's character and personality. John was a modest, even humble, man with no airs or pretentions. His bequest to the State Library of Victoria will ensure that everyone can appreciate, and learn from, the treasures in this collection.

In an obituary delivered by Professor Wallace Kirsop, he said:

> *Let there be no mistake: this is one of the great legacies to any Australian library. John Emmerson's name will live in the collective memory as well as in the minds of those of us who had the great privilege of knowing him and his special qualities for many years.*

These were fitting words. Through this wonderful Collection, the memory of John Emmerson lives on.

The renaissance of the Bar library

NATALIE HICKEY

Natalie Hickey, Samantha Marks QC, James WS Peters QC, Ed Heerey SC and the Hon Peter Heerey AM QC (seated).

The top definition for "library" in Urban Dictionary (an online crowd-sourced resource) is: "An awesome place that is underrated in today's society".

The Bar library, located on level one of Owen Dixon Chambers East, aptly fits this description.

Samantha Marks QC, the Chair of the Bar's Library Committee, wants people to know about the library, and to use it, pointing out that barristers help pay for the Bar library through their subscriptions.

With her fellow committee members, she has a vision for the space and is well on her way to achieving it: "Libraries can be beautiful spaces to work in because of their atmosphere and history. They make you want to work there". She adds that it is important to have a space that makes you feel part of the club, and part of something bigger. The Bar library has that history, starting on an ad hoc basis with donations from barristers. This is a continuing tradition that includes a recent donation from the Hon Peter Heerey AM, QC.

There is also a collection from the estate of Ian McIvor containing an extraordinary number of books about trials and advocacy, many unopened. A book containing extracts of cross-examination from Charles Manson's trial beckons.

The library now also has a Chesterfield sofa and two chairs, creating a club-like atmosphere, also thanks to an anonymous donation. On a recent visit by *Victorian Bar News*, the library was busy with barristers using computers and working on matters with the help of the available books.

As Marks points out, "Our library should be about history and community. The way we advise and argue is about how others have argued in the past. It is part of our common law tradition. We want the room to be busy and useful because we should not always be alone in the work we do. That is why community is so important."

She encourages people to come to the library rather than sit in chambers. "We don't move around as much as we should. Come and get a take-away coffee in the Essoign and bring it into the library. We've relaxed the rules about food and drink so that people can be comfortable."

> “Libraries can be beautiful spaces to work in because of their atmosphere and history. They make you want to work there.”

People are changing the way libraries are used, and we are no different, she suggests. That said, Marks indicates some hesitation about bringing in fish and chips.

Barristers may be surprised about the quality and depth of the resources available. The Bar has funded the upgrade of computers. These provide access to numerous resources via subscriptions such as LexisNexis and Thomson Reuters. Users cannot presently print out materials, but they can email them. The library also has wifi.

Whilst a lot is now available online it is sometimes a lot easier to pick up a book. Marks says “With conflict of laws, for instance, I find it miles easier to pick up a book,” Marks says. And the Bar library contains some excellent texts in that area.

For civil lawyers, the Bar library’s editions of *Williams* and *Federal Court Procedure* are kept up-to-date. For those of us with months of updates remaining in their plastic sleeves, this is no small task. That these volumes are kept up-to-date is due to the tireless efforts of Richard Brear, deputy chair of the library committee.

The Bar library also offers the following to barristers:

- 24-hour-access (so if the Supreme Court library closes, the Bar library will be open).
- A large number of reports and text books.
- An entire section where people can borrow books (including from the Heerey Collection and the McIvor Collection).
- A section on the Bar website displaying the books and subscriptions available, so people can check availability before walking across to the library.
- The introduction of talks and sessions in the library which are resource-related.

For people interested in donating books or other items, the library committee is happy to be approached. “Send us what you have as a list and we will consider it”, Marks suggests. There are space issues, though. For instance, there is an American book collection that must be located outside the library, albeit in the Neil McPhee Room, next door.

The library committee notes the Bar’s contribution and investment in the library. It is more than a room; it is a welcome and useful space. Come and give it a try!

The Heerey Collection – donation to the Bar library

Retired Federal Court judge, the Hon Peter Heerey AM, QC, has donated his collection of legal books to the Bar library.

The Heerey Collection is no ordinary collection. There are no traditional textbooks or journals here. Rather, this thoughtful and generous donation reveals much about the broad-ranging interests of the author. The collection is divided into categories of books about ‘advocacy’, ‘anecdote, humour and miscellany’, ‘biography, letters and autobiography’, ‘court architecture’, ‘judges and judging’, ‘law and literature’ and ‘trials’.

For the author and former editor of *Victorian Bar News*, a love of books comes naturally. Peter Heerey enjoyed poetry at school, which led to his own attempts at verse, since published in *A Moment’s Delight*. So too, he published a series of essays last year in the aptly titled *Excursions in the Law.*

“Books are about people and language”, says Heerey. “They provide a sense of history, of time and place, and how this informs law and life today.”

As for the collection, it constitutes books that, to him, represent useful ideas. There was no organised process. “Over the years I collected books that interested me”, he says. “There are things that legal practice lead you into that excite interest: law and language, great stories and funny stories”.

For example, the collection includes books by Dan Kornstein, such as *Kill all the Lawyers? Shakespeare’s Legal Appeal*. Kornstein is a trial lawyer who finds fascinating parallels between Shakespeare’s plays and current day questions. The Elizabethan age was as litigious as our own, and Shakespeare was very familiar with the language and procedures of the courts.

Heerey accepts the individualistic nature of the collection, but that is the point. The books are not expected to be a formal resource. Rather, he simply hopes barristers will read them.

Whilst finding it difficult to choose, Peter Heerey has nominated his five “desert island” books from the collection:

1. *Order in the Court* – “As a former Bar News editor, I couldn’t pass up this collection of the best of *Verbatim*.”
2. *American Original* – “This frank but fair-minded biography of US Supreme Court Justice Antonin Scalia is a fascinating look at the philosophy and politics of the US judicial system.”
3. *Owen Dixon* – “A fine biography giving some human insights into this Olympian figure of the law in Australia.”
4. *Hitler’s Justice: the Courts of the Third Reich* – “For the German courts and legal profession it was business as usual under the Nazi regime.”
5. *The Claimant: the Tichborne Case Revisited* – “An 18-stone butcher from Wagga Wagga claimed to be the baronet Sir Roger Tichborne, thought to have been lost at sea many years previously.”

Asked why he donated the collection, he responds simply: “I am very grateful for my time at the Bar”.

The Honourable Linda Dessau, AM, Governor of Victoria

Governor Dessau was sworn in as Governor of Victoria on 1 July 2015. VBN asked her Excellency to reflect on her new role and her other remarkable achievements.

Please describe a typical day as Governor.

There is no typical day. That is one of the great pleasures, having come almost directly from 28 years on the bench where each day had a similar pattern of 10am until 4.15pm in the courtroom.

As Governor, I could be chairing Executive Council, helping at a breakfast program at a local school, meeting farmers in regional Victoria or presenting awards to brilliant young people for timber design and manufacture (using timber from a historic tree felled within the Government House Grounds).

I could be hosting events in our Ballroom, including the Investiture of Australian Honours, receptions for international delegations, the Victorian Multicultural or Senior of the Year awards.

I could be travelling overseas to represent Victoria, participating at a world economic forum or watching a soccer match between robots developed in our sister prefecture of Aichi in Japan.

And, any of those things could easily be in the course of the same day.

What is your favourite part of the role of Governor, so far?

I enjoy the positivity of the role.

After a career in law and so long in the courts, I realise how much of court work is not only adversarial by its very nature, but also what a challenge it can be for a judge to constantly deliver what is inevitably bad or hard news for at least one of the parties: a long prison sentence, a significant financial loss, or the devastation of no longer being able to see their children, just by way of example.

My days now are much more likely spent celebrating selfless community work, inspiring social entrepreneurship, innovative contributions to business, the resilience of our farmers or the groundbreaking brilliance of our bio-scientific researchers.

Are you a Republican?

I am comfortable that for now the people have spoken as to the system they want to keep. In the event that it changes in the future, I hope we retain a structure with an independent Head of State, someone outside of politics, someone who can be a guardian of the Constitution, and non-partisan ceremonial and community leader.

Who are the past or present governors or leaders who inspire you?

All the past Governors inspire me, albeit in different ways. Each has approached the role in their own individual way in the context of their time in history, and inevitably playing to their individual strengths or interests, but I have no doubt that every Governor has felt keenly the same sense of privilege and responsibility of serving the Victorian community.

As to other leaders, there are world figures like Nelson Mandela, Australians like Professor Fiona Wood or Rosie Batty, but the longer I am in this role, I am discovering and admiring leaders of small groups and large across all different communities and in all parts of the State. People who imagine and successfully start clever not-for-profit organisations, or a sporting club, a youth group or whatever their particular community needs – they are truly inspirational.

How would you like to make your mark as Governor and to what extent can a Governor control her agenda and the causes she assists?

I hope to do as much good work for Victoria as I can possibly do, across the broadest spectrum of regions, disciplines, businesses, organisations and community groups, and hopefully to contribute to enhanced social harmony and cohesion.

That might sound like a lofty aspiration but it is a role with the widest opportunities to facilitate the great work of others in all of those areas. And, there is certainly scope to ensure that organisations or events that I regard as dear to those objectives do gain some support.

How has being a barrister and Judge prepared you for the role of Governor?

I think the legal background helps in two particular ways.

First, when it comes to carrying out the constitutional aspects of the role - although it is by no means a necessity. There are many fine Governors, without legal training, who are a testament to that.

It also helps in terms of an ability to absorb and distil new information. That is the essence of being briefed, or hearing evidence in a case. It is useful when attending such a vast variety of functions and organisations, and meeting such a wide range of people.

You have been a barrister, a judge, an AFL Commissioner and now Governor: which role was the most difficult; which the most enjoyable; and which, in your opinion, seems to command the most respect?

Each has been enjoyable. Each has been challenging. Each has been right for me at the time.

I loved the Bar. I loved the advocacy and the camaraderie. Of course I met my husband there too!

I relished our time prosecuting in Hong Kong. It is such an exciting city, and one

that gave me the opportunity to learn criminal law and to be exposed to criminal trials every day for nearly three years.

I loved every minute of my almost-10-years as a magistrate, across the Children's Court, Coroner's Court, and then Melbourne Magistrates' Court, in particular running the Committals' Court, as I did for the last few years I was there. It is truly the "people's court". It has the most community contact of all the courts. It is busy, vibrant and human.

Equally, I enjoyed my 18 years as a Family Court judge.

People often asked me if the work was repetitive or depressing. It was certainly never repetitive. Every case was different. Families are different. People are different. At the end of the 18 years, I was still hearing new things.

It wasn't depressing either. Sometimes sad, that's for sure. But often uplifting too to see how bravely people coped with adversity, to see how some people so clearly put their children's needs ahead of their own, or to see grandparents selflessly stepping into parenting roles when their children were not able to do it. And sometimes, I felt that I was helping a family, at least by averting some of the possible damage of their dispute.

And finally, I enjoyed the two years between the Court and this role, immersed in various community boards. In particular, the combination of football (through the AFL Commission) and the arts (through the NGV and Melbourne Festival) gave me a nice balance. I am a firm believer that whilst it is not compulsory to love either football or the arts, it is certainly not a necessity to choose one or the other. I see the beauty and the community enrichment through both.

Which role gets you the best tickets to the AFL Grand Final?

Former Commissioners are always invited to the AFL Grand Final. So is the Governor.

What is your favourite song?

I believe in diversity in all things, including music! But at my inauguration I had Puccini's *O Mio Babbino Caro* sung (magnificently by a wonderful Wiradjuri woman, Shauntai Batzke) so that is a pretty good measure of one of the arias dearest to my heart.

"All the past Governors inspire me ... I have no doubt that every Governor has felt keenly the same sense of privilege and responsibility of serving the Victorian community."

What is it like living in Government House?

We moved in just the day before my inauguration. That evening, when my family had gone off to bed, I walked around by myself and felt a sense of history, but mostly a sense of temporary custodianship, contemplating the 17 Victorian Governors and the eight Governors-General who had, just like me, moved in and inevitably moved out again.

Naturally it felt new and strange, but I contemplated that it must have felt like that to each who had gone before me, the more so for those whose arrival was in fact the culmination of a very long trip from England.

Who is the most interesting person you have met so far, as Governor?

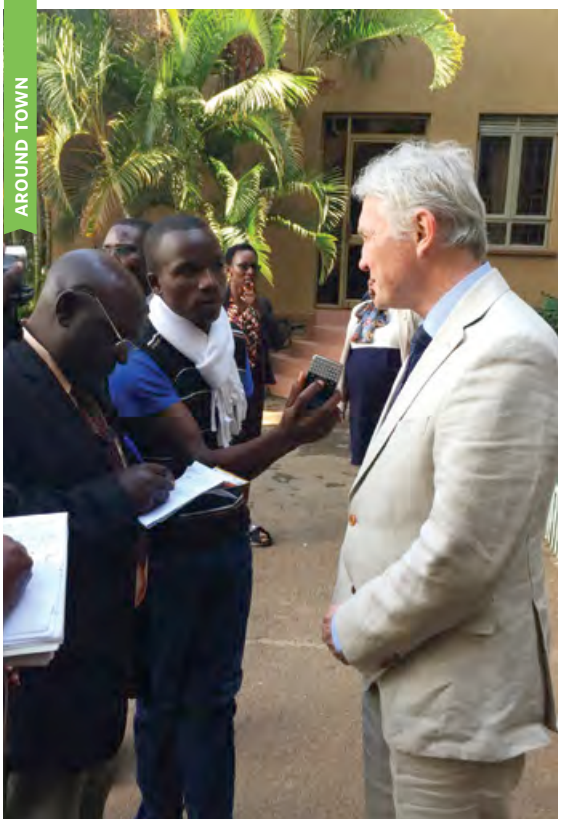
That is difficult to answer because of the variety of people I have met so far. They have been from all walks of life, from all parts of the State, and indeed from many different countries.

I was particularly moved by the stories of the World War II veterans who came to the House on the 70th anniversary of Victory in the Pacific Day.

Each one had a story, but when I asked one gentleman where he had served, he told me that he had served in Melbourne. Starting as a 15 year old, he worked through the war for the PMG, undertaking the gruelling and heartbreaking work of delivering the telegrams that announced to families that their beloved sons or husbands had been killed in action. I was struck by the heavy burden on a young teenager, and reflected on the vicarious or second-hand trauma of war.

When you were a child, what did you want to be when you grew up?

A psychiatrist, until I discovered that you had to do medicine first!



Advocating for Africa

Five Victorian barristers, one Victorian judge and 30 Ugandan prosecutors. ASHLEY HALPHEN

Judge Montgomery of the County Court of Victoria, and barristers Samantha Marks QC, Lesley Taylor QC, Tony Trood, Michael Cahill and I share something special. They answered a call from the International Justice Mission of Australia (IJM), made on behalf of the Ugandan Director of Public Prosecutions, to conduct an advocacy workshop for prosecutors in Kampala, Uganda.

IJM challenge poverty by improving justice systems in a number of developing countries to ensure the rule of law is upheld and access to justice for those in dire need of protection is made more possible.

Australia shares a common law background with Uganda. There is recognition of a crisis in this distant jurisdiction. 'Land grabbing' is an epidemic in Uganda and disproportionately affects widows and orphans in the community. Men often die intestate, leaving behind lawfully purchased plots of land; a treasure chest in ensuring stable accommodation and income for the surviving family. Traditional practices however, inspire a deceased's clan to go to extremes to take over the land. Requests to leave often escalate from harassment to forced evictions and nefarious violence.

Criminal prosecutions are frequently viewed as civil disputes. IJM stepped in to support local law enforcement agencies. Community values are gradually changing: this is gender based violence. More arrests and prosecutions have arisen in recent times.

Enter a Victorian Judge and five members of the Victorian Bar in August 2015. They had nothing to give except their joint experience as advocates. This sentiment would prove worthwhile in their primary pursuit to develop local advocacy skills. General deterrence is viewed by IJM as critical in reducing the epidemic. An elderly widow attacked with a machete by a relative over her modest plot of land where she had lived for decades would no doubt agree.

The team presented, demonstrated and then reviewed individual performances in all areas of advocacy to over 30 local prosecutors with experience ranging between two to 17 years, but all bereft of the kind of advocacy training offered in Victoria.

Feedback was expressed in the true spirit of genuine and warm African gratitude, scarring the hearts of the Australian team with a defining memory. Without fuss or complaint, colleagueship lent buoyancy to any pressure, and farewells were infused with the priceless sensation of reward and satisfaction. It is well to remember that education provided anywhere provides the potential for advancement well beyond immediate frontiers.

Any subsequent progress will be tracked by IJM; those who took flight from Entebbe Airport back to Australia anticipate only positive results. What a privilege it is to conduct oneself beyond the day-to-day realities of practice and perhaps be a small part of change to those most in need.

Pizer passes the baton

Launch of the fifth edition of Pizer's annotated VCAT Act. BEN JELLIS

On a wintry Wednesday night in August, the Victorian Civil and Administrative Tribunal was jam-packed with practitioners, friends and family for the launch of the new edition of Pizer's *Annotated VCAT Act*.

First published 14 years ago, the book is now in its fifth edition. In that time, it has joined a select group of textbooks identified by the name of an eponymous author: 'Cross', 'Jacobs', 'Palmer', 'Pizer'.

Over those 14 years, the authors' scholarship and the quantity of case law involving the Tribunal has seen the book swell from 500 to about 1200 pages in length.

In a warm and generous speech, the Honourable Justice Greg Garde, President of the Tribunal, welcomed the new edition, identifying "who's got my Pizer" as a frequent refrain within the Tribunal.

Guests were also treated to an amusing speech by Christopher Townshend QC who praised the scholarship of the book, but otherwise promised "not to give away the ending".

The evening ended on a touching note, with Jason Pizer QC revealing that the fifth edition would be his last as an author. He likened the experience to finishing a marathon that has been run over 14 years. With that, he pulled out an athletics baton and symbolically passed it on to Emrys Nekvapil, a current co-author, who will assume sole authorship for future editions. Emrys is, himself, an accomplished administrative lawyer. The sentiment around the room was that this much respected and practical book will remain in sound hands over the years to come.

1. Paul Conner; Elizabeth Wentworth and Sr Member Ian Proctor; 2. Emrys Nekvapil; Nyadol Nyuon; Stefan Nekvapil and Sheryl Nekvapil 3. Eliza Bergin and Julia Watson 5.Jason Pizer QC and The Hon Associate Justice Melissa Daly 6. Indigo Casablanca, Linda Casablanca, Jason Pizer QC and Kai Pizer. 7. The Hon Justice Garde

CommBar Cocktail Party

CommBar held its annual cocktail party at the Federal Court of Australia on 8 October 2015. Chief Justice Allsop and Philip Solomon QC made speeches. The function was attended by the Commonwealth Attorney-General Senator the Hon George Brandis QC, many judges, barristers, solicitors and corporate counsel and was adjudged a great success.

1. Kate Jenkins and the Hon Justice Elizabeth Hollingworth 2. Katherine Gobbo and Carey Nichol 3. Andrew Kirby and Kieran Hicki 4. Felicity Bentley, Adam Rollnik, Tamieka Spencer Bruce 5. Rebecca Nelson and Gabrielle Crafti 6. Elizabeth Boros, Lucy Kirwin Philip Corbett QC 7. Louise Jenkins; Premala Thiagarajan and Caroline Kenny QC 8. Chief Justice Allsop, Philip Solomon QC, Wendy Harris QC, Philip Crutchfield QC 9. Elizabeth Brimer and Suresh Senathirajah 10. Phil Soloman QC

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CommBar & Combar London 2016 Conference

PAUL HAYES

The London 2016 International Commercial Law Conference (London 2016 ICLC) is a joint undertaking of the Commercial Bar Association of Victoria (CommBar) and the Commercial Bar Association of England and Wales (Combar) and will be held at the Inner and Middle Temple in London, on Wednesday 29 and Thursday 30 June 2016.

The theme of the London 2016 ICLC is *The Future of International Commercial Dispute Resolution* and is an exciting initiative of the Melbourne and London commercial bars which will bring together commercial dispute resolution lawyers from Australia, the United Kingdom and Asia over the two days of the conference.

Leading members of the judiciary will be speaking at the London 2016 ICLC and so far include Chief Justice Warren AC (Chief Justice of Victoria); Lord Neuberger (President of the Supreme Court of the United Kingdom); Lady Justice Arden and Lord Justice Jackson (England and Wales Court of Appeal); Justices Sifris, Croft and Digby (Supreme Court of Victoria); Justice Jonathan Beach (Federal Court of Australia); The Honourable Dame Geraldine Andrews (High Court of Justice) and The Honourable Susan Crennan AC QC, along with members of CommBar and Combar respectively.

To accompany the eight business sessions which cover a wide range of litigation, arbitration and commercial law topics, an attractive social program has been put together which includes a gala black tie dinner at the Middle Temple Hall and an end-of-conference drinks reception to be held in the Temple Church Courtyard, which will provide ample opportunities for informal conference discussion and networking.

Following its official launch in November, registration for the London 2016 ICLC is now open. The conference registration fee has been set at $1,400 per delegate and will also offer an accompanying person supplement for the social component. Places will be limited, so early bookings are strongly recommended. If you are interested in attending the London 2016 ICLC, visit the CommBar website (www.commbar.com.au) and follow the links to the London 2016 ICLC website, or contact the London 2016 ICLC Conference Organising Committee at: CommbarLondon2016@vicbar.com.au.

A charter for change

Launch of the CommBar Equitable Briefing Initiative.

KATHLEEN FOLEY

On 11 November 2015, the CommBar Equitable Briefing Initiative was launched at the Federal Court of Australia in Melbourne. The launch was the culmination of work over an 18-month period involving a collaboration between CommBar, the Victorian Equal Opportunity and Human Rights Commission and the judiciary.

As part of the initiative, members of the judiciary met with senior members of the profession from private law firms, the government sector and the corporate sector in two private workshops to discuss the underrepresentation of women barristers in commercial litigation, and what might be done to address the inequity. The workshops were facilitated by Kate Jenkins, Victoria's Equal Opportunity and Human Rights Commissioner, and involved judges from the High Court of Australia, the Federal Court of Australia, the Supreme Court of Victoria (including the Court of Appeal) and the County Court of Victoria.

As a result of the workshops, a Charter of Commitment was formulated. Signatories to the Charter have committed, over a three-year period, to six concrete actions aimed at achieving gender equality in commercial briefing. The Charter includes a target to brief in approximately equal proportion to the percentage of women practising in commercial work, both in terms of number of briefs and value of briefs. It includes a commitment to ensure that shortlists for clients include suitably qualified and experienced women barristers. There is also a commitment to collect and report relevant data on briefing to the Commission, every six months.

The founding signatories to the Charter of Commitment are:

- Arnold Bloch Leibler
- Australian Securities & Investments Commission
- Corrs Chambers Westgarth
- Gilbert & Tobin
- K & L Gates
- Lander and Rogers
- Maddocks
- Norton Rose Fulbright
- Slater + Gordon
- Telstra
- Victorian Government Solicitors Office

Speaking at the launch, Chief Justice Warren noted the number of women judges in the various courts, and said that if firms want to do the best by their clients, it would maximise their clients' interests to brief a diverse range of advocates. Justice Maxwell, President of the Court of Appeal, encouraged men in the profession to take action in relation to the issues facing women. He asked men to "push a little bit harder, and … make ourselves a bit unpopular by saying 'as senior counsel or junior litigator, I want that woman'." Describing the Charter as remarkable, he urged every firm in Victoria to get out in front in relation to equitable briefing. Chief Justice Allsop of the Federal Court also spoke at the launch. He spoke of the reasons for the difficulties facing women in the profession, and in particular noted the blokey and sometimes aggressive atmosphere in courtrooms. The Chief Justice said it was the responsibility of everyone to drive this kind of mindset out of the courtroom.

The equitable briefing initiative, and the Charter, is ground-breaking. CommBar is incredibly proud to have been a part of this initiative, and with the support of the Victorian Bar, we look forward to other firms signing up to the Charter in coming months. Particular thanks go to the working group who developed the project and continue to work on it. The members of the working group were Justice Mortimer of the Federal Court, Justice Hollingworth of the Supreme Court, Kate Jenkins, Philip Crutchfield QC, Anna Robertson and Kathleen Foley.

"A bit battered, but there it is"

The continuing story of the Silver Cigarette Case – Part II

LUKE HOWSON

In 1895, one barrister gave another barrister a silver cigarette case. The giver was Walter Colham; the receiver Herbert Bryant. Bryant received it with his name and the year 1895 engraved. On 19 August 2015, Julian Burnside gave it to Julian McMahon. When McMahon got it, there were eight further engravings: Eugene Gorman 1924, John Barry 1935, John Nimmo 1962, Richard E McGarvie 1975, Frank Vincent 1983, Dyson Hore-Lacy 1995, Julian Burnside 2005, Julian McMahon 2015.

When handed to Bryant, it contained a handwritten note: "In recognition of your readiness to uphold the highest traditions of an advocate and to appear without fee for those unable otherwise to afford your services."

With one exception, all who have possessed it have upheld those traditions. The exception will remain nameless: the thief who stole it from Justice Vincent left it unengraved.

Dyson Hore-Lacy SC lost it behind a volume of the VRs. Although not usually a traditionalist, he did recognise the difference between breaking with a tradition and destroying one. Once he found it, he mounted the case within a perspex box of a size not easily consumed by bookcases.

In the thorough feature article "The continuing story of the Silver Cigarette Case" at page 24 of Victorian Bar News 102 (1997 Spring) the story ended with Justice Vincent handing it to Hore-Lacy. This is the story of the two Julians who followed.

They share more than a name. Both have had to battle governments, whether Australian, Singaporean or Indonesian. Both played for high stakes: McMahon's battle was to keep governments from killing his clients; Burnside's was to keep one government from sending his clients back to another who, from time to time, would want to kill them. Both have had to move community opinions, becoming the faces of public (and sometimes political) media campaigns: this is neither familiar – nor, through the eyes of some, appropriate – for a barrister.

Nevertheless, they both succeeded. Politicians hawking fear and selfishness had calloused Australian sympathy. Burnside and McMahon dissolved them; they reminded us of their clients' humanity. The term "illegal immigrant" now elicits (sometimes) polite contempt; it is unthinkable that an Australian Minister, much less a Prime Minister, would now bay for an execution to be carried out, in any country, for any reason.

Julian Burnside AO QC

As a barrister, Burnside is a minimalist. Everything gets distilled down until it is as simple as possible. He has a gentle manner but a sharp mind. He practised almost exclusively in commercial law, acting for such well-known rich people as Rose Porteous and Alan Bond. This is not why Hore-Lacy gave him the cigarette case.

In 2001, the Australian government decided it was in the country's interests to imprison people fleeing persecution "on the deck of a steel ship in the tropical sun".[1] Burnside disagreed. He saw *Tampa* through from first instance to appeal. It permanently changed his career and life.

Since *Tampa*, Burnside has appeared in roughly 30 migration cases, three in the High Court. It is hard to estimate how much

time he has spent, but easy to calculate how much money he has been paid: he has not received a cent.

Fighting for refugees both consumes and invigorates him. He is no longer purely a courtroom advocate, but the chief prosecutor of the larger argument, flying around the country to win over packed audiences. For many years he has housed families of refugees in his own home. About a decade ago he became foster father to a refugee, now at university.

If he is right to describe his work as "14 years of bashing away at it, going backwards," it is hard to imagine where we would be without him. Although he recognises that attracting the enmity of government is "disturbing", he "couldn't give a rat's."

Julian McMahon

As a criminal defence barrister, McMahon is known for his courage. Burnside gave him the cigarette case for death penalty cases, most recently that of Myuran Sukumaran and Andrew Chan. That was a fight he, and others, took up nearly nine years ago. At the end he worked long days, for months on end, pro bono.

Whatever the subject matter of a case, he researches it deeply. That might mean linguistics, the Koran, or Indonesian law and society. He is a long-term strategist. For most criminal defence barristers, this means knowing what you want to get out of your cross-examination. For Julian McMahon, it has meant knowing what you want years from now. In Indonesia, there were many temptations to behave reactively, angrily or manipulatively. It was McMahon who had the long-term vision and deep strategic thinking to say "no" when it mattered.

When he received the cigarette case, McMahon said it was a shame there wasn't one for everyone on the team; it is somewhat surprising he hasn't cut it to pieces. He often said, "All of us are expendable. If one of us gets hit by a bus, another can take over." He said it without irony. Everyone else knew who the exception was.

McMahon did not invite fame, but the team needed a media representative: "All the really smart people on the team were smart enough to make me do it."

A continuing tradition

The tradition of the silver cigarette case is now 120 years old. It is pleasing to observe a ritual that is not the contrivance of a marketing committee, but an accident of the deep-felt admiration of one barrister for another. Justice Vincent speaks lovingly of the tradition:

> *It's one that's grown. It's held for varying periods until the holder thinks there's someone to whom it's passed on. It's a bit battered, but there it is.*

Justice Dixon organised a small informal ceremony for the handing over. The day coincided with her Honour's appointment to the bench. It was well-attended, by all living recipients of the silver cigarette case (and Richard W McGarvie QC, representing his father Justice Richard E McGarvie), and by those on McMahon's team.

1 Mark Dapin, "Julian Burnside: fighting from the bar", *The Sydney Morning Herald*, 8 November 2014.

A dinner to mark the retirement of the Honourable Susan Crennan AC QC

At a dinner on 8 September 2015 to mark the retirement of the Honourable Susan Crennan AC QC, Jeff Gleeson QC delivered the following speech.

Your Excellency, honoured guests, Mensa members who passed the Bar exam and relieved pre-Bar exam admittees.

Of course, it is tempting to start with the stats, but what great story ever started with statistics.

If you want the dates and details, you can look them up, but can I cover the field by saying that Sue, who is otherwise impeccably well mannered, has done everything there is to do in the law, a little earlier than is polite and a lot better than is diplomatic.

I first met Sue when we were both in a case about abalone fishermen.

The judge was Justice David Harper. Sue said to me – perhaps once more than was strictly necessary – that she and David Harper had fought it out for the Melbourne University contracts prize when they were at university. I don't want to suggest that Sue is intellectually competitive, but the flicker of a smile and then the delicious restraint exhibited by Sue when the opportunity arose to correct his Honour on the statement of principle from *Carlill v Carbolic Smoke Ball Co* was something to behold.

I understand that Sue has been appointed to every post for which she has been considered in her long and distinguished career. Perhaps with the one exception when, as I understand it, she was narrowly edged out by Mary MacKillop.

But back to the abalone stoush. In this case Sue acted for the abalone licence holder. I acted for the abalone diver. Our clients had largely common interests and we worked together cooperatively and cohesively, by which I mean to say that I adopted every single syllable that she wrote or said for the entirety of the trial. I tried to walk like her and affect her tone of voice and on day-three of the trial I may have worn mascara.

At the end of day-four of the trial, I was leaving court with my client when a witness for the other side, a salty old fishing type, muttered to my client that he would break his flipping legs. Or words to that effect. I felt a rush of righteous indignation and reported the incident to Sue. I may have used the phrase "barbarians at the gate". I self-censored the content a little, thinking the verbatim just a little too starchy for one so refined. I used the euphemism. Sue, understandably, thought from my account that the witness had himself used the euphemism. She appeared a little perplexed. I tried to explain, again protecting her delicate ears from the true horror of what had been said, but this time I said the word FLIPPING a little louder. I may have used bunny ears. She shrugged and said "Oh flip Jeff, do what you think you need to do." Or words to that effect.

Yes, she even swears beautifully.

Anyway, the judge was kind enough to indulge my sophomoric bout of dobbing and gave the grinning fisherman a mild rebuke and the case resumed. We won. By which I mean to say, Sue's client won and that meant that nothing I did could have possibly resulted in my client losing.

But the abalone case had a postscript. We were all invited by Sue's client to celebrate his victory with a lunch at his sprawling property on the Mornington Peninsula.

In a crass, boorish and thoroughly marvellous display of new money, the abalone man showed us his shiny new helicopter. He offered to take Sue on a quick jaunt around the peninsula in the chopper. He was part Blackhawk pilot and part National Park chopper pilot from Skippy the Kangaroo. Sue played the breathless Clancy to his Jerry. She was unnerved just a little when he quipped before take off: "My grandfather always used to say, 'leave them wanting more' – which is why he lost his job as a pilot."

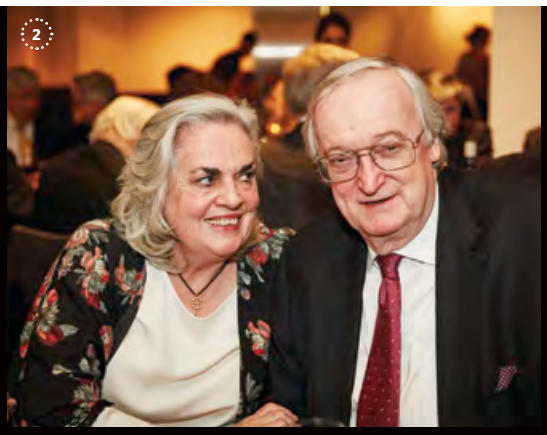
Michael Crennan unsuccessfully urged her not to take the flight. But the lady was not for turning. Michael wandered off to a clump of moonah trees muttering that he would never understand why such a scholar of the law understood so little about reasonable foreseeability.

The chopper landed safely and I decided that this caper of winning in the Supreme Court was better fun than losing car crash cases in the Magistrates' Court, so I set about devising a plan to ingratiate myself with Sue and get some junior work. She seemed keenly interested in small babies, so I decided to have one. That worked well. Sue arrived at our house with flowers and teddy bears and the junior work flowed. So I decided to have two more, both at the same time, just to make it perfectly clear that my enthusiasm for junior briefs had not diminished. There were more visits with flowers, teddy bears, dolls, jigsaw puzzles and more junior briefs. We were up to four children by this stage. My wife said "we have one more baby and then you come up with another plan to get junior work".

Nobody was more relieved than my wife when Sue was appointed to the Federal Court.

As I worked with Sue, I learned that she sprinkled her conversation effortlessly with foreign words. I spent six months thinking that sotto voce was the softly spoken Spanish chap on the 17th floor.

The biggest matter we worked on together was an arbitration called *Varnsdorf v Fletcher Construction*. It was an epic and



1. Jeffery Gleeson QC 2. The Honourable Susan Crennan AC QC and Michael Crennan QC 3. Jennifer Batrouney QC and William Alstergren QC 4. Paul Conner; Anderew Maryniac Qc and Laura Crennan 5. Georgie Coleman; Daniel Crennan; Andrew Di Pasquale and Ben Gauntlett

> “Sue lifted her noble chin ever so slightly and waved regally.”

protracted construction law dispute (now there’s a tautology). It was about turbines that had been installed in six of Victoria’s major hospitals. In the words of counsel for the respondent, John Digby (as he was then, and occasionally still is) these turbines routinely suffered an “uncontained failure”. In the words of anyone else: they blew up.

Anyway, prior to the commencement of the arbitration hearing it was decided that our legal team and the expert witnesses needed to inspect these turbines. They were located at hospitals in Dandenong, Ballarat and Geelong. It was decided that we should do them all in one day and that instead of trailing around in separate cars we would all go in the one big, long car and then counsel and witnesses could confer while in transit. The entourage included Sue, me, her other junior Nick Pane, our instructor, a brace of articled clerks and more nerdy looking engineers than you find in the queue for a *Star Trek* movie.

So it was that we pulled into the car park of the Geelong hospital in the longest stretch limousine seen this side of Surfers Paradise. Curious hospital staff and patients emerged to see who or what might step from this impossibly extended vehicle. Sue didn’t miss a beat. She lifted her noble chin ever so slightly and waved regally.

Pane and I played the dutiful corgis to her Elizabeth.

The site inspection went without incident until at one point the entire shuffling cavalcade of visitors found themselves in the control room. The guide was droning on and Sue’s sense of mischief got the better of her and she took the opportunity to utter the words that are typically heard only in jokes or bad disaster movies: “What does this button do?” Intending only to point – she pressed. The operation shuddered to a halt and we hastened to our long car while the guide had his own uncontained failure. It is not a myth that the operational records tendered later in the arbitration described the stoppage as “Plant stopped by QC”.

Varnsdorf had its moments in the courts too. Our client called on the performance bond and Beaumont QC (who is here tonight), and who acted for the builder, thought the call on the bond was outrageous, contumelious and brazen. Then when he got before Byrne J he really spoke his mind. There were four giants of the law in that matter: Beaumont leading Pam Tate (a name approximating that with which she was christened and which still forms part of her judicial title), Crennan leading me. We had a collective height of 5 ft 11. We won and George self-combusted.

It went on appeal and Archibald replaced Beaumont, immediately restoring a soporific calm to proceedings, doubling the aggregate height of counsel but doing nothing to affect the outcome. The Full Court had some fire power: their Honours Charles, Batt and Callaway. They were ready to re-write the law on

1. David Curtain QC; Andrew Bailey; Matthew Hooper 2. Her Excellency the Honourable Linda Dessau AM and Maree Cummins 3. Stewart Anderson QC and Dr Catherine Button 4. Kathleen Crennan; the Honourable Susan Crennan AC QC; Daniel Crennan; Laura Crennan; Michael Crennan QC 5.Spike Buchanan; Alexandra Folie and Brad Holmes 6. Tiphanie Acreman and Miguel Belmar Salaguy 7. Stephen O'Meara QC; Dr Steven Stern; Dr Richard Scheelings; Norman O'Bryan AM SC; Georgina Costello; Nicholas Pane QC; Andrew Woods and Philip Crennan.

performance bonds. Sue quieted their pens. Her performance that day was spell-binding. In his judgment, when discussing a particularly satisfying piece of contractual symmetry, Callaway uses the wonderful phrase "the key was apt to fit the lock". Sue gave him that line. I have used it in every submission I have drafted since, including at the AFL Tribunal and the Greyhound Racing Board. I say it when ordering at a restaurant and when disciplining my children as they stare into the middle distance.

Just sometimes cases do turn on the perfect phrase. Sue has a gift for crafting that phrase.

In the interests of balance, I have endeavoured to identify any shortcomings in Mrs Crennan's reputation. I have inquired across different courts, states, genders and races. All were effusive in their praise (which was mildly surprising as this is a tendency that is typically – and I'm sure coincidentally – more pronounced when a judge is welcomed than it is when they retire).

Merralls QC, who distributes praise with the frugality of a legal aid funder, commended Sue's fine judgments, particularly in the field of intellectual property, and described her as having oodles of common sense.

Justice Kiefel described Sue as a fellow foodie. She was confident that the two Sues were the first of our High Court justices to discuss their latest culinary triumph and swap recipes (although there she possibly overlooks the cordon bleu power couple Ian "call me Heston" Callinan and Dyson aka "Marco Pierre" Heydon). Justice Kiefel said she noted the longer period of time Sue had had in lucrative private practice as, when preparing for a dinner party, Sue disgorged the entire contents of a fine bottle of Burgundy into the coq au vin she was preparing. It was, Justice Kiefel said, an astonishingly good coq au vin and she was glad she had resisted the urge to wrench the bottle from Sue's hands in the kitchen.

Cooking remains Sue's love. She mixes basil, tamarind, mace, galangal, cardamom, fenugreek seeds, oxtails and chickens. On a weekend she is like the heroine from some Latin "magic realism" novel and, like those worthy writers, Michael realises the importance of preventing her slipping completely into metaphor.

Speaking of Dyson Heydon (as I was before, not during, my aside about magic realism), I emailed him asking for any anecdotes about Sue. But he didn't email back. Perhaps he overlooked it.

If there is the slightest chink in the armour of perfection (and here I tread lightly), it may relate to her driving. One Friday evening Sue was driving out of the underground carpark in Owen Dixon West when she manoeuvred the vehicle in such an ... idiosyncratic ... way that the carpark gate closed behind her and remained closed. Other occupants were unable to remove their cars for the entire weekend. She received numerous letters of complaint from her colleagues, but two letters of thanks. One was from Archibald, who asked her to repeat the task the following weekend as he had three appeals and two trials commencing on the Monday and another weekend in chambers would suit him perfectly. The other was from Middleton (as his Honour

then was, at least before midday), who was glad of the better excuse than usual for not being able to drive his car home on a Friday.

One of the first cases Sue heard after commencing on the High Court in November 2005 was *Harriton v Stevens*. The question before the court was whether losing the opportunity to not exist as a human being could constitute damage recognised at law. This from Justice Crennan in her first single judgment in the High Court:

> *"A comparison between a life with disabilities and non-existence, for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is impossible.*
>
> *There is no present field of human learning or discourse, including philosophy and theology, which would allow a person experiential access to non-existence, whether it is called pre-existence or afterlife."*

Reflect on that when you next draft your submissions, stridently demanding further and better particulars.

Given the content of some of tonight's speech I take the opportunity to remind Sue of her very sound reasoning in the notorious High Court matter of *Monis v The Queen*. It was a case dealing with the meaning of the word "offensive". In a joint judgment, redolent with brilliant logic and radiant common sense, Justices Crennan, Kiefel and Bell held that the word offensive should not be mildly construed. Hear hear.

I had the good fortune to appear before her Honour in the High Court at a couple of special leave applications and one full appeal in Canberra.

In the moments prior to the appeal I was nervous. How nervous was I? What is an after-dinner speech without a ham-fisted simile … I was as nervous as the ABC employee checking twitter feeds on *Q&A*.

My mind turned to earlier High Court judgments. But unhappily none of them had anything to do with the case at hand. I thought of *Harriton v Stevens* and craved non-existence. My drift to the metaphysical continued. I considered the writings of that noted jurist Woody Allen and thought, "What if everything is an illusion and we do not exist? In that case I am definitely paying too much for chambers."

In the moments before commencing my submissions, I became bizarrely distracted by the thought that I was going to commit that sin of advocacy that reveals both misogyny and, worse, ignorance of the judiciary: that I would refer, when citing an authority, to a female judge as "his Honour" or vice versa. In my scrambled state I concluded that the vice versa was the lesser evil and proceeded to refer to every judge I quoted as her Honour.

I had also recently been impressed, when opposed to Joe Santamaria (as he never was and certainly isn't now), by his casual use of the judicial first name: "his Honour Sir Cyril Walsh"; "Master of the Rolls Sir George Jessel".

I launched into my submissions and observed Sue look down with mute horror as I think I may have referred manically to decisions from Her Honour Betty Ormiston and her Honour Dame Gwenda Barwick.

I am eternally grateful for her gentle interjection: "Mr Gleeson, we are familiar with those authorities and with those who authored the judgments." With her marvellous insight into human frailty and understanding that submissions about legislative provisions don't require the use of personal pronouns, she smiled and said "What do you say about s 13 of the Act?"

I wanted to end with a joke about feminism, but her Honour Justice Gordon wouldn't let me.

Instead I will say this: Sue, you are a brilliant lawyer and were a brilliant judge. You are living proof that you can be both those things as well as a kind, compassionate, warm and funny human being. I would like to add forgiving to that list of attributes, but we shall see.

Sue – as you then were, still are and forever will be – we congratulate you on your outstanding judicial career. And welcome back from all of us.

Thriving in an increasingly complex legal world

Victorian Bar and Law Institute of Victoria conference 2015. JUSTIN HOOPER AND MIN GUO

The second Victorian Bar and Law Institute of Victoria joint conference was held at the Melbourne Cricket Ground on 9 October 2015. The conference was a great success and doubtless provided much food for thought for the many barristers, solicitors, in-house counsel and other attendees.

The conference took a similar format to the 2014 conference. This year's theme was 'thriving in an increasingly complex legal world'. There were five separate sessions on diverse topics.

The day began with the President of the Bar Council, Jim Peters QC, and the President of the LIV, Katie Miller, discussing complexities in the modern legal world and the opportunities they will bring, especially as we continue into the 'Asian Century'.

The Federal Attorney-General, Senator the Honourable George Brandis QC, gave the keynote address. The Attorney-General focused on opportunities for practitioners arising from free trade agreements that liberalise the profession in our region. He mentioned India, particularly, as a source of new opportunities.

Chief Justice Warren chaired a panel comprising President Maxwell, Justices Jack Forrest, Hollingworth and Judd and Associate Justice Derham. Their Honours discussed new trends in Supreme Court litigation, including greater case management in civil and criminal proceedings and the benefits of (and need for) judicial mediation.

Next was a lively debate about 'law, duty and morality'. The participants were Justice Jonathan Beach of the Federal Court, Helen Symon QC, Michael Wyles QC, Tony Troiani (King & Wood Mallesons), Melinda Mulroney (IAG), Professor Carolyn Evans (University of Melbourne) and Nicole Ryan-Green (Clayton Utz). Each participant offered a different and insightful perspective into this thorny topic.

The third session, 'litigation as a regulatory tool', was chaired by Norman O'Bryan SC. Chief Justice James Allsop (Federal Court) referred to the challenges associated with pleadings in 'values-based' regulation. Michael Kingston (ASIC) and Wendy Peter (ACCC) each discussed the role of litigation in the regulators' respective enforcement pyramids; Janet Whiting (Gilbert + Tobin) offered her perspectives; Caroline Cox (BHP) discussed deferred prosecution agreements. The panel concluded by discussing the recent *Fair Work v CFMEU* [2015] FCAFC 59 decision relating to parties agreeing penalties.

After lunch, Matt Connock QC led a discussion about electronic trials. Justice Elliott, the Supreme Court's technology judge, noted recent technological developments in the Supreme Court but also spoke of the need for the Court to hasten slowly because technology still has a way to go before it meets the requirements of in-court work. Peter Cash (Norton Rose Fulbright), Alex Wolff (Baker & McKenzie) and Andrew Harpur (Ashurst) discussed the

risks associated with legal process outsourcing, namely conflicts, quality of work and confidentiality. Owain Stone (KordaMentha) gave examples of the quantum leaps in efficiency generated by the latest technology-assisted document review and predictive coding software.

Next, Dr John Marsden (Economist) discussed the opportunities and challenges for Australian legal services engaging Asia. Justice Croft of the Supreme Court said it was vital for corporate counsel to promote Melbourne and Sydney as cost-competitive alternatives to Hong Kong and Singapore for international arbitration. Bronwyn Lincoln (Herbert Smith Freehills) suggested that Australia's competitive edge might be in promoting the strength of its case management processes. Reynah Tang (Johnson Winter & Slattery) and William Lye of counsel spoke of the benefits of employing Asia-literate Australian-based lawyers with established networks and connections to Asia.

The final panel session was a discussion led by Michael O'Bryan QC about consumer and competition law, class actions and contingency fees. The panel discussed proposed reforms recommended by the Harper Competition Policy Review. The audience obtained insights from Justice Middleton of the Federal Court and other expert commentary from litigators practising in the competition area, including David Brewster (Allens), Daniel Marquet (Corrs Chambers Westgarth) and Ben Phi (Slater & Gordon).

The Victorian Attorney-General, the Honourable Martin Pakula MP, closed the conference. He identified and reflected on the trends currently shaping the profession in Victoria.

One is accustomed to blockbuster events at the "G" and the organisers of this conference did not let the spectators down. The presence of the Commonwealth and State attorneys-general to open and close the event speaks volumes for its significance on the legal calendar, and each of the panel sessions demonstrated why that is the case. The organisers, participants and attendees are to be congratulated on an overwhelming success.

BACK ROW: Stuart Wood QC (coach), Richard Clancy, Andrew Denton, Stephen Sharpley QC (GK), Morgan Brown, Rob O'Neill FRONT: Mark Batrouney, James Batrouney, Will Crozier, Hamish Jones, F John Morgan, Ross Gordon ABSENT: Andrew Robinson

Bar v LIV hockey match report

The 32nd annual Barristers v Solicitors hockey match was held on 22 October 2015 at the State Netball Hockey Centre. MORGAN BROWN

The LIV team prepared for the match with a gruelling six-week altitude training camp led by Ric Charlesworth and that guy from The Biggest Loser. In comparison, the Barristers' team relied on a certain sunny optimism and the knowledge that we had managed to rope in some of the more senior members' progeny to play. With a game plan that included "score more goals than they do", the team felt destined to succeed.

Well.

The best one might offer on behalf of the Bar team is that they achieved a moral victory, rather than an actual victory. 'Pantsing', 'hiding', 'complete annihilation' are also phrases, which, perhaps, shouldn't be ruled out. But that's only if you were paying attention to the scoreboard. Trivial details really.

Stephen Sharpley QC was silky smooth in goals (geddit?) assisted by team stalwart Rob O'Neill in defence. Ross Gordon and Andrew Robinson were Dwyer-like in attack, ably supported by John Morgan and the Bar progeny Batrouney x 2 and Jones. As for Andrew Denton, don't be fooled by the glasses and the respectable VicBar profile, the man is a ruthless killing machine; albeit a very polite one.

Big shout out to ex-MUHC legend Stuart Wood QC for coaching, with a style equal parts Sheedy cunning and Cheika understatedness.

Despite the score (which no one can remember) it was, as usual, a hard fought game played in good spirits. Congratulations to the LIV team for the win, but look out, 2016 will be the year of the comeback.

LEFT TO RIGHT: The Hon Justice Ross Robson (Justice of the Victorian Supreme Court), Caroline Kenny QC (CIArb Centenary Chair), The Hon Murray Gleeson AC, Albert Monichino QC (CIArb Australia President), The Hon Stephen Charles QC, The Hon Peter Heerey AM QC (former Federal Court Justice); Professor Doug Jones AO (CIArb Global President 2011)

Evidence in international commercial arbitration: some issues

MURRAY GLEESON*

The UNCITRAL Model Law on International Commercial Arbitration, which is given force in Australia by the *International Arbitration Act 1974* (Cth) does not have much to say on the subject of evidence. Article 18 provides that each party shall be given a full opportunity of presenting his case. Article 19 provides:

> 19 (1) *Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*
>
> *(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the tribunal incudes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

The formula used in the concluding sentence is repeated in the *UNCITRAL Arbitration Rules* and similar language is used in the *IBA Rules on the Taking of Evidence in International Arbitrations* and in the rules of some arbitral institutions. The ICC Rules of Arbitration require the tribunal "to establish the facts of the case by all appropriate means".

There is deliberate lack of specificity upon a topic which, in an Australian commercial court, is the subject of elaborate rules sourced in legislation and common law and which is often the occasion of disputes in the course of conduct of a trial. Legal cultures have different approaches to the role of a fact-finder in a process of dispute resolution. The common law tradition assumes an adversarial process in which the parties present such information as they seek to rely upon, and there are laws of evidence which, in the event of dispute, bind the court as to what information will be received and what must or may be rejected. In the civil law tradition there are, of course, principles and rules that guide the judge in making decisions of fact, but the common law technique does not apply. As between common law jurisdictions themselves, the rules of evidence vary. In an international commercial arbitration where the hearing

takes place in Australia and the law of the arbitration is Australian law, it may be that the arbitrators are from different backgrounds of legal culture. It may also be that, in the case of a contractual dispute, the governing law of the contract is that of some other jurisdiction. It would be unsafe to assume that disputes about evidence will be resolved in the same way as in the Supreme Court of one of the States, or the Federal Court. This affects the preparation as well as the conduct of the hearing.

In the days when many civil cases were tried by jury, judges and advocates were required to have considerable facility in dealing with objections to evidence. Juries could not be expected to retire from the courtroom every time an objection was taken, and arguments had to be put, and rulings given, briefly and promptly. Some judges would not permit any extended argument. The consequence of a serious error in a ruling on admissibility could be a mistrial. Nowadays there are few civil juries, and little harm may be done in a civil case by the reception of evidence which a judge ultimately concludes was inadmissible. Even so, wrongful admission of evidence can cause confusion, expense and delay, and wrongful exclusion of evidence can cause unfairness.

In an arbitration, the most obvious risk attending exclusion of evidence is that a party may be denied an opportunity to present its case. Arbitrators may be unlikely to be prejudiced by evidence they ultimately conclude to have been inadmissible. There is, therefore, some practical pressure, in cases of doubt, towards generosity. Nevertheless, considerations of both fairness and efficiency mean that arbitrators cannot simply let in, over the objection of one party, everything the other party wants the arbitrator to know. If one party is permitted to introduce material that is irrelevant, for example, the other party may be obliged to pursue a false issue.

The Model Law refers to admissibility, relevance and materiality, but they are not three entirely separate concepts. It also refers to weight.

“Wrongful admission of evidence can cause confusion, expense and delay, and wrongful exclusion of evidence can cause unfairness.”

The laws or rules of evidence that apply in court proceedings are of varying kinds. The basic principle in Australian law is that information that is not relevant to an issue at trial is not to be received; information that is relevant to an issue is to be received unless some exclusionary rule requires otherwise. The *Evidence Act 1995* (Cth) defines relevant evidence as evidence that, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings. One example of an exclusionary rule is the rule against hearsay. Another is what is sometimes called the best evidence rule. Some grounds for exclusion may be discretionary rather than mandatory. Evidence may also be excluded on the basis of considerations of legal policy, such as legal professional privilege or confidentiality. Some exclusionary rules relate to form rather than content. Ultimately, the weight to be given to the information that is received is a matter for the judgement of the tribunal of fact.

The *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, which may or may not apply in a particular case depending upon the arbitration agreement, say that the arbitral tribunal shall, at the request of a party or of its own motion, exclude from evidence (or a requirement for production) any document or oral testimony for the reason of lack of sufficient relevance or materiality. The word “sufficient” in the context of relevance is interesting. Relevance is not ordinarily regarded as a matter of degree. Perhaps the word is intended, primarily, to qualify materiality, and perhaps that in turn may raise questions of weight or importance. The Australian law of evidence sometimes calls for a weighing of what is referred to as probative value. It appears to be that a concept akin to probative value is what is in mind. It may be contemplated, for example, that an arbitral tribunal may exclude evidence of slight probative value, or marginal significance, if its reception would give rise to disproportionate cost and delay. That would be consistent with general statements in arbitral rules as to the tribunal’s capacity to control the proceedings. It would also be consistent with the power to exclude material from a requirement for production if that would involve an unreasonable burden. In some cases the consideration of reasonableness would involve an assessment of the potential importance of the material to the outcome of the case, and measuring that against the expense or difficulty associated with production.

The *IBA Rules of Evidence* also identify, as specific grounds of exclusion, legal professional privilege, compelling commercial or technical confidentiality, special political or institutional sensitivity, or compelling considerations of fairness or equality. With the exception of legal professional privilege, the grounds of exclusion referred to in the IBA Rules are discretionary rather than categorical.

The *English Arbitration Act 1996*, in s 34, reflects the traditional approach to evidence in arbitration by providing that it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree on any matter. This power is said to include a power to decide whether to apply strict rules of evidence as to the admissibility, relevance or weight of any material.

The obligation of fairness which governs a tribunal’s exercise of its

> “Sometimes, while reserving their respective legal positions, both parties will engage in an exchange of evidence of doubtful relevance and leave it to the tribunal to decide the question”

powers and discretions is likely, in its practical application, to be fact-specific. When one party objects to certain evidence which is accepted to be relevant, invoking some available ground of exclusion, such as one of the grounds stated in the IBA Rules or some ground based on a requirement of the applicable law, a question may arise as to how and when the objection is to be resolved. Sometimes the parties agree to the reception of the material subject to objection, so that the tribunal can deal with the matter in its award. However, the parties, or one of them, may reasonably require to know, before the evidence is completed, or before closing arguments, how a particular objection has been dealt with. The reasoning in the award may need to show how the evidence has been treated.

Where an objection to evidence is made upon the basis that it is irrelevant, then, possibly depending upon the agreement of the parties, it may be necessary to deal with the objection when it is taken. This, of course, involves a risk. Because there may be little likelihood of practical harm from the reception of immaterial evidence, and because they have a common interest in avoiding failure of the process on technical grounds, parties often agree to postpone argument and decision on such an objection. Sometimes, however, a party will force the issue, perhaps because a decision to receive the evidence will affect the future conduct of its own case. Sometimes, while reserving their respective legal positions, both parties will engage in an exchange of evidence of doubtful relevance and leave it to the tribunal to decide the question, if necessary, in its award.

It should also be noted that, even in court proceedings where strict rules of evidence apply, including criminal trials, it is not always possible to decide the relevance of evidence at the time it is adduced. An assurance by counsel that he or she will make relevance apparent at a future point is often accepted as a basis for provisional acceptance of material.
One of the useful disciplines resulting from the process of criminal or civil trial by jury was that the trial judge, when material was received, was required to think about what was ultimately to be said to the jurors about the use they could make of such material.

An issue as to admissibility of evidence that commonly arises in international commercial arbitrations concerns the use that can be made of pre-contract negotiations for the purpose of contractual interpretation. The law of Australia, which is substantially the same as English law, is materially different from that of civil law jurisdictions.

Although the principle that is applied by Australian law is sometimes expressed as though it were an exclusionary rule, the question is properly regarded as one of relevance. It is to be determined according to the governing law of the contract.

According to Australian law, and the common law generally, the meaning of a written contract is determined objectively. The document means what a reasonable person, having the background knowledge available to the parties in the situation at the time of the contract, would understand it to mean. Here, as in other areas of the law, the reasonable person is invoked in order to de-personalise the issue. Lord Hoffmann pointed out in *Attorney-General of Belize v Belize Telecom Ltd*[1] that the objective meaning of a legal instrument, that is, the meaning which it would convey to a reasonable person, “is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to be the author of the instrument”.

The rationale for this objective approach was explained by Lord Devlin, writing extra-judicially, by reference to the commercial orientation of the common law of contract. He said:

> *If a man minded only about keeping faith, the spirit of the contract would be more important than the letter. But in the service of commerce the letter is in many ways the more significant. This is because in most commercial contracts many more than the original parties are concerned. The contract is embodied in a document which may pass from hand to hand when the goods it represents are sold over and over again to a string of buyers, or when money is borrowed on it, or insurances arranged . . . For the common law, the sanctity of the contract means the sanctity of the written word in the form in which it is ultimately enshrined. Normally, evidence is not admissible of conversations and correspondence leading up to the contract; they cannot be used to amplify or modify the final document. The document must speak for itself. For the common law has its eye fixed as closely on the third man as on the original parties; and the final document is the only thing that can speak to the third man.*[2]

Some of this language is reminiscent of the concept of merger. Where the parties, perhaps after a protracted process of negotiation, express their agreement in a formal written document, their individual purposes merge in the text of the instrument. It is not unusual for this to be reinforced by an express provision that the document contains the entire agreement of the parties. This is not mere boilerplate. It serves a purpose which is normally fundamental to the exercise in which the parties engage when they take the trouble to reduce their agreement to writing. If, as often happens, the agreement is a bankable document, intended to be shown to, or relied upon by, for example,

financiers or other investors, what can those third parties know of the exchanges in the course of drafting the contract? The text is to be construed in the light of the purpose and object of the transaction, but that is not the same thing as the subjective intentions or wishes or expectations of the parties, which are superseded by, and merged in, the contract in its final form.

This is not the same approach as that taken in some other legal systems where, if a common subjective intention can be established, it controls the meaning of the contract; the objective approach is a kind of default option to be adopted when there is insufficient information about the state of mind of the parties. The *United Nations Convention on Contracts for the International Sale of Goods,* the Vienna Sales Convention, has been ratified by Australia. It could well apply to an international commercial arbitration involving a contract governed by Australian law. Article 8 provides:

> *(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.*
>
> *(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.*
>
> *(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*

The contrast with the common law approach is evident. To return to the common law, pre-contract exchanges sometimes contain information about facts and circumstances in the contemplation of the parties, which is relevant, on an objective approach, to the meaning of the contract. This assists what has been called, in a slightly different area, *informed interpretation*. Many commercial contracts would be wholly or partially incomprehensible to a reader unacquainted with aspects of the context, or what advocates, adopting a phrase used by Lord Wilberforce, call the matrix of facts. In order to understand the object and purpose of a transaction, or some aspect of a transaction, it is often necessary to be aware of matters of context or background, and these sometimes appear from pre-contract exchanges between the parties, as well as from other sources.

The kind of pre-contract exchange that sometimes presents an advocate with an irresistible temptation is a communication, in a drafting exercise, about the meaning of some language that is under consideration. These communications rarely occur between the actual parties to the contract, who are typically corporations, or between people who have the capacity to bind a corporate party to a contract. They are far more likely to be between in-house or external lawyers than between the people who will ultimately sign the contract on behalf of the respective parties. What is the legal relevance of information that a lawyer acting for one of the parties in a drafting exercise believed that certain words in a draft bore a certain meaning, or that his or her opposite member shared the same belief? The answer depends on the issues in the case. On a question of construction of the final document, the answer is likely to be that the information is irrelevant. However, if there is an issue as to estoppel, or mistake, or misleading and deceptive conduct, or some other topic that may turn upon subjective intention or knowledge, the information may be relevant.

At the level of contractual interpretation, plainly there is a difference between what a contract means and what somebody involved in the drafting process believes it to mean. Logically, there is also a difference between what a contract means and what everybody involved in the drafting process believes it to mean. The law of mistake assumes that both parties to a contract can share the same erroneous view as to what it provides and, in appropriate circumstances, will order rectification.

There is also a potential issue of agency and contractual capacity. Suppose, after a process of negotiation, a complex written contract is entered into between a bank and an insurance company. Suppose the drafts are prepared by in-house lawyers on both sides. Those lawyers are not themselves parties to the contract, and they almost certainly have no authority to bind their employers contractually. Identifying their subjective beliefs with the intentions of the parties may be a process of doubtful legitimacy.

Furthermore, to return to a point made earlier, if the final product of their labours, executed by the appropriate signatories, is to be used for the purposes of third parties, such as investors, what will those third parties know about what was going on inside the minds of the in-house lawyers?

Because relevance is determined by the nature of the issues that an arbitral tribunal is required to decide, it is not unknown for advocates to raise otherwise unmeritorious issues in order to justify the reception of evidence which it is hoped might have some useful prejudicial effect. Ultimately, however, the tribunal will have to decide for itself what use may properly be made of such evidence, and the answer may be that, consistently with the law governing the interpretation of the contract, there is none.

In aid of what they contend to be an informed interpretation of a contract, parties sometimes attempt to provide

a tribunal with the benefit of opinion evidence concerning the meaning of a contract. This brings me to the subject of expert evidence, which can raise various issues as to admissibility.

Under Australian law, the meaning of a legal instrument, including a commercial contract, is a question of law, not of fact. Facts may be relevant to a decision about the issue, but it is a legal issue.

The distinction between issues of law and of fact was important in trials by jury because it separated the functions of the judge and the jury. Issues of law were for the judge and issues of fact were for the jury. The distinction is also important for other purposes, including potential judicial review of arbitral awards. An error in contractual interpretation is an error of law.

Arbitrators do not receive expert evidence from lawyers about questions of local law. (The content of foreign law is treated as a question of fact, and expert evidence on that subject may be relevant and admissible. That, however, is a different topic and may be put to one side.) In particular, where the governing law of a contract is Australian law, a party could not tender evidence of an expert in Australian law as to his or her opinion of the meaning of the contract. Questions of Australian law are matters for argument, not opinion evidence, although evidence of relevant facts, which could include matters of expert opinion, may have a bearing upon the application of the law. However, although it would never occur to advocates to seek to lead evidence from expert Australian lawyers as to the meaning of a contract, they sometimes attempt to lead such evidence from experts in other fields.

Expert witnesses sometimes give evidence of facts which may be material to an understanding of a commercial contract. For example, a complex building or construction contract is very likely to contain provisions which would mean nothing to someone unacquainted with technical information, and expert evidence of technical matters may be a necessary aid to an informed understanding of the text. On that basis it may be relevant and admissible.

Expert witnesses may also give opinion evidence provided certain conditions are fulfilled. First, the subject matter of the opinion must be relevant. Secondly, the topic must be one which is properly the subject of specialised knowledge. Thirdly, the witness must be suitably qualified in that topic. Fourthly, the evidence must be given in a form that makes it possible to distinguish between the witness's expert opinion, and the assumed facts upon which that opinion is based.

Both litigation and arbitration can present notorious difficulties in confining expert testimony within its proper bounds. Experts are often, understandably, reluctant to submit to what they regard as inappropriate constraints imposed upon them by lawyers when they express their opinions. Furthermore, the manner in which such testimony is taken, perhaps involving pre-hearing conferences between the experts on opposing sides, simultaneous evidence at the hearing, and even questioning of each other by the witnesses, may promote a degree of informality and may encourage experts to express themselves in a manner that takes them beyond their strict roles. When the expert evidence concerns matters bearing upon the interpretation of a contract, some expert engineers or architects or financiers will have no hesitation in telling the tribunal what they think the contract means, even though an expert lawyer could not do the same thing. It may be difficult for the lawyers to persuade them that the meaning of a contract is a matter of law and that a tribunal does not receive evidence on questions of law even from a lawyer, much less from someone whose expertise lies elsewhere.

Historically, many arbitrations were conducted in a way that made them hard to distinguish from expert determinations. Arbitrators were often chosen for their expertise in fields other than law. Fifty years ago, the most common arbitrations in which Sydney barristers appeared arose out of building or construction disputes and the arbitrators were likely to be engineers, architects or builders. It is still not unusual to see an arbitration clause that specifies that an arbitrator must have a certain kind of commercial background.

The first arbitration in which I appeared as a very junior barrister concerned a major construction project. The parties were a government agency and the local subsidiary of a foreign corporation. The sole arbitrator was a distinguished retired engineer, who was very experienced in the administration of contracts such as that in question. I am sure he was chosen by the parties because they both thought he was likely to deal with questions about the meaning of that kind of contract at least as satisfactorily as any lawyer. They were probably right.

I referred earlier to the concept of informed interpretation. When applied to the meaning of a commercial contract, the distinction between fact and law can be somewhat artificial, especially where the subject matter of the contract is one involving specialist knowledge and expertise. Moreover, there are areas of expertise, of which accountancy is an obvious example, where the dividing line between a legal opinion and another kind of opinion is blurred.

The main thing is that the tribunal and counsel, and, so far as possible, the witnesses understand and accept that it is for the tribunal to decide all issues of law, including the meaning of the contract. The problem of experts going beyond their field of expertise and telling a court or tribunal how they would decide the case is not limited to commercial arbitrations, and is probably ineradicable. Cases can develop into battles of the experts, and, to put it bluntly, some witnesses may be enthusiastic and skilful advocates. This is a well-known risk at criminal trials before juries, but it can also affect proceedings before judges and arbitrators. Modern rules

commonly require experts to conform to obligations of impartiality but it is impossible to legislate against human nature. If experts are required to state fully their reasons for their opinions, to identify the boundaries of their expertise, and to separate their opinions from assumed facts, it will usually become apparent when they are going beyond their proper role. Normally, it is to be hoped that, if this is not apparent from their evidence-in-chief, it will be brought out in cross-examination, or at least in argument.

An aspect of contractual interpretation that straddles the evidentiary issues I have been discussing is the legal aspiration to understand the commercial rationale of a contract, and, so far as it can be done consistently with the paramount importance of the text, to prefer a commercially sensible interpretation to one that produces results that are not commercially sensible. This is not an invitation to courts or tribunals to tell people how they should run their businesses. However, it is a consideration that may legitimately inform the choice of arbitrators and the content of evidence. The commercial rationale of a contract, or part of a contract, may be far from self-evident. Often the competing views are left at the level of assertion by counsel in argument, but this may be insufficient.

A danger is that a tribunal may feel that its understanding of such an issue is informed, not by evidence or argument, but by some prior or superior level of knowledge or experience that is never revealed to the parties. Information which a tribunal thinks it knows may be incomplete, or wrong. A tribunal may have a view about what is a sensible or rational outcome, which is ill-conceived and has never been put to the parties to be tested. The obligation to give a fair hearing requires that parties have an opportunity to know and to debate, if they wish, considerations not covered by the evidence which a tribunal regards as influential. Most decision-makers will readily inform counsel if they

“Modern rules commonly require experts to conform to obligations of impartiality but it is impossible to legislate against human nature.”

feel the need of further information. The risk is that a decision-maker may regard himself or herself as informed from sources outside the evidence in the case, and counsel may not have an opportunity to deal with this, and perhaps correct a misapprehension or add some countervailing consideration. A much-talking arbitrator may be, like the judicial counterpart, an ill-tuned cymbal, but the silent ones can also be a danger.

The principal focus of this paper has been relevance. In court proceedings, what are commonly described as rules of evidence, or exclusionary rules, apply by hypothesis to information that is relevant. If it were not relevant, there would be no occasion to consider any other matter. Relevant evidence may be excluded on grounds of form or substance. Considerations of form may include hearsay, the best evidence rules, and matters concerning documentary material. Consideration of substance may include legal professional privilege, confidentiality, or statements made without prejudice. Subject to the rules governing the particular arbitration, these rules of evidence are unlikely to be of direct application in an international commercial arbitration. It should be kept in mind, however, that they are not arbitrary; they are based on judicial experience and principles of rationality and fairness. Rationality and fairness ought to guide arbitral proceedings as well, and it is therefore not unlikely that, where there is an objection to evidence, the same practical outcome may result, even though the rubric under which a ruling is made may be different.

An example of such an outcome may be hearsay evidence. Whether information is hearsay may depend upon the purpose for which a party seeks to use it. If a witness says that she knocked on a door, and the door was opened by a woman who, when asked where her husband was, said he was overseas, then if such evidence is tendered to prove as a fact that the husband was not in Melbourne, it is hearsay. If, however, the witness is a process server and the evidence is tendered to prove that an enquiry was made, rather than to prove the truth of the answer, then it is direct evidence.

Often, hearsay is unreliable and it may be unfair to receive it because it cannot be tested. In some circumstances, however, it is reliable and it is not unfair to receive it. Business records provide a well-known example, and in most Australian jurisdictions are covered by legislation permitting them to be used in court proceedings, subject to certain conditions.

In some other legal systems, there is no rule of admissibility that excludes hearsay, but the same practical result arises from insistence on something like a best evidence requirement: if primary evidence of a fact is available, secondary evidence will not do.

In an arbitration, considerations of rationality and fairness may dictate an approach not much different from that which is taken in a court.

Arbitral tribunals, like courts, are reluctant to allow the outcome of a civil dispute to be dictated by technicalities of evidence. At the same time, questions of cost efficiency and, of course, fairness may require appropriate control over the material adduced by the parties and, in particular, attention to relevance.

* The Hon Murray Gleeson AC is a former Chief Justice of the High Court of Australia, a Companion of ClArb and Patron of ClArb Australia. This paper was delivered at an event on 23 June 2015 hosted by the Victorian Chapter of the Chartered Institute of Arbitrators (Australia) to celebrate the centenary of the Chartered Institute of Arbitrators

1. [2009] UK PC 10 at [16].
2. Patrick Devlin, The Enforcement of Morals, (1965) at 44.

Champion of change

An interview with the President of the Court of Appeal.

GEORGINA COSTELLO AND NATALIE HICKEY

At his welcome speech in July 2005, new Court of Appeal President Chris Maxwell nominated his "first and most urgent project" to be reducing delays in the hearing of appeals. Ten years on, the dramatic reduction in delays in the Court of Appeal, particularly in criminal appeals, shows the President to be a man of action and a man of his word. The median time to finalise criminal appeals has effectively halved, from 12.5 months in 2010/2011 to 6.2 months in 2015.

At university, Justice Maxwell was an outstanding scholar and athlete. While studying at the University of Melbourne, he played A-grade amateur football for the Uni Blues and received a full blue. As a 1975 Rhodes Scholar, he completed a B. Phil at Oxford. He qualified for the English Bar and practised briefly there before returning to Melbourne in 1979. After 18 months as a solicitor, he became a legal adviser and speech writer for Gareth Evans, who was then the shadow Attorney-General for the Commonwealth. When Labor won the 1983 election, Gareth Evans was appointed Attorney-General. Justice Maxwell worked as his chief-of-staff in 1983–84, before signing the Bar Roll in November 1984. Justice Maxwell read with Kenneth Hayne and Ross Robson, and took silk in 1998.

Whilst at the Bar, Justice Maxwell was President of Liberty Victoria for two years and appeared with Julian Burnside QC in the Tampa refugee case. His practice at the Bar was mainly in tax and public law. He is married to Sarah Stephen, who works as a senior public servant and is the daughter of Sir Ninian Stephen. The couple have three adult children, of whom one is a practising lawyer and one is a law student. Their third child is studying history at university.

The appellate division of the Supreme Court of Victoria came into existence in 1995. Justice Maxwell has been the President of the Court of Appeal for its second decade. The Court of Appeal is widely respected under the President's leadership. Barristers who have regularly appeared before his Honour have told *Victorian Bar News* that while his Honour can be firm in exchanges with barristers, particularly senior counsel, he is a merciful judge with a deep and abiding sense of fairness.

In November 2015, Bar News interviewed Justice Maxwell in his chambers at the Court, to hear from the man himself about his time at the Court so far. His Honour praised the contributions of those who brought the idea of a Victorian Court of Appeal into existence. According to the President, a seminal article in Bar News by Stephen Charles in 1987 propelled the concept of a Court of Appeal in the first place. Stephen Charles later became a leading member of the Court of Appeal.[1]

His Honour describes the contribution to the Court of his predecessor, founding President John Winneke, as "outstanding", saying that "nothing done in the second decade would have been possible without the firm foundations laid in the first decade". Justice Maxwell observes that:

> *the Court in its first 10 years had to start from scratch, convince doubters that a Court of Appeal was a good idea, develop a whole range of new procedures, and work really hard with fewer resources than the Court now enjoys.*

His Honour describes a "real sense of continuity" with the work of the early appellate judges and feels that he is "the custodian of responsibility for a division of the Supreme Court."

Justice Maxwell received a Companion of the Order of Australia in the Queen's Birthday honours in June 2015 for "eminent service to the law and to the judiciary, particularly administrative reform of the appeals process, through contributions to legal education and professional development, and as a leading supporter of human rights and civil liberties". Justice Maxwell sees himself as "fortunate to have arrived at the Court at a time when, under Chief Justice Warren's leadership, the winds of change were beginning to blow".

He describes Chief Justice Warren's leadership of the Supreme Court as "inspirational" and his collaboration with her as of fundamental importance. He says that the two of them have had a shared vision about the Court and "any changes in the Court of Appeal under my presidency, we have done together".

In his role as leader of the Court of Appeal, the President has taken on the tasks of administering the Court as a first among equals, together with an illustrious collection of leading jurists. As he told the recent Bar/LIV conference:

> *One of the pleasures of sitting in the Court of Appeal is being able to work with colleagues of exceptional ability in a collaborative endeavour to get to the right answer. The fruits of this collaborative engagement are evident in the large number of joint judgments which the Court publishes.*

When appointed, he was a newcomer to an established court and jurisdiction. Having come from the Bar as a sole practitioner, he had little management experience, although his time as chief-of-staff for Gareth Evans

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provided some grounding. So it was a process of trial and error and Justice Maxwell concedes that he "made a few mistakes in the first four to five years as President". He says that "learning about management, leadership and public administration in close collaboration with the Chief Justice has been enormously interesting."

As a former administrative lawyer, the President has an acute understanding of the separation of powers. But he emphasises the importance of a good relationship with government, and the need to continue to refine those relationships. Good relationships between government and courts help drive law reform, he says. "Effective communication with government means that good ideas for improving the system will be supported, provided always that a proper financial case is made." He speaks of the Supreme Court's role as the judicial arm of government, using language likely to be understood by holders of the public purse:

> *We recognise we need to be accountable to the public. We are functioning to a high standard. We need to maintain the confidence of the community.*

Justice Maxwell's vision of the Court of Appeal does not involve men and women sitting in an ivory tower. Many Court of Appeal judges have previously been trial judges. They love the role and want to revisit the trial division every so often. Justice Maxwell, in collaboration with Chief Justice Warren, has facilitated this. Through exchanges of judges between the Trial Division and Court of Appeal, judges can easily experience what each role requires.

In 2007, Justice Nettle — now at 'Mount Olympus' as Justice Maxwell describes Nettle's recent appointment to the High Court — was the first Court of Appeal judge to spend time in the Trial Division, followed in later years by Justices Eames, Ashley, Bongiorno, Weinberg, Osborn and Priest. Maxwell himself presided over a murder trial in 2014 and again in 2015. Equally, trial judges now sit as additional Court of Appeal judges in rotation. These exchanges ensure that the work of the Court of Appeal is continually informed by experience at trial level and — equally — that trial judges have the opportunity to see cases from the appellate perspective.

The task of a judge, whether at appellate level or otherwise, requires writing judgments. Justice Maxwell found that the experience of writing judgments was a natural extension of writing opinions. While he "loved judgment writing from the beginning", he hopes he has "got better at it." He says "in 2006 I thought I was a good writer", but during a two day live-in course at the Judicial College on judgment-writing, he discovered some things he could do better. Paired with Melbourne writer, Ginger Briggs, he submitted a version of a judgment for Briggs to review (which he thought was one of his better written judgments). Briggs duly scrutinised the text and told him: "The first six to eight paragraphs are unintelligible to a non-lawyer. Go and re-write it". It took a bit of redrafting to implement her suggestions but Maxwell told Bar News (with a twinkle in his eye) that, by the end of the course, the judgment "read like an airport novel".

> "Justice Maxwell's vision of the Court of Appeal does not involve men and women sitting in an ivory tower."

The Judicial College course emphasised the need for judgments to be accessible to a variety of audiences. To that end, all his judgments begin with what has been decided. He believes that a summary of issues and conclusions is a help for the reader and a good discipline for the writer.

Justice Maxwell enjoys being part of a Court which values coherence, courtesy and collaboration. At the Bar/LIV conference, he urged lawyers appearing in the Court of Appeal to see their work as a "collaborative endeavour" with the Court. They should not limit their arguments to the merits of a particular ground of appeal but "articulate, as clearly as you can, the informing legal principle and how the result for which you contend is consistent with principle and will maintain doctrinal coherence."[2]

Relationships with other courts are very important, Justice Maxwell says. He believes that appeal courts should have:

> *an unconditional commitment to courtesy to trial judges. Our job is to identify error and explain why. To be overturned is an uncomfortable experience. After all, it involves a public declaration that colleagues consider you to be wrong. There is no place for gratuitous criticism.*

His Honour believes it is important to engage directly with County Court judges about significant appellate decisions. Offering guidance to trial judges can make their task easier and the Court has provided seminars for County Court judges.

Reflecting on his now decade in the role, his Honour said he has been "surprised by joy", recalling CS Lewis' memoir of the same name.[3] Justice Maxwell's reference reveals his keen interest in reading. In 2000, he joined a book club that continues to meet monthly. They take a task-oriented approach: "we focus on the text".

So too, he adopted a methodical approach in 2005. When he started, he concentrated on learning how to write judgments and run an efficient court. The scope of the job has, however, been far broader than he expected. He has found his work at the Court to be "an enormously interesting and satisfying experience". He attributes this not just to the work, but to the meaningful associations accompanying it: teamwork with the Chief Justice and other judges on the Court; the challenges of leadership; and the

ability to promote changes which can be of benefit to litigants, to judges, and to the profession as a whole."

What were the most significant changes in the Court of Appeal over his decade as President? He nominated three. The first was solving the problems of delays in appeal hearings.

Second, better resourcing and better management of the Court of Appeal's workload, meaning "judges no longer have to work at unsafe levels". The Court now has specialist criminal and civil lawyers in the registry who undertake the work necessary to prepare appeals for hearing. Oral hearing times, especially in civil appeals, have been substantially reduced. Appeal mediation has been introduced. In 2006, Justice Maxwell reduced the number of sitting days per week from four to three, in order to give judges some breathing space: time to write and think, and enable them to go home at more reasonable hours.

His impression is that there is a strong, collegiate atmosphere at the Court of Appeal and that judges enjoy working together and feel on top of their workload. In a sign that the Court is a good place to work, a series of judges — including Justices Ashley, Neave, Bongiorno, Hansen and Mandie — have worked until retirement age and then offered to come back as reserve judges.

Third, Justice Maxwell notes that the criminal and civil appeal reforms implemented since 2011 have been "built on sustained collaboration between the Court, the legal profession and statutory agencies such as the Office of Public Prosecution and Victoria Legal Aid." Through these collaborative processes, the Court has driven important law reform: the *Jury Directions Acts 2013* and *2015*; the introduction of interlocutory appeals in criminal matters (*Criminal Procedure Act 2009* s 295*)*; and new procedures for presenting expert forensic evidence in criminal trials (Practice Note 2 of 2014).

Justice Maxwell believes:

> *As lawyers we have a responsibility to keep the system under critical review. How could it be fairer, better, cheaper? What does the community expect of us? This generation of judges has assumed the responsibility to engage critically with the system, both in substantive law and procedure. But this is to be distinguished from policy. These are machinery issues. In our engagement with government, we stay on the proper side of the line, drawing on our experience to help simplify law and procedure.*

Conceding that sentencing is an area where policy and machinery can overlap, Justice Maxwell says:

> *Sentencing is contestable and controversial. It is important. It is difficult to get right. Sentencing judges and this Court on appeal, take the task very seriously.*

The President points out that, as was intended, the criminal appeal reforms have led to a greater presence of trial counsel arguing criminal appeals. He has noticed more junior barristers, and more female counsel, appearing in his Court in recent years. The Court has sought to make new counsel welcome in the Court of Appeal and hopes they find work in the Court stimulating, challenging and rewarding. He says:

> *We want the appeal argued by the person who knows what they are talking about. Often that is well-prepared trial counsel. It need not be a silk. The Court is less concerned with how the trial might have been conducted than with what actually took place.*

Justice Maxwell imparts his passion for the law to Juris Doctor students at Melbourne University, where he team-teaches a course called "Philosophical Foundations of Law". Its aim is to help students realise that "legal rules reflect underlying assumptions, conceptions and choices based on moral and political values." He has also facilitated a clinical studies program at the Court of Appeal for law students from Victoria University and RMIT University, in which the judges of the Court actively participate.

Something of a media furore followed the public revelation that the President and Chief Justice Warren had refused invitations to speak at four clubs because of their male-only rule. In June 2015 his Honour told the Herald Sun: "It is remarkable that, for the first time in Victorian history, the Chief Justice has not been offered membership of any of these clubs — simply because she is a woman."[4] Justice Maxwell is part of a program called Male Champions of Change, established in April this year by Victoria's Commissioner for Equal Opportunity, Kate Jenkins. He views gender equality as a matter of fundamental human rights:

> *This is not about men marching in and solving the problem. It is about men saying to women, 'This is not just your battle; this is our battle'. Flexibility is an increasingly important issue for everyone in the workplace, it is not a 'women's problem'.*

Justice Maxwell is a practising egalitarian and a strong champion for change. He has brought to the Court intellectual brilliance, a collaborative approach to management, a series of remarkable reforms, and receptiveness to junior and trial counsel appearing there for the first time. *Victorian Bar News* congratulates his Honour on his outstanding decade of service and wishes him well in the years to come.

1. Stephen Charles QC, "A Court of Appeal for Victoria?" (1987) 62 *Victorian Bar News* 16.
2. Justice Maxwell, Speech to the joint Victorian Bar/ Law Institute of Victoria Conference, MCG, 9 October 2015.
3. C.S. Lewis, *Surprised by Joy: The Shape of My Early Life* (1955).
4. Rita Panahi, "Melbourne's elite gentlemen's clubs must dispense with discrimination and join 21st century" *Herald Sun* 24 July 2015.

Michael Rozenes AO, QC

GEORGE HAMPEL

My cousin Michael is a wonderful person and a great friend. Sadly he became ill early this year and had to resign his position as the Chief Judge of the County Court of Victoria. Happily he is making a remarkable recovery and we all wish him well.

It is with much pleasure that I write his story.

Michael's family migrated from a small industrial town in Poland called Sosnowiec. I mention the name because of its significance in the history of the success of migrant families and lawyers in Australia whose origins were there. They are Michael's and my family and those of former NSW Chief Justice Jim Spiegelman, Federal Court Justice Annabelle Bennett and former Dean of Arts at Melbourne University and of Law at Monash, Arie Frieberg.

My mother was a Rozenes, so her brother Heniek, his wife Manka, and young Michael moved in with us. Michael was two years old and I was 15. There were six of us in two bedrooms and a small lounge. This was luxury compared to what we had all experienced during the war.

Those early memories were of having to babysit and look after Michael while the adults were working and doing their best to adjust to their new life. I recall pushing Michael around in his stroller, reading and speaking to him in English, which his parents could not do.

When he was a little older, I remember his fascination with my cadet uniform and my .303 rifle, which I was allowed to bring home. Once I jammed my finger in the bolt while showing him how it worked. He laughed and went about telling everyone. This, I think, was the beginning of the perpetuated misconception that I was accident-prone.

Laughter was to become such an important part of Michael's character. He inherited this trait from his father who, together with my parents and our mutual grandfather, were my favourite adults.

The Rozenes family moved to their own place, everyone was working hard, adjusting to our new world, trying to improve our English and fit into our new cultural environment. I kept in touch with Michael and the rest of our small family.

Eventually we got him into Brighton Grammar where he completed his schooling. Michael was a competent but not great student. He was a good sprinter and was coached by the famous Franz Stampfel, who used to say to him, "Michael, you are fast but you run like a monkey". While he was still at school, I suggested he might come to court with me. On a perfect spring day we drove to Shepparton in my MG with the roof down. By 11am, after a short plea with a reasonable fee and result, we were on our way home. After a stop at a local winery and a light lunch we were back in town by mid-afternoon. He even had a little drive on the way.

"Cousin George," he said, "this is the life; I think I want to be a barrister". The plea brief was from Frank Galbally's office so later, when Michael was finishing law in his early days at Monash Law School, I helped to arrange work experience for him with "Mr Frank", who got to like Michael and later gave him articles.

During his articles Frank asked Michael to be his junior in a murder trial. "Do not spend much time on the law", Frank told him, "the judge knows the law, it's the facts that count". The night before the trial Michael came over to borrow my wig and gown. We talked about the case and thought there was a legal submission to be made so he told Frank about it just before they got into court. Before the jury was empaneled and without warning, Frank got up. "Your Honour we have been working on a matter of law", he said, "and my junior will make the no case submission". In his state of terror Michael got up and tore my gown which was a little long for him, on the leg of the chair. The submission failed, the case was won on the facts but Frank told me Michael had done a great job.

At the firm, Michael met Bob Galbally, who became his supporter and lifelong friend. I told Bob I was writing this and asked him for his strongest impressions of Michael. "He is unique", said Bob, who had briefed him for many years at the Bar and had appeared before him in court. "I have never met anyone who does not like and admire him. He has it all: intellect, sense of humour, a warm personality and a strong sense of loyalty".

The Bar was his next and obvious step and he read with me. We had lots of fun but he was also an enthusiastic hard worker. We became close friends and did many cases together. He was a challenging junior, ready to question and express opinions. At the end of his reading period Michael was briefed as John Walker's junior in the then-famous Magna Alloys secret commissions committal and trial. Also at the bar table were Vic Belson QC, with me as his junior, Phil Cummins and Norman O'Bryan QC, leading Gordon Spence for the Crown. What a learning experience that was for young Michael. Later he became my junior in some of the civil litigation which followed the Magna trial.

On one occasion Michael, our close friend Tom Danos

Grandmother Rozenes, Michael's father Heniek Rozenes, Herman Hampel (Michael's uncle and the father of George Hampel), Grandfather Nathan Rozenes, Michael (aged about 3), Michael's mother Manka Rozenes, and Felicja Hampel (Michael's aunt and the mother of George Hampel).

> "His strength was in analysis, brevity and precision."

and I were on our way to do a case in Sydney. As we flew over the border I handed my folders and books to them and explained that in NSW silks did not carry, juniors did. On the way back Michael handed it all back. "We are home now, you can carry your own bloody books," he said.

Early in Michael's career Frank Galbally, who recognised his ability, offered him a murder brief. Michael spoke to a number of us and decided that he was not ready to take on such a trial. In my opinion he was well ahead of others who took on such cases but he felt he would be out of his depth. He was concerned that he would not be briefed again by Frank Galbally but his decision was respected and even admired. He became one of the firm's favourite counsel and my favourite junior.

There was one incident in a murder trial for which he did not forgive me. I gave him all the prosecution experts to cross examine and he did very well. But, as it tuned out, it was better that we did not have to rely on the expert evidence because we had a good alibi. In my final address I had to dump him. I told the jury that it was important for my junior to test the experts and the jurors nodded in agreement that he had done a great job. But the expert evidence was no longer relevant to their decision. Michael was cross but the alibi was the way to go.

Michael's special interest even as a young barrister was in the tactics of a trial. His strength was in analysis, brevity and precision. The principle that less is more characterised his work as a barrister and later as a judge. Michael was modest about his own success and disliked barristers and judges who were verbose and pompous.

When Michael took silk in 1986 I gave him my red bag. Monash law school was proud of its first three silks, Weinberg (Mark), Finkelstein (Fink) and Michael.

From a strong junior practice involving such major trials as the great bookie robbery, Michael developed a strong silk's practice in many fraud trials, Full Court and High Court appeals. His special

> “Michael was a strong leader of the criminal bar and was elected chairman of the Criminal Bar Association with his friend Roy Punshon as his vice chairman.”

skills evolved mainly in white collar crime and ultimately, despite his work having been predominantly for the defence, he was appointed Commonwealth Director of Public Prosecutions.

He did two terms as the DPP and loved the job. Two qualities stood out: administration and leadership. He also enjoyed developing policy and arguing appeals for the Commonwealth. The High Court loved him.

One Judge said to me, when he found out about my relationship with Michael, “We love having Michael in court. Within a few minutes he makes us relax and interested. And he gets right to the point”.

Michael’s forte as an advocate was his charm. But behind the disarming charming manner there was his thorough preparation and performance skill. He did not yell at witnesses and got what he needed for his argument. He knew how dangerous it was to try to ague his case through the witnesses. He knew the important points in argument, went for them and abandoned useless points and waffle.

Despite his busy practice he recognised the importance of a full and balanced life. He and Barbara brought up two children, Ben and Georgia both of whom became lawyers. Barbara, who is my first cousin on my father’s side, also became involved with the law in her long career with Court Network and in organising most of the County Court social functions. She is also a member of the Sentencing Advisory Council. Michael’s time with the family was important. They traveled, skied and grew olives on their property on the Peninsula. Michael played tennis, kept fit in the gym, joined a book club and was a regular at MSO concerts.

Collingwood was his team, Heathcote shiraz and Italian food were his favourites.

When Michael finished his second term as DPP he decided to come back to the Bar. “Who will brief me, they have forgotten I exist,” he worried. I assured him that would not be so and within a week he was flat out.

Michael was briefed by the Commonwealth to prosecute in the famous Compass Airlines fraud trial. One Friday, when I had a call-over of criminal cases, I listed that trial for mention only. He was leading Felicity and they told the many barristers in court that it was my birthday. Because of Michael’s seniority the Compass case was called first. “May it please Your Honour,” he announced with a grin, “this morning we have a present, I mean a presentment, for you which we wish to give, I mean to file on behalf of the Commonwealth.” There was much laughter and a jolly mood in court for the rest of the day.

Michael was a strong leader of the criminal bar and was elected chairman of the Criminal Bar Association with his friend Roy Punshon as his vice chairman.

After a couple of attempts Rob Hulls finally persuaded Michael to accept the appointment as Chief Judge of the County Court. And what a great appointment that turned out to be. His experience as the DPP stood him in good stead as a leader, administrator and policy maker.

Michael was critical of some judges of a past era who perceived themselves to be too important to deal with the Department of Justice. “They have the money and we need it to run the court” was his approach, and he developed a good relationship with the department to the Court’s benefit.

He had no time for people who saw themselves as being self important and looked down on others. Michael’s warm and

The photograph was taken by George Hampel, then aged about 16.

engaging personality enabled him to develop good relationships with his judges. While he expected hard work and commitment, pastoral care and the wellbeing of the judges were important characteristics of his leadership. He led from the front by working hard, running the Court and sitting as much as time permitted. Michael was a great communicator and the care he had for his judges is reflected in his establishment of the ‘Well Being’ program to ensure that the hard work of the judges on the County Court was matched by a balanced and happy life. He encouraged judges to engage in judicial education and attend conferences. Michael was an innovator and was made an Officer of the Order of Australia for his contribution to the law.

Michael had just over a year to serve before he had to retire when he became ill and had to resign. There was an electric moment when Michael unexpectedly walked into court moments before Peter Kidd’s welcome ceremony. There was a hushed silence. It was the silence of respect.

We all love Michael and wish him a good and happy recovery. Amongst his first words when he could speak again were “I have not lost my sense of humour”.

Law and the marriage equality debate

MATT COLLINS

On 18 October 1973, former Liberal Prime Minister John Gorton moved a motion in the House of Representatives that 'homosexual acts between consenting adults in private should not be subject to the criminal law.' The motion was seconded by Labor Attorney-General in the Whitlam government, Moss Cass. Dr Cass no doubt accurately reflected the times when he said:[1]

> *Australia does not look favourably upon homosexuals. In our predominantly conformist, overtly masculine society, focused on the 2-child nuclear family mushrooming in suburban wastelands, the homosexual is an unwelcome outsider. Unmasculine by popular consensus, unmarried, non-fathering, anti-suburban, homosexuals are Australia's most obvious minority group. In this country the homosexual is not merely shunned as a moral leper or despised as a pervert, he is actively discriminated against. Our criminal penalties are severe, and our social sanctions savage. At a particularly barbaric level 'poofter-bashing' is virtually a recognised national civilian team sport, while police harassment in some States is accepted as an office perk by the police and as an occupational hazard by the victim.*

Sir John Cramer, a Liberal member of the House of Representatives, opposing the motion, worried that the decriminalisation of homosexuality would 'open the door to the recognition of homosexuality as a normal way of life', when it was instead 'a distorted way of life' and an 'obnoxious habit'. He said that decriminalisation 'would bring down on Australia a further advance of the permissive society that is so destroying the fabric of the moral rectitude of the Australian people.'

Gorton's motion, which had no legal effect, passed by 64 votes to 40. In the years following the motion, however, legislation removing provisions of the criminal law that penalised homosexual sexual activity was progressively passed in each State and Territory, beginning in South Australia in 1975 and concluding in Tasmania in 1997.[2]

In the course of his second reading speech for the Crimes (Sexual Offences) Bill 1980, the Hon. Haddon Storey QC, a former member of our Bar who was then Attorney-General in the Hamer Liberal government, outlined the Victorian Government's rationale for abolishing the offences of buggery and gross indecency between males:

> *It does not represent any approval or condonation of these activities. The Government does not accept sexual relationships between persons of the same sex as an acceptable alternative lifestyle. Nothing in the Bill is intended to give any support to such attitudes. The Government simply believes that they are not matters for the criminal law.*[3]

Another Liberal, Murray Hamilton MLC, spoke against decriminalisation, on the ground that it was no more than the obsession of 'a small number of homosexuals'. He warned that decriminalisation was 'the greatest single step towards self-destruction than can be taken by any civilized society', before presciently resorting to the slippery slope:

> *The Government will come under increasing pressure to approve a homosexual marriage and to grant homosexual couples living together the right to adopt children.*[4]

Hamilton was not alone. The then member for Doncaster, Morris Williams MLA, citing the pronouncements of various religious leaders, thought that 'homosexual practice is a debasement of human nature to the detriment of society' and that decriminalisation was 'but the first step towards public acceptance and legal recognition of the alternative life styles and sexual living-together arrangements that could undermine society as we know it.'[5] The National Party opposed decriminalisation as a bloc, on the basis that homosexual activity was 'repugnant', 'completely unnatural' and 'not carried out in the animal world'.[6]

The Victorian decriminalisation legislation

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

ultimately passed easily by a vote of 72 to 7 in the Legislative Assembly, and without a division in the Legislative Council. The new law came into effect on 1 March 1981.

From a modern perspective, the anxiety of the State Parliament, more than two generations ago, to condemn homosexuality, even as it passed legislation to decriminalise it, appears laughingly begrudging. The arguments harnessed against the reform would be just as laughable, but for the harm they no doubt did to generations of gay men and lesbians, who reportedly continue to attempt suicide at up to 14 times the rate of their heterosexual peers.[7] Yet clear echoes of that mentality resound today.

In October 1986, the future Pope Benedict XVI, in his then capacity as Prefect for the Congregation for the Doctrine of the Faith, said that homosexuality was 'a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination must be seen as an objective disorder.'[8] He returned to the theme in July 2003, declaring that 'There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law.' He went on:

> *When legislation in favour of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic law-maker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favour of a law so harmful to the common good is gravely immoral.*[9]

In March 2010, then federal opposition leader, Tony Abbott, said he felt 'a bit threatened'[10] by gay people, elaborating that 'there is no doubt that it challenges, if you like, orthodox notions of the right order of things'.[11] Throughout his tenure as Prime Minister, Mr Abbott was consistent in his opposition to the legalisation of marriage as between two persons of the same sex—marriage equality—arguing from tradition, however, rather than from scripture or religious obligation.

In March 2011, then Prime Minister Julia Gillard opposed marriage equality 'because of the way our society is and how we got here'. She said, 'If I was in a different walk of life, if I'd continued in the law and was partner of a law firm now, I would express the same view, that I think for our culture, for our heritage, the *Marriage Act* and marriage being between a man and a woman has a special status.'[12] Ms Gillard's subsequent public pronouncements on marriage equality suggest, to put it kindly, that the veracity of that statement is to be doubted. In September 2014, after leaving parliament, she suggested that her opposition to marriage equality was borne not of respect for the special status of marriage, but of 'an old-fashioned, feminist view' that there should be some way, other than marriage, 'of solemnising relationships and recognising them as of worth and status.'[13] In August 2015, she said she had changed her view, and would now vote in favour of marriage equality.

Marriage equality has been achieved in a significant number of countries, including all of the other major English-speaking democracies.[14] Opinion polls consistently show strong and growing support in Australia. A Fairfax/Ipsos poll taken in November 2010, for example, put support at 57 per cent and opposition at 37 per cent, with 6 per cent undecided. By June 2015, the same poll showed 68 per cent in favour and 25 per cent opposed, with 7 per cent undecided. Those results show a percentage of the population in favour of marriage equality that is similar to or greater than reported public polls in a number of comparable countries where reform has already occurred.[15]

Country	Date of legalisation	Poll	Total in favour	Total against
Canada	2003	Forum Research, June 2015	70%	22%
France	2013	Ifop, November 2014	68%	32%
New Zealand	2013	NZ Herald, March 2013	50%	48%
England	2014	BBC, March 2014	68%	26%
Ireland[1]	2015	Ipsos, May 2015	58%	25%
United States	2015	Washington Post/ABC News, April 2015	61%	35%
Australia	—	Fairfax/ Ipsos, June 2015	68%	25%

The prohibition on same sex marriage in Australia

Same sex marriage was legalised in most Canadian provinces and territories in 2003.[16] In 2004, two Melbourne-based same sex couples, who had married in Canada, applied to the Family Court with the assistance of members of our Bar for recognition of the validity of their marriages under section 88D of the *Marriage Act 1961* (Cth), which at the time contained no definition of the term 'marriage'. Those applications were the impetus for the introduction into the Federal Parliament by the then Attorney-General, Philip Ruddock of the Marriage Amendment Bill 2004. The Bill relied for its constitutional validity upon section 51(xxi) of the Commonwealth Constitution, which gives the Federal Parliament the power to make laws with respect to 'marriage', a term not defined in the Constitution.

The Bill contained only two substantive provisions: a definition of 'marriage' as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life', a definition derived from the speech of Lord Penzance in *Hyde v Hyde* [17], and the introduction of a new section 88EA, providing that a union solemnised in a foreign country between a man and another man, or

a woman and another woman, 'must not be recognised as a marriage in Australia.' Mr Ruddock explained the urgency of the Bill in his second reading speech on 24 June 2004[18]:

> *The bill is necessary because there is significant community concern about the possible erosion of the institution of marriage. The parliament has an opportunity to act quickly to allay these concerns. The government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution. It is vital to the stability of our society and provides the best environment for the raising of children. The government has decided to take steps to reinforce the basis of this fundamental institution.*

Ruddock went on to deliver a lecture to same sex couples, such as those whose applications were then pending before the Family Court:

> *As a result of the amendments contained in this bill, same-sex couples will understand that, if they go overseas to marry, their marriage, even if valid in the country in which it was solemnised, will not be recognised as valid in Australia.*

The Bill passed with bipartisan support and without a division in the House of Representatives. In the Senate, the Bill was unsuccessfully opposed by the Australian Democrats and the Greens.

Marriage equality legislation before the Federal Parliament

In the 42nd parliament (Rudd/Gillard), the Greens introduced a marriage equality bill in the Senate. It was rejected by a vote of 45 to 5 on 25 February 2010.

In the 43rd parliament (Gillard/Rudd), Greens MP Adam Bandt, and independent MP Andrew Wilkie, presented a marriage equality bill to the House of Representatives on 13 February 2012. It lapsed without a vote. On 19 September 2012, the House of Representatives rejected a marriage equality bill introduced by Labor backbencher, Stephen Jones, by a vote of 98 to 42. The following day, the Senate rejected a corresponding bill introduced by four Labor Senators by a vote of 41 to 26. In February 2013, the Greens reintroduced marriage equality legislation in the Senate. It lapsed without a vote upon the dissolution of parliament in August 2013.

In the present parliament (Abbott/Turnbull), the Greens introduced marriage equality legislation in the Senate in December 2013. In November 2014, Liberal Democratic Party Senator David Leyonhjelm introduced a further private member's bill. In June 2015, opposition leader Bill Shorten introduced a bill in the House of Representatives. In August 2015, Warren Entsch introduced a cross-party bill in the House of Representatives. There has not been, nor is there likely to be, a vote on any of those bills in the current parliament.

Marriage equality in the ACT

On 22 October 2013, the parliament of the Australian Capital Territory passed the *Marriage Equality (Same Sex) Act 2013*. The Act passed by nine votes to eight, supported by the Labor government and the Greens, but opposed by the Liberals. It defined 'marriage', for the purposes of the Act, to mean 'the union of two people of the same sex to the exclusion of all others, voluntarily entered into for life', but not including 'a marriage within the meaning of the *Marriage Act 1961*'. The definition was thus an attempt to avoid any overlap—and therefore inconsistency—with the definition of marriage inserted into the *Marriage Act 1961* (Cth) in 2004.

The ACT Act commenced operation on 7 November 2013, but did not permit marriage ceremonies to be performed until 7 December 2013. The Commonwealth challenged the validity of the Act in the High Court. Argument occurred on 3 December 2013, and judgment was delivered on 12 December 2013.[19] Between 7 and 12 December 2013, at least 15 same sex couples took advantage of the legislation by marrying under the Act.

In *Commonwealth v ACT*, the High Court unanimously ruled that the ACT Act was incapable of operating concurrently with the *Marriage Act 1961* (Cth) and hence of no effect. The court said that the Commonwealth Act 'makes the provisions which it does about marriage as a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage,' [20] and necessarily contains 'the implicit negative proposition that the kind of marriage provided for by the Act is the *only* kind of marriage that may be formed or recognised in Australia.' [21] It followed that the ACT Act was inoperative by reason of section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), which provides relevantly, in substance, that a provision of an ACT law has no effect to the extent that it is incapable of operating concurrently with Commonwealth legislation in force in the ACT.

In the course of its judgment, the High Court traced the history of common law decisions touching upon the meaning of the term 'marriage' in English and Australian jurisprudence, before concluding that it was to be understood in section 51(xxi) of the Constitution as referring to 'a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.'[22] The court said that section 51(xxi) grants to the Commonwealth parliament the power 'to make a national law with respect to same sex marriage.' [23]

Current debate

Of the four marriage equality bills presently before the Federal Parliament, only the cross-party Marriage Legislation Amendment

Bill 2015, introduced by Liberal MP Warren Entsch on 17 August 2015, stood any chance of coming to a vote. That hope was, however, dashed on 11 August 2015 when, after a six-hour debate in a joint party room meeting of members of the Liberal and National parties, members voted by about 60 to 30 against their being given a free vote in respect of the bill. The effect of that vote was effectively to bind all Ministers to oppose marriage equality legislation in the current parliament, and to require backbenchers to cross the floor, and risk damage to their career prospects, in order to vote in favour of marriage equality. The then Prime Minister, Tony Abbott announced later that evening that government members would have a free vote in subsequent parliaments, and that the 'disposition' of the party room was that the question of marriage equality should be put to the people by way of either referendum or plebiscite some time after the next election.

The position of the Federal Labor Opposition is that its members have a conscience vote in respect of marriage equality in the current and next parliaments, but will be bound to vote in favour of it in the following parliament. The Opposition Leader has opposed putting the issue to the people by way of a referendum or plebiscite, and undertaken to introduce marriage equality legislation within the first 100 days of the election of a Labor government.

Following the decision of the Coalition joint party room not to allow its members a free vote on marriage equality in the current parliament, debate turned to the form in which the question of marriage equality might be put to the people. On 12 August 2015, Scott Morrison, who opposes marriage equality, suggested a full constitutional referendum. The Attorney-General, George Brandis, who reportedly favours marriage equality, said a referendum was 'entirely unnecessary', having regard to the High Court's clear statement in *Commonwealth v ACT* that the marriage power in the Constitution empowered the federal parliament to legislate for same sex marriage.

Senator Brandis was, with respect, plainly correct. The only rational subject matter for a referendum, in light of the High Court's interpretation of section 51(xxi), would be a proposal to amend parliament's existing legislative power, presumably by defining 'marriage' as an exclusively heterosexual institution. Unsurprisingly, no-one has suggested such a referendum.

Since becoming Prime Minister, Malcolm Turnbull has adhered to the position of his predecessor, promising a national plebiscite on marriage equality after the next election. The Prime Minister reportedly gave a commitment to maintain the government's extant position to the National Party in the course of negotiating a fresh Coalition agreement in the days after he replaced Tony Abbott. [24]

There have been only three national plebiscites in the history of our federation. None provides a useful precedent for marriage equality.

Plebiscites were held in October 1916 and December 1917—almost a century ago, and decades before the ready availability of reliable, national opinion polling—to test the public's attitude towards then prime minister Billy Hughes' plan to introduce conscription during World War I. The 1916 plebiscite failed overall (by 48.4 per cent to 51.6 per cent) and in New South Wales, Queensland and South Australia. A majority of voters was in favour, however, in Victoria, Western Australia, Tasmania and the Territories. A further plebiscite, in respect of a more limited conscription proposal, was held in 1917. It also failed (46.2 per cent to 53.8 per cent), with a majority of voters in favour only in Western Australia, Tasmania and the Territories.

The third plebiscite occurred in 1977, when voters were asked whether they wished to retain God Save the Queen as Australia's national anthem, or to replace it for non-regal and vice-regal occasions with Advance Australia Fair, Waltzing Matilda or Song of Australia. 43.3 per cent of voters favoured Advance Australia Fair, with 28.3 per cent preferring Waltzing Matilda, 18.8 per cent God Save the Queen and 9.6 per cent Song of Australia. Advance Australia Fair was the most popular choice in all jurisdictions other than South Australia, which preferred Song of Australia, and the ACT, which favoured Waltzing Matilda. Advance Australia Fair became the national anthem, by proclamation of the Governor-General, on 19 April 1984. Important though it was, the 1977 plebiscite involved no question of civil rights or conscience.

The Australian Electoral Commission estimates that a plebiscite on the question of marriage equality would cost $158 million if held separately from a federal election, and $44 million if held at the same time as the next election[25]. Those figures do not include any allowance for public funding of the competing campaigns. If public funding were to be extended to the competing campaigns, it is difficult to see how that could be done equitably. Equal funding of the competing cases would imply that the competing arguments were of roughly equal merit: a proposition that does not withstand scrutiny when applied to any civil rights question. Consider, for example, the 1967 referendum concerning removal of the words 'other than the aboriginal people in each State' from section 51(xxxvi) of the Constitution. If the yes and no cases had been publicly funded to an equal extent, the no case, which ultimately attracted only 9.23 per cent of the vote, would have been artificially boosted.

The proposal for a plebiscite on the question of marriage equality is an abrogation of the responsibility of the parliament to legislate for the peace, welfare and good government of the Commonwealth. Australian

parliaments routinely legislate in respect of matters of civil rights or conscience without resort to plebiscites or referenda. Conscription was introduced in 1942 for the remainder of World War II, and compulsory national service operated during the Korean and Vietnam Wars, without the matter being expressly put to the people. Women were given the vote, the death penalty was abolished, homosexuality decriminalised, no-fault divorce introduced, the White Australia Policy reversed, and detention centres for asylum seekers set up in the Pacific Islands—all without the mandate of a plebiscite or referendum.

The legalisation of marriage as between couples of the same sex has become one of the totemic civil rights struggles of our times.

The arguments most commonly advanced against marriage equality boil down to assertions that extending marriage to same sex couples will weaken the institution, that marriage is about children, and that legalisation of same sex marriage will lead to calls for the legalisation of polygamy (or, as Senator Cory Bernardi asserted in 2012, bestiality)[26], arguments from scripture or religious belief, and resort to tradition.

Marriage equality has been legislated in all of the countries we routinely compare ourselves with, and many others besides. In the Netherlands, where same sex marriage was legalised in 2001 and the most reliable statistics are available, same sex marriages account for about two per cent of total marriages. The divorce rate for same sex married couples is about one-half that of heterosexual couples.

The sanctity of traditional marriage has been challenged by a host of phenomena, from no-fault divorce, to drunken ceremonies in chapels in Las Vegas, to reality television programs in which heterosexual couples 'marry at first sight'. Around one-third of marriages already end in divorce.

It cannot sensibly be contended that a foundation stone of our civilisation will crumble if something in the order of two per cent of future marriages are celebrated by same sex couples. Nor can blame for debasement of the institution of marriage be laid at the feet of those now conscientiously fighting for entry.

The attempted linkage of marriage with a natural law argument that men and women are complementary, that reproduction depends on men and women, and that children need a mother and father, is also fundamentally flawed. [27] The institution of marriage is not denied to infertile heterosexuals, men who have had vasectomies, or women who have passed menopause; and marriage is not a requirement for child-bearing or rearing. Moreover, to deny entry to the institution to same sex couples who have children is to risk harm to those children and to signify that their families are somehow worth less than the families of opposite sex couples.

The slippery-slope argument is equally without merit. There is no apparent demand in Australia for the legalisation of polygamy. Even if there were, the arguments for and against the legalisation of polygamy are different from those that pertain to same sex marriage, not the least because of the typically unequal, and usually patriarchal, nature of polyamorous relationships.

Arguments from scripture or religious belief, while of course entitled to a degree of respect, ought not to carry weight in relation to the definition of a civil institution in a secular society. Religious objections can readily be accommodated by provisions of the kind set out in clauses 8 and 10 the Marriage Legislation Amendment Bill 2015 introduced to the parliament by Warren Entsch on 17 August 2015, which provide that ministers for religion and chaplains may refuse to solemnise marriages for any reason, including incompatibility with their understanding of the doctrines, tenets, beliefs or teachings of their denomination, church or faith group.

Some opponents of marriage equality raise the spectre of bakers and florists being fined for refusing against their conscience to provide cakes and floral arrangements for same sex marriage ceremonies, as has occurred in the United States. That argument, too, is specious. The *Equal Opportunity Act 2010* (Vic) already prohibits direct and indirect discrimination on the grounds of, among other attributes, lawful sexual activity and marital status. Equivalent provisions have long operated throughout Australia, without any apparent impact upon cake and flower vendors. There do not appear to have been any calls to exempt bakers and florists from their current obligations under anti-discrimination legislation.

Finally, the plea from tradition ignores the evolution of the institution of marriage over time. In the absence of demonstrably negative consequences, tradition is not an argument against reform, any more than it was an argument against the introduction of universal suffrage; or the abolition of slavery, prohibitions against miscegenation or the White Australia policy.

To my ear, the arguments against marriage equality, individually and collectively, are so lacking in persuasive merit that they must be a proxy for something else, the obvious candidate being a lack of acceptance of homosexuality as a normal and natural predisposition. It is hard not to conclude that the arguments are smokescreens for a lingering distaste for and intolerance of homosexuality, with a direct lineage to those that were trotted out at the time of the decriminalisation debate more than two generations ago. They are a refusal to accept that couples of the same sex should be treated as the equals of opposite sex couples.

Opponents of marriage equality have recently taken to accusing proponents who deconstruct their

> "The legalisation of marriage as between couples of the same sex has become one of the totemic civil rights struggles of our times."

arguments in this way of being intolerant or bigoted. Lyle Shelton, for example, a spokesperson for the Australian Christian Lobby, told a Senate committee on 11 September 2015 that 'many' on his side of the debate felt fear and intimidation. Having regard to the long history I have sketched above of religious and political leaders branding gay men and lesbians as intrinsically morally evil, objectively disordered, a challenge to the orthodox notion of the right order of things, and repugnant and completely unnatural, there is, to my mind, a breathtaking hypocrisy in that charge. In any event, it is not intolerant or bigoted to call out hollow arguments and hypocrisy.

It is true that, for most purposes, Australian law no longer distinguishes between married and de facto couples, including between married couples and same sex de facto couples. Same sex partner visas have been available in Australia since 1991. The Family Court has had jurisdiction since late 2008 with respect to property and parenting disputes involving same sex de facto partners. Assisted reproduction laws were amended in Victoria in 2008, making IVF treatment available to female same sex couples. At the time of writing, the Victorian Government had introduced laws that will, if passed, permit the joint adoption of children by same sex couples in this State.[28]

In some areas, however, the law continues to discriminate. Contrary to principles of comity, same sex couples who are legally married by the laws of countries in which marriage equality has been achieved are stripped of their relationship status in Australia. Married couples do not have to prove the standing of their relationships in order to access legal entitlements and protections available to couples: an obstacle that cannot be overcome by same sex couples, whatever the duration or bond of their relationship, and that can have devastating consequences.[29] The absence of a right to marry can also affect Australian same sex couples in countries where legal rights attach to the fact of marriage, as opposed to the existence of a bona fide relationship. In some countries, for example, hospital visitation rights are denied to de facto partners. Marriage equality is, in these ways, not a matter of mere symbolism, but a matter of substantive rights.

On 29 June 2015, the President of the Victorian Bar issued a media release, observing that the Bar's strong commitment to diversity in the profession and to equality and protection under the law free from discrimination provided support for legislative amendment of the definition of 'marriage' in the *Marriage Act 1961* to provide for marriage between same sex couples. That media release was wholly consistent with the proud tradition of our Bar in furthering equality before the law and access to justice.[30]

1. Hansard, House of Representatives, 18 October 1973.
2. The Tasmanian provisions criminalising homosexual activity were overridden by the *Human Rights (Sexual Conduct) Act 1994* (Cth), and repealed by the *Criminal Code Amendment Act 1997* (Tas).
3. Hansard, Legislative Council, 18 November 1980, 2874. There were no corresponding offences for sexual acts between females.
4. Hansard, Legislative Council, 3 December 1980, 4119.
5. Hansard, Legislative Assembly, 11 December 1980, 5025–6.
6. Hansard, Legislative Assembly, 11 December 1980, 5080.
7. Suicide Prevention Australia, *Suicide and self-harm among gay, lesbian, bisexual and transgender communities* (2009).
8. Congregation for the Doctrine of the Faith, *On the pastoral care of homosexual persons*, 1 October 1986.
9. Congregation for the Doctrine of the Faith, *Considerations regarding proposals to give legal recognition to unions between homosexual persons* (31 July 2003).
10. *60 Minutes* Interview with Liz Hayes, 7 March 2010.
11. *Lateline* Interview with Leigh Sales, 8 March 2010.
12. Transcript of Interview, *Australian Agenda*, 20 March 2011.
13. Interview with Ray Martin, Channel Nine, 23 September 2014.
14. Argentina, Belgium, Brazil, Canada, France, Great Britain, Greenland, Iceland, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United States, Uruguay.
15. These figures are from an Ipsos poll. In the non-compulsory national referendum held on 22 May 2015, the vote in favour of marriage equality attracted 62 per cent of the vote.
16. Federal legislation came into force in 2005: *Civil Marriage Act 2005*.
17. (1866) LR 1 P&D 130, 133.
18. Hansard, House of Representatives, 24 June 2004, 31459.
19. *Commonwealth v ACT* (2013) 250 CLR 441.
20. *Commonwealth v ACT* (2013) 250 CLR 441, [57].
21. *Commonwealth v ACT* (2013) 250 CLR 441, [59].
22. *Commonwealth v ACT* (2013) 250 CLR 441, [33].
23. *Commonwealth v ACT* (2013) 250 CLR 441, [56].
24. Gabrielle Chan, 'Nationals negotiate tougher Coalition agreement with Malcolm Turnbull', *The Guardian*, 15 September 2015.
25. Lisa Cox, 'Separate poll on same-sex marriage would cost $158 million: Australian Electoral Commission', *Sydney Morning Herald*, 8 September 2015.
26. Hansard, Senate, 18 September 2012, 7245.
27. See, for example, the Amicus brief filed by Ryan Anderson in *Obergefell v Hodges* 576 US (2015).
28. Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic).
29. See, for example, Tracey Spicer, 'It is an urban myth that same-sex couples and married heterosexuals have equal legal rights', *The Age*, 8 November 2015.
30. I was a member of Bar Council at the time the media statement was debated and released.

Spreading the word (in hard copy)

Commbar launches *Insolvent Investments* JULIE DODDS-STREETON

On 26 August 2015 the Commercial Bar Association and LexisNexis consummated an innovative and commendable partnership by launching a new book: *Insolvent Investments*. The work is edited by Stewart Maiden and contains 13 chapters authored or co-authored by members of the Victorian Bar. At the launch an address was given by the Hon Julie Dodds-Streeton QC, a member of the Bar and a former Judge of the Court of Appeal of the Supreme Court of Victoria and of the Federal Court of Australia. The President of Commbar, Philip Crutchfield QC, introduced Ms Dodds-Streeton, and Stewart Maiden delivered a reply.

The book grew out of a series of 12 seminars presented by Commbar in 2014. The seminars showcased the significant skills and experience of the insolvency section of the Victorian Bar. Each was delivered by at least one barrister, with most being delivered by a junior together with a judge, a silk, or one or more senior solicitors. The seminars were popular, with several attracting around 100 members of the Bar and invited solicitors.

The papers presented at the seminars became the chapters of the book, and a foreword was kindly provided by the Hon Chief Justice Marilyn Warren AC. The book has been well received, with a copy recently tabled at the Senate Economics References Committee's Inquiry into Forestry Managed Investment Schemes.

Bar News congratulates the Commercial Bar Association on the publication of this timely work that collects in one place much of the hard work and learning generated out of recent cases in Victoria.

Ms Dodds-Streeton QC has kindly agreed to *Bar News* reprinting the following remarks she made on launching the book:

I feel privileged to speak at this launch of *Insolvent Investments*, the work of a formidable collective of, I think, exclusively Victorian lawyers, who are (as the book reveals) directly experienced specialists in a challenging, emergent area of legal practice.

This is an impressive and authoritative work on a subject which may be uncomfortably topical as global share markets are shuddering.

Insolvency law can appear arcane, but it is one of the most interesting and intellectually challenging areas of commercial law. It is, in many ways, real lawyers' law, with a high threshold to mastery, requiring a grasp of fundamental concepts of property, trusts, corporations, security and contract and the capacity to analyse their interplay, both mutually, and with an often complex array of statutory provisions, including (but not limited to) the specific insolvency regime of the *Corporations Act*.

When insolvency intervenes, hitherto nameless and unexamined rights and interests must be identified, because, as the editor Stewart Maiden remarks, "under stress, the characteristics of the investment are thrown into relief."

The late Professor Harold Ford, an eminent pioneer in the scholarship of insolvency law, made a similar point when he told me long ago "insolvency is the acid test of rights." Experience has brought home to me the aptness of that comment – the crucible of a deficiency of assets to satisfy competing claims compels the precise identification of those claims to decide how they will fare.

At least, when a business or investment vehicle assumes a familiar form (such as a corporation) a comprehensive and well-established insolvency regime will apply to govern that competition in accordance with the evolved principles and goals of modern insolvency administration.

Those abiding principles include:

1. limited liability for investors in the enterprise;
2. a rational and principled order of payment for different classes of competing claims;
3. the equitable treatment of claims of a like nature;
4. quarantining the beneficially-owned property of third parties from distribution to the insolvent's creditors; but
5. expanding the assets for distribution and achieving equity between creditors by the avoidance of certain classes of antecedent transactions, such as preferences, gifts, fraudulent dispositions etc, made by the insolvent.

Also of increasing importance (and concomitant to limited liability) is the goal of a commercial fresh start, unencumbered by the liabilities that sank the enterprise – supported by cogent alternatives to winding up, most effectively, the voluntary administration procedure in Part 5.3A of the *Corporations Act*.

In contrast to a corporation, the managed investment scheme, which is the organising concept of this book, is far more elusive and protean, although it frequently includes a corporation, or indeed, groups of companies.

The managed investment scheme does not constitute a separate legal entity in its own right and can assume an unlimited variety of forms, frequently incorporating trusts, companies and contractual and security arrangements. Its form, and participation in the enterprise, are often

tax-driven. Despite the complexity and prevalence of such schemes, the statutory provisions for their winding-up are sketchy; and, upon the unviability (or, in effect, the insolvency) of the scheme, are inadequate. There is no equivalent to the comprehensive and detailed insolvency regime for companies, although this may apply to components of the scheme.

As Stewart Maiden and Carl Möller point out, despite the proliferation of schemes and the vast sums invested, in that context the usual legal problems of financial collapse are magnified.

The genesis of the present book was, I think, the aftermath of the global financial crisis, in which many significant schemes became unviable, spawning much complex and highly publicised litigation, which exposed both the deficiencies and potentials of the current provisions.

Many of the authors were closely involved in significant cases, which gives these studies their great sense of immediacy, authority and firm practical grasp. While there is detailed exposition of particular litigation, it is not mere recounting of war stories; but instead incorporates the conceptual and scholarly perspective of authors whose genuine interest in the development of the law is manifest.

> “Many of the authors were closely involved in significant cases, which gives these studies their great sense of immediacy, authority and firm practical grasp.”

It was particularly impressive that despite the large number of authors involved in writing 13 chapters, there is virtually no repetition and the collection of individual studies reads harmoniously.

What does the book contain?

Carl Möller (chapter 2) discusses the prevalence and magnitude of managed investment schemes and the flexible variety of legal forms they can assume. He also describes a disappointing and unexplained failure to enact amendments recommended to give certainty and clarity to the winding up of unviable schemes. Carl emphasises that the want of a specific comprehensive statutory regime has generated great uncertainty, multiple costly court applications, poor outcomes for investors and impediments to fruitful restructure.

Within that rather disheartening context, Ian Martindale QC and Robert Strong (chapter 3) offer a thorough and thoughtful analysis of the duties of directors of the responsible entity, including the impact of Corporations Act duties interacting with the statutory duties of the responsible entity itself, and the scheme constitution.

In chapter 4, Michael Sloan, Sarah Kimpton and Mark Costello provide guidance on advising directors and managers in the face of financial crisis, including on the important issue of insolvent trading, which is not, of course, limited to managed investment schemes. The authors advocate more emphasis on developing a business rescue culture. They suggest that this is not assisted by an unduly low threshold for liability, which deters trading out and leads to loss of value in the enterprise.

Consistently with that theme, Leon Zwier, Justin Vaatstra and Oren Bigos (chapter 5) explore the potential for restructuring unviable schemes, with particular reference to some of the prominent agribusiness scheme collapses. While the advantages of preserving businesses and avoiding fire sales are obvious, the authors identify many impediments to restructure exposed by the de facto winding up of recent collapsed schemes, many of which defied attempts at salvage. In the authors’ view, principal obstacles and targets for urgent reform are ss 601FS and FT which (by mandating the lumbering of any replacement responsible entity with the fatal liabilities of the old one) ensure that a replacement will not be forthcoming in insolvency. They propose amendments, including capping liabilities of the incoming responsible entity to the scheme property and introducing an equivalent of s 447A; and discuss introducing a voluntary administration procedure for schemes and a separate legal entity to own scheme property, enter contracts and sue and be sued.

The proposition that ss 601FS and 601FT should be amended is disputed by Paul Anastassiou QC and Kathleen Foley (chapter 6) who, in their chapter, comprehensively analyse the Gunns litigation and the role of the courts in restructuring. They argue that while prevalent broad constructions of s 601FS do impede the restructure of distressed schemes, a curial power to modify the provision may effectively promote, unjustifiably, a paramountcy of investors’ interests.

Justice Michael Sifris and Penny Neskovcin, in chapter 7, confront the unique practical problems stemming from the absence of a separate legal entity despite the present proliferation and scale of managed investment schemes. They propound a hypothetical “perfect storm”, around which they offer informed guidance on practical issues.

Tony Troiani, Samantha Kinsey and Stewart Maiden in chapter 8 on “Competition for Assets”, point out that the choice of investment vehicle remains central to how different competing claims will fare on insolvency. They consider what amounts to scheme property; and tracing, pooling and substantive consolidation within corporate groups.

> “The authors include a valuable discussion of reliance, causation and security for costs in scheme class actions.”

Garry Bigmore QC and Simon Rubenstein (chapter 9) discuss scheme investor rights in the insolvency context. They argue that scheme investor protection in the insolvency context is inadequate, exposing investors to disproportionate loss and risk. As the authors point out, although members' liability is typically formally limited to their investment, in practice, due to the tax-driven nature of such investment, they frequently have significant borrowings for which they remain liable, albeit their scheme interests are illiquid, locked-in and valueless.

Norman O'Bryan AM SC and Catherine Pierce (chapter 10) examine whether, and to what extent, class actions might ameliorate the plight of investors in managed investment schemes, with particular reference to the *Timbercorp* and *Willmott Forests* litigation. The authors include a valuable discussion of reliance, causation and security for costs in scheme class actions.

Philip Crutchfield QC and Christina Klemis (chapter 11) offer a pithy discussion of the important question of disclaimer of property on insolvency, including leases which are not onerous and of which the insolvent company is the lessor, rather than the tenant. Their study is centred on the *Willmott* litigation, and exposes potential anomalies and outstanding questions related to an outcome which was in some ways unexpected, given the matters Keane J raised in his dissenting judgment in that case.

Jonathan Moore QC's contribution (chapter 12) is a lucid and helpful exposition of directions applications, the rights of third parties, and particularly the current status of *GB Nathan* considerations. This, of course, has general implications not limited to managed investment schemes.

Nick Anson and Catherine Button's contribution (chapter 13) explores the topic of practitioner remuneration, costs and security in various insolvency contexts, identifying statutory lacuna in relation to schemes. The authors also usefully discuss generally relevant rights of indemnity and the *Universal Distributing* and *Berkeley Applegate* principles.

This is an excellent, authoritative and relevant work, which, while it offers a very broad range of informed analysis on interesting insolvency topics by diverse commentators from the coalface, also retains a central coherence and a scholarly perspective.

It is a great achievement by the Victorian insolvency lawyers involved.

A new Kidd in town

An interview with the Chief Judge of the County Court VBN

If you were looking to cast a gouty old 19th century judge for a Gilbert & Sullivan style operetta, Chief Judge Kidd would not be your man. His Honour's chambers, like the man himself, exude an un-stuffy approachability and down-to-earth practical feel. In a frank and wide-ranging interview with Bar News, his Honour reflected on some of the challenges that face him, particular hopes for the Court, and the long road ahead.

From Adelaide to William and Lonsdale Street, via Sarajevo.

Chief Judge Kidd reaches the apex of Victoria's County Court by an uncommon route. He was born in Adelaide, into a family with a scientific bent. Both his father and uncle were dentists. He studied law at the University of Adelaide. He remains tight-lipped about his time there, proffering a cautious "Probably I was like any younger person at university. Perhaps I'll just leave it at that", in response to VBN's probing questions. He was prepared to disclose a close association with the University Blacks Football Club – apparently the largest in the country. He played on the wing, he thinks in the fifths, or perhaps the sixths (the Adelaide Uni Blacks fielded eighths). And although there were no immodest recollections of fantastic achievements as a footballer, his Honour did note, "It was a fantastic social life at Adelaide University Football Club". Further evidence about these issues is limited. Enough said, perhaps.

After success at Adelaide University, his Honour obtained articles of clerkship at what was then Mallesons Stephen Jaques. Following articles, he worked at Mallesons for a further 18 months. A number of recent appointments to Victorian courts have had an association with Mallesons. Doubtless, Mallesons will proudly, and rightly, claim Chief Judge Kidd as another of their successes. However, it seems fair to say that Mallesons and the future Chief Judge were not a seamless combination. His Honour reflected:

> *It wasn't for me. There were lots of aspects to that – it's not personal to Mallesons but I think that type of legal culture, the big law firm, with the billable hours, it just didn't grab me. I had no difficulties with any personalities. The work just didn't excite me.*

So, in a chain of events that is not completely unheard of among bright, young graduates, his Honour found the realities of practice in a successful firm of city solicitors a touch less engaging than predicted. After two-and-a-half years (and who could say how many boxes of documents) he was contemplating leaving the law altogether. Instead, he took a chance:

> *I enjoyed criminal law. I enjoyed evidence. So I thought, 'Let's just have a look at criminal law'. And that's when I saw an advertisement in the paper for the Commonwealth DPP. In some respects, it was really me saying to myself, 'I'll try this before I make the decision to move on.' I applied and got the job, and I never really looked back after that point. I suddenly realised I could be excited by my work.*

After three challenging and successful years working for the Commonwealth DPP, his Honour made another significant decision. In September 1995 he came to the Bar and read with Damien McGuire. Life at the Bar commenced with an 18 month brief to prosecute in a massive trial involving an alleged conspiracy and attempt to pervert the course of justice, led by the late Martin Shannon QC and McGuire. Almost always a prosecutor, this was the first of many very tough cases, including the Bega school girl murders, abduction and rape cases, and the murder trials of Victoria Police members, Sergeant Gary Silk and Senior Constable Rodney Miller.

After nearly 10 years at the Bar, he had another significant change of course. In late 2004 (after what one suspects was a neat bit of advocacy in the home) his Honour moved with his wife and young family to Switzerland to study a Master of Laws in International Criminal Law at the University of Geneva. Following this, he applied for, and was appointed as an international prosecutor with the War Crimes Chamber of the State Court of Bosnia-Herzegovina, in Sarajevo.

In November 2008, after three important and successful years in Sarajevo, his Honour returned to Victoria. On 30 January 2009 he became a Crown Prosecutor, and in 2011, after taking silk, a Senior Crown Prosecutor, excelling in both those roles.

Seeing the long lines

His Honour is a great traveller. He remarks with some pride to VBN that, before the end of the Cold War, he travelled between Hong Kong and Europe by train. Anyone who has travelled that route knows the huge distances involved, and how the tracks stretch out through the wide-open spaces of the Gobi Desert and the wilds of Siberia. Listening to his Honour reflect on his time in Bosnia-Herzegovina it is apparent that the sense of adventure that drove him to make that long journey has stayed with him. Perhaps that trip was also where he picked up the habit of looking for the big

> “For all the zinging enthusiasm that his Honour radiates, the message is clearly: steady as she goes.”

picture and the long lines.

Victorian Courts have an institutional presence and respect that makes them seem almost inevitable; courts and judges get criticised from time to time, but their authority and legitimacy are rarely questioned. This happy state of affairs was in stark contrast to what faced him in Bosnia-Herzegovina. As his Honour explained, the new Tribunal was far from universally accepted and its very existence depended on the ability of those charged with implementing it to demonstrate its legitimacy. Its fragile status made it necessary to consider carefully, not only the forensic merits of cases, but also wider questions about how the Tribunal should function to achieve justice:

> *In Bosnia, we were in a court which was fast developing with people from all over the world, from different legal systems – What works? What's right? What's fair? How should we approach prosecution policy? Something as basic as that. What do we do in an environment which involves three ethnic groups who were at war together? How do we choose which cases to prosecute? It was imperative that the international community and the three ethnic groups developed confidence in the impartiality and fairness of the Prosecutor's Office and the Court.*

Reflecting on his time in Victoria as a Crown Prosecutor, his Honour made related observations about his interest in the broader, structural role a prosecutor plays in the administration of justice:

> *I have always enjoyed playing a role in shaping whatever criminal justice system I am working in. As a Crown Prosecutor, in particular as a Senior Crown Prosecutor, I was able to play that role. Whilst I was separate from the Office of Public Prosecution, I was obviously working closely with the Director with respect to how we approached certain cases. Which cases do we appeal? What do we need to focus our attention on? What is our advice on issues of law reform? These are all structural elements or components of the overall criminal justice system, and I have always really enjoyed working with those various constituent parts, not just the court work.*

Gently into the saddle and the long road ahead

So what can we expect from a new Chief Judge with such broad and varied experience, and such wide horizons? Well for a start, expect a Chief Judge keen to engage with the primary work of the Court. His Honour is a recognised expert in, among other fields, tendency and coincidence evidence. Quizzed about that, his Honour said:

> *It's certainly no easier to apply today than it was yesterday. And these issues present real challenges for a court which conducts many sex cases. As we know, in many sex trials there are multiple complainants, which immediately raises the question of tendency and coincidence evidence. In fact, even with single complainants the issue is raised - that in itself is controversial. I intend to get involved in trials myself, including multi-complainant sex trials. I intend to have a hands-on role in this particular field.*

In terms of the broader approach, for all the zinging enthusiasm that his Honour radiates, the message is clearly: steady as she goes. Pressed by VBN about the significance of his international experience for his new role, his Honour demurred:

> *I don't want to overstate it. I still think that the most significant qualification for being a Judge here, or a Chief Judge, is being in touch with our community, understanding the various stakeholders and having a good sound knowledge of the law here. There is no doubt that my experience over there made me appreciate what we have here.*

And asked to identify areas of the Court he might be looking at changing, his Honour was reticent:

> *I don't think there's anything to be gained by going into detail at the moment. I can tell you why – There are many issues. I am learning them every day. I am in the process of discussing these issues with Judges and other staff members on a daily basis. I am trying to identify what works, what doesn't work, and what could work better. But that's a long conversation.*

Partly at least, this approach seems to reflect an awareness about the nature of the institution he takes over, and a respect for those already doing its work:

> *The Court has been through a difficult period with Michael Rozenes' illness. We've had an Acting Chief Judge, Judge McInerney, who did a wonderful job. The Court has been in a state of flux for a period, and there will inevitably be clear answers to some of the things that arise, but some things won't be so clear.*
>
> *I'm extremely conscious of the fact that I am brought in from the outside. I don't know all of the Judges. One of the things that I need to do is to win their support and confidence.*

And his Honour need not be in a hurry. Appointed at age 49 (welcomed the day after his 50th birthday), he has the next 20 years in which to shape the Court. Not surprisingly, he sees no need to rush his fences:

> *I'm going to be here for many years at least, and it gives me a great opportunity. It's time to listen, learn and develop these ideas.*

Taking it to the people – especially the younger ones

Despite this apt judicial reticence we were able to draw his Honour

> “Audio and visual streaming in the court-room and the like? Well these are things we need to look at.”

out on one issue, clearly close to his heart. Circling back to his time in the former Yugoslavia, his Honour reflected on the very high standards of judicial competence enjoyed in this State and how international institutions had adopted the best traditions of our common law processes. In that context, he is keen to foster a greater understanding in the public mind of what goes on in courts, and the rigour involved in curial processes:

> *I strongly believe that the more we are able to communicate the work we do to the public, the better the community will understand, appreciate and respect our court and our criminal justice system. So it's important, therefore that we communicate through the media and other means what we are doing here. And that it is done at a very sophisticated level.*

His Honour uses sentencing as an example:

> *It may be that many members of the community don't appreciate how complex the process of sentencing is and how there are countervailing and conflicting considerations that a judge must weigh in sentencing somebody, in particular when sending them to jail. The Court needs to somehow play an educative role with the community to help them better understand the process.*
>
> *I want to explore any means or mechanism that enables better access to the courts such as cameras in court, the use of social media and publication of sentences. I don't think anything should be taken off the table. But of course, it's a very conservative profession, for good reason, and any changes can only be implemented after they have been exhaustively examined. Care needs to be taken to ensure that if we do introduce change that it's in the public interest.*

His Honour has a particular interest in how courts can communicate their work to young people, and he linked this issue directly to both social media and effective general deterrence:

> *I am extremely conscious that my children and their friends don't read newspapers, and they never will. So how do we send the message out that if you get into a car when you are intoxicated and you kill someone, or seriously injure someone, you will almost certainly be facing jail? Young people read news on their telephones. If we're serious about general deterrence working, well they need to know it. I don't want young people coming to court having been charged with a serious offence, not knowing beforehand that jail would be the consequence. So how do we communicate our sentences to them? How do we get that message out to them? I think that's a real challenge in the 21st century.*
>
> *We're confronting a new reality of social media and we need to ensure there is this 'connect' between the courts and the community, not a 'disconnect'. Against this, you need to balance the requirement to maintain fair trials, judicial independence and respect for the judiciary.*

And for all the reluctance to jump to early conclusions, some ideas appear to be taking shape:

> *In an environment where journalists are more pressed for time, how do we deliver our work to them so that they can then deliver it to the community? Audio and visual streaming in the court-room and the like? Well these are things we need to look at.*

Empathy for the bedevilled

All courts need counsel, but perhaps the County Court more than any other is the home of the working barrister. The high volume of complex cases and limited resources means the Court depends on the Bar to a significant degree. And barristers are likely to welcome a Chief Judge who has a real affinity for the work of barristers, particularly those running criminal trials, what it takes out of them and the issues that they currently face:

> *I recognise the challenges that young barristers working in criminal law face. The financial challenges, as well as the workload challenges. Running a criminal trial can be brutal. It's physically and mentally draining. It's all-consuming. It involves a tremendous amount of work, late nights, weekends, public holidays and the like. And if there is a difference between criminal law and some of the other jurisdictions it is that with criminal law, running trials is a mainstay of the practice. Sure, a number settle and there are pleas and there are other miscellaneous hearings, but you can't get away from the fact that if you're a criminal barrister in a higher court you're running significant trials of duration under huge pressure. And there are some financial challenges that I am very well aware of also. Clearly part of my role is engaging with the Criminal Bar and the relevant associations, and that's what I intend to do.*

A Chief Judge for all, with assistance

As the County Court is responsible for the bulk of the serious criminal trials in Victoria, his Honour's huge experience in the criminal justice system will stand him in good stead. However, crime is not the Court's only dominion. It also has important jurisdictions in common law and commercial law. His Honour was keen to recognise and point to the significance of these. He also candidly reflected on the more limited experience he has in those areas, and how he would deal with this. Asked if he proposed to sit in common law or commercial, his Honour said:

Not at this stage, but I don't know about the future. However, I recognise the importance of those two divisions. I see my role as making sure I provide as much support as possible to both of those divisions.

They've got division heads in Judge Chris O'Neill in common law and Judge Maree Kennedy in the commercial division. I need to learn as much as I can about the work that they do and the way in which they function so I can provide them with the maximum support possible.

Evidently, even at this early stage, the non-criminal work has been a focus for his Honour's attention. He impressed on VBN some recent successes:

The commercial division has a significant role to play in that they have concurrent [ie. unlimited] jurisdiction with the Supreme Court. You will see on our website, from both of those divisions now, some of the trial figures, and time-to-judgment figures, that they've achieved in the recent past.

> "One of the things that separates those who don't commit war crimes from those who do is respect for the written word, the rule of law."

The accidental jurist

His Honour does not come across as too bookish. Although a recognised expert in some of the most difficult areas in his field, it seems clear that as a young man it was the practice of law – and practice at the most viscerally real end of the spectrum – that excited his Honour's interest. For all his learning, that air stays with him. Perhaps because of this, there is something striking about the way his Honour talks about the bigger concepts for which he now has a significant personal responsibility. Like a soldier's view about battle, his Honour's thoughts on the rule of law have a powerful, understated quality; the legacy of uncommon experience:

When you see what occurred in Bosnia, which was – prior to the war – a developed, sophisticated country, and an advanced legal culture where many people were highly educated. When the war began there was a complete collapse of the system and that rule of law disappeared.

When you see, as I did, not quite first hand, but one step removed, what happens when the rule of law disintegrates, in that moment you realise how important a strong legal system is. And how potentially fragile it can be. A lot of people who were involved in committing war crimes during the war were professors, doctors, lawyers, mayors, politicians, teachers and the like. People who were highly respected and would have otherwise led perfectly lawful lives had the war not happened. With the advent of the war some of these people engaged in the most shocking and vile crimes imaginable; not always directly but they tolerated them. So it makes you reflect: what would I do if I was placed in that situation? What would we all do? Because in a civil war, one does not have the luxury of taking a neutral position. Everyone becomes involved in some capacity. One of the things that separates those who don't commit war crimes from those who do is respect for the written word, the rule of law. The strong, the principled and sometimes the very brave are those who adhere to it.

His Honour's experiences in the former Yugoslavia have clearly stayed with him and inform his views on the Victorian legal system:

My experience over there made me really appreciate what we have here. I remember I went up to the Court of Appeal, not long after I came back, and a couple of things struck me about the attention to detail our courts give to the facts of an individual case. That's so even if the case appears to be quite small, and I use that term advisedly. You go up to the Court of Appeal - you might have a minor theft case, which throws up an esoteric legal point that's never really been considered before, and it occupies the attention of three of the most senior judges of our State. They produce a written judgment of some detail analysing the particular issue to deliver a principled result and justice. It just struck me how incredible that is, and how fortunate we are, that we've got a legal system that is prepared to devote all its resources and time to principle, no matter how small the case. I'd never quite appreciated that before I went overseas. It's more of a compliment to our system rather than a criticism of any other system.

For all his self-effacing good-natured approachability, one senses in Chief Judge Kidd a man of deep beliefs and convictions with an ambition to serve and promote justice in this State. His Honour's view that principle is important, not just to individual cases but for the system itself, is likely to affect his approach.

It's hard not to like Chief Judge Kidd. There is a refreshing lack of bombast, and one can't help but detect a slight and very appealing reticence about what he might have got himself into. It's also easy to respect a man who has spent the past 20 years on his feet, running some of the toughest cases imaginable. It's plain, however, that his Honour is more than just a tough and skilful advocate. Whatever was going on at Adelaide University, his Honour's practice as an advocate, both here and internationally, has left him with a unique insight into how justice works and why it is important, both in individual cases and more broadly. In the short time that VBN spent in his Honour's presence, his enthusiasm for the task ahead was contagious. All of this augurs well for a highly successful Chief Judge. VBN wishes his Honour every success.

In conversation with Cristof Heyns

UN Special Rapporteur on extrajudicial, summary or arbitrary executions

EUGENIA LEVINE

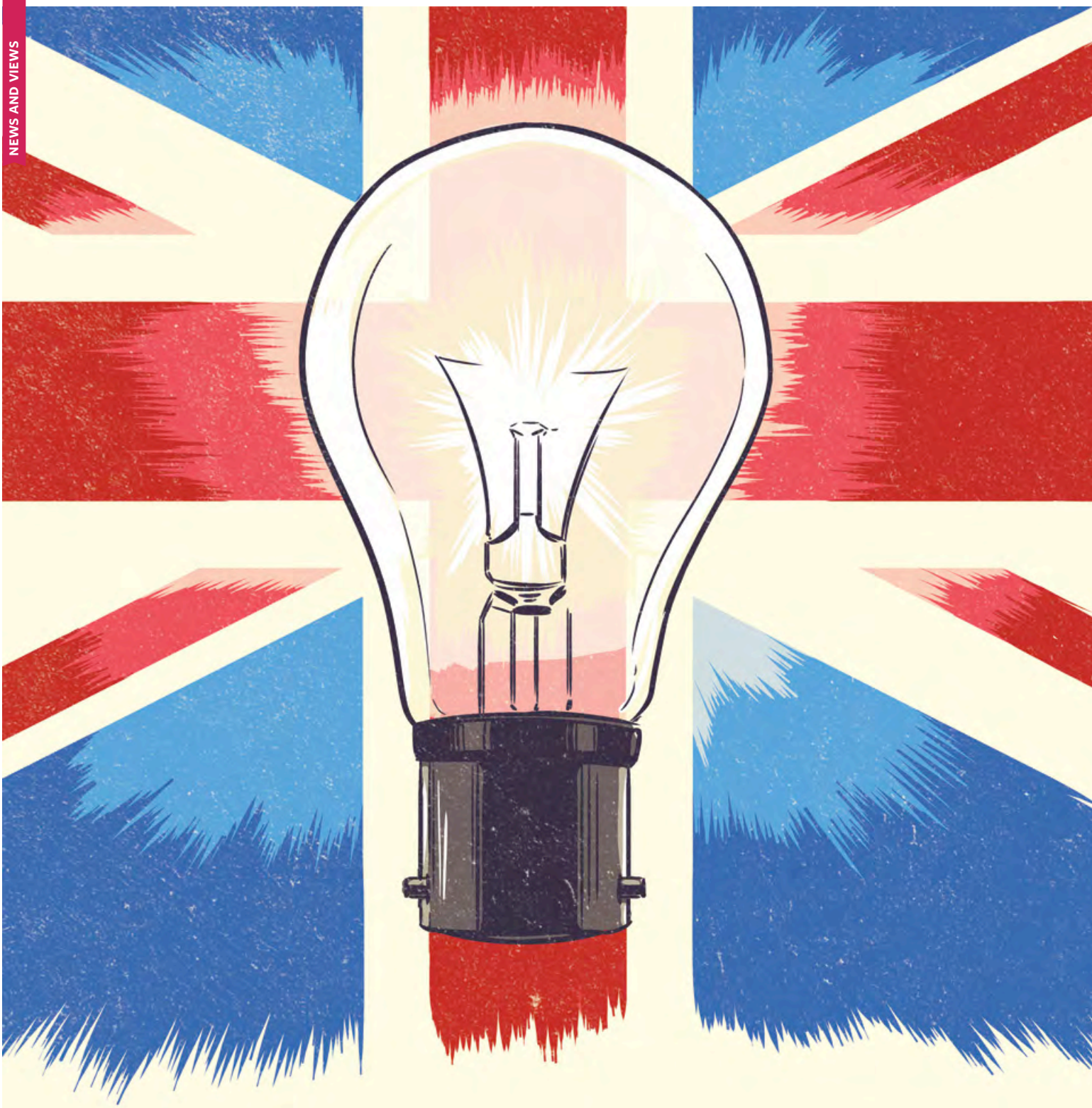
On 8 October 2015, Professor Cristof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, spoke at the Law Institute of Victoria on current issues surrounding extrajudicial, summary and arbitrary executions, including the move towards greater autonomy in weapons systems and the application of the death penalty for drug offences. The topical event was organised by the Victorian Chapter of the International Law Association (Australia Branch).

Professor Heyns, from South Africa, is a director of the Institute for International and Comparative Law in Africa and Professor of Human Rights Law at the University of Pretoria, where he has also directed the Centre for Human Rights. He was appointed as United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions in 2010.

One of the issues investigated by Professor Heyns in his role as Special Rapporteur, and an issue he discussed in some depth during the presentation at the LIV, concerns the increasing use of unmanned systems or drones in modern warfare. During his presentation, he raised some key legal and ethical challenges arising from greater use of drones by states such as the USA, including whether drones can meet the requirements of the law of armed conflict, the legal responsibility for drones, and the complicated ethical issue of giving robots the power over life and death.

Professor Heyns also addressed the use of the death penalty for drug offences, an issue of relevance to Australia following the execution of two Australian citizens for drug offences in Indonesia earlier this year. He emphasised that the International Covenant on Civil and Political Rights prohibits the imposition of the death penalty for any but the "most serious" crimes, and that the Human Rights Committee has stated that drug offences do not fall within this category. Accordingly, it is unlawful under international law to apply the death penalty to drug offences. The difficulty, however, is that a minority of governments, including Indonesia, continue to justify using the death penalty for drug offences by applying domestic standards to the meaning of a "most serious" crime.

Professor Heyns' presentation addressed some of the key international law issues currently facing national governments and the international community, and provided a unique opportunity to engage in a discussion of these issues with one of the world's leading experts on human rights.



The Intellectual Property Enterprise Court of England and Wales

with commentary on D'Arcy v Myriad Genetics Inc [2015] HCA 35

Procedural innovations to better protect innovators PETER VICKERY*

In September this year, the Melbourne Law School, in conjunction with the Institute of Patent and Trade Mark Attorneys of Australia, hosted a public lecture by the Hon Mr Justice Birss, a judge of the Chancery Division of the High Court of England and Wales (appt. 2013). His Honour's subject was "To boldly reform IP dispute resolution: Experience in the "IP Enterprise Court (IPEC)". The presentation, and the discussion over dinner which followed, was an absorbing and engaging event. This short article includes a summary of the central observations and hard-won experience of Justice Birss - so please forgive the omission of slavish footnotes to his text, which is gratefully acknowledged in full. His Honour's work promises to stimulate a conversation about procedural reform in our own IP jurisdiction, elements of which may extend in due course beyond these specialist IP cases.

The themes of this article on the IPEC reforms have been brought into sharp focus by the recent decision of the High Court in the landmark case of *D'Arcy v Myriad Genetics Inc* [2015] HCA 35 - a judgment which considered one of mysteries of the DNA double helix unravelled by the respondent company for the purpose of identification of susceptibility to breast and ovarian cancer, and for possible use in the development of better diagnostic and prognostic products and improved cancer therapies. A short commentary on the case is provided in the context of the IPEC experiment, which has proved to be a success.

The IPEC Reforms

On 1 October 2010, secondary legislation came into force in England and Wales to amend the IP Civil Procedure Rules in order to introduce a new procedural scheme for what was then called the Patents County Court. Under the new Rules, the managing court was renamed the Intellectual Property Enterprise Court. As Justice Birss said, "The point of those reforms was to improve access to justice in IP matters, particularly for small businesses."

The IPEC now forms part of the Chancery Division of the High Court of England and Wales. It provides an alternative venue to the High Court for bringing legal actions involving intellectual property matters. It is set up to handle a broad range of intellectual property cases, including patents, designs (registered and unregistered), trade marks, passing off, copyright, database rights, other rights conferred by the *Copyright Designs and Patents Act* 1988 and actions for breach of confidence. For example, the IPEC may hear and determine actions and counterclaims for:

» Infringement of patents, designs, trade marks, copyright and other intellectual property rights
» Revocation or invalidity of patents, registered designs and trade marks
» Amendment of patents
» Declarations of non-infringement
» Determination of entitlement to a patent, design or any other intellectual property
» Employee's compensation in respect of a patented invention
» Unjustified threats of proceedings for infringement of patents, designs or trade marks
» Misuse of trade secrets and other breaches of confidence.

Whilst the IPEC is now part of the High Court, Patent and Trade Mark attorneys retain their rights of audience and litigation.[1] Larger cases can be transferred from the IPEC list to be heard by the main High Court at the discretion of the IPEC judge. The High Court also routinely transfers cases from its list to the IPEC. As with the High Court, appeals from IPEC decisions (if leave to appeal is granted) are heard by the Court of Appeal.

The objective of the IPEC is to provide a forum where simpler and relatively small-scale cases can be dealt with under a cheaper and more streamlined procedure than the High Court.

Today the revitalised IPEC is regarded as a success. It enjoys an increased case load compared with the former PCC and appears to be fulfilling a community need in providing access to justice for 'smaller players', who might otherwise be denied such access.

When IPEC commenced in October of 2010, Judge Birss (as His Honour then was) became its first presiding judge and was the sole judicial appointment to the new court. At this time, he had only three IP trials in his list. In contrast, at the time of writing, the IPEC website reveals that after some five years of operation, it has forty current cases pending. Following this significant increase in workload, the present IPEC presiding judge, His Honour Judge Hacon (appt. 2013), was provided with two deputy judges to assist him. From a modest beginning, the new procedures have expanded court business in the IP jurisdiction and IPEC has commensurately grown in capacity over time to meet the demand.

In an independent report commissioned by the UK IP Office published on 22 June 2015, a group of academics, Helmers, Lefouili and McDonagh, said the following about the IPEC reforms:

> *the cumulative effect of the IPEC reforms 2010-2013 has been highly significant – in addition to an increase in the numbers of filed cases at the IPEC, the creation of the streamlined IPEC... for litigating disputes... has fundamentally altered the IP dispute landscape, and in doing so... have increased the likelihood that IP holders will attempt to uphold their rights against potential infringers. In other words, now that IP holders have the ability to utilize the IPEC... IP holders are more confident about entering into disputes with potential infringers, where previously they would have not felt confident enough to do so.*

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP

Why the need for reform?

A short journey into legal archaeology may prompt an answer.

As far back as 1892, Lord Esher MR, sitting on the English Court of Appeal, was very critical of the burden involved in litigating patents; even suggesting at one point that the process was not unlike catching a nasty disease. *Ungar v Sugg* [1892] R.P.C. 113 concerned alleged representations made by a patentee to the plaintiff's customers, and others, to the effect that the plaintiff was manufacturing lamps which infringed the defendant's patent. In the course of his judgment, the Master of the Rolls was scathing in his criticism of the way patent cases were tried in England. Cases which he thought should last six hours, he bemoaned, occupied six or even twelve days. Lord Esher said of this malady (at pages 116-117):

> *It used to be said that there was something catching in a horse case: that it made the witnesses perjure themselves as a matter of course. It seems to me that there is something catching in a patent case, which is that it makes everybody argue, and ask questions to an interminable extent – a patent case lasting six hours is invariably made to last six days, if not twelve. I am sure there ought to be some remedy for it.*
>
> *...*
>
> *Well, then, the moment there is a patent case one can see it before the case is opened, or called in the list. How can we see it? We can see it by a pile of books as high as this [at this point it is reported that the Judge was holding up the papers] invariably, one set for each Counsel, one set for each Judge, of course, and by the voluminous shorthand notes: we know: 'Here is a patent case.'*
>
> *Now, what is the result of all this? Why, that a man had better have his patent infringed, or have anything happen to him in this world, short of losing all his family by influenza, than have a dispute about a patent. His patent is swallowed up, and he is ruined. Whose fault is it? It is really not the fault of the law; it is the fault of the mode of conducting the law in a patent case. That is what causes all this mischief.*

Lopes LJ in the following passage (at page 120) fanned the discomfort expressed by Lord Esher:

> *I entirely concur in everything that has been said by the Master of the Rolls with regard to the waste of time and the terrible waste of money which seems to have become an inherent belonging to these patent cases.*

That is what Lord Esher and Lord Justice Lopes said 120-or-so years ago. It was a real problem then and it was, in England, a real problem until more recently, prior to the introduction of the IPEC reforms.

The new IPEC rules were designed to reverse the situation. They work together to provide effective measures for reducing costs. By this means they facilitate a forum for 'small scale' claimants and defendants to conduct cases without being deterred or overwhelmed by the prospect of a massive costs order, particularly if met by an opponent of substantial means.

The IPEC Procedures

In IPEC the procedures for IP cases are streamlined by incorporating techniques such as: greater detail being required in the particulars of claim; no discovery without it being justified and leave for discovery being granted; no examination in chief of expert witnesses; tight control by the Judge of the issues that go to trial; and limiting court directions to one directions hearing or Case Management Conference (CMC) at the commencement of the process, which then serves to direct all procedural issues up to trial in one hearing. The CMC charters the entire procedural course of the trial from the outset, and sets a trial date.

Additionally, significant financial limits have been introduced, both as to recoverable damages and maximum legal costs. The costs limits do not operate to cap the amount which each party may spend in prosecuting or defending an action, but limit the costs recoverable from another party for costs. Finally, the time for trials is limited, and cases are not fixed with an estimate of more than two days.

The IPEC has a 'multi-track' list and a 'small claims track' list. This provides for two alternative procedures for bringing a claim in the Court. The IPEC multi-track has a limit on damages of up to £500,000. Costs orders will be made which are proportionate to the nature of the dispute and subject to a cap of no more than £50,000. The small claims track is for suitable claims in the IPEC with a value of up to £10,000. Costs orders on the small claims track are highly restricted.

The jurisdiction of the IPEC small claims track is a subset of the normal jurisdiction on the IPEC multi-track. The rules limit the kinds of IP claim that may be allocated to the IPEC small claims track. The IPEC small claims track may deal with any IP claim within the jurisdiction of the IPEC, save for those expressly excluded in this way. In practice, this means the small claims track may hear claims relating to copyright, trade marks and passing off, and unregistered designs and breach of confidence. Claims relating to patents, registered designs and plant varieties may only be heard on the IPEC multi-track.

All the remedies available in the High Court are available in the IPEC including injunctive relief, damages, accounts of profits, delivery up and disclosure. In particular, search and seizure (Anton Piller) and asset freezing (Mareva) orders are available in the IPEC. There is one exception. The IPEC small claims track has no power to order preliminary or final injunctions, search and seizure (Anton Piller) and asset freezing (Mareva) orders.

All these remedies are, however, available in the IPEC multi-track.

The 30-page IPEC Court Guide, issued April 2014, provides further detail as to the operation of IPEC and its governing rules.[2]

Recent Developments in Australia: D'Arcy v Myriad Genetics

On 7 October 2015 the High Court delivered its decision in *D'Arcy v Myriad Genetics Inc* [2015] HCA 35. Myriad Genetics Inc claimed that it had a valid patentable invention that covered naturally occurring nucleic acid that had been 'isolated', where the particular sequence of genetic coding carried with it characteristics which were indicative of susceptibility to a greater risk of breast or ovarian cancer and could potentially be applied to other medical procedures and therapies.

The High Court unanimously allowed Ms D'Arcy's appeal, and held that the invention claimed was not a "patentable invention" within the meaning of s 18(1)(a) of the *Patents Act 1990* (Cth).

The central question in the case was whether the subject matter of the principal claim was an invention which fell within the concept of a 'manner of new manufacture' as defined in the archaic language of s 6 of the *Statute of Monopolies*. Section 18(1) of the Patents Act sets out the essential characteristics of a 'patentable invention' for the purposes of the modern Act. Section 18(1)(a) provides: "Subject to subsection (2), a patentable invention is an invention that, so far as claimed in any claim: (a) is a manner of manufacture within the meaning of section 6 of the Statute of Monopolies".

The *Statute of Monopolies* was an Act of the Parliament of England, passed on 25 May 1624, within eight years of the death of Shakespeare. It is recognised as the first statutory expression of English patent law. The Statute was the basis of patent law in the United Kingdom until 1977, when the UK adopted the European Patent Convention 1973. The Statute remains to this day as a foundation of Australian patent law, incorporated into the Patents Act by s 18(1)(a). Section 6 of the Statute declared, in the Jacobean language of the day, all monopolies to be void save for:

> *Letters Patents and Grants of Privilege for ... the sole working or making of any manner of new Manufactures within this Realm, to the true and first Inventor and Inventors of such Manufactures, which others at the time of making such Letters Patents and Grants shall not use, so as also they be not contrary to the Law, nor mischievous to the State, by raising prices of Commodities at home, or hurt of Trade, or generally inconvenient ...*

Applying the ancient principles of the Statute and its case law to the sophisticated gene technology of the 21st century, the High Court in *D'Arcy* held that the claimed invention did not fall within the definition of 'a manner of new manufacture'. While the invention claimed might be a product of human action, it was the existence of naturally occurring information stored in the relevant sequences of genetic code that was an essential element of the invention as claimed.

In this case, as with other cases in this field, the principal competing interests are on the one hand the social interest in potentially containing the costs of medical treatment for patients, the arguable ethical interest in making discoveries of things naturally occurring publicly available, and the public and scientific interest in preventing a patent over a single gene establishing a barrier against its later use in a quite different genetic procedure from that originally contemplated, and on the other hand the need for a financial incentive for product developers to invest the necessary hundreds of millions of dollars on research and development to discover and commercialise an application. The High Court has left the delicate balancing of these competing interests where it belongs, to the legislature.

Parting Thoughts

The appellant, Ms D'Arcy, won a goliathan legal battle, reversing the decisions of a single judge (Nicholas J - 2013) and then of the Full Court of the Federal Court (Allsop CJ, Dowsett, Kenny, Bennett and Middleton JJ - 2014).

Food for thought. One wonders how many people, without the unique fortitude and passion of Yvonne D'Arcy, have been denied access to justice in IP cases by the daunting prospect of a tortuous and costly legal process, which remains as omnipresent today as it was when Lord Esher penned his words in *Ungar v Sugg* so many years ago.

It is trite to say that Judges are confined to deciding cases which are brought before them. In this context, the D'Arcy case also illustrates the prospect of development of our IP law, in the ever important fields of genetic engineering, science and technology, being unduly stunted if attention to our legal processes is not critically reviewed to enable litigants to bring worthy cases before the Court.

The five-year experience of the United Kingdom with the IPEC model establishes that the bold experiment has thrived, dispelling in its wake the doubts that were initially expressed at the time of its introduction. The recent history of IPEC demonstrates not only what is possible, but what is manifestly achievable.

* The Hon Justice Peter Vickery is the judge in charge of the Intellectual Property List, Supreme Court of Victoria

1. Traditionally in the UK (unlike in Australia), solicitors do not have a right of audience before superior courts.
2. www.gov.uk/government/publications/intellectual-property-enterprise-court-guide

BAR Lore

The killing at Devils River

KEN OLDIS*

My husband when in liquor ... used to get sometimes delusions and talk other languages. During his late illness he has threatened to take my life ... he was always drunk when he threatened to take my life and when he was sober he was always sorry for it.[1]

Thousands of words were published about Elizabeth Scott, the first woman executed in the Colony of Victoria, though not these words of hers. In 1863 an all-male jury convicted Scott of murdering the man she married at 13. The Chief Justice of the Colony ensured the death sentence he pronounced upon her was carried out. For years before and after Scott's case, all women convicted of murder were reprieved.[2] Her case was different. Scott was vilified more for her supposed adultery than for procuring her lover and a mixed-race cook to shoot her bedridden spouse. She had no prospect of surviving a trinity of public, judicial and executive opinion that decreed this "female monster" must be hanged.

Bob Scott ran a thriving sly grog enterprise on the Jamieson-Mansfield road, where he lived with his vivacious young wife and their two infant sons. A lodger, 19 year old Davey Gedge, worked at the stage coach stables nearby. The Scotts' cook, Macao-born Julian Cross, completed the household.

One afternoon in April 1863, farmer Elias Ellis and his wife Ellen arrived on their dray to camp overnight at Bob Scott's shack beside Devils River. They knew Bob was sick, having visited him earlier in the week on their way into Jamieson. Elizabeth Scott, exhausted from nursing her husband alone through the night for the past week, welcomed the respite of Ellen Ellis' arrival. By candlelight the women nursed Bob Scott late into the evening. A weary Elizabeth Scott confided in the older woman that her own mother had married her off to this man who was now so in the grip of liquor and jealousy she dared not leave him. After Bob settled, Ellen Ellis left the timber hut to join her husband in bed on their dray.

Near midnight a gunshot broke the still night air. Elias Ellis then heard footfalls rapidly approaching the dray.

"Ellis, are you asleep?" It was Davey Gedge.

"No."

"For God's sake jump up, Bob has shot himself."

Ellis bolted barefoot up and into the house with his trousers under his arm, straight into Bob Scott's room. He ran a practical eye over the body lying on its right side in the bed. Blood flowed from a wound just below and behind Bob Scott's *left* ear. A pistol lay beside him on top of the bedclothes, which covered both arms almost to the shoulder.

When Ellis had seen enough in the bedroom, he went out to find Davey Gedge, Elizabeth Scott and his wife standing in the kitchen. Ellis pulled on his trousers and spoke his mind. "This is a bad job. There will be an inquest over this job. The man never could have shot himself in the position in which he is lying."[3] Ellis demanded to know what Bob Scott was shot with, and was told "the pistol" lying on the bed. It had been left on a shelf within the sick man's reach. Ellis remained unconvinced about Bob Scott's suicide, but decided nothing more could be done until morning and went back to bed.

At daybreak Davey Gedge came back to Ellis with a new version of Bob Scott's death. The cook, "black fellow" Julian Cross had shot Scott.[4] Cross had threatened Gedge at gunpoint not to betray him, and to tell Ellis that Scott shot himself. Gedge rode away leaving an incredulous Ellis on watch while he went to notify the Mansfield police. Elizabeth Scott could not go inside the bedroom where her husband's body lay. When the police arrived to arrest Cross, he declared in broken English his innocence, but the next day, while being escorted by police from the Mansfield lock-up ▸

> “ The young man now cast as Mrs Scott’s protector, was trapped by his bogus suicide tale. The prosecutor was keen to embroil Mrs Scott in the lie. ”

back to Scott’s shanty for the Inquiry into the death, he confessed and implicated Gedge in the murder.

Whether he realised it or not, Cross also accused the “Missus”, Elizabeth Scott, of murder too. According to Cross, after Gedge roused him from bed and told him it was his turn to shoot Scott, Cross wondered aloud if the Missus wanted Bob shot. Gedge assured him, “Oh yes, you go and see her.” Cross did and confessed that after she said, “yes, you do it” and gave him a glass of brandy, he shot Bob in the head.[5]

Information Julian Cross gave police corroborated their examination of the two firearms located at the scene. The pistol left on Bob Scott’s deathbed had misfired without discharging a shot, so it became an ironic prop for Davey Gedge’s suicide tale. The other gun found had recently been fired and was evidently the murder weapon.

While the police discussed the ramifications of Cross’ confession in private, Davey Gedge and Elizabeth Scott waited to give evidence at the Inquiry, unaware they were now considered murderers. Detective Edwards, who would assist the magistrate at the Inquiry, could question them, but only if they remained witnesses. Once arrested and charged, like all accused, neither could be compelled to say anything in or out of Court. So the question was whether to arrest and charge the pair before or after the Inquiry. The police decided to ambush them.[6]

The Magistrate’s Inquiry was held inside Scott’s shanty, with Detective Edwards appearing to assist the Court. Julian Cross sat and watched the proceedings with no one to speak or ask questions on his behalf. Bob Scott’s body was viewed *in situ* and Edwards then called the first witness, Elizabeth Scott. She identified the body in the next room as her husband Robert Scott who was 45 years old. He had been ill the past fortnight and drink was the cause of his illness. She described the events of Saturday night:

> *Mrs Ellis sat at the fireside until she rose saying she would go and see where Elias was, and she remained out about three quarters of an hour, as near as I can imagine. She never said good night and I thought as she was so long she was gone to bed. I went out with the intention of seeing if she had gone to bed.*
>
> *I had not been out more than three minutes when I heard the report of firearms, one single shot. I went back to the kitchen door to see what had happened and could see nothing but smoke in the bedroom. Just as I came to the door David Gedge came past me and said he was going to call Ellis. I immediately turned after him and waited around the end of the house. I followed Ellis into the kitchen, Ellis went into the bedroom and came out and told me Scott was shot. That is all I know about the affair.*[7]

When questioned Scott agreed she did not rush inside upon hearing the gunshot, allowing the idea she *expected her husband* to be shot dead. The Magistrate heard her husband had “drunk very hard for the last two years.’[8] Yet Scott agreed to suggestions belittling her domestic strife. Her husband did drink, but it made him “quiet”. He would blow up, but it was “nothing to signify”. He threatened her life, “but I never took any notice of it.”[9]

Davey Gedge gave evidence, repeating the story he told police about Julian Cross shooting Bob Scott. When Detective Edwards implied that the deceased’s jealousy was well-founded, Gedge denied the smear. “I and Mr Scott never had any angry words. I never told him that I would not see him ill treat the Missus.”[10] The young man now cast as Mrs Scott’s protector, was trapped by his bogus suicide tale. The prosecutor was keen to embroil Mrs Scott in the lie. He asked Ellis to identify who it was who had said that Scott shot himself with the pistol, but was disappointed by the answer, “I believe this was said by David Gedge.”[11] The detective had snared Davey Gedge, but not Elizabeth Scott, in the suicide-by-pistol lie.

The Inquiry was adjourned to the following Saturday. Now that Scott and Gedge had been questioned, Detective Edwards applied for them to be remanded in custody on charges of murder. When the magistrate refused to do so, Edwards proceeded to arrest them on his own responsibility as soon as the court rose.[12]

Edwards took Davey Gedge to Jamieson while Cross went back to Mansfield. Sergeant Moors put his prisoner, and probably her three and seven year old sons too, in a cart to carry them to Jamieson. The little boys went “into the care of the police at Jamieson”, their mother into the lock up.[13] If Moors thought Elizabeth Scott might give herself away on the slow journey to gaol he was wrong. She made no statement of any kind.[14]

Gedge took a different route with Detective Edwards. Not far down the road he announced, “I’ll tell you the truth about it. I did not shoot him.” Gedge thought not pulling the trigger made all the difference:

> *After Mrs Ellis had gone out, Bob got scolding the Missus. Julian called out from his room, ‘what’s the matter?’ I told him Bob was scolding the Missus and he came into the kitchen and took up the gun that was there.*

Gedge explained the idea was to make it appear Scott shot himself with the pistol by leaving it on his bed.

> *I went in and told Mrs Scott to go out for a while. She passed through the kitchen where Julian was with the gun. I went in to see if Bob was asleep, he was not but he was stupid and not*

> *looking towards me. Julian then went to the door of the room and shot him. He ran to bed, I ran out to Ellis and seen Mrs Scott standing at the chimney, I pushed her further back. I called to Ellis and told him Scott had shot himself, Ellis came with me back to the house, and he has told the truth today.*[15]

By jettisoning the version of events he had sworn to only hours earlier, Gedge did more than unwittingly admit to murder. He imputed knowledge of the crime to Elizabeth Scott before it took place, along with her silent assent to the lie about the pistol. On Davey Gedge's version of events, Elizabeth Scott abandoned her husband for her confederates to murder him in his bed.

Gedge's confession contained a motive for the murder; *Bob got scolding the Missus*, but a husband's abuse of his wife did not divert the investigators from the theme they were fixed on – a treacherous wife.

When the Inquiry was next listed, a bench of three magistrates condemned the first hearing as "irregular and illegal", and refused to recommence it. Instead, the trio were formally charged with murder and remanded for committal proceedings.[16]

At the committal, Elias Ellis, now accompanied by his wife Ellen, changed his tune. Husband and wife became the body and soul of the prosecution case against Elizabeth Scott, who had disgusted Mrs Ellis by playing cards with Davey Gedge the afternoon after her husband's murder. It was not the way a bereaved widow behaved.

Since the Inquiry, Ellen Ellis had sharpened her husband's memory about the lies told by the accused. This time Elias Ellis detailed how Mrs Scott and Gedge were as one in discussing the circumstances of the shooting. And on the crucial issue of whether Scott adopted the lie about suicide by pistol, the Ellises were both adamant. "Mrs Scott and Gedge with the same voice replied, 'With the pistol'."[17] Elizabeth Scott appreciated the significance of this evidence and challenged Ellis about it, but he insisted she had declared it along with Gedge.[18]

> "Scott's vice was understood as being intrinsic to her sex and in the blood of her female kin."

Mrs Ellis provided the tawdry theme that hanged Elizabeth Scott. She recalled the Wednesday morning before the murder. "I saw the prisoners Elizabeth Scott and David Gedge come out of the shanty together. They walked across the road to the coach stables ... they went in there together, and remained in the stables a full hour, when they returned again to the shanty." Even an "innocent looking lad" like Gedge understood this testimony was devastating. He only questioned this part of Ellis' evidence, to no avail. Ellen Ellis mirrored her husband's evidence about the assignation, as their reactions did at the time. To her husband's remark "that don't look well" she rejoined, "no it don't."[19]

After the prisoners were committed for trial, Sergeant Moors reported to District Headquarters.

> *The evidence is presumed to be tolerably conclusive against the two male prisoners, but not so much so against the female prisoner. The presumption is that the prisoner Gedge and the prisoner Scott were more intimate than prudent and that the murdered man was an obstacle in the way of their desires, and that the prisoner Cross was made a cat's paw of to commit the murder, but at present there is almost a total absence of any proof as to motive.*[20]

Moors shared the popular presumption about the Scott case—adultery was the catalyst and Cross the instrument of the murder, while admitting its most perplexing aspect. The confessions of Gedge and Cross implicated Elizabeth Scott in the murder, but were not evidence against her. In her case the prosecution relied on innuendo rather than evidence.

For nearly a month the sergeant keenly observed his female prisoner and enquired into her background. The sergeant begrudgingly conceded "nothing is absolutely known against her previous character, but her husband was always jealous of her." The reason for the smoke was plain to see. "When young she was very pretty and it is believed that she was unfortunate through the inducements and examples of her mother and sisters."[21] Scuttlebutt and prejudice informed the sergeant's view. Scott's vice was understood as being intrinsic to her sex and in the blood of her female kin.

Elizabeth Scott's real vice was her demeanour. Rather than casting herself down into throes of mourning, she "exhibited the utmost levity and apparent indifference to the death of her husband and to her own position," according to Moors. Scott compounded her fault by being "very fond of any sly allusion to, or any joke on obscene topics", and when "encouraged her conversation was more like that of a common streetwalker than of a proper woman."[22]

The sergeant kept his most damning commentary as a motive for the murder. "She only appeared to be depressed in spirit but once, and that was on the morning that the prisoner Gedge left for Beechworth Gaol. She watched his departure and then had a long and hearty cry."[23]

Chief Justice Stawell presided over the Beechworth Circuit of the Supreme Court. The trial of Scott and her co-accused began and ended on the first Friday of the sittings. All three were represented and none made a statement from the dock. At the time a defendant in a criminal trial could not give sworn evidence in their own defence. The confessions of Gedge and Cross would go virtually unchallenged—so their convictions were inevitable.

Elias Ellis was called to the witness box first. When he swore that Scott

> “Once the jury of husbands imagined young Davey Gedge secluded in the stables with the murdered man’s wife, Elizabeth Scott’s conviction was certain.”

and Gedge chorused their complicity in the murder by answering “the pistol”, to his question, “What did the man shoot himself with?”.[24] Scott’s counsel succeeded in unsettling Ellis, who conceded, “I am not positive, but I think the woman Mrs Scott said so too.”[25]

Ellen Ellis put the verdict beyond doubt. Scott was cast as an audulteress who conspired with her paramour Gedge, to murder her helpless spouse. Elizabeth Scott was a malcontent, reciting a litany of complaints on the night of the murder: grievances about her own mother, and marriage to her hard drinking, jealous husband.

And there was no doubt in her mind, she was positive, Scott had answered “with the pistol on the bed”, when asked about the killing.[26] And the good wife needed no prompting to tell the jury how Mrs Scott and Gedge went into the stable together: “They remained there an hour.”

Throughout the trial Mrs Scott sat quiet in the centre of the courtroom, sharing a dock with self-confessed murderers, once again in the thrall of men. Her counsel argued on Scott’s behalf that, given the presence of witnesses, the care she had given her ill husband, and the fact that all believed he would soon die, why be involved in his murder? The judge then had Ellen Ellis recalled. She told the jurors when she left the house before the shot, Gedge and Mrs Scott were “sitting together on a form in front of the fire.” The last evidence the jury heard was that the wife and her lodger were alone together just before the murder.

A journalist recorded the Chief Justice’s charge to the jury:

> *His Honour laid down the law of the case respecting murder very clearly and pointed out that under the present law those who were guilty in the first, second or third degrees were all equally guilty. His Honour quite agreed with the learned counsel Mr Stephen that the case was in some respects the most extraordinary he ever met with. The confessions of the prisoners were in each particular case only applicable to the person making the confession. It was necessary for the jury to decide at the outset if the story of the prisoners Scott and Gedge was true that the deceased had shot himself. The prisoner Scott had made no confession. Nevertheless she had, if the evidence is believed, acknowledged that to be true what she knew to be untrue about her husband’s murder. He had never known a case where it was so necessary for a jury to be careful as in this. The jury must consider each case separately and if they had a doubt, give the prisoners the benefit of that doubt.*[27]

Elizabeth Scott never confessed. Yet by directing the jury about *“what she knew to be untrue”*, being the suicide-by-pistol lie, the Chief Justice emphasised an implied admission tantamount to a confession. Ellen Ellis and her husband certainly decided Elizabeth Scott’s fate, albeit implicating her via the pistol lie was only a legal means to a guilty verdict. Prurient Ellen Ellis introduced the notion of a tryst into the trial. Once the jury of husbands imagined young Davey Gedge secluded in the stables with the murdered man’s wife, Elizabeth Scott’s conviction was certain. The jury retired and returned with three guilty verdicts in 30 minutes.

Stawell implored the convicts to prepare for their future state before sentencing them to be hanged.[28] Elizabeth Scott showed no reaction to the verdict or sentence.

Before her death the newspapers pilloried Scott, sympathising with the “wretched young man Gedge, who it would appear, had been led to a course of crime by the seductions of the woman Scott.”[29] Yet the young man persisted in stating that no improper intimacy took place.[30] Even so, the newspapers still preached the executions would be a “warning and discourage sinful desires”.[31]

There was no Court of Criminal Appeal in 1863. Scott had no recommendation from the jury for mercy, usually a vital element in having a death sentence commuted by the Executive Council. The Governor and his Councillors considered the view of the trial judge and often petitions from the public. By 1863 the police informed the Council on the character of convicts. Sergeant Moors comprehensively smeared Scott’s character in likening her to a streetwalker, a widow not at all mournful who was only ever distressed by separation from her paramour.[32] Detective Edwards provided a pithy appraisal, “her husband was jealous of her”.

A petition from Mansfield residents in support of Scott was reported in the local press, but if ever created, it never found its way onto the Executive Council file. Yet aside from moral assessments Elizabeth Scott was described as intelligent in conversation, of vivacious disposition, and as being fairly educated and well informed.[33]

On Friday 30th November, Chief Justice Stawell was invited into the Council Chamber where he explained “some of the material features of the evidence”. The judge emphasised the jury did not accompany their verdict with any recommendation to mercy. Most significantly there was “no shadow of a doubt of the guilt of the whole of the prisoners.” The Councillors unanimously recommended all three capital sentences be carried into execution. The Governor concurred with the advice. The prisoners would die on 11 November 1863.[34]

Scott was visited by her “respectable looking” sisters to the last.[35] On the eve of their execution, all three passed a night of undisturbed rest. On being awakened in the morning, they did not exhibit any traces of special mental

suffering.[36] Each prisoner was let out to have their arms pinioned. Cross stepped out first. He joined in the incantations of the priest with fervour, while an acolyte held up a crucifix before him like a wand. Gedge began well, calmly submitting to his arms being tied, but before it was done he broke down, crying streams of tears down his young face.

> *When Elizabeth Scott came out everyone was struck by the bold, yet not exactly defiant aspect of her countenance. There was no trembling of the limbs, no paleness of cheek or lip, no quiver of the eye, and indeed no indication that she was filled with dread of the hangman's touch as any women not altogether of adamantine heart might be expected to be. She seemed entirely unsexed; and in point of nerve far excelled her fellows.*[37]

Dressed sombrely in black, her hair fashionably braided, Scott held a white cambric handkerchief. The executioner silently fastened her thin arms and then crowned her with a white cotton cap. Scott assisted his work by posing herself properly. The procession moved off accompanied by religious murmuring and out into the yard where the gallows stood. Elizabeth Scott exhibited no sign of trepidation, later explained as a failure by her spiritual advisors to make any impression on her hardened feelings.[38]

On the scaffold Scott declared herself entirely innocent. Almost within arm's reach of him, Elizabeth Scott turned and asked, "will you clear me now Davey?".
The weeping youth said nothing. The words hardly left her lips before the bolt was pulled and Scott dropped through the trap door. Observers saw her suffer. When they took her down the men saw she was fearfully altered, her head and distorted purple face were swollen immensely.[39] They had their female monster now.

The police put Elizabeth Scott's orphaned sons in the Protestant Orphanage in Melbourne after their mother's execution.[40]

Elias and Ellen Ellis returned to their farm outside Violet Town after the trial. Two years after Elizabeth Scott's execution, Ellen Ellis was found face down in her bed. A coroner found she "died from suffocation while in a helpless state from drink."[41]

* Ken Oldis is a member of the Victorian Bar and the author of The Chinawoman (2008, Australian Scholarly Publishing), which records the police-hunt for the murderers of an English prostitute which fanned anti-Chinese hysteria in colonial Melbourne.

1 VPRS: Victoria Public Record Office Series. Deposition of Elizabeth Scott at Devils River 13th April 1863. Criminal Trial Briefs, VPRS 30 Unit 261.

2 In 1860 Ann Hayes stabbed her husband to death during an argument over groceries. Her death sentence was commuted to 15 years imprisonment, VPRS 1080 Unit 5 Minutes of the Executive Council 1860 page 371. Most murders by women were infanticide. Although Margaret O'Donohue's sentence was commuted, she murdered a fellow prostitute in 1872 for calling her mother a whore, VPRS 264 Unit 7.

3 Deposition of Ellias Ellis at Devils River 13 April 186,3 Criminal Trial Briefs, VPRS 30 Unit 261, page 5.

4 Julian Cross said that his father was Portuguese and his mother Chinese; other reports described him as Malay.

5 Deposition of Constable J Bruce at Mansfield 24th April 1863 Criminal Trial Briefs, VPRS 30 Unit 261, page 5.

6 Sgt. Moors to The Officer in Charge Benalla 8/12/1863, VPRS 937 Unit 43.

7 Deposition of Elizabeth Scott at Devils River 13th April 1863,Criminal Trial Briefs, VPRS 30 Unit 261, pages 7-8.

8 Ibid, 5.

9 Ibid, 6.

10 Ibid, 10: deposition of David Gedge at Devils River 13 April 1863.

11 Ibid, 5: deposition of Ellias Ellis at Devils River 13 April 1863.

12 Det. Edwards to Supt. C. Nicolson 26th November 1863, VPRS 937 Unit 43.

13 Chief Commissioner of Police Standish memorandum of 17/11/1863, VPRS 1189 Unit 671.

14 Sgt. J. Moors to O.I.C. Benalla Police 8th December 1863, VPRS 937 Unit 43.

15 Deposition of Detective J Edwards at Mansfield 25th April 1863, Criminal Trial Briefs VPRS 30 Unit 261, 44-45.

16 Sgt. J. Moors to O.I.C. Benalla Police, 28t April 1863 VPRS 937 Unit 46.

17 Deposition of Elias Ellis, page 6. Deposition of Ellen Ellis at Mansfield 20th April 1863 Criminal Trial Briefs, VPRS 30 Unit 261, page 18.

18 Ibid, 10- 11.

19 Ibid, 22: deposition of Ellen Ellis at Mansfield 24 April 1863.

20 Sgt. J. Moors to O.I.C. Benalla Police 28 April 1863, VPRS 937 Unit 46.

21 Sgt. J. Moors to O.I.C. Benalla Police 27 October 1863. Capital Case Files, VPRS 30 Unit 261.

22 Ibid.

23 Ibid.

24 Trial transcript, page 5 Elias Ellis Criminal Trial Briefs, VPRS 30 Unit 261.

25 Ibid, 10.

26 Ibid, 15.

27 *The Ovens and Murray Advertiser* 24/10/1863.

28 *The Ovens and Murray Advertiser* 24/10/1863.

29 *The Herald* 12/11/1863.

30 *The Ovens and Murray Advertiser* 27/10/1863.

31 *The Herald* 12/11/1863.

32 Sgt. J. Moors to O.I.C. Benalla Police, 27 October 1863 Capital Case Files, VPRS 30 Unit 261.

33 *The Argus* 9/11/1863.

34 VPRS 1080 Unit 8, Minutes of the Executive Council 30/10/1863, pages 101-3.

35 *The Herald* 11 & 12/11/1863.

36 *The Herald* 12/11/1863.

37 Ibid.

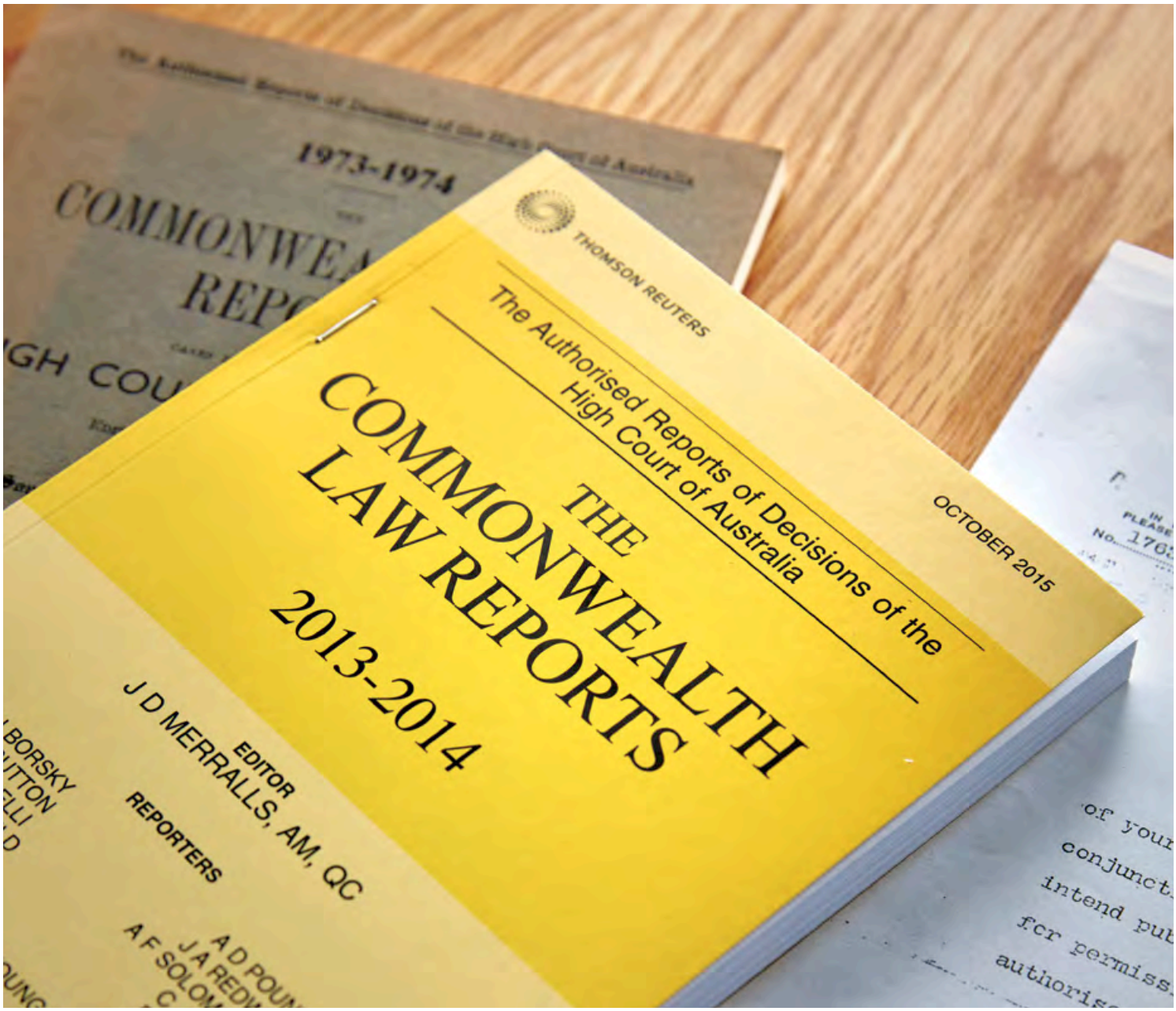
38 Ibid.

39 Ibid.

40 CCP Standish letter of 30/11/1863, VPRS 1189 Unit 671. Thomas was killed in a horse riding accident in 1879 the day after he turned 20. John died on the anniversary of his mother's death in 1936.

41 VPRS 24 Unit 169 Ellen Ellis Inquest number 384, 1 December 1865.

I must acknowledge Anne Hanson's *A White Handkerchief: The story of Elizabeth Scott, the first woman hanged in Victoria*, (Beechworth 2010), available in CD format and online at https://sites.google.com/site/awhitehandkerchief/.



The Commonwealth Law Reports

A personal reflection by J D MERRALLS

I have been asked for a piece giving a human face to 253 volumes of the Commonwealth Law Reports. Actually 253 is 254. The publishers' first avowed intent to publish annual volumes foundered with the advent of Mr Justice Isaacs in vol 4, which, to hold his outflow, became two volumes: parts 1 and 2. And so 254 volumes have been published over 112 years.

There have been many human faces behind the reports: those of publishers, editors, reporters and contributors.

In 1903, law publishing in Australia was a cottage industry. The company that was authorised to publish the judgments of the new High Court was not a branch of a huge international concern but a small Melbourne firm which grew out of the publishing side of the law stationer's business of George Maxwell. The first two volumes were published under the imprint of the Law Book Company, the next 28 under that of Maxwell.

I became a reporter for the CLR in 1960, two years before the retirement of Horace Lambert as managing director of the Law Book Company. I mention him not because I knew him but because he was a link with the earliest days of the

company. He joined Maxwells in 1901, became managing director of the Law Book Company in 1915 and held that position until retirement in 1962. Amongst his achievements was the establishment of the Australian Law Journal in 1927 and of The Australian Digest four years later. He was what would now be called a "hands on" CEO. Though not a lawyer he is said to have proofread every galley of the ALJ.

I did know his successor, David Caithness, another old hand, who expanded the company's text book publishing, and I had a close and happy association with all the managing directors and chairmen until the company left its cottage and moved to the metropolis. Dr James Williams, author of a treatise on the Statute of Frauds and editor of the best modern contracts text, became an active chairman after retirement as a vice-chancellor in New Zealand; Don Potter, who appointed me as editor, had a printing background; and Tony Lees was an English solicitor who came from editing and publishing at Sweet & Maxwell.

The first editorial and reporting team were in the main Maxwell men previously involved with the Australian Law Times, an unofficial series of reports of the judgments of the supreme courts of the southern states. The tale of their succession reads like the Book of Kings. The first editor of the CLR, James C Anderson, became editor of the ALT in 1889, having been a reporter at least since 1885. He belonged to the old school of law reporters. Though a member of the Bar, with a room in Selborne Chambers, he appears to have worked full time at reporting, moving from court to court to find suitable cases and note judgments. He edited the ALT as well as the CLR until his death in 1913. He was assisted in this by Bennet Langton, who reported most High Court cases from the inception of the CLR until his death in June 1929 (vol 41). He succeeded Anderson as editor of the ALT and held that position until his death when he was followed by Alfred H Hayball who had been an ALT reporter since 1904. Langton attended the sittings of the High Court as a reporter in Melbourne, Sydney, Adelaide and Hobart. His obituary in the Australian Law Journal records that "He was much esteemed by members of the legal professions, who always found him willing to give assistance to any of them who sought it in matters within his intimate and extensive knowledge of the decisions and practice of the High Court. His reports are characterised by accuracy and clearness."

> "A link with Federation was provided by W.A. Barton, a son of the first prime minister and original member of the Court, who was one of the first group of reporters."

The reports were at first edited, printed and published in Melbourne, where the principal registry of the Court was located. A link with Federation was provided by W.A. Barton, a son of the first prime minister and original member of the Court, who was one of the first group of reporters. But his association was brief. Even then the prime ministership had an association with New South Wales Rhodes Scholars. Wilfred Barton was the first Rhodes Scholar for that state. He practised later at the London Bar, appearing in the years between the Wars as junior in many notable cases from Australia before the Privy Council.

The original reporter of New South Wales cases was C A White, who later became the senior judge of the District Court of that state. No reporter was appointed from the other states, the reporting of cases from the outstations being assumed by the associate of one of the Justices, initially the associate to Mr Justice O'Connor, the redoubtable H E Manning—who was to be the first former reporter to be knighted (not wholly in recognition of his contribution to the craft of law reporting). He was followed by Sir Edmund Barton's associates Norman Pilcher and H V Jaques and Sir Samuel Griffith's, Norman McGhie. But by volume 14, Bennet Langton was the sole reporter.

Alfred H Hayball followed Anderson as editor of the CLR in 1913. He too was a full time reporter. He seems to have been a bit of a character. On leaving school he served apprenticeship as a printer at the Brighton Southern Cross newspaper before proceeding to Melbourne University where he graduated in Arts and Law. In his obituary it was said that he regarded his technical knowledge of the art of printing as standing him in good stead in his work of editing, in which he took great delight, and the production of the reports became his life work. A knowledge of printing was no disadvantage because until 1975 the reports were set by a process known as monotype which used individual pieces of metal for each character. The reports stayed in their cottage for rather a long time. I am grateful that for many years I have had the able assistance of someone who has performed many of the myriad tasks that poor old Mr Hayball had to undertake himself: Carolyn May, production supervisor of the reports in Sydney, who has held that position since 1987. She understands the computers that are the modern equivalent of monotype, while I have yet to begin apprenticeship in that field.

Harry Hayball was editor for 31 volumes and 21 years until his death in 1934. His successor, E F Healy, also came from the Australian Law Times. That great legal editor Jean Malor once told me that she considered him to have been the best editor the reports ever had. The headnotes of his time confirm that opinion. They are concise, accurate and consistent. Healy also had the advantage of editing the reports in the years of Sir Owen Dixon's dominance of the

F.

Comm-Law Reports. Authorisation.

COMMONWEALTH OF AUSTRALIA

IN REPLY PLEASE QUOTE
No. 1763/03.

ATTORNEY-GENERAL'S DEPARTMENT

Melbourne, 21st December, 1903.

Sir,

I have the honor to acknowledge the receipt of your letter of the 19th ultimo informing me that in conjunction with the Law Book Company of Australia you intend publishing the Commonwealth Law Reports, and asking for permission to have these reports recognized as the authorised issue.

In reply, I have the honor by direction of the Attorney-General to inform you that, at his request, the Chief Justice has expressed his willingness, and that of the other Justices, to revise the proofs of the reports, and to give any other assistance in their power to the reporters.

This will give the Reports the status, which you desire, of authorised reports.

It is understood that the Justices of the High Court, and this Department, will be consulted as to the form of the reports, the mode of reporting, etc.

I should be glad at the earliest opportunity, to see your representative and discuss with him several questions arising out of the proofs submitted.

I have the honor to be,
Sir,
Your obedient servant,

R. K. Finlay
Secretary.

C. F. Maxwell, Esquire,
(Messrs G. Partridge & Co),
458 Chancery Lane,
Melbourne.

Court. Even so his manifold qualities did not save him from dismissal in 1941 when he refused to accept a reduction in salary as a wartime austerity measure. Volume 66 contains the report of an appeal from the Supreme Court of Victoria in the master and servant case of *Healy v The Law Book Co of Australasia Pty Ltd*. Sad to say the appellant lost, but Mr Justice McTiernan's judgment notes that the company's letter of termination expressed regret at the severance of their relations and appreciation of the appellant's work as editor. Healy was down but not out, for the title page of that same volume records his return to the fold as a reporter, and so he remained until his death in 1952, 20 volumes later. For most of that time he doubled as associate to Mr Justice Starke.

On Healy's termination the editorship moved north. I suspect this was a wartime expedient, for the new editor, Bernard Sugerman, was a Law Book Company stalwart, who had been editor of the Australian Law Journal from its foundation in 1927 as well as the editor-in-chief of the Australian Digest. One must admire his capacity, for, as well as meeting his publishing commitments, he was a lecturer in the Sydney University Law School from 1926 to 1943 and he also conducted an extensive practice. He was the first editor also to be engaged in active practice and his appointment set the pattern for the future. The old breed of professional reporters also disappeared, the last being Joseph Bales of the New South Wales Bar, whom I can remember at Taylor Square in my days as an associate.

Sugerman was made silk in 1943. He resigned as editor in 1946 to become a judge of the Commonwealth Conciliation and Arbitration Court and was later a judge of the Supreme Court, the Land and Valuation Court and the Court of Appeal of New South Wales, from which he retired as president in 1970. He was the first editor not to be retained under a contract of service.

> "Conversations with Sir Garfield were only one way. He knew nothing about the problems or practice of law reporting but his fertile mind produced a host of ingenious ideas."

His successor, Bruce Macfarlan, editor for 13 years and 29 volumes, also was a leading barrister and one whose work lay more in the High Court itself. It was he who completed the change of practice in recruiting reporters, enlisting the likes of Francis Burt in Western Australia and Richard Searby in Victoria. When I became a reporter at vol 103 in the year after Macfarlan's appointment to the Supreme Court, Simon Sheller and Geoffrey Kennedy were amongst those on the strength. Macfarlan's recruiting practices continued under his successor and in my own time. My first appointment was of a Vinerian Scholar, Ross Sundberg, whose initials appear at the tail of most cases from vol 118 to vol 183. He was a reporter for 26 years from 1969 until 1995 when he became a judge of the Federal Court. His term as reporter just exceeded that of Bennet Langton but, unlike Langton, he combined the work with a substantial equity practice. Of his contribution to the reports, not only as reporter but as the source of second opinions about suitability, it is impossible to speak too highly.

In the last 40 years, the group of reporters has been drawn from Vinerian Scholars, Rhodes Scholars, prize winners from Australian universities, associates of High Court Justices, and other young barristers of high distinction. Former reporters have become judges of most superior courts of record, State and Commonwealth.[1] We await our first alumnus on the High Court bench to have been a fully fledged reporter, but one Justice did make a brief initialled appearance.[2] It should also be mentioned that Sir Frank Gavan Duffy was the first editor of the Australian Law Times, which had so many links with the CLR.

Bruce Macfarlan was followed as editor by my mentor Bob Howell, from whom I learned much. A breakdown in his health contributed to his resignation in 1969 but he answered a call to the colours in 1974 to become editor of the New South Wales Law Reports, holding that position for five years until his death at the age of 55. He was a fine man and it is regrettable that he did not achieve as much in the law as his ability deserved. We shared a common interest in attempting to breed and race thoroughbreds at the highest level with modest resources.

I can speak of relations with the Court only from my own experience. There have been six Chief Justices in my term as editor. Though I have known them all, my closest contact was with Sir Garfield Barwick. He liked to have his finger on everything connected with the Court and so we met over a meal or a cup of tea whenever he visited Melbourne. Conversations with Sir Garfield were only one way. He knew nothing about the problems or practice of law reporting but his fertile mind produced a host of ingenious ideas. One was that cases on the borderline for inclusion should be printed on perforated paper. After three (or perhaps five) years they should be reconsidered for permanency. If they made the grade they would be reprinted with proper page numbers. If not, they were to be torn out upon pain that if they remained no Court was to permit them to be cited in argument. Another idea, not so much for reports as for judgment-writing itself, was that there should be what he called a syllabus of facts and issues for each case, prepared by an officer of the Court, to which the reasons of Justices would be appended. This was proposed as a remedy for excessive length. I offered the opinion that the remedy

> “But from over 50 years as a reporter and over 45 as editor I do have a favourite contributor. Sir Frank Kitto...”

was perhaps too drastic and that it would be preferable for the Justices to consult in conference about the contents of individual judgments with a view to co-ordinating them. This suggestion was dismissed with scorn. “That would require them to adopt cabinet method. What,” he said with a contemptuous flick of the thumb, “what would *they* know about cabinet method? At the end of each case, each crawls off to his monastic cell and therein writes his judgment.” A third proposal was that the High Court should take over the production of the reports in the basement of the new building in Canberra. A judge who had retired from the Supreme Court of New South Wales after a stroke would be the editor and the associates would compose the headnotes. I told him that in my experience it took about a year to train a reporter, but he did not want to hear. Soon after that the ex-judge died and the government refused funds for the publishing venture. “You win,” he said, as though I had been left clutching a coveted prize.

The other Chief Justice whom I should mention is Sir Anthony Mason—Sir Anthony Mason of Mosman. He showed practically no interest in the reports and so I was intrigued to receive a telephone call from him out of the blue. He enquired about the practicability of printing footnotes to judgments. I said that it was a technical matter but I thought that there would be no problem. I asked why footnotes. “Some of my colleagues want their judgments to have the appearance of an article in a learned journal”, he said. Since at the time Sir Anthony was cultivating certain English learned journals which took pride that their articles looked like judgments, I found this explanation a little confusing. But the decision was made and a new era dawned.

Twenty-two years later, from parts north, south and west of Mosman, we have judgments that have the appearance of Halsbury’s Laws of Australia, judgments that have the appearance of a chapter for the next edition of a learned treatise, judgments that have the appearance of annotated statutes, judgments that have the appearance of transcripts of evidence and so on, but judgments ever longer and longer and less like those of pre-footnote days.

The editor of the Australian Law Journal once wrote about his favourite volumes of the Commonwealth Law Reports. I have none. I have only relief when each volume hits the shelf. But from over 50 years as a reporter and over 45 as editor I do have a favourite contributor. Sir Frank Kitto was not only a skilful practitioner of the art of judgment-writing. He also wrote a brilliant paper about that art which ought to be in the kitbag of every new judge.[3] He wrote of the travail of the “throes of putting ideas down on paper, altering what has been written, altering it a dozen times if need be, putting it away until the mind has recovered its freshness, even tearing it up and starting again” so as to obtain what is all “most of us [can] hope to get, in a difficult case, the fruits of the requisite intensity of penetrating thought, the best we can do in the direction of profundity”. He did just that. But with beguiling artifice. His judgments give the impression that when he picked up his pen he knew precisely the path it would follow. The judgment moved with clarity and precision, and nary a spare word or a loose phrase, to a conclusion firmly fixed in his mind. Proper words in proper places marked the true definition of his style. For the reporter the essence was already there.

The essence is not always there, and an important part of law reporting is distillation. The function is not always understood. When I was mentioned in an honours list a few years ago, a short piece appeared in a local newspaper. A reporter telephoned in the belief that I was the head of the Commonwealth court shorthand service. I told her something about the reports. In due course the item appeared. It said that I had read every judgment of the High Court in the past 30 years. I had then removed the meaning to make them fit for publication.

One of the hardest tasks in reporting and editing judgments of an appellate court is to know when and how to combine in holdings the reasons of separate judgments. A decision has to be made whether to regard concurrent judgments as saying similar things in different language or as differing in the substance of reasoning. Sir Frederick Pollock mastered the art of combining reasons in common propositions when editor of the English law reports. Healy managed it too as editor of the CLR. But I have always found it difficult and have perhaps burdened headnotes with distinctions without difference. Some reporters have the knack. Others do not.

Changes other than footnoting have occurred over the past 20 years. At the suggestion of Sir Gerard Brennan paragraph numbers were introduced in 1999 (vol 192). At the same time the Court adopted a numbering system for cases, which in conjunction with paragraph numbering has facilitated the adoption of what have become known as medium-neutral citations. To accommodate paragraph numbers marginal titles were discontinued and an unsatisfactory system of running head titles was adopted. Conventional short titles for citation are now to be found only in the tables of cases reported at the beginning of volumes.

Since the requirement of special leave for all appeals to the High Court was adopted by amendment of the *Judiciary Act* in 1976, the

number of reportable decisions has increased and fewer cases are excluded from publication in the CLR. The annual tables of unreported decisions of the Full Court now contain few ultimate decisions.[4] When an appeal lay from every judgment which involved a claim to or respecting any property of the value of $3,000, the Court was powerless to reject dross. Many cases were not only unsuitable for the CLR but also for publication in the Australian Law Journal Reports and the Australian Law Reports. All judgments assigned an HCA number are now published in the ALJR and so the editor's occasional decision to omit a case accepted for decision by the Court only to correct blatant error has no real significance. Only a handful of cases are omitted each year.

Another change resulting from new practices is in the quantity of material supplied to reporters. Until the late 1980s reporters received only the appeal books or other initiating documents, the transcripts of oral argument and carbon copies of the judgments. Now all documents before the Court are conveyed, usually filling an archive box. In summarising argument reporters have, as well as the transcript, the written submissions, outlines of oral argument, myriad accompanying documents, and sometimes subsequent memoranda. As well as the judgment booklet, they have the Court's own summary of the decision. Marrying the written and the oral requires skill and judgment. With so much material to be digested it has become harder to condense argument. Logistical problems with this host of materials have led to a change in appointment practice. To facilitate access to documents by the editor as well as reporters, reporters are now appointed only from the Victorian Bar.

The editor now must deal with materials, judgments, drafts and proofs at five stages before publication. Draft reports and galley and page proofs are also read by the publisher's experts at three stages. Yet errors slip through and the editor is seldom satisfied with the published result.

The other major change of recent years is in the form of publication of the reports. Bare bones versions of the judgments are made available on electronic media by entities such as AustLII and the Court itself. The printed reports provide what is called added value through headnotes, curial histories and summaries of argument. Because of the inadequacy for practical purposes of reliance on keywords in searches for judgments, catchwords have special value. The publishers of the CLR have entered the electronic age not by providing a new unique form of reports but by publishing the printed version in page form electronically. A decline in print subscriptions has been balanced by electronic subscriptions from users who wish to retain access to the added features. The electronic age thus has brought no changes in the method and style of reporting and the editor has been untroubled by modernity. The reports have not yet acquired a robotic face.

1 Eighteen named reporters have been appointed to State Supreme Courts (including six to Courts of Appeal and two Chief Justices) and seven to the Federal Court.

2 See *Thomas v Hollier* (1984) 156 CLR 152.

3 "Why Write Judgments?", *Australian Law Journal,* vol 66 (1992), p 789. The paper was presented to a convention of judges in 1973.

4 The table for 1974 in vol 130 contained notes of 40 cases, 23 of which were fully reported in the ALJR. The table for 2013 in vol 252 contained notes of six such cases.

Editors' Note

Victorian Bar News is pleased to publish this account of the history of the Commonwealth Law Reports by James Merralls, who has been their editor since 1969. Since that time technology has so altered the process of publication that many barristers may never actually hold a volume of the CLRs in their hands. The way we read them might have changed, but the essential value that they bring to the reader remains the same- and it is to be found in the skill of the reporters. In an address to mark the 150th anniversary of the establishment of the Council of Law Reporting on 6 October 2015, Lord Neuberger, President of the Supreme Court of the United Kingdom made the following remarks:

> *"Law reporters are the unsung heroes and heroines of the common law. The role of judges and legal practitioners in developing the common law has been taken for granted for centuries. And while the role of legal academics has become fully recognised relatively recently, the contribution of law reporters is not always properly appreciated.*
>
> *Selecting important cases, preparing a headnote, ensuring judgments are accurate, identifying the facts, history and cases cited, and summarising the arguments precisely, all require expertise, intelligence, care and effort. And, the moment one stops to think about it, one realises how great an influence law reporting must have had on the development of the law. In the past, unless they were reported, judgments were hard to know about or to find, so the selection and other tasks carried out by the law reporters plainly played a vital part in the perception and development of the law.*
>
> *Even now, with the electronic reproduction and consequent easy and immediate access to so many judicial decisions, law reporting plays a vital role. The very fact that so many cases are available electronically means that selecting and reporting the really important decisions is as vital as it ever was, as are the other law reporting functions. In the legal world, just as in most other fields, a significant present day problem is information overload, whereas the corresponding problem [in the past] has been information scarcity"*[1].

1 Victorian Bar News is grateful to his Lordship for granting permission to reproduce his remarks.

A case in history: R v Richards; Ex parte Fitzpatrick and Browne[1]

CLIFF PANNAM

... an unprecedented case of privilege in which Parliament defended itself with a zeal that many outsiders regarded as excessive. It was rather as if the House had been annoyed by two blow-flies, and used its new Mace to swot them.[2]

Way back in June 1955 I was a first year law student at the University of Melbourne. One of my subjects was Introduction to Legal Method (I.L.M.). The teacher was Arthur Turner, the sub-Dean of the Law School. The newspapers were full of reports, comments and criticisms about the fact that on 10 June 1955 the Commonwealth House of Representatives had decided to impose prison sentences, effective immediately, on two Sydney men. The men were alleged to have committed a serious contempt of the Commonwealth Parliament.

There was public feeling as to how it could be that the Commonwealth Parliament as a legislative body and not a court of law had the power to imprison these men. It was a lively topic of debate in our I.L.M. classes, and generally on the University campus.

Arthur Turner told us that the imprisonment decision was to be the subject of an urgent legal challenge before the Full Bench of the High Court sitting in Melbourne and those of us who could do so should attempt to attend. Turner said the case would turn upon the meaning, effect and relation between two sections of the Commonwealth Constitution – sections 49 and 71.[3]

The case was heard in the No. 1 Court of the then High Court building in Little Bourke Street. I arrived very early and was fortunate enough to obtain a seat. The Courtroom was packed. P.D. Phillip QC leading A. Mason appeared

for Raymond Fitzpatrick; R.J. Newton, J.M.I. Young and N.M. Stephen appeared for Frank Browne; and J.D. Holmes QC leading Else Mitchell appeared for the respondent. Little did I know then that I was later to come to know both Phillips and Holmes quite well.[4]

I was overwhelmed by the spectacle. The seven High Court Justices presided over by the Chief Justice, Sir Owen Dixon. Behind them, as an observer, sat Sir Raymond Evershed resplendent in his robes as Master of the Rolls who was visiting Australia and was a guest of the High Court. A crammed wigged and gowned Bar table. Beautifully dressed and hatted women sitting in what appeared to be the jury box.

The transcript of P.D.'s argument is in the National Archives of Australia and is available on the web. His main argument seemed both simple and compelling. The Parliament in hearing the charges against the men; finding them guilty; and then ordering their imprisonment, was exercising federal judicial power. This was a power that the legislative arm of government did not have because it vested exclusively in the courts as provided for in section 71 of the Constitution. Assuming both that the House of Commons had such a power and that the Australian Parliament had not declared otherwise, section 49 had to be interpreted so as to exclude the exercise by the Parliament of judicial power whatever other powers the Parliament may have had in relation to the protection of its powers, privileges and immunities.

In other words, unlike the position in the United Kingdom, section 49 had to be interpreted so as to accommodate the separation of legislative and judicial powers provided for in Chapter III of the Constitution of which section 71 formed a critical part. This was not to say the two men could not have been prosecuted and punished in a court. The point was that this could not take place in the Parliament.

I was more than a little surprised that all of this argument was taking place without any reference whatsoever being made to any of the facts of the case. From the judicial interventions during argument it seemed that these were regarded by the Court as completely irrelevant. Once the House of Representatives had resolved that the men were "guilty of a serious breach of privilege" such that they should be "kept in custody until the 10th day of September, 1955" and the Speaker had issued warrants for them to be taken into custody based on those resolutions, that was the end of the matter.

The Court did not call upon Holmes QC. It delivered its Reasons in such an important case orally and briefly the day after the argument finished. The Joint Judgment was delivered by Dixon CJ. His Honour referred to the situation in England and said:

> *... It is unnecessary to discuss at length the situation in England; it has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. ...*[5]

As Sir Owen Dixon put it:

> *The words are incapable of a restricted meaning, unless that restricted meaning be imperatively demanded as something to be placed artificially upon them by the more general considerations which the Constitution supplies.*[6]

His Honour then turned to deal with Mr Phillip's central argument.

> *It is correct that the Constitution is based in its structure upon the separation of powers. It is true that the judicial power of the Commonwealth is reposed exclusively in the courts contemplated by Chap. III. It is further correct that it is a general principle of construction that the legislative powers should not be interpreted as allowing of the creation of judicial powers or authorities in any body except the courts which are described by Chap. III of the Constitution. Accordingly, it is argued that a strong presumption exists against construing s. 49 in a sense which would enable the particular power we have before us to be exercised by the Senate or the House of Representatives. ...*
>
> *The consideration we have already mentioned is of necessity an answer to this contention, namely, that in unequivocal terms the powers of the House of Commons have been bestowed upon the House of Representatives. ... It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically – perhaps one might even say, scientifically – they belong to the judicial sphere. But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words, which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear.*[7]

A Petition for Special Leave to Appeal was made to the Privy Council. Sir Hartley Shawcross QC leading R.J. Newton appeared for Fitzpatrick and Browne.[8] The Commonwealth Attorney General Senator Spencer QC, J.D. Holmes QC and Else Mitchell appeared for the respondent. The Petition was heard on 14 July 1955. Sir Hartley put in great detail the argument which had been advanced by Phillip QC in the

High Court. However counsel for the respondent were again not called on.

As a mere law student I was shocked by all of this. Without knowing of, let alone considering the facts of the case or even the nature of the precise charges they faced, these two men had been imprisoned on the basis of a judicially unexaminable resolution of the House and a warrant of the Speaker which recited it. This was despite the fact that section 71 committed the judicial power of the Commonwealth to the federal courts and a compelling interpretation of section 49 which accepted the existence of all the "powers privileges and immunities" to which it referred but committed their enforcement so far as that involved the exercise of any judicial power to the courts and not to Parliament. And these considerations said by both the High Court and the Privy Council to be so clearly incorrect as not even to need to call upon opposing counsel!

Well I thought then, and more than 60 years later I still take leave to think, that both decisions were plainly wrong.

The Factual Background

Ray Fitzpatrick was the archetypal Australian ill-educated battler who made good in the heady atmosphere of Bankstown politics in the 1940's and 50's. He built up what his biographer, Professor Andrew Moore, has described as having been "… one of Australia's largest trucking, excavation, plant hire, sand, gravel and metal supplies' businesses."[9]

Bankstown is almost 20 kilometres south-west of Sydney. During the Second World War, Bankstown was home to a purpose built key strategic U.S. controlled air base. This base provided the area with major infrastructure and aviation related industrial developments. When the war ended Bankstown became a centre for a multitude of manufacturing businesses. What had been known as "Yankstown" became the "Birmingham" of Australia.[10]

Fitzpatrick had what might be charitably described as "close connections" with members of the Bankstown Municipal Council which he used to obtain valuable contracts for his expanding business. He became known as the "Mr Big of Bankstown" and did not hesitate to use unlawful means to further his interests, including so it was said: intimidation; arson; assaults; racketeering and bribery. It also seems clear that he had "friends" in high places both in the legislature - and even the judiciary - who played various roles in "protecting" him. These were the times of which Professor Moore has written:

> *The 1950's were a high water mark of corrupt practices in government in New South Wales, rivalled only by the subsequent Askin era, or the Rum Corps of the earlier colonial period.*[11]

The *Bankstown Torch* was a long-standing and well-regarded local newspaper with a large circulation. It had frequently published material that was critical of Fitzpatrick and his family's involvement in local municipal affairs. In 1950, as a reaction to this, Fitzpatrick decided to commence publication of his own newspaper, the *Bankstown Observer*.

In March 1954, the Bankstown Council was dismissed and an administrator appointed. This was the result of a damning Local Government Inspector's Report in January of that year. The report was critical of Fitzpatrick's business dealings with the Council, especially his brother Jack's activities in the electrical department. The *Torch* gave all of this a very detailed coverage. In retaliation Ray Fitzpatrick used the *Observer* to launch vitriolic attacks upon the *Torch* and its editor.

Charles Morgan was a solicitor. He was elected as the member of the Commonwealth House of Representatives for the electorate of Reid in the periods 1940-6 and 1949-58. At that time Bankstown was in the electorate of Reid (it was later incorporated into the electorate of Blaxland).

In 1944 Morgan launched an attack on Fitzpatrick under the protection of Parliamentary Privilege in which he accused him of "flagrant" breaches of the National Security Regulations. Fitzpatrick had been one of the main contractors responsible for building the Bankstown aerodrome. Morgan alleged that Fitzgerald had used his position to defraud the Commonwealth. Morgan's allegations prompted an elaborate investigation by the War-Expenditure Committee which uncovered various rorts in relation to the theft of an airplane hangar; hire of equipment; deliveries of non-existent and under-weight loads of metals, sand or gravel of inferior quality; bribery of various officials and employees; and much more. For various reasons, including the extra-judicial involvement of a friendly Judge who was a mate of Fitzpatrick's, he escaped with two minor fines of £75 for breaches of the National Security Regulations. An associated civil case against him by the Commonwealth was settled for a very small sum.

Before the war started in 1939 Morgan had formed a business under the name "Australian Settlers Agency" which was conducted in his legal offices as a solicitor in Sydney. This business involved the application on behalf of European refugees fleeing Fascism in Europe for immigration permits to enter Australia. It seems that intending immigrants were charged a non-refundable fee of £5 to submit an application; and, if a permit was granted, another £15. There were many other immigration agents offering such services and the fees charged by Morgan do not appear to be excessive. The business failed with the outbreak of the war. In any event, only 60 applications were lodged. Of these 26 were successful and only six refugees actually arrived in Australia.

There was one file held by ASIO under the name "Charles A. Morgan". This file mysteriously disappeared from the offices of the Security Service.

In 1944, after Morgan's attacks on him in the Commonwealth Parliament, Fitzpatrick wrote letters to the then Attorney-General Dr Evatt and other members of the Government complaining about Morgan's conduct. The letters referred in detail to Morgan's migration activities and clearly indicated that Fitzpatrick had access to details appearing in the missing security file.

Prior to the 1946 elections, Fitzpatrick - in his role as the campaign director for Jack Lang, Morgan's rival for the seat of Reid - had arranged for the printing of anti-Morgan pamphlets. They contained detailed information that again could only have been obtained from the Security Service file. The pamphlet described the contents of a "Police Report on C.A. Morgan MHR Connection with Refugee Racket". The pamphlets were widely circulated within the electorate. Morgan believed that they were the main reason why he lost his seat at the 1946 election.

In December 1949 Morgan was re-elected to the Commonwealth Parliament. From then until 1955 he remained silent as rumours and allegations spread about the "gang" that controlled Bankstown led by Fitzpatrick. However both the *Torch* and the major Sydney metropolitan newspapers subjected Fitzpatrick's affairs to continuous detailed scrutiny and criticism.

On Easter Monday 1955 the premises of the *Torch* were blown up and destroyed by an explosion and resultant fire. The proprietor of the *Torch* alleged that the Fitzpatrick brothers were responsible. They replied that the proprietor was responsible for the fire intending to claim the resultant insurance proceeds. There followed an inconclusive coronial inquiry. All of this was grist for the Australian press. It was said that Bankstown had become another "Chicago". The Melbourne *Herald's* E.W. Tipping reported that he thought he was

> "Browne was a well-known and prolific political journalist regarded by many as mentally disturbed, aggressive and a fantasist."

in a distant war zone rather than Bankstown and had heard many stories that he could not write because of the law of libel. Morgan was reported as having said that he believed a price of £3,000 had been offered to get him out of the way. He claimed that Bankstown had been subjected to a reign of "terrorism and gangsterism" arranged by Ray Fitzpatrick and that a Commonwealth Royal Commission should be established to investigate Bankstown's "reign of terror".

The strain of all of this was too much for the *Observer's* editor. He resigned. Ray Fitzpatrick was forced to find a replacement. He quickly did, appointing Frank Browne.

Browne was a well-known and prolific political journalist regarded by many as mentally disturbed, aggressive and a fantasist. He claimed to have spent time in America in the 1930's associating with mobsters and wrote in the racy style of Damon Runyon whom he admired. Browne published a gossip-filled weekly newsletter between 1946-1975 which had a large subscription base. It was called – *Things I Hear*; or, as Sir John Gorton once called it – *Things I Smear*! There were few public figures and politicians in Australia who had not experienced the discomfort of being in Browne's sights.

In any event and for whatever reason Browne accepted Fitzpatrick's offer of employment in mid-April 1955. He immediately set about ridiculing Morgan's claims about "terrorism and gangsterism" in Bankstown. Fitzpatrick was quick to show Browne the documents from the missing security file on Morgan.

The first article in the *Bankstown Observer*, written by Browne was published on its front page on 28 April 1955. The headline was:

M.H.R. and IMMIGRATION RACKET

Investigation Necessary

In the present Labor faction fight, all sorts of charges are being bandied about. Some are no doubt true, and some are without foundation.

Nobody expects politicians fighting for their political lives to be fair.

However, the anti-Evatt group in NSW are making charges that deeply concern the residents of this area.

They claim that Mr. C.A. Morgan, M.H.R., who is supporting Dr. Evatt, is, or was, mixed up in what can only be described as an Immigration Racket.

Unlike some of the charges made, these charges are detailed, and give names and dates, upon which it is alleged certain happenings took place.

Broadly, the charges are that Mr. Morgan, in company with another M.H.R., Mr. J.J. Clarke, and a man named Walter Goldman, were procuring entry into Australia for aliens at a fee of £20 per person.

It is also charged that false particulars were placed on application forms sent to Canberra.

[A list of 21 names then appeared which could have only been obtained from the missing Security File. The article then continued:]

Whether or not these charges are true ***The Observer*** *has no way of knowing. But can't help feeling that they are a good deal more detailed than the charges that Mr. Morgan has made inside and outside Parliament when it suited him and upon which he demanded a Royal Commission.*

If Mr. Morgan has an explanation, then he should be provided with an Inquiry at which he can refute the charges. If the charges are true, then, in the opinion of this newspaper Mr.

> “Fitzpatrick and Browne were afforded no effective opportunity to contradict, refute or even comment on Morgan’s allegations.”

C.A. Morgan is totally unfitted to be a Member of the Federal Parliament.

The Parliamentary Proceedings

Morgan was furious. On 3 May 1955 in a speech in the House he moved that the publication of the article should be referred to the Committee of Privileges. He claimed that it constituted “a maliciously false attack” on him. He said:

To put it in a nutshell, Fitzpatrick through his paper says, ‘If you don’t shut up in the House you will have further ignominy brought upon you and may even be driven from Parliament again’.

The article and all the surrounding circumstances, clearly shows the desire of Fitzpatrick through his paper to usurp the functions of the electors of Reid and arrogate for himself, for ulterior purposes, the right to dictate the conduct of the Member, both inside and outside the House.

In the light of his previously successful effort which, according to his own claims, deprived the Member of his seat for a term this could have the effect of intimidating the Member against carrying out what he conceived to be his duty to constituents and the community.

The motion was successful and the matter was referred to the Privileges Committee.

Browne and Fitzpatrick could not resist an immediate response to Morgan’s speech. On 5 May 1955 the headline in the *Observer* was:

MORGAN HIDES BEHIND PRIVILEGE AGAIN

Cowardly Canberra attack on the Observer

Under it there was a lengthy article in which the following appeared:

It has fallen to this paper to fight an issue which had to be fought sooner or later.

That issue is whether or not in this day and age, it is possible for any citizen who has anything to say against a Member to be dragged to Canberra, and put before some sort of an inquisition of politicians on the grounds that the dignity of Parliament has been injured.

Nothing was further from this paper’s mind than to attack the dignity of Parliament. Nowhere in the charges we mentioned was there an attack on Parliament.

Morgan had his remedy. If the charges were not true he could have approached the Courts …

A few days later, on 12 May 1955, the Observer returned to the subject. Morgan had been interviewed by another newspaper reporter, Alan Reid, who had published an account of it with the headline:

M.H.R. ATTACKS JUDICIARY, POLICE, AND POLITICAL PARTIES

STRANGE OUTBURST BY MORGAN

IS MEMBER FOR REID A SICK MAN?

The subjects dealt with in the interview were far ranging and constituted a savage attack by Morgan on Fitzpatrick and his associates. The Observer described them in considerable detail and concluded:

There is one clue perhaps to Mr. Morgan’s state of mind contained in Mr. Reid’s highly fanciful article.

It speaks of Mr. Morgan’s “black despair”.

As matters stand, the only people entitled to be plunged into “black despair” are the electors of Reid, and especially the electors of Bankstown, who are paying a man to spend most of his time slandering the district and those in it.

On 17 May 1955, Morgan himself appeared before the Privileges Committee. His evidence and commentary took up a whole morning and produced a transcript of some 42 pages of close typescript. It was an extraordinary performance. He launched into a scathing general attack on Fitzgerald. Allegations were made about his involvement in local government corruption; wartime frauds involving serious breaches of national security; sinister connections with a senior Judge (Justice Taylor of the NSW Arbitration Court) who was said to have exercised influence on his behalf; unlawful evasion of income tax; the theft and use of the missing Security file; and a variety of other matters. Browne too came in for his share of Morgan’s complaints.

Morgan also vigorously defended himself against the allegations that he had engaged in unlawful and improper conduct in relation to his actions as a solicitor in connection with immigration applications prior to him entering Parliament. He launched into a spirited defence of all the allegations which had been made against him in the *Bankstown Chronicle*. The exercise represented a wholesale attack on the honesty of Fitzgerald and Browne which the Committee encouraged.

Whether or not Morgan’s version of some or all of the multitude of the events and allegations to which he referred was accurate or justified is irrelevant. The fact is that they were made in private to the members of a Committee which was investigating the breach of Parliamentary privilege allegations. However, the fundamental problem about this is that neither Fitzpatrick nor Browne was given copies of this transcript; or informed about the substance of what Morgan had said. Morgan’s evidence was not only never tested; Fitzpatrick and Browne were afforded no effective opportunity to contradict, refute or even comment on Morgan’s allegations.

Despite this the Committee summoned Fitzpatrick and Browne to appear before them on 7 June 1955. Fitzpatrick applied for but was denied the right to be represented by his counsel, Mr A. Mason (as Sir Anthony then was). This was despite the fact that it was clear from the outset that the possible exercise of his right to refuse to answer questions on the basis that the answers might incriminate him was of critical importance. Indeed at the time the Committee refused Mr Mason leave to appear the following interchange took place:

> *The Chairman. - ... if we felt as a committee that he was likely to incriminate himself then in a spirit of justice, we would advise him accordingly.*
>
> *Mr. Mason. – I think that this is one of the real difficulties of this case, the possibility of incriminating questions being put to him.*
>
> *The Chairman. – We will watch that.*

The Committee certainly did not. Far from it. All of Fitzpatrick's evidence which appeared in their report, and which was the basis of the Committee's decision, was given by him in answer to questions which had the tendency, indeed the very object, of incriminating him! Furthermore those questions were asked in the main by Percy Joske Q.C. (later a Judge) and Messrs. Freeth and Bourke who were both solicitors.

Indeed this was so obvious that the Prime Minister, Mr. Menzies, observed when he later moved the House to adopt the Committee's findings –

> *If frankness could excuse an offence, then indeed this offence would be rapidly excused, because rarely in my experience, has a man been so completely forthcoming in what is called the object of the exercise.*[12]

When called before the House of Representatives to make submissions or comment after it had been determined to adopt the Committee's Report, Fitzpatrick again requested that Mr Mason be heard and again this request was refused.

Much later Sir Anthony Mason, recalling his involvement in this case said:

> *As counsel who was refused leave to appear, my sense of outrage over Parliament's denial of due process and natural justice remains undiminished after the lapse of 40 years.*[13]

The Committee's Report is dated 8 June 1955. The Committee found:

> *15. That Mr. R.S. Fitzpatrick and Mr. F. Browne have been guilty of a serious breach of Privilege by publishing articles intended to influence and intimidate a member, the honorable Member for Reid, in his conduct in the House, and in deliberately attempting to impute corrupt conduct as a Member against the honorable Member for Reid, for the express purpose of discrediting and silencing him. The Committee recommends that the House should take appropriate action.*
>
> *16. That there was no evidence of improper conduct by the honorable Member for Reid in his capacity as a Member of the House. ...*

It would be a far too lengthy exercise to set out the whole of the Committee's Report here but I will make this comment with no fear that it can be contradicted – no piece of evidence relied upon by the Committee to find guilt was obtained other than by answers to questions that were clearly designed to incriminate them and no warnings as to the answers as promised by the Chairman to Mr. Mason had been given.

The same day, 8 June 1955, the Chairman of the Committee, Jock McLeay, advised the House that Fitzpatrick and Browne had published:

> *... articles intended to influence and intimidate a Member, the honourable Member for Reid, in his conduct in the House, and in deliberately attempting to impute corrupt conduct as a Member against the honourable Member for Reid, for the express purpose of discrediting and silencing him. The Committee recommends that the House should take appropriate action.*

On 9 June 1955 the Prime Minister Menzies moved in the House of Representatives "That the House agrees with the Committee in its report." Both he and a ministerial colleague, Harold Holt, spoke briefly in support of the motion with even briefer contributions being made by two members of the Opposition. The motion was passed without dissent.

There was no re-hearing. Fitzpatrick and Browne were not invited to attend or be represented to make submissions as to whether or not the report should be adopted. Only the Prime Minister and Harold Holt spoke at any length. There were brief comments by Alan Fraser (A.L.P.) and Robert Joshua (Anti-Communist Labor). Dr Evatt, the leader of the Opposition, said that he would leave his comments until the men appeared before the House. It was all over very quickly.

Thus Fitzpatrick and Browne were convicted by the House of Representatives of the Commonwealth Parliament without ever having been heard as to why the Committee's Report should not have been adopted.

But convicted of what? No specific charge had been formulated or put to them in order that they could attempt to meet it; or to take legal advice in relation to it.

Frank Green was the Clerk of the House of Representatives between 1937 and 1955. He gave written advice to the Committee that in his view the case against Fitzpatrick and Browne was not a matter for Parliament, but rather was a defamation of Morgan in respect of a matter taking place long ago outside Parliament and was for the civil courts to determine.[14]

Green's view was not shared

by the Committee or the Prime Minister. When Menzies moved the House to adopt the Committee's Report he said – "… these attacks were designed to prevent him carrying out his duty to his constituents". The next day when the House was considering what penalty would be appropriate this became "a conspiracy to blackmail a member of the Parliament into silence" and actions "to close the mouth of a member of Parliament". Dr Evatt said it was a case of "contempt of the Parliament".[15]

The only matter left for debate was the decision as to what penalty would be imposed. Fitzpatrick and Browne were given the opportunity to be heard at the Bar of the House as to anything they might have to say on that subject at 10 a.m. the following day.

The only material before the House was the Report of the Committee itself. No transcript of the evidence or any other material or argument that was before the Committee was presented to the House.

After the Speaker, Archie Cameron, brusquely refused Fitzpatrick's request for his counsel, Mason, to speak on his behalf all that a tongue-tied Fitzpatrick managed to blurt out was:

> *I would like to apologise to the House for what I did. When the article was published in the newspaper I had no idea that it was against parliamentary privilege. I humbly apologize.*

Not so the truculent Browne. He delivered an elegant and passioned speech criticising the whole process that had brought him before the Parliament in the course of which he made and developed the following points:

> *First, I have been convicted and never charged. Secondly, at no time have I had legal representation. Thirdly, the case against me has not been properly proved. Fourthly, I have never had the right to cross-examine my accuser. And fifthly, I have no right to appeal. As far as the last is concerned, it is the inherent right for a man to have his case taken in an atmosphere that does not allow him to enter the court-room with the hatred, not only of spectators but of practically every one in the courtroom, including the jury, stirred up against him to a point where, if this was a community of another type, I doubt very much whether he would get into the court at all; he would be lynched on the way in.*

Then there followed a lengthy debate led by the Prime Minister who proposed a three-month period of imprisonment. He said that the Committee in substance had found the two men guilty of "a conspiracy to blackmail a Member of the Parliament into silence". He firmly expressed the very questionable legal view that the House did not have the power to impose a fine and that in his view a reprimand would be "ridiculous". I say "questionable" because it involved an acceptance of the dubious proposition that a sovereign Legislature could lose a power by desuetude in that the House of Commons had not used it for a few hundred years.

The Leader of the Opposition, Dr Evatt, also a distinguished lawyer (indeed an ex-member of the High Court!) challenged the view that the House had no power to impose fines and suggested that a substantial fine was the appropriate penalty. He said that the Prime Minister had incorrectly suggested there were only two choices – reprimand or prison.

There were many contributions to the debate. The Deputy Leader of the Opposition, Arthur Calwell, launched into a vicious personal attack on Browne calling him an "arrogant rat, just a character assassin". For the rest however the debate was restrained concentrating on whether a prison sentence would or would not be an appropriate penalty.

Throughout the debate the Speaker continually intervened to prevent any reference being made to anything that was before the Committee that was not expressly referred to in its Report. He also refused to permit his ruling to refuse to allow counsel to represent Fitzpatrick (and thus Browne as well) to be discussed.

Morgan himself was the last speaker in the debate; although he did not vote on the issue of sentence. Curiously he expressed the view, which had also been put forward by Gough Whitlam, that it would be better to have had the matter dealt with by an independent body rather than the House. He also said that in his opinion the whole of the transcript of the proceedings before the Committee should have been before the House.

Looking back from this distance at the content of the debate perhaps it was the words of Mr Allan Fraser, who had been a distinguished journalist, that seem the most compelling:

> *I cannot vote for the imprisonment of a man when that man has not first of all had the right to have the charges against him specifically stated in open hearing, the right to be represented and the right to cross-examine – all the rights which we give to men charged with the most horrific crimes in this community. These men have not had those basic and elementary rights …*[16]

Nonetheless this was the body which sentenced Fitzpatrick and Browne to three months' imprisonment. It was not an impartial tribunal acting in accordance with the principles of fairness and natural justice.

There was a completely indecent taste about it all. The Parliamentary session was to end on 9 June 1955. The Privileges Committee heard Fitzpatrick and Browne on 7 June and presented its report the next day. On 9 June after perfunctory debate the House agreed to the report. The session was extended for one day and Fitzpatrick and Browne were brought back to Canberra on 10 June. After the debate on that day they were imprisoned.

In his retirement reflections the Prime Minister Sir Robert Menzies recalled the case.

> *Looking back on it all, I think that what we did was right; that there was no undue haste; that the House itself maintained a high standard of responsibility; that the punishment inflicted served as a proper warning to people that the freedom of a newspaper or writer is freedom and not a license, and that it can be lost when it is abused.*[17]

It is very difficult indeed to accept that view.

Let me summarise in point form the various ways in which in my opinion Fitzpatrick and Browne were deprived of even the semblance of a fair hearing.

1. No specific charge against them was ever formulated.
2. They were denied legal representation before the Committee and the House.
3. They were never made aware of the evidence that Morgan had given to the Committee.
4. They were never afforded any opportunity to cross-examine Morgan or to even comment on his evidence.
5. They were not warned that their answers to a whole raft of critical questions might incriminate them; and they did.
6. They were given no opportunity to address or make any submissions to the House as to why the Report of the Committee should not be adopted.
7. The legal power of the House to impose a fine instead of imprisonment was never properly determined.
8. They had no right of appeal.
9. They were denied a fair hearing before an impartial tribunal.
10. The whole proceeding was conducted in an atmosphere of haste at the end of a Parliamentary Session.
11. There was no identified standard of proof.
12. The rules of evidence, or any semblance of them, did not apply in any form.

“ Sir Anthony Mason has described the decision as “unsatisfactory” and that it represents a “startling departure from the separation doctrine”. ”

Since 1955

In the years since 1955, the High Court has treated the exercise of judicial power in the form of prosecution and punishment of privilege cases in the Commonwealth Parliament as one of two exceptional cases to the otherwise exclusive vesting of Commonwealth judicial power in s. 71 Courts. The other being the disciplinary powers of defence force Courts Martial.[18] Indeed it has on occasion been stated that it is not judicial power at all but is a legislative power.[19]

There have been some judicial and extra-judicial murmurings of discontent. Sir Anthony Mason has described the decision as “unsatisfactory” and that it represents a “startling departure from the separation doctrine”. He added: “The facts of the case illustrate why the right to a fair trial before a Court is an indispensable element in the judicial process which culminates in conviction and sentence”.[20] Gleeson CJ has observed that the decision “has been questioned and doubted.”[21] Kirby J expressed the view that although the Court had:

> *... held that neither the structure of the Constitution providing separately for the judicature, nor its provisions, required a reading down of s. 49 of the Constitution defining the privileges of the two House of the Federal Parliament in terms of those of the House of Commons of the Parliament of the United Kingdom, that aspect of the decisions ... may one day require reconsideration.*[22]

It is difficult to disagree with Justice McHugh’s observation made in a lecture whilst he was still a member of the Court:

> ... [Fitzpatrick and Browne] ... *is difficult to defend ...The High Court upheld the imprisonment on the basis that s 49 of the Constitution gave each House the privileges of the House of Commons. In an oral judgment, the Court simply said that the separation of powers doctrine was not a sufficient reason for giving s 49 a restrictive meaning. But surely reconciling ss 49 and 71 required greater analysis than the Court gave to the problem. The resolution was an attainder, adjudging two men to be guilty of an offence and committing them to prison. It was an exercise of judicial power. No attempt was made to justify how or why the general language of s 49 should be given ascendancy over s 71 of the Constitution.*[23]

In 1908 a Joint Select Committee of the Parliament had considered these questions. The Committee found that the ancient procedures of the House of Commons to punish for contempt were “cumbersome, ineffective, and not consonant with modern ideas and requirements in the administration of justice.” It recommended that all alleged contempts be prosecuted by the Attorney General before a Justice of the High Court upon evidence on oath in open Court with the accused having the right to present evidence. If found proved, there was to be a power to impose a fine not exceeding £500 or imprisonment not exceeding 12 months. Nothing came of the recommendations.

Immediately after the Parliamentary proceedings against Fitzpatrick and Browne had concluded, Prime Minister Menzies said in a press statement that he would request Parliament in the next session to review the methods of enforcing its privileges.[24] That did not happen.

It was not until the *Parliamentary Privileges Act* 1987 came into force that the Commonwealth Parliament took any action under section 49

of the Constitution to deal with the question of its privileges and immunities. Section 5 provides that save as provided in its terms the powers, privileges and immunities of each House under s. 49 were to continue in force. Section 6 provided for a maximum penalty of imprisonment for an offence against a House of the Parliament of six months and for maximum fines of $5,000 (an individual) and $25,000 (a corporation). Section 9 provides:

> *"Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence."*

Section 4 headed "Essential element of offences" provides:

> *"Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member."*[25]

Whilst these provisions may have opened the door to some kind of judicial review they completely fail to address the multiple features of the breaches of natural justice that the Fitzpatrick and Browne case exemplified. There may be a judicial review to determine whether the conduct particularised in the Parliamentary resolution was capable of constituting an offence under s. 4 but what about the manner in which that conduct was said to be proved? It would seem findings by the Parliament in defiance of the principles of natural justice would not be a ground of review. And what is the possible justification for section 9 to only apply to the penalty of imprisonment and not a fine?

This legislation represents a considered and deliberate decision by the Parliament itself to retain the power to try and punish for contempt of itself instead of passing that power to the Courts. It simply does not meet the fundamental constitutional objection.

My introductory year to the study of law back in 1955 left me with the view that the decisions in *R. v Richards; Ex parte Fitzpatrick and Browne* was wrong. More than 60 years later I still have the same view.

1 (1955) 92 CLR 147.

2 Gavin Souter, Acts of Parliament (1988) at p. 431.

3 *Section 49 (Contained in Chapter I – The Parliament)*
"The … privileges, and immunities of the Senate and of the House of Representatives, and of the members and committees of each House, shall be as declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth".
Section 71 (Contained in Chapter III – The Judicature)
"The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in which other courts as it invests with federal jurisdiction".

4 Sir Phillip, as he was later to become, was a caring mentor of mine when I later taught at the Law School and during my early days at the Bar. Holmes JA of the NSW Court of Appeal, as he was later to become, was the author, inter alia, of a book on the law of money lending which he persuaded me that I should expand and rewrite as my own. I did, but with his considerable assistance. I also had a standing commission to locate and inform him of books or other materials relating to the history of the federation movement in Australia that I might happen to find ferreting around secondhand bookshops. I think his collection is now in the Mitchell Library.

5 P. 162.

6 P. 165.

7 P 167.

8 The transcript is also available in the National Archives. See footnote 5.

9 Andrew Moore, *Mr. Big of Bankstown* (2011) at 19.

10 Moore op. cit. at 12.

11 Moore op. cit. at 8.

12 He also said in a press release that both men "… fully and frankly admitted what they had done and why they had done it. In a substantial sense they pleaded guilty."! See: *The Argus* (14/6/1955) at p. 5.

13 *A New Perspective On Separation of Powers* (1996) Canberra Bulletin of Public Administration (No. 82) at p.1.

14 A view he repeated much later in his book *Servant of The House* (1969) at 155 – 162.

15 Later this view was forcefully expressed by Harry Evans who was the Clerk of the Senate (between 1988 – 2009) in his paper *Fitzpatrick and Browne: Imprisonment by a House of the Parliament* in Lee and Winterton (eds) *Australian Constitutional Landmarks* (2003). He bluntly expresses the view that Green's "advice was wrong" and based on a "confusion of a 'breach of privilege' and 'contempt of Parliament'".

16 When Parliament reconvened on 31 August, after the Privy Council decision, Fraser moved that Fitzpatrick and Browne should be released – "No imprisonment without fair trial – it is a cry which rings down the ages of glorious history". His motion was defeated 62/3.

17 *Afternoon Light* (1967) at 304.

18 For example: *Chu King Lim v Minister for Immigration* (1992) 176 CLR. 1 at 27; *By Their Next Friend GS* [2004] HCA 276 para 50; *Egan v Willis* (1998) 195 CLR 424 at paras 27-29; *Thomas v Mowbray* [2007] HCA 33 at para 91; *Sue v Hill (*1992) 199 CLR 462 at para 35.

19 See for example *Re Woolleys* (2004) 225 CLR 1 at para 50.

20 See note 13 at p5.

21 *White v Director of Military Prosecutions* [2007] HCA 29 at para 142.

22 *Egan v Willis* (1998) 195 CLR 424 at para 136.

23 "Does Chapter III of the Constitution protect substantive as well as procedural rights?" (2001) 3 *Const Law & Policy Review* 57 at 62.

24 *The Argus* (14/6/1955) at p. 5.

25 To be read with s. 6:
Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.
Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

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 15 October, 2015.*

Back of the lift
Adjourned Sine Die

Federal Circuit Court

Judge Frank Turner

Bar Roll No. 2888

A ceremonial sitting for the Federal Circuit Court was held on 19 June 2015 to farewell Judge Frank Turner. His Honour's career prior to his appointment has been noted in a past edition of the Victorian Bar News and was canvassed extensively also in his welcome ceremony on 19 October 2006. This brief article does not propose to revisit those matters, distinguished as they were.

The farewell was attended, as the Attorney-General's representative correctly remarked, by a great number of distinguished guests, including members of the federal judiciary and visitors who had travelled from interstate and colleagues within the Federal Circuit Court itself. The ceremony was also, it should be noted, attended by a considerable number of practitioners who were mainly from the Victorian Bar, whose areas of practice reflected the breadth of his Honour's judicial activity. Industrial lawyers jostled family lawyers and others in the resulting scrimmage.

This attendance reflects not only admiration for Judge Turner, but also the affection in which he is so rightly held.

Writing as a colleague on the bench of some nine years and as a colleague at the Bar for far longer than that, what characterised his Honour as a judge were the qualities of courtesy and industry, allied in court (in appropriate situations) with devastating use of his Honour's understated but trenchant humour. Outside court, Judge Turner's humour applied without restriction in any circumstance he felt appropriate.

Speakers at the farewell commented on his Honour's courtesy to litigants and to those who appeared before him. His Honour was a byword for courtesy and was particularly adept at dealing with litigants in person, a difficulty that presents itself far too frequently in family law matters. His down-to-earth and direct manner defused many a difficulty and allowed proceedings to progress in circumstances where they very easily might not have.

His Honour throughout his time on the bench attended diligently to his very extensive docket and his judgments never got out of hand. He left court, as may be expected, with a completely clean slate and so far as I am aware has certainly not been overturned in any appeals thereafter.

It may be confidently expected that his Honour will make good on his expressed intention to visit his friends in the country and assist them in the repair of their machinery (his Honour has an extremely practical bent) and in the appropriate diminution of such supplies of wine as they may possess.

His Honour's responding speech was marked with perhaps two particularly

obvious qualities. The first is his devotion to his wife of so many years, Helen, who has been such a clear and obvious source of support during his time on the bench. The second was his Honour's unassuming, self-deprecating but devastating wit. His doubts about his mentor Pat Doulton's golfing ability were beautifully turned, and his self-deprecating paraphrase of Helen's advice about the speech, "Don't try to be intelligent or interesting. Just be yourself." are some examples.

Judge Turner leaves the Federal Circuit Court not only with the ringing endorsement of those who spoke at his farewell but also with the constant and continuing affection of all of his colleagues. All of us take pleasure in wishing him a long and very happy retirement.

PHILIP BURCHARDT

Silence all stand

Supreme Court of Victoria

The Honourable Justice Dixon

Bar Roll No 2287

There could be little doubt about the incredible commitment Justice Jane Dixon showed to her clients, her profession, and her community over her 26 year career at the Bar.

Justice Dixon's passion for the law and those involved in and affected by it developed at an early age. While still at school, she would go to watch her father, then a Crown Prosecutor, in court. Still at school, she did work experience with Betty King at the Bar – a fitting connection as she now takes the vacancy created by Justice King's recent retirement.

Her Honour served articles with Frank Galbally, affectionately known as Mr Frank, at Galbally & O'Bryan. She was the firm's first female articled clerk. Upon coming to the Bar in 1988, her Honour rather unusually split her reading so as to get a variety of experience, first with Lillian Leider in crime, then with Dyson Hore-Lacy in civil. Her Honour's practice was mainly in crime, however upon taking silk in 2006 this expanded as she took on more civil work.

To her clients, she would not only bring intelligent forensic analysis to their cases, but genuine compassion. She would often spend hours with clients, listening, coming to understand motivations, then being able to confidently make her case to a jury at a trial, or a judge upon a plea. Many times the latter was not necessary because of her success with the former.

To her profession, she was also dedicated. At an individual level she devoted many hours to her readers and the many juniors passing through her chambers. All speak of her dedication and ongoing generosity.

Beyond that, Justice Dixon's commitment to the Bar has been extraordinary, and usually combined to deliver a broader social benefit to the community. To mention a few contributions: she served on Bar Council; she taught in the Bar's South Pacific Advocacy Program; she was a foundation member of the Indigenous Lawyers Committee on which she served for 15 years; she served on and chaired the Pro Bono Committee for five years, leading by example and initiating the Bar's volunteer response to the 2009 Victorian Bushfires; then lately, at a time of increased politicisation of 'law and order', and although a private and family person, her Honour accepted a two year appointment as the high profile President of Liberty Victoria in order to promote the defence of human rights and justice for all.

It is pleasing for the rest of us to observe that Justice Dixon does have some flaws. Like so many over-achievers, she can struggle with the more mundane aspects of life: making sure there is petrol in the tank; catching a V-Line that is travelling towards Melbourne, rather than Sydney; and marking backsheets.

Justice Dixon has upheld the best traditions of the Bar and has now committed the rest of her professional life to public service. We can only hope that her new Associate knows to keep a spare set of keys to the Supreme Court handy.

MEGAN TITTENSOR

The Honourable Associate Justice Ierodiaconou

On 12 May 2015, Mary-Jane Ierodiaconou was appointed an Associate Justice of the Supreme Court of Victoria after more than 18 years of practice as a solicitor. Her Honour comes to the Court from Justitia, a firm of solicitors specialising in employment and industrial relations, where she was a founding partner.

Her Honour studied History, Politics and English Literature, graduating with a Bachelor of Arts at the University of Melbourne in 1989. In 1992 she returned to study law and graduated with Honours before going on to complete her Masters of Law, also at the University of Melbourne.

Her Honour completed articles

with Stephen Walters at Dunhill Madden Butler, now Norton Rose Fulbright, and became a senior associate at that firm before moving to Blake Dawson, now Ashurst, as a senior associate in the Industrial Relations and Employment group.

At Ashurst, her Honour became the firm's pro bono coordinator in its Melbourne office. Her commitment to pro bono work was evident long before her Honour took up that role. From 1996 to 2006, her Honour volunteered at the Victorian Immigration Advice and Rights Centre, offering free legal advice to migrants and refugees. It remained evident after her Honour left Ashurst and was recognised by the Commonwealth Government, which listed Justitia as one of the top 10 pro bono contributors in 2013-14. Her Honour has also published several important articles and reports on refugee claims and other human rights issues.

As a solicitor, her Honour developed a reputation as an engaged and creative instructor whose careful analysis of every matter was captured in a thorough and detailed brief. Among the barristers her Honour briefed were some who are now judges of the Supreme Court. Justice McDonald, whom her Honour briefed in a restraint of trade case, recalls that her Honour had very firm and confident views as to how the case was to be run and what advice was to be given to the client.

Her Honour also briefed Chris Maxwell and Karin Emerton as counsel in the High Court in *Re McBain; Ex parte Australian Catholic Bishops Conference*,[1] a case identified by the Australian Human Rights Commission as one of the major Human Rights decisions in the last 21 years. President Maxwell recalls her Honour's idealism, energy and vigour – and her *joie de vivre*.

Her Honour brings to the Court a strong record of hard work, passion, careful analysis and confident assessment, a calm manner and a warm smile, all of which are valuable qualities in a member of the Court. Bar News wishes her Honour every success in her new role.

VBN

1 [2002] HCA 16; 209 CLR 372.

County Court of Victoria

Her Honour Judge Amanda Chambers

Amanda Chambers was appointed to the County Court of Victoria on 9 June 2015. Her Honour was also appointed as the fourth President of the Children's Court of Victoria, for a term of five years.

Her Honour graduated with arts and law degrees from Monash University in 1988. After completing the Leo Cussen practical training course, her Honour worked as a solicitor at Slater & Gordon in its industrial section with Julia Gillard, who would become Prime Minister, and Bernard Murphy, now Justice Murphy of the Federal Court. After travelling the world, her Honour joined Maurice Blackburn & Co as a senior associate in the firm's industrial and employment division in 1994.

As a solicitor, her Honour immediately impressed as intelligent and extremely hardworking with a great empathy for her clients. These qualities have shone through in the subsequent chapters of her working life.

Among the cases her Honour was responsible for as a solicitor was a challenge to the "scratch ticket" system of public transport ticketing in the late 1980s. The challenge was made under the *Equal Opportunity Act 1984* (Vic). It was alleged that a number of would-be commuters with disabilities were the subject of indirect discrimination as a result of the ticketing system, as they were less able to use the public transport system than people without disabilities. Her Honour briefed Tony North QC, now Justice North of the Federal Court, with Herman Borenstein. The many long days and nights put in by that formidable legal team were ultimately rewarded with victory before the High Court. The Court's judgment (*Waters v Public Transport Corporation* (1991) 173 CLR 349) remains one of Australia's leading discrimination cases.

Her Honour was appointed to the Magistrates' Court in September 2006. During her eight years on the bench, her Honour impressed her colleagues, litigants and advocates alike with her keen intelligence, efficient court craft and genuine concern for all who appeared in her court. She contributed also by participating on many court committees.

Her Honour's work on the Court was recognised in November 2008 when she was appointed to the Law Reform Commission of Victoria. Her Honour worked on numerous references in her four years at the Commission, including jury directions, protection applications in the Children's Court, sex offenders' registration and guardianship.

Outside the law, her Honour is an avid movie-goer and reader and, with the possible exception of watching re-runs of *The West Wing*, enjoys nothing more than overseas travel with husband, Peter, and their children, Ben and Jessie.

Victorian Bar News congratulates her Honour on her appointment to the important position of President of the Children's Court and is confident that her Honour's strong sense of fairness and social justice will ensure that she serves the Victorian community well in this challenging role.

VBN

Her Honour Judge Sara Louise Hinchey

Bar Roll No 3035

As the overflowing ceremonial court room of the County Court demonstrated on 4 June 2015, the Victorian Bar was delighted by the appointment of Sara Hinchey to the County Court.

Judge Hinchey was educated at Monash University, and undertook articles at Purves Clark Richards in 1993. She went straight from articles to an associateship with Justice Hansen in the Supreme Court, a position she occupied until 1996. In 1996 her Honour signed the Bar Roll and read with Paul Santamaria.

Her Honour enjoyed a wide-ranging practice at the Bar over almost 20 years, appearing in virtually all courts and tribunals, including the High Court, before Royal Commissions and other enquiries, and before the Medical Board. Her practice spanned the gamut of the law —common law, crime, commercial, public and industrial law. As the President of the Victorian Bar observed at her Honour's welcome, she will be at home in all divisions of the Court.

Her Honour was a great contributor to the Victorian Bar. She served with distinction on the Victorian Bar Council from 1998 to 2001 and then again from 2007 to 2010, having being a member of the Bar Council Executive Committee from 2007 to 2009 and assistant treasurer in 2009-2010. Her Honour also served on several Bar Council committees and has been a director of the Essoign Club.

Her Honour had five readers, including two from Vanuatu, and her approach to mentoring has been described as generous, gracious and supportive.

However, as much as she is famous for her career as a barrister, her Honour is also justly famous as a Francophile, chef, bon vivant and mimic. Her Honour has achieved prominence in culinary circles over recent years and in the media as "the Truffle Hound". She has conducted master classes in the use of Australian and European truffles for the Gourmet Traveller magazine and with Guy Grossi at Grossi Florentino. To the delight of those assembled, Judge Hinchey's skill as a mimic was on public display at her welcome.

Her Honour is married to Tom Pikusa of our Bar. Her appointment will undoubtedly be a great success, and Victorian Bar News warmly congratulates her Honour on her ascension to judicial office.

TIMOTHY MCEVOY

Magistrates' Court *of* Victoria

His Honour Mr Charles Tan, Magistrate

Bar Role No 3171

His Honour, Mr Charles Tan, was sworn in as a magistrate of the Magistrates' Court of Victoria at a sitting of the court held on 30 July 2015.

His Honour graduated from Monash University with a Bachelor of Economics and a Bachelor of Laws and was admitted to practice in 1996. He signed the Roll of counsel in November 1997, having worked as a solicitor for but a few months before commencing the Bar readers' course.

His Honour developed a practice in criminal matters in the Magistrates' and County Courts, at first undertaking pleas and appeals and later conducting contested criminal matters in the Magistrates' Court. In due course he was briefed in jury trials in the County Court and, while appearing mainly for the defence in these trials, also prosecuted from time to time.

When time allowed, his Honour appeared in a variety of civil matters, including debt matters, motor vehicle accident claims and family law matters.

In more recent years, his Honour developed a substantial practice in the child protection jurisdiction and while appearing mainly for the Department of Health and Human Services, also appeared for other parties in these matters from time to time.

As an instructor at the Leo Cussen Institute for some 15 years before his appointment, his Honour instructed in the civil litigation component of the Practical Training Course, and conducted moot bail courts in that course. In recent times his Honour undertook the role of mentor to online students in the Practical Training Course.

His Honour also participated as an instructor in a two-day training course in pleadings and drafting, offered to lawyers in the Papua New Guinea Office of Solicitor-General and conducted in Papua New Guinea by the Leo Cussen Institute.

His Honour was born in Malaysia and came to Australia as a four-year-old, living with his parents and his sister in Queenstown on the west coast of Tasmania, where his father work as a doctor in the local hospital. His Honour's family moved to Melbourne after four years in Tasmania and he went on to attend Caulfield Grammar School and Monash University.

His Honour played cricket as a spin bowler of some ability, once taking four wickets for one run in an inter-school match.

He follows Richmond and admits to having owned and worn a black and yellow scarf and a duffle jacket, the latter embroidered with the names of the Richmond heroes. He also owns up to having attended many, many matches, where he gathered behind the goals with many others wearing identical scarves and jackets.

As a member of the Bar, his Honour gained a reputation as hard-working, conscientious and unfailingly courteous, and many of his colleagues attended the ceremonial sitting held to welcome his appointment.

We extend our congratulations to his Honour upon his appointment and wish him well for the future.

JIM BUCHECKER

Vale

Francine McNiff

Bar Roll No 2206

Francine was something of an enigma to those of us who knew her well. She possessed a combination of ability and style, which made her a very capable advocate, as well as a pronounced sense of mischief which could surface without warning.

Both as a magistrate and as counsel she was absolutely fearless and passionately dedicated to fairness in any matter in which she participated. Some of the most abstruse technical discussions I have ever had commenced with her lighting up one of her favourite "black Russian" cigarettes and saying "now tell me what you think …" It is not an understatement to say that the next twenty minutes would cover law, tactics and, most importantly, the fairness of any proposed course.

In her later years, ill health forced her retirement from the Bar but did nothing to affect her ability to comment, often caustically, always accurately, on the legal system and several of its (mercifully unnamed) participants.

In the event that the afterlife requires me to stand trial on anything, she will certainly be lead counsel for the defence.

I shall miss her.

MAX PERRY

Clive James McPherson

Bar Roll No 1292

Clive McPherson (born 5 December 1937) practised as a solicitor in Tatura and Rushworth – as a Principal in the firm of O'Toole & McPherson – for some 6½ years (1965-72). He was then a solicitor with VicRail. He came to the Bar in 1976 and read with Jeffrey Loewenstein.

He was first appointed a Magistrate in the Northern Territory and served there for six years (1984-89). He was appointed a Victorian Magistrate on 26 April 1990 and served more than 16 years until his retirement in July 2006.

In January 1993, he was asked to relieve for three months at the Children's Court. Thirteen years later, he was still there. The Children's Court held a ceremonial Farewell sitting on 7 July 2006. His contribution to the Court was described as "outstanding". He continued to serve as Judge Coate's Associate until her Honour's appointment as State Coroner.

He had, in his youth, been a fine athlete, running in the Stawell Gift, and playing football and cricket – he played in the Bar cricket team against the solicitors.

VBN

The Honourable Frank Callaway RFD, QC

Bar Roll No 1336

Frank Hortin Callaway was born on 10 November 1945, the only child of only children.

Educated at Melbourne Church of England Grammar School, winning Entrance, Junior and Senior Government Scholarships, he matriculated in 1963 with Special Exhibitions in Latin and in French and a General Exhibition and a Trinity College Non-residential Exhibition. Repeating in 1964, (as was then the custom), he obtained four First Class Honours and was a Cadet Under Officer, House Captain, School Prefect and the School Librarian.

He graduated with a First Class Honours Law Degree from Melbourne University in 1969, winning the EJB Nunn Scholarship, the Robert Craig Exhibition in Company Law, and the Supreme Court Prize, as well as being Editor of the Melbourne University Law Review. His Master of Laws thesis at the University of Melbourne in 1974, supervised by Professor H.A.J. Ford, was later published as *Winding up on the Just and Equitable Ground*. He also published an invaluable set of "*Drafting Notes*", which is out of print but prized by those who have a copy.

He was articled to Colin Trumble at Mallesons, and his admission to practise was moved on 1 April 1969. Admitted swiftly to partnership in 1974, he spent three years as a partner before retiring from Mallesons in 1977 to come to the Bar. He read with Ross Sundberg and practised mainly in company law, trade practices and constitutional law.

While still a junior, he appeared twice before the Privy Council, in *Coachcraft Ltd v SPV Fruit Co Ltd* (1980) 28 ALR 319 and in *Hamersley Iron Pty Ltd v National Mutual Life Association of Australasia Ltd* (1985) 64 ALR 19. In the latter case, the trial had taken three weeks. An appeal to the Full Court of Western Australia had taken five days and the appeal in the Privy Council took two days. Callaway took the matter over from SEK Hulme QC who had suffered a heart attack shortly before the hearing in the Privy Council.

In argument Lord Templeman said the appeal essentially had two points. The first point had been lost by the appellant at trial and in the Full Court. The second point had been upheld by the trial judge and the minority judge in the Full Court. Callaway pressed the first point to which Lord Templeman remarked "On your second point, you are pushing at an open door as far as I am concerned. In fact I am agog to hear what the respondent has to say about it. But I can't see there is anything in your first point." Callaway succeeded- on the second point only.

He took silk in 1987. Before doing so he had announced that he would take only appellate work. Thus, he had a large appellate practice before the High Court, many state Supreme Courts and even the Family Court. His advocacy was marked by meticulous preparation and clarity of expression and thought. As in life, he always flew first class and never by the seat of his pants.

Appointed in June 1995 as an original member of the Victorian Court of Appeal, he took to his

appointment with relish. He was widely regarded as a courteous, helpful judge who had thoroughly read and understood the material presented and, as some advocates have described it, there would often be a waterfall of paper from the bench as he passed cases down to counsel. He always got quickly to the main points of the case, and was particularly skilled at handling difficult litigants in person. Despite having no experience in the field of criminal law, it was said at his farewell that his greatest contribution as an appellate judge had been to the Victorian criminal law where he had "brought order to chaos".

He spoke several languages fluently, was widely read and had an interest in all things ancient, classical, linguistic, military and travel related. In retirement he tutored, running a philosophy club at Geelong Grammar School and promoting positive psychology there and at St Paul's College at the University of Sydney.

At a memorial service commemorating his life, the Dean of Melbourne referred to Callaway's deep contemplation of philosophy and faith and quoted from his pseudononymously published book about positive psychology *Reflections*:

> *As part of his reflections on life, justice and the life after death, he also spent time reflecting on what it means to let go: 'It is of the essence of the spiritual life … that one must first "let go": … [this is first of all] a matter of stopping and, as it were, doing nothing. Later it extends to letting go of ideas, as well as mental habits that cause unnecessary suffering. For some people there is a release from anxiety and a sense of inner peace.' (Reflections, p. 1).*

On 2 July 2015, Callaway "let go" at a time of his own choosing.

James Stephen (Jim) Bessell

Bar Roll No. 1355

On Friday 31 July 2015, Jim passed away in the Alfred Hospital after a very determined, courageous battle against illness at just 63 years of age. His wife Victoria, and sons Jack and Alex, have farewelled a good and decent man, a loving, devoted, gentle and kind husband and father; his myriad of friends from all walks of life will miss his loyalty, generosity, unique sense of humour and the sheer pleasure of his company; and the Victorian Bar has lost a most respected capable, fair, compassionate and fearless criminal advocate of just on 40 years standing.

Jim lived a full and interesting life as detailed by his beloved brother Dan during a moving eulogy to a packed funeral service on 7 August, 2015. He was born on 23 March 1952, the youngest of two sons to Jim and Thelma, and spent his happy boyhood in Essendon where he attended Essendon Grammar. Here, by all accounts, he was "a sometimes enthusiastic scholar" but "an always eager member of the football, cricket and swimming teams." During these years Jim's dad purchased a large bakery in the district and young Jim delighted in visiting at every opportunity to play in and explore the large premises, but more particularly to sample its many wares which were abundant and of course "free". At aged twelve Jim continued his education as a boarder at Peninsula Grammar in Mornington where he was so popular that he eventually became a prefect and house captain. Suffice to say, he was not one for the enforcement of strict discipline and none of his schoolmates ever had a bad word to say about him.

He studied law at Monash University and whilst there his family purchased and ran the El Dorado Hotel in North Melbourne where Jim lived and worked part-time as a barman and at times as the cook, although he always preferred and insisted on the title "head chef". It was here he developed his passion for the North Melbourne Football Club, or "NORF" as he called them.

After graduation, Jim served articles with Cohen, Kirby and Iser in Bendigo, signed the Bar Roll in October 1977, and read with F.G.A. (George) Beaumont. From 1984 to 1989 he worked as crown counsel, then senior crown counsel in the Hong Kong Attorney General's Department, and one case saw him travel to London to appear before the Privy Council. At many long lunches that escapade inevitably got an airing. Homesickness eventually won out and Jim returned to Melbourne in 1990 where he quickly re-established a successful practice in defence and prosecution trial work. In 1993 he married the love of his life Victoria Whitelaw and was overjoyed when they welcomed son Jack into the world. Jim was a wonderful father to both sons and they were devastated when finally he lost his battle.

Throughout the last ten years, Jim's practice shifted to mainly prosecution work and he enjoyed going on circuit. He loved his work, country Victoria, and country people. Many of his mates will attest to Jim's ability to always source the best produce from rural areas which he would distribute on his return with the words "very very nice".

Jim Bessell was a man big in stature, big in character, and big in personality — although there were times when he would exhibit a most endearing shyness. All who met Jim liked him, those of us closest to him loved him, and all were the richer for having known him. His passing leaves a great void in the lives of many. Well done on a life well-lived "Baron". We miss you!

WAYNE TOOHEY

John Ainslie Bell

Bar Roll No 1888

John Bell passed away peacefully on 12 August 2015. He was 72 years of age. His health had deteriorated in the past few years.

During and after school John farmed on the family property, "Warrumea", at Wangoom, near Warrnambool, following his father and grandfather before him. He initially only completed a Leaving Certificate in the expectation that he would continue to

farm but, at the age of 27, he completed his Matriculation. He subsequently graduated LLB at the University of Melbourne.

John was admitted to practice in November 1975 and worked as an employee solicitor with Ellison, Hewison & Whitehead (now Minter Ellison). In 1979 he became an associate with the firm. He worked mainly with David Jones (then a partner but later Judge Jones of the County Court) and mostly on instructions from the State Insurance Office. During his years as a solicitor, John continued to run Warrumea until its sale in 1983.

John signed the Bar Roll in May 1984 and read with Lloyd Bryant, whom he had briefed as a solicitor. He had chambers initially in Four Courts Chambers, now Douglas Menzies Chambers, and later on the sixth floor of Owen Dixon Chambers West. He was originally on Percy Dever's list and later on Spurr's list, which became Gordon & Jackson's list.

In 1985 John purchased a small property at Bolinda, near Romsey, where he continued part-time farming for many years. It had originally been owned by "Big Clarke" of Clarkeville. Lloyd Bryant remembers meeting John at cattle sales at the old Newmarket sales yards and at Yea, where John's cattle brought top prices.

John practised at the Bar for more than 27 years. He had a general practice, which included personal injuries, insurance, testators' family maintenance, building disputes and leases, and interlocutory matters in both the County and Supreme Court Practice Courts.

John loved the bush and was a strong walker and keen skier. He introduced Trevor Rosen, Chris Thomson and Michael Clarke of the Bar to the Melbourne Walking Club.

John is survived by his loving wife, Sue, and two children, Andrew and Jane. His older siblings, Gilbert and Enez, also survive him.

John was loyal and kind. He walked the extra mile to help. He was a dear friend to many.

The Bar was well represented at John's funeral on 19 August, 2015 at St John's Anglican Church, Toorak, where Sue and John married in 1979.

MICHAEL CORRIGAN, TREVOR ROSEN AND MICHAEL CLARKE

Dr John Bleechmore

Bar Roll No: 1306

John Francis Bleechmore passed away amongst family at his home in South Melbourne on 30 August 2015, aged 72.

John was a true 'renaissance man'.

Having completed his secondary schooling at Xavier College, he attended university in Singapore and at the University of Melbourne where he was a champion butterfly swimmer and served in the Army Reserves Commandos. In 1965, he graduated LL B (Hons) and embarked on a career in the legal academy. He began as a tutor and then senior tutor at the University of Melbourne; then went to north America on Fellowships to Osgoode Hall (York University, Toronto); to the University of Texas, there completing an LL M; to New York University; and to the Harvard Law School. He was, for four years, a Senior Lecturer at the Melbourne Law School. He taught for several years at the University of Alabama School of Law as a Visiting Assistant, Associate, and then Professor.

In 1976 he was admitted to practice and came straight to the Bar. He read with Michael Kelly.

In 1983 John was invited to return to Harvard as a Visiting Scholar, where he taught for a semester and completed his doctorate (SJD). He also taught copyright law for a semester in 1985 as a Visiting Professor at Santa Clara Law School.

At the Bar, John established a remarkably broad practice, ranging from criminal trials and appeals, including the appeals in the Burwood student murders to, more recently, a predominantly commercial practice specialising in copyright, intellectual property and trade practices. Rarely did he ask to be led, even when opposed to silk, as he frequently was.

He served on the Bar Academic and CLE Steering Committee and on the Bar Indonesian Legal Aid Committee. He had five readers. He taught advocacy at the Leo Cussen Institute for eight years.

John loved the law and was a superb lawyer. He practised with great humility, treating his instructing solicitors, opponents and clients with the utmost respect and courtesy.

He also loved sport and enjoyed extreme physical endeavour. He ran a marathon. A week was not complete without several long bike rides. He raced at St Kilda Cycling Club into his seventies.

He loved music and literature, and was passionate about and wrote poetry.

Whether it was his joy in outdoor physical activity and adventure, or the pleasure of sharing his love of the law, Jack Daniels whiskey, music, or poetry, many of us who treasured his counsel, his companionship and his friendship are missing him deeply.

MARK HEBBLEWHITE

Gonged!

Fellow of the University of Melbourne award

Allan Myers AO QC

Queen's Birthday Honours

The Hon Justice Chris Maxwell AC
The Hon Justice Lex Lasry AM
His Honour Reserve Magistrate Gregory Levine OAM

Australian Psychological Society Excellence Awards

Health and Wellbeing Committee

The work of the Victorian Bar's Health and Wellbeing Committee was recognised at the Australian Psychological Society Workplace Excellence Awards held on 2 June 2015. The Victorian Bar was a finalist in the Health and Wellbeing Category.

QUARTERLY COUNSEL

George Georgiou SC

JESSE RUDD

George Georgiou came to the Bar in 1990 and developed a practice mainly in criminal law. It was not long, however, before he got itchy feet. George was keen to follow in the footsteps of the many illustrious members of our Bar who have devoted their time and energy to practising in the Northern Territory. So, when in 1994 fellow barrister Charlie Rozencwajg (now Magistrate Rozencwajg) alerted him to a locum opportunity in Alice Springs, he jumped at the chance. It was meant to be an eight week stint. George returned to Melbourne seven years later.

George was immediately captivated by Alice Springs – "an ugly town in the most beautiful setting" – and he knew he would be staying. He worked for the Northern Territory Legal Aid Commission doing trial and appearance work. Occasionally, his work would take him up to Darwin. The work was challenging, but ultimately very satisfying. A major challenge was overcoming language and cultural barriers when representing Aboriginal persons. People were reluctant to give evidence for cultural reasons, and there were challenges for defence advocates in cross-examination with the issue of 'gratuitous concurrence'. George feels his advocacy has benefited from these experiences. As he puts it, "I gained a lot of experience in appearing in difficult matters".

Outside of his work, George immersed himself in the natural environment and Western Desert art.

Now back in Melbourne with a busy criminal law practice, George still finds time to head up to Alice Springs and Darwin a few times a year for work. George describes the disparity in incarceration rates between Indigenous and non-Indigenous Australians as "a terrible indictment". George has always been interested in social justice issues, so it is no surprise that he has recently taken over the Presidency of Liberty Victoria from Justice Jane Dixon. In conjunction with the organisation's other members, this role includes making submissions on proposed legislation that touches upon human rights and civil liberties, as well as general advocacy in preserving those rights. George also finds time to teach advocacy, an exercise which "keeps me on my toes".

George is a proud and passionate Collingwood supporter, and his only regret from his time in Alice Springs is that it killed off a budding skiing career. Perhaps this is just as well though, because he is no fan of the Melbourne Football Club.

Victorian Bar readers

September 2015

BACK ROW: Kimberley Phair, Brendan Avallone, Olaf Ciolek, Patrick Miller, Luke Virgona, Rajat Bhattacharya, Owen Wolahan, Nicholas Elias, Reiko Okazaki, Gary Clark, Jacob Pruden-Collier, Michael Sharkey, Lisa Papadinas, Olivia Thompson, Sophie Mariole **MIDDLE ROW:** Wendy Pollock, Raini Zambelli, Monika Paszkiewicz, Andrew Yuile, Justin Rizzi, Gorjan Nikolovski, Mark Benkel, John Moore, Alison Burt, Stephanie Scully, Jason Romney, Ryan Maguire, Min Guo, Kim Cullen, Emma Jeans, Rachel Chrapot **SEATED ROW:** Samantha Renwick, Joseph Amin, Rose Cameron, Andrew Pollock, Anastasia Smietanka, Nicholas Phillpott, Christopher Fenwick, Carly Robertson, Adam McBeth, Diana Karamicov, Christopher Jensen, Jing Zhu, Fiona Crock

Victorian Bar council

2015-2016

STANDING ROW L-R: Julia Frederico, Elizabeth Ruddle, Andrew Denton (Assistant Honorary Secretary), Christopher Winneke SC, Dr Greg Lyon QC, Ted Woodward SC, Karen Argiropoulos, Daniel Crennan (Assistant Honorary Treasurer), Barbara Myers, Sam Hay, Dr Matthew Collins QC, Justin Wheelahan, Daniel Bongiorno, Wendy Harris QC **SEATED L-R:** Áine Magee SC, Samantha Marks QC (Honorary Treasurer), David O'Callaghan QC (Senior Vice-President), Paul Anastassiou QC (President), Jennifer Batrouney QC (Junior Vice-President), Paul Holdenson QC, Suzanne Kirton. **ABSENT:** Michelle Quigley QC, Paul Panayi (Honorary Secretary)

New silks Q&A

In November 2015, the Hon Chief Justice Warren AC appointed the following barristers as senior counsel in and for the State of Victoria.

FAR BACK ROW: Tom Keely, Dermot Dann BACK ROW: Daniel Gurvich, Chris Winneke, Chris O'Grady, Anthony Young, Michael Flynn MIDDLE ROW: Gerard Darlton, Ed Heeery, Michelle Britbart, Jonathan Brett, Andrew McClelland FRONT ROW: Michael Whitten, Chris Horan, Áine Magee, Jonathan Davis, Peter Willis, Andrw Strum, Paul O'Grady

Jonathan Brett

When you were a child, what did you want to be when you grew up? A medical research scientist.
Who were some of the silks you liked to work with as a junior and why? I really don't like to single anyone out because I worked with many really good and nice people, but Brian Collis does a lot of his own preparation, sees the point and sticks to it, argues it well, and then sits down.
What advice would you give to junior barristers about how to succeed at the Bar? Play it straight and put the client's interests first.
What is your favourite song? "Mr Tambourine Man".
What strategies do you use to cope with work pressure? I wish I knew.
What is your most treasured possession? Nothing really – perhaps my piano.
What book will you be reading this summer? The latest Don Winslow/ Dennis Lehane or similar.

Michelle Britbart

When you were a child, what did you want to be when you grew up? A nurse, so I could spend all my time with my uncle who was a doctor.
Who were some of the silks you liked to work with as a junior and why? I refuse to list them as I will miss someone and be forever embarrassed. But as a junior I had the privilege to work with many outstanding common law silks who were without exception highly intelligent, strategic, well prepared, patient and excellent company. Appearing against them may not be as enjoyable.
What advice would you give to junior barristers about how to succeed at the Bar? Always be better prepared than your opponent.
What is your favourite song? "Gold" by Spandau Ballet. Or anything by Wham!
What strategies do you use to cope with work pressure? Watching reality TV with my kids.
What is your most treasured possession? My passport.
What book will you be reading this summer? *Bossypants* by Tina Fey.

Dermot Dann

When you were a child, what did you want to be when you grew up? Running in the Olympics.
Who were some of the silks you liked to work with as a junior and why? I derived great benefit from working with Silks. I tried to learn as much as I could from them with all their different approaches and styles. As a young Articled Clerk starting out it was inspiring to watch these silks in action.
What advice would you give to junior barristers about how to succeed at the Bar? Prepare as well as you can. Believe in yourself. Be yourself. Try and keep your life balanced with time for family and other interests. Be ready to take advice and learn from your colleagues.
What is your favourite song? "This is the day" by The The.
What strategies do you use to cope with work pressure? Knowing when and how to relax helps. Luckily I have a busy family and plenty of other activities to occupy my mind.
What is your most treasured possession? The 1996 A grade Amateur Football Premiership medallion (we in last place on the ladder at the half way mark of the season.)
What book will you be reading this summer? "Long Bombs to Snake".

Jonathan Davis

When I was a child I wanted to be a test cricketer when I grew up.
Some of the Silks I liked to work with as a junior were Charles Scerri QC and David Collins QC. They set an example to their juniors as fine technical lawyers who mastered their clients' legal position from the outset of their engagement. They also had great practical insight into their clients' best realistic outcome in a potential or actual dispute and how this might be achieved.
My advice to junior barristers on how to succeed at the Bar is to live a balanced life.
My favourite song is "Desolation Row" by Bob Dylan.
To cope with work pressure I exercise, listen to and play music.

My most treasured possession is my Gibson J200 acoustic guitar.
This summer I will read *A Brief History of Seven Killings* by Marlon James.

Michael Flynn

When you were a child, what did you want to be when you grew up? A scientist.
Who were some of the silks you liked to work with as a junior and why? John de Wijn, Jennifer Davies, Tony Pagone and Brian Shaw. I learned from each of them and they were very generous in allowing me to present parts of cases.
What advice would you give to junior barristers about how to succeed at the Bar? Use your quiet time productively and persevere.
What is your favourite song? "We are the navy blues".
What strategies do you use to cope with work pressure? Try to prioritise tasks and don't panic.
What is your most treasured possession? A shoe box which my late father made for me.
What book will you be reading this summer? *This House of Grief* by Helen Garner (a gift from my clerk).

Daniel Gurvich

When you were a child, what did you want to be when you grew up? Centre for Carlton.
Who were some of the silks you liked to work with as a junior and why? Tehan QC, Lyon QC, Robinson QC, Bromwich SC, Rapke QC, Abraham QC. All generous with their time and experience.
What advice would you give to junior barristers about how to succeed at the Bar? Prepare, do your best and get on with your next case.
What is your favourite song? "Cheek to Cheek", Irving Berlin. Anything by George Gershwin.
What strategies do you use to cope with work pressure? A long run.
What is your most treasured possession? My current pair of runners.
What book will you be reading this summer? *Bail Law in Victoria, Second Edition.* (Someone's got to!).

Ed Heerey

When you were a child, what did you want to be when you grew up? Not a barrister.
Who were some of the silks you liked to work with as a junior and why? James Elliott, David Yates, David Shavin – each brilliant in his own way.
What advice would you give to junior barristers about how to succeed at the Bar? Be yourself.
What is your favourite song? "Jump Around" by House of Pain.
What strategies do you use to cope with work pressure? Brother Baba Budan.
What is your most treasured possession? My bass guitar.
What book will you be reading this summer? Dr Seuss with my kids.

Christopher Horan

When you were a child, what did you want to be when you grew up? A teacher. Or the proprietor of a lolly shop.
Who were some of the silks you liked to work with as a junior and why? Charles Scerri QC, Neil Young QC, Jim Merralls QC, Stephen Donaghue QC, all of whom were generous and inspiring leaders.
What advice would you give to junior barristers about how to succeed at the Bar? Be nice to other barristers.
What is your favourite song? "All Blues" (Miles Davis), or "Since I've Been Loving You" (Led Zeppelin).
What strategies do you use to cope with work pressure? Regular exercise and good friends.
What is your most treasured possession? 2011 Boston Marathon finisher's medal, and a signed Jack Riewoldt 10-goal match-worn jumper.
What book will you be reading this summer? Something other than a court book or appeal book.

Tom Keely

When you were a child, what did you want to be when you grew up? I didn't have any real idea until I was at secondary school. I started to eliminate things that I wasn't interested in and over time came to a clear view that I wanted to have a career in the legal profession.
Who were some of the silks you liked to work with as a junior and why? Pat Dalton QC, for his fearlessness and fighting qualities; Brian Collis QC, for knowing what was and wasn't important in cases and his good company on circuit; Rob Blowes SC, for his creative and strategic thinking; and Sturt Glacken QC, for his incisiveness and high level of rigour.
What advice would you give to junior barristers about how to succeed at the Bar? Thorough preparation, listening to your common sense and watching good barristers conduct cases.
What is your favourite song? "Hey Jude", by the Beatles.
What strategies do you use to cope with work pressure? Having activities outside work that are completely absorbing e.g. listening to music and watching my now adult children play sport.
What is your most treasured possession? My Italian walking boots
What book will you be reading this summer? *Paul Keating: The Biography* by David Day.

Áine Magee

When you were a child, what did you want to be when you grew up? Always wanted to be a lawyer – which was strange because there were none in my family at that time.
Who were some of the silks you liked to work with as a junior and why? A lady never tells – suffice it to say that all the silks I have worked with have been wonderful.
What advice would you give to junior barristers about how to succeed at the Bar? Know your Brief inside out – maintain a sense of humour and always, always, always act with dignity.

PHOTO COURTESY OF PETER BONGIORNO

What is your favourite song? "Ode to my Family" by the Cranberries.
What strategies do you use to cope with work pressure? Exercise and the odd glass of wine.
What is your most treasured possession? My wedding ring.
What book will you be reading this summer? *Anna Karenina* – a re-read after watching "The Beautiful Lie".

Andrew McClelland

When you were a child, what did you want to be when you grew up? A zoologist. I once received an encyclopedia of snakes and lizards as a gift, and spent the next six months studying it obsessively. I am sure that will come in handy one day.
Who were some of the silks you liked to work with as a junior and why? Melanie Sloss SC (now Justice Sloss), David Collins QC, Jim Delany QC, Neil Young QC, Mark Derham QC (now Associate Justice Derham) and Peter Collinson QC.
Every one of them has shown me great faith and given me opportunities that have led me to becoming a silk myself. They have taught me the value of humour even in difficult cases, that the hardest working team is the one most likely to win, that advocacy can be an art, and that being at the top of your profession and having friends and passions outside the law all go hand in hand.
What advice would you give to junior barristers about how to succeed at the Bar? It is very easy to feel invisible at the Bar. Don't let that happen to you. Make sure that you tend to your friendships at the Bar. It will help you professionally in all sorts of ways, and make your life much more rewarding. The other piece of advice is to find some mentors. Senior barristers are more open to helping and developing friendships than you might think. You don't have to work it all out on your own.
What is your favourite song? I have been known to play "Wake Me Up" by Avicii at high volume when I have had a hard day.
What strategies do you use to cope with work pressure? I am very fortunate to have great friends in chambers. If I have a problem, I wander in, and just start talking.
What is your most treasured possession? I try not to put too much value in possessions. But I have an ugly old brown mug from my grandparents' house I use only on special occasions.
What book will you be reading this summer? *Lonely Planet's Guide to Vietnam.*

Chris O'Grady

When you were a child, what did you want to be when you grew up? Archaeologist.
Who were some of the silks you liked to work with as a junior and why? Frank Parry; Nick Green; Jeremy Ruskin. Willingness to engage in open discussion as to how to work through the problem; a sobering assessment of the issues that needed addressing coupled with the infectious enthusiasm and/or determination needed to get it done.
What advice would you give to junior barristers about how to succeed at the Bar? Enjoy the privilege of the work and the opportunity of working with good people.
What is your favourite song? Billy Bragg: "New England".
What strategies do you use to cope with work pressure? The collegiality of the bar.
What is your most treasured possession? My motorcycle.
What book will you be reading this summer? *Conspirator: Lenin in exile.*

Paul O'Grady

When you were a child, what did you want to be when you grew up? At no stage was I ever going to be a lawyer – what happened?
Who were some of the silks you liked to work with as a junior and why? Justices Chris Jessup and Richard Tracey and Michael Wheelahan QC for their incisive intellect. Justice Michael McDonald, Frank Parry QC and Justin Bourke QC for their mastery of litigation strategy. Nick Green QC, Richard Niall QC and Paul Santamaria QC for their ability to keep an eye on the horizon and focus on where the case is heading. All of them for being such a pleasure to work with.
What advice would you give to junior barristers about how to succeed at the Bar? Be patient with yourself. Be patient with others. You will learn from your own mistakes, as well as those of others.
What is your favourite song? "Don't Be Denied", Neil Young, circa 1973.
What strategies do you use to cope with work pressure? Engage with the community in volunteer roles, family time, keeping fit and playing cricket.
What is your most treasured possession? A print of the first international cricket match played at the MCG in 1862.
What book will you be reading this summer? Whatever puts me to sleep in the hammock – something like *Macken's Law of Employment*.

Andrew Strum

When you were a child, what did you want to be when you grew up? I didn't know and I'm still not sure I know. Hopefully I'll work it out one day.
Who were some of the silks you liked to work with as a junior and why? All of them, for different reasons.
What advice would you give to junior barristers about how to succeed at the Bar? Work to live, don't live to work.
What is your favourite song? "Forces" by Japanese Wallpaper (a.k.a. Gab Strum, my son).
What strategies do you use to cope with work pressure? I go home to my family.
What is your most treasured possession?
My collection of antiquarian books.
What book will you be reading this summer?
As many of them as possible.

Michael Whitten

When you were a child, what did you want to be when you grew up? A barrister, yes, even before I really knew what one was.

Who were some of the silks you liked to work with as a junior and why? Richard Manly, John Digby (as His Honour then was), George Golvan, Charles Scerri, just to name a few. While all had/have different virtues and styles, all consistently demonstrated the highest work ethic, surgical insight and, most importantly, unwavering integrity.

What advice would you give to junior barristers about how to succeed at the Bar? Do the best with what is in front of you today. Be useful. Work hard. Back yourself. Be brave. Be honest, no matter what. Laugh often. Never give in, never give up.

What is your favourite song? Nessun Dorma.

What strategies do you use to cope with work pressure? Meditation. Exercise. Music.

What is your most treasured possession? Upon reflection, nothing material. If it is something that can be 'possessed', then I most treasure what the Japanese call in a martial arts context "Osu No Seishin" meaning to persevere, to endure.

What book will you be reading this summer? All those my lovely children gave me for Father's Day which have since been covered by briefs.

Peter Willis

When you were a child, what did you want to be when you grew up? A builder, then an architect. Later, a historian.

Who were some of the silks you liked to work with as a junior and why? All whom I worked with! To observe the magic of their weaving an opening or finding the heart of a witness's story or sculpting written submissions, out of a mess of material that appeared jumbled and unpromising.

What advice would you give to junior barristers about how to succeed at the Bar? There is no substitute for experience; and there is no-one who does not fall down at least once, so to borrow a family motto: keep going!

What is your favourite song? Hmm - the answer is blowin' in the wind: for present purposes, let us say the Lord Chancellor's song from 'Iolanthe'.

What strategies do you use to cope with work pressure? As much as I can, I attend Japanese sumi-e and calligraphy classes: it is humbling to be so clumsy.

What is your most treasured possession? A model red London bus, purchased the day I left after four years' working there. My children, when very young, were convinced I went to work to play with it.

What book will you be reading this summer? Book? Who reads one, when several will do: the new books on the Dismissal; *The Poetry of Li Yu* by Cliff Pannam; and maybe an old favourite eg a Judge Dee mystery.

Chris Winneke

When you were a child, what did you want to be when you grew up? As a child, if I ever gave thought to what I might do as an adult (and I don't recall ever giving it much thought) it would certainly have involved surfing.

Who were some of the silks you liked to work with as a junior and why? I was fortunate to work with quite a number of silks, and I enjoyed working with all of them because they were very wise people (I'm sorry about that evasive answer).

What advice would you give to junior barristers about how to succeed at the Bar? Keep your practice as broad as possible for as long as possible, know your brief back to front and don't stint in your communications with your instructor and client.

What is your favourite song? Anything by Alphaville (a strange 80s German techno pop band) and, in September, "We're a Happy Team at Hawthorn".

What strategies do you use to cope with work pressure? Try to avoid it by adequate preparation, but in any event, keep up your exercise and switch off with your family as much as you can.

What is your most treasured possession? My Stihl chainsaw.

What book will you be reading this summer? The last couple of books in the Patrick O'Brian, Aubry / Maturin series.

Anthony Young

When you were a child, what did you want to be when you grew up? A park ranger (as a child I was an avid watcher of Skippy on TV).

Who were some of the silks you liked to work with as a junior and why? Cliff Pannam QC, Allan Myers QC, Neil Young QC, Noel Magee QC and Neil Clelland QC. Each one of them is an exceptional advocate, a good teacher, good humoured and a pleasure to work with.

What advice would you give to junior barristers about how to succeed at the Bar? In 1958, Henry Cecil (Leon) wrote that there are four qualities that you should have to succeed at the bar: (1) patience, (2) the abilities to understand and express, (3) integrity and (4) a capacity for hard work: Brief to Counsel (London, 1958), Ch. 2. Despite all that has changed since 1958, the desirability of having those qualities has not.

What is your favourite song? "Oh Very Young" - Cat Stevens.

What strategies do you use to cope with work pressure? Try to remember that after every wave there is a trough.

What is your most treasured possession? I don't treasure possessions; there are more valuable things.

What book will you be reading this summer? *More tales of Paddington Bear* - to my children.

Boilerplate

A BIT ABOUT WORDS

Wading In

JULIAN BURNSIDE

It is increasingly common to find reports in the printed press as well as in the electronic media of politicians, sports stars, commentators and others *wading into* various discussions, problems, debates, etc. It even happens in the Fairfax media. *The Age* once carried a headline which read *Turnbull wades into asylum debate*. If Fairfax does it, it might soon be accepted in the OED.

The correct expression is *weigh in*. It comes from boxing, in which a competitor is required to weigh in before the fight. Likewise in horseracing, jockeys are required to weigh in before competing. Thus, *weighing in* is an official step before participation in a competitive event. (The competitors are also required to weigh out afterwards, but this does not seem to have fallen into the vernacular.)

It is not hard to see how the slide occurs. The metaphor of *weighing in* is an obvious fit for a person's entry into a debate or issue; and to say that *the fighters weighed in* sounds identical to *the fighters wade in*. The visual imagery of a person wading into troubled waters fits readily enough with the idea of joining a controversy, and carelessness does the rest.

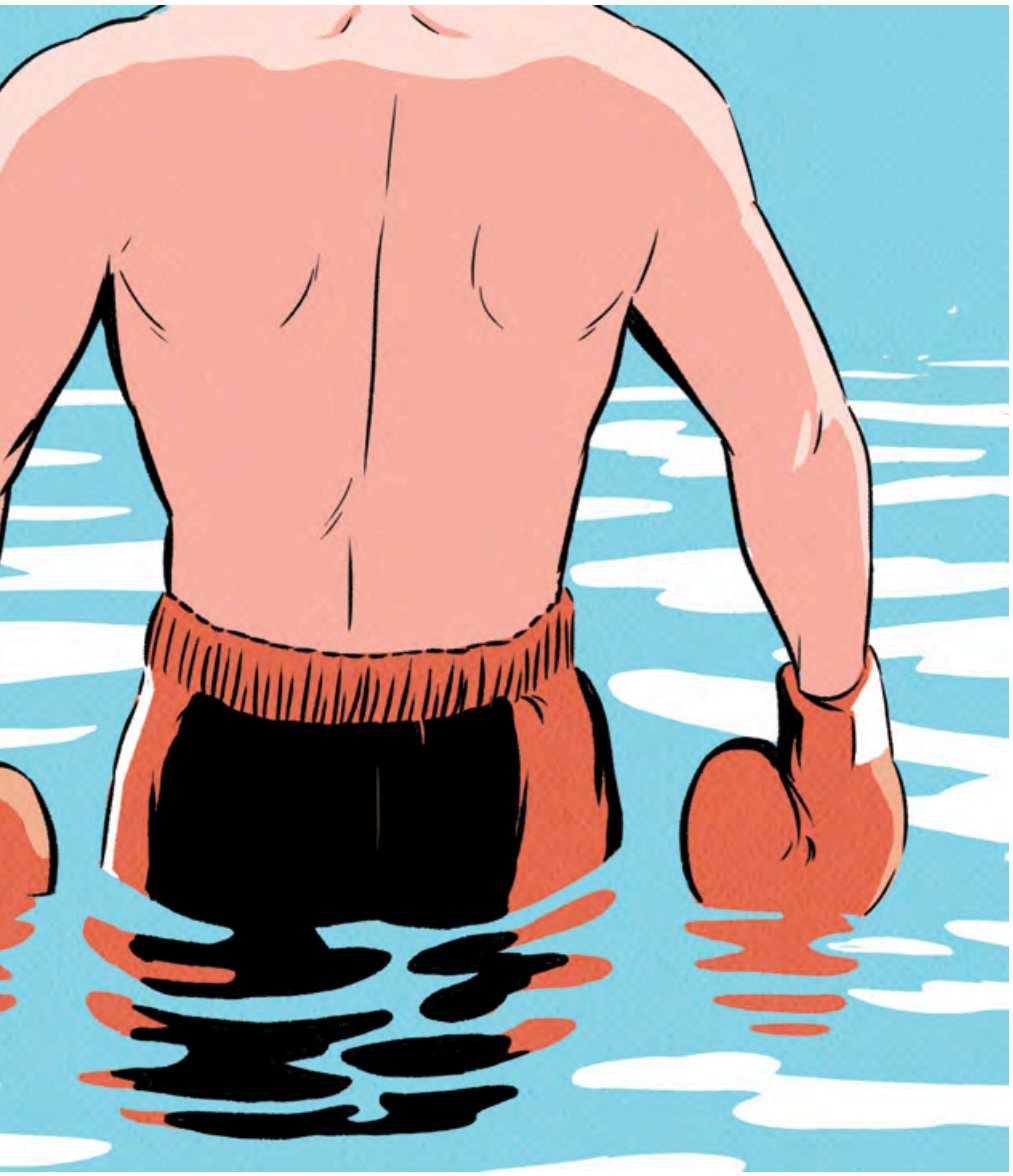
It seems to be a fairly recent error: Sidney J. Baker in the 1966 edition of *The Australian Language* recognises *weigh in* as a metaphor derived from boxing, but does not note *wade in*. What was interesting about the *Age* headline is that, if the error has made it into respectable print, it will probably stick.

Perhaps it does not matter, except to purists. It is fascinating to see colloquial expressions twisted out of shape so that they lose contact with the metaphor from which they spring, yet remain intelligible as part of our common agreement about meaning. The best example of this is the increasingly common *the proof is in the pudding*. This is more often heard than the original *the proof of the pudding is in the eating*. In the original expression, the meaning comes from the fact that *proof* is used in the early sense of *test*. So, the test of a pudding is to eat it. The original expression naturally conveys the idea that the worth of a thing is found by putting it to its intended purpose. It is understood this way by convention, even though the speaker may have no idea that the phrase depends on an archaic meaning of the word *proof*. As a colloquial expression, it has an accepted meaning that no longer depends on understanding the individual words which comprise it. As a result, the expression itself can be mangled without losing its agreed meaning. Thus, *the proof is in the pudding* is understood as representing the original, the meaning of the original is commonly understood, and that meaning is imprinted on the mangled version. All this despite the fact that, as a group of words, *the proof is in the pudding* means nothing at all. (Incidentally, in Scotland the trial of an action in Court is called the *proof*).

Wade in and *the proof is in the pudding* are examples of a curious phenomenon: they are expressions whose literal meaning does not correspond to their understood meaning. And in a contest, the understood meaning will always prevail, despite the moans of the purists.

Developments in technology make it likely that some other expressions will join that group. Some people still speak of *dialling* a telephone number. The reference is,

ILLUSTRATION BY GUY SHIELD/THE SLATTERY MEDIA GROUP



> *Weighing in* is an official step before participation in a competitive event.

of course, to that earlier species of telephone which used a circular dial that could be rotated, by means of finger-holes, to establish connection with another telephone. They are rarely seen these days. On digital phones, the idea of dialling a number is anachronistic. But it will probably remain and be understood, even by people who have never seen the old-fashioned type of telephone. A parallel expression is to *ring someone*, and we are urged to buy various *ringtones* to make incoming calls more intrusive and irritating. But *ring* is hardly apt to describe the noises made by modern phones, especially mobile phones. It is possible to buy ringtones which comprise the popular songs of more than a thousand singers — from *Thriller* by Michael Jackson to LeToya Luckett's *Not Anymore*, remixed by DJ Mealdue. One ringtone website offers a selection from categories which include Country, R&B, Christian and Gospel, Classical, Latin, World Beat, and Sound Effects. But phones still *ring*.

In the age of digital clocks, *clockwise* remains meaningful and is generally understood. And in the age of word processors, people still *type up* a document. But *typing* comes from the *typewriter*, and the link between the typewriter and the modern computer is limited to the layout of the keyboard. Beyond that, they have nothing in common. The activity once accurately described as *typing* is sometimes referred to now as *keyboarding*. Although this has the advantage of literal accuracy, it is ungainly and will probably not stick.

These new uses of old words follow a pattern which is so common that we tend not to notice it. For example, the *dashboard* of a car is so named because, originally, it resembled the dashboard of a carriage in appearance and function. According to the second edition of the Oxford English Dictionary, it was originally 'a board or leather apron in the front of a vehicle, to prevent mud from being splashed by the heels of the horses upon the interior of the vehicle'. To *dash* was 'To bespatter or splash (a thing) with anything (e.g. water or mud)'. The dashboard can be seen on very early motor cars in about the same position as it had in horse-drawn carriages. It was a natural place for instruments, because it was readily visible to the driver. It drifted upwards to its present position in order to improve the visibility of the instruments, but kept its name.

If you suggested to anyone today that the purpose of the dashboard was to keep mud from splashing the driver's clothes, you would be thought mad. In earlier times, mad people (in London at least) were likely to be admitted to the Hospital of St. Mary of Bethlehem, in London, which had been founded as a priory in 1247. By 1403 it was specialising in the care of lunatics. It was originally in Bishopsgate. In 1676 it moved to new buildings in Moorfields designed by Robert Hooke. In 1815 it transferred to St. Georges Fields in Southwark. Long use of its name wore its pronunciation down from Bethlehem to *Bedlam*. From that we have the metaphorical meaning of madness and confusion, which is the only meaning currently associated with it. How many people at Christmas time would understand how close is the link between the chaos of the festivities and the event being celebrated?

MUSIC

Blurred Lines: Pharrell Williams et al v Bridgeport Music et al

ED HEEREY

I'm tipping you're reading this column, in this magazine, because you have more than a passing interest in both music and law. That being the case, let me fill you in on the biggest musical case of the twenty-first century.

In one corner: the grown-up children of the late Marvin Gaye

A true megastar of soul music, Marvin Gaye topped the charts a dozen times in the US and around the world from his first big hit in 1967, *I Heard it Through the Grapevine,* to 1982's amorous *Sexual Healing*.

But there was another very serious side to his work, epitomised by his deeply stirring 1971 protest against both the Vietnam War and the treatment of its veterans, *What's Going On?* That war inspired many a protest song, but few were more disarming and effective than this. Drawing in the listener with a bongo beat and sax solo, Gaye smoothly but soulfully opens a conversation with his mother and his brother (his brother Frankie was a Vietnam vet), before explaining to his authoritarian father: "*Father, father, we don't need to escalate, you see war is not the answer, for only love can conquer hate*".

Gaye died tragically in 1984, aged 44, shot by his father after intervening in an argument between his parents.

This case concerns Gaye's No 1 hit from the summer of 1977: *Got to Give it Up*, an infectious dance hit with Gaye's falsetto vocals sitting on top of a sparse arrangement of driving percussion, a syncopated cowbell, an intermittent bass riff and background party noise.

In the other corner: Pharrell Williams and Robin Thicke

At 42 years of age, Pharrell Williams has the modern music world at his feet. He has written for, produced and performed with all the biggest names of modern popular music, from Snoop Dogg to Daft Punk, Beyonce, Justin Timberlake, Madonna, Britney Spears and many in between. He has also enjoyed several massive hits on his own, notably *Happy* which won the BBC Music Award for Song of the Year in 2014 and a Grammy in 2015. In 2015 he also won the Top R&B Artist and Top R&B Album awards at the Billboard Music Awards.

It is no exaggeration to say that Marvin Gaye and Pharrell Williams are musical giants of their respective generations.

Robin Thicke is not quite in that league. The son of two TV actors (Alan Thicke from *Growing Pains* and Gloria Loring from *Days of our Lives*), Thicke grew up in Hollywood and gradually made a name for himself as an R&B singer, with some modestly successful hits.

Thicke's career suddenly took a sky-high trajectory in 2013 with the release of *Blurred Lines,* which he recorded with Pharrel Williams. The song was a worldwide smash hit, reaching number one in over 114 countries including a record-breaking 16 weeks at the top of the US Billboard chart.

You be the judge

If you are curious to form your own "untutored" view before reading further, get onto YouTube and look up *Robin Thicke – Blurred Lines VS Marvin Gaye – Got to Give it Up* which plays snippets of each song back to back. Do they sound similar to you?

Blurred lies?

While promoting the release of *Blurred Lines,* Thicke gave a series of interviews which were central to the case brought by the Gaye family.

On 7 May 2013, Thicke said in an interview with *GQ* magazine:

> "On the third day I told him I wanted to do something kinda like Marvin Gaye's *Got to Give it Up*"

> *Pharrell and I were in the studio and I told him that one of my favourite songs of all time was Marvin Gaye's* Got to Give It Up. *I was like, 'Damn, we should make something like that, something with that groove.' Then he started playing a little something and we literally wrote the song in about half an hour and recorded it.*

Thicke also told *Billboard* magazine on 9 July 2013:

> *Pharrell and I were in the studio making a couple of records, and then on the third day I told him I wanted to do something kinda like Marvin Gaye's* Got to Give it Up, *that kind of feel 'cause it's one of my favourite songs of all time. So he started messing with some drums and then he started going 'Hey, hey hey..' and about an hour and a half later we had the whole record finished.*

Thicke made statements to similar effect in numerous other interviews in print and on television, each time identifying *Got To Give It Up* as an inspiration for *Blurred Lines*.

Perhaps unsurprisingly, in light of Thicke's statements in the media, Williams and Thicke received a demand from the Gaye family to assign copyright ownership of *Blurred Lines*. Williams and Thicke were first to bring the matter to Court, applying on 15 August 2013 to the United States District Court for a declaration that *Blurred Lines* did not infringe copyright in *Got To Give It Up*. On 30 October 2013, the Gaye family filed a counterclaim for copyright infringement.

A feature of United States litigation is that litigants are required to attend depositions prior to trial, where they are cross-examined by opposing counsel (without interference from any pesky judge). The evidence is video-taped and transcribed.

The good folks at www.hollywoodreporter.com have seen fit to upload full copies of the "confidential" deposition transcripts of each of Williams and Thicke. Thicke's transcript is quite a read. Focussing on his interviews in the media, he was asked:

> *Q. Did you have any conversation with Pharrell Williams during or before the creation of* Blurred Lines *in which you discussed with him Marvin Gaye's song* Got to Give It Up*?*
>
> *A. No.*
>
> *Q. Do you consider yourself an honest person?*
>
> *A. No. That's why I'm separated. [Thicke had recently separated from his wife.]*
>
> *Q. Do you make it a habit of being dishonest when you give interviews?*
>
> *A. When I do – when I give interviews, I tell whatever I want to say to help sell records.*

Thicke was taken to the above extract from his interview with GQ magazine:

> *Q. Is that statement true?*
>
> *A. No.*
>
> *Q. Why did you say it if it is not true?*
>
> *A. Because after making six albums that I wrote and produced myself, the biggest hit of my career was written and produced by somebody else and I was jealous and I wanted some of the credit.*
>
> *Q. . . . So it is your testimony that neither before the creation of* Blurred Lines *nor during the process did you and Pharrell discuss in any way, shape or form the song* Got to Give It Up*?*
>
> *A. No.*
>
> *Q. It is correct? What I just said is correct?*
>
> *A. Yes, what you said is correct, that him and I did not discuss it. I tried to take credit for it later because he wrote the whole thing pretty much by himself and I was envious of that.*

. . .

I was high on vicodin and alcohol when I showed up at the studio.

So my recollection is when we made the song, I thought I wanted – I – I wanted to be more involved than I actually was by the time, nine months later, it became a huge hit and I wanted credit.

So I started kind of convincing myself that I was a little more part of it than I was and I – because I didn't want him – I wanted some credit for this big hit.

But the reality is, is that Pharrell had the beat and he wrote almost every single part of the song.

. . . I offered no ideas to connect to anything to Marvin Gaye.

Q. You didn't offer any ideas at all; right?

A. No, not really.

When asked why he said he came up with the elaborate story about Marvin Gaye, Thicke deposed:

. . . I thought it would sell records.

I thought that it being my song – my idea would make it more personal because my music has always been so personal, that this was the first time I had a song out that wasn't personal and had nothing to do with me, and yet it was my biggest successful, which, you know, was very tough for me.

And so I lied in my story so I could at least make it seem like, hey, I'm the guy who came up with this great idea. And you know what? I didn't even use the Marvin Gaye thing until everyone started saying to me, "Hey, it's reminiscent of the Marvin Gaye song." And I was like, "Well, yeah, that was my idea. I wanted to do something like that." There was no other way for me to get credit for this biggest song of the year unless it was my idea.

Q. Which none of it was?

A. Which none of it was my idea.

Thicke was also taken to the above extract of his interview with *Billboard* magazine and deposed that it was not true. He added: "*with all due respect, I was high and drunk every time I did an interview last year*." He also said that he was drunk and on vicodin when he appeared on *Oprah* to promote the song, but confirmed that he was not drunk or on any drugs during his deposition. (Vicodin is a combination opioid narcotic and analgesic prescription drug.)

When it was put to him that he did not appear either drunk or on vidocin in his video interviews, he said:

A. Every day I woke up, I would take a vicodin to start the day and then I would fill up a water bottle with vodka and drink it before and during my interviews.

During Williams' deposition he was asked if he had ever owned any version of the song *Got To Give It Up*, to which he said "*Believe it or not, no, I don't have it, but my aunt used to play it all the time*."

Williams confirmed that the song was written and recorded in about an hour and a half.

When asked to explain Thicke's interviews in the media, Williams said:

He is also a friend of mine, right, and this is public record. At the end of the day, he's a friend of mine and I'm not trying to, you know, belittle his character in any way, shape or form.

But this is what happens every day in our industry. You know, people are made to look like they have much more authorship in the situation than they actually do. So that's where the embellishment comes in.

Williams said "*Cowbell's been a staple in my production for about like 20 years.*" However, when pressed, he could only identify three songs in which he had ever used a cowbell.

Williams denied that he and Thicke ever discussed Marvin Gaye's song *Got To Give It Up* any time during the making of the song *Blurred Lines*. But he was then taken to a media interview where he said:

And just for a bit of humor, the percussion that I use in Blurred Lines, *aside from the music notation being completely different – completely different – the sheet music is available online, by the way, but the percussion – I was trying to pretend that I was Marvin Gaye and what would he do, had he went down to Nashville and did a record with pentatonic harmonies and more of a bluegrass chord structure.*

Williams was asked:

Q: Hold on. When you were creating Blurred Lines, *were you trying to pretend that you were Marvin Gaye?*

A: At that particular time, no, but as I look back, I feel that feeling.

Williams confirmed that he played all the instruments in *Blurred Lines* and wrote all the vocal melodies, and all that Thicke did was ask for the second verse to be sung in falsetto.

When asked why Thicke had any ownership in the song and why Williams agreed to give up a percentage of the song, Williams said:

It's something that ... just happens in our business. Did he write a specific line? No. Did he ask that we sing high on the second verse? Yes. Did he give a basic demonstration of what that might be? Yes. But I wrote that second verse as well.

Q. Do you know if he got 50 percent of the song?

A. No, I'm not that generous.

At the very least, it was clear that Williams (and Thicke, to the extent that he created *Blurred Lines* at all) had knowledge of Gaye's *Got To Give It Up*, such that they could not avoid infringement on the basis that they created *Blurred Lines* independently of any knowledge of Gaye's song. But reference to the prior work is only one part of copyright infringement. It is also necessary (both in the United States and Australia) to demonstrate that the two works have sufficient objective similarity, such that the later work is truly a copy of the earlier work.

Battle of the musicologists

Each side called their own expert musicologists to give opinion evidence as to whether *Blurred Lines* was "substantially similar" to *Got To Give It Up*.

The Gaye family relied on Judith Finell, who identified "*a constellation of eight substantially similar features*" in the two songs, namely:

(1.) the signature phrase: in *Blurred Lines* sung to the lyrics "*And that's why I'm gon' take a good girl*"; in *Got To Give It Up* sung to the lyrics "*I used to go out to parties*";

(2.) the vocal hook: in *Blurred Lines* sung to "*take a good girl*", in *Got To Give It Up* sung to "*keep on dancin'.*"

(3.) the backup vocal hook: in *Blurred Lines* sung to "*good girl*" and in "*Got To Give It Up* to "*keep on dancin'*".

(4.) the "*core theme*" of each song: comparing the verse in *Blurred Lines* to the backup hook in *Got To Give It Up*;

(5.) the backup hooks: "*hey, hey, hey*" in *Blurred Lines* and "*dancin' lady*" in *Got To Give It Up*;

(6.) the bass melodies, including an intermittent descending melody;

(7.) the keyboard parts, with chords in rhythms emphasizing the offbeats, with shared pitches and rhythmic feature;

(8.) unusual percussion choices, particularly a syncopated cowbell part and an open hi-hat.

Ms Finell also noted that both songs use distinctive falsetto vocals, both deviate from the norm by omitting a guitar and both contain party noises throughout the song.

Ms Finell concluded that the similarities between the songs "*surpass the similarities that result from their shared genre, and are the result of many of the same deliberate creative choices made by their respective composers. Consequently, rather than merely resembling one another stylistically, these two works sound substantially similar in many of their most distinctive features.*"


Pharell Williams

PHOTO COURTESY OF NICK UT/ASSOCIATED PRESS

> "The Gaye family relied on Judith Finell, who identified *"a constellation of eight substantially similar features"*"

Williams and Thicke relied on the report of another musicologist, Sandy Wilbur, who prepared a 55-page declaration containing a comparative analysis of the two songs. She found no substantial similarity between the melodies, rhythms, harmonies, structures and lyrics of the two songs and concluded that the songs were not substantially similar. She critiqued Ms Finell's report, noting that "*there are no two consecutive notes in any of the melodic examples in the Finell Report that have the same pitch, the same duration, and the same placement in the measure.*" She also opined that many of the purported similarities are unoriginal, and rather they comprise "*the basic building blocks of musical composition that are present, if not inevitable, in many songs*" or were found in prior art including *Low Rider, Superfly* and *Funkytown*.

The Gaye family also adduced a 30 page declaration from Professor Ingrid Monson, who carries the imposing title of the Quincy Jones Professor of African American Music at Harvard University. Professor Monson found at least seven similarities between the two songs and that the similarities were so pronounced that "*direct copying*" seemed likely.

Trial by jury

Williams and Thicke unsuccessfully applied for summary judgment, which was denied by Federal District

> “Perhaps more than most, modern popular music is notoriously derivative.”

Court Justice John Kronstadt, who ruled on 30 October 2014 that there were genuine issues of material fact as to the “*extrinsic similarity*” of the two songs, and that the “*intrinsic similarity*” is a jury question.

A jury trial commenced in Los Angeles on 24 February 2015 and ran for seven days.

In a significant set-back for the Gaye family, the judge ruled prior to trial that the jury could not be played the full version of *Got To Give It Up* as recorded and published in 1977. Rather, because of the relevant legislation which applied at that time, the relevant copyright work was limited to the sheet music composition as noted on paper on file at the United States Library of Congress. At a late stage they were allowed to introduce recordings that were supposedly stripped of non-copyrighted elements. (To this extent, the jury did not hear precisely the same version of *Got To Give It Up* that you will hear in the YouTube link referred to above. In particular it is not clear from the available reports how much the recordings played to the jury lacked the full percussion parts you will hear in the commercially released version of *Got To Give It Up*.)

The jury selection process included an unusual question for each potential juror: whether they were offended by the music video for *Blurred Lines*, which featured bare-chested, nearly nude women. Some responded that they couldn’t remain impartial and were dismissed. Other questions in the selection process included whether prospective jurors played a musical instrument or could read music, whether they knew Williams’ work and liked it (Thicke’s repertoire was not addressed) and whether they could judge celebrities fairly. Five women and three men finally passed this selection process.

In his opening to the jury, the Gaye family’s attorney focused on the inconsistency between the depositions of Thicke and Williams and their earlier interviews in the media to promote *Blurred Lines* in which they cited Gaye’s song as their inspiration. He cautioned jurors about the oral evidence of Williams and Thicke: “*They will smile at you and they will be charming. Keep one thing in mind: They are professional performers.*”

The attorney for Williams and Thicke told the jury “*We’re going to show you what you already know: that no one owns a genre or a style or a groove. To be inspired by Marvin Gaye is an honorable thing.*”

The jury was treated to rare details of the financial dividends of *Blurred Lines*, which earned US$5.6 million for Thicke, US$5.2 million for Williams and another US$5-6 million for the record company, as a well as an additional US$8 million in publishing revenue.

The attorney for Williams and Thicke told jurors that there was more at stake than the millions in profits: “*This affects the creativity of young musicians who hope to stand on the shoulders of other musicians. Let my clients go forth and continue to do their magic.*”

Gaye’s widow testified that when the family heard *Blurred Lines* they praised it and tweeted out a thanks to Williams and Thicke thinking that the duo had paid a licensing fee for the use of *Got to Give It Up*. The family learned later that no permission for use had been requested.

The jury was shown videos of the depositions of Thicke and Williams. Before the jury, Thicke repeated his claim that he was high on Vicodin and drunk during each of the media interviews where he identified Gaye’s song as the inspiration for *Blurred Lines*. He was allowed to demonstrate on a keyboard how songs can have similar chord structures, comparing U2’s *With Or Without You* to Youth Group’s *Forever Young* and Michael Jackson’s *Man in the Middle* to the Beatles’ *Let It Be*.

The jury deliberated for two days and delivered its verdict on 10 March 2015, finding infringement of copyright and awarding nearly US$7.4 million to the Gaye family. On 14 July 2015, Kronstadt J ruled on several post-trial motions, with the result that the damages award was reduced to US$5.3 million.

An appeal is pending.

My humble thoughts

When I first heard about the case in the news, I decided to conduct my own trial by jury. I arrived home to find a suitable jury of two 10 year olds, an 8 year old and a 5 year old all busily enjoying Friday night spag-bol. Suspecting (correctly) that they already knew *Blurred Lines* very well from its high exposure in recent years, I played them *Got To Give It Up* and asked if they could identify it. Within seconds of hearing the opening rhythm, one of the 10 year olds immediately stated that it was *Blurred Lines*.

A curious feature of this case is that the similarities between the songs are primarily rhythmic and structural rather than melodic. Lyrically they are entirely different. But there is no reason why melody and lyrics ought to be more important than rhythm and structure. After all, this is dance music.

How would the case fare in Australia? For better or worse, in our system cases such as these are determined by judges not juries, but they remain highly subjective and impressionistic. Copying a small but important part of a work can be enough to make out infringement. My money would be on the Gaye family.

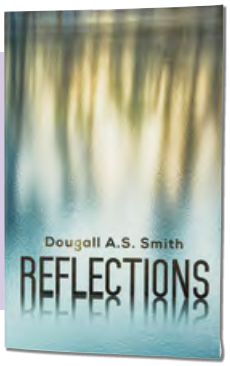
But is it fair to monopolise a groove? Like many artforms, perhaps more than most, modern popular music is notoriously derivative. As Keith Richards said about Chuck Berry, “*I lifted every lick he ever played.*” The line between copying a style and copying a song will always be blurred.

BOOK REVIEWS

Reflections

SIMON WHELAN

Reflections
By Dougall A S Smith
Create Space
Independent
Publishing Platform
2013



Frank Callaway was a meticulous lawyer. His scholarship was exemplary. He took care never to adopt an unfounded conclusion or to express an idea which was not fully considered. He set high standards for himself, and for others.

Before his death he wrote a book. The book is called *Reflections*. It is about the meaning of life. In this book Frank allowed himself to range across fields in which he was not expert and to address topics he had not spent a career researching. He allowed himself to express ideas not fully formed, and to speculate on topics he had not studied in depth.

For many of us, this is something we do often. Not so for Frank.

The author clothed himself in several layers of protection, likely because he felt the book was out of character. First, he used a pseudonym, Dougall A S Smith. Then, the pseudonymous author explained that the work was not his at all, but rather the writings of a dead friend. Finally, the pseudonymous author told us that his friend did not write the work for publication and that the work was in fact unfinished. The true author thus launched these reflections into the world while disclaiming both authorship and fitness for publication.

I am not qualified to assess the book's merit as a work of theology or philosophy. I read it with interest. One can only admire Frank's preparedness to confront such a profoundly difficult subject. The book should be judged on the terms its author has set. They are reflections which are unfinished. Frank published them, but he did not write them with that intention.

Admiralty Jurisdiction: Law and Practice.

SAM HORGAN

Dr Cremean has published his fourth edition text on Admiralty Jurisdiction: Law and Practice. The text is an extensive and detailed coverage of the provisions of the *Admiralty Act* 1988 (Commonwealth) and the regulations and Court Rules made in respect of that statute. The work extends now to cover Admiralty Jurisdiction substantive law and practice not only in Australia but also in New Zealand, Singapore, Hong Kong and Malaysia. The value of this extended coverage allows comparison and consistency throughout practice and procedure in matters of admiralty concerning major countries in the Asian region.

Principally, the text covers the jurisdictional basis for actions in rem based upon proprietary, general and other maritime claims. All statutory and procedural matters concerning the arrest of ships are covered in extensive detail. This new edition has updated the references and includes an account of all relevant admiralty decisions since the previous edition in 2008.

Unlike previous editions, the current edition does not include the statutes referred to nor a full text of the Rules of Court discussed. It is understood that this decision was made to keep the scale of the book manageable. Perhaps also the text has graduated from being a slimline annotated version to being a full and comprehensive text on its subject in the jurisdictions discussed.

Chief Justice Allsop has written the Foreword to this fourth edition, proclaiming it "a beautifully crafted and comprehensive work, written by someone with command of his field". This is undoubtedly correct. The work is well structured and comprehensive in its analysis.

It is a very useful text for all general commercial practitioners. The fact that new editions are regularly published means that the practitioner can have a degree of confidence that the contents will be up to date and authoritative.

Admiralty Jurisdiction: Law and Practice. Australia, New Zealand, Singapore, Hong Kong and Malaysia.

Fourth Edition by Damien J Cremean.
The Federation Press 2015
pp (i)-(li), 1-297

OFF THE WALL...

What we mean when we talk about provenance. SIOBHÁN RYAN, ART & COLLECTIONS COMMITTEE

Sometimes the true value of an artwork lies not in its subject matter, or who painted it, but in its own story; that is, its provenance. The term derives from the French word *provenire* meaning *to originate*. Some readers may be familiar with the BBC television series *Fake or Fortune?* which teams a glamorous presenter with an urbane art historian, an arsenal of high-tech tests and some old-school sleuthing to authenticate the pedigree of undocumented works. But provenance comprehends much more than attribution. A work's provenance reflects artistic tastes, fashion conceits and collecting priorities and is shaped by historical events; from the momentous to the seemingly innocuous.

By way of a local example, in the regional town of Warrnambool there is an excellent example of a nineteenth century ornamental peacock manufactured by the celebrated English pottery company Minton & Co. It was shipped to Australia in 1878, destined to be a key exhibit in the 1880 Melbourne International Exhibition. Tragically, the clipper *Loch Ard* on which it was travelling was shipwrecked off the south-west coast. All but two of her passengers and crew and most of her cargo perished but the *Minton Peacock* miraculously survived. It was kept for over fifty years by the family who had purchased the *Loch Ard* salvage rights, and was ultimately purchased by the people of Warrnambool in 1975. The *Minton Peacock* is entered on Victorian Heritage Register because of its aesthetic significance and its association with these important events in the history of Victoria. Its notable provenance is reflected in its current valuation of $4.5 million.

The Victorian Bar's Peter O'Callaghan QC portrait gallery was opened in August 2014. Prior to its establishment, the works were scattered around the precinct. Whilst the Bar always identified these works as being part of its 'collection', the concept was loose and this is reflected in the paucity of records. The act of uniting the works in a dedicated space brought curatorial priorities and provenance into sharper focus. In this article, we look at the provenance of three works in the collection.

Sir Isaac Isaacs KCMG GCMG GCB KC by Percy White

This portrait was donated to the Bar by Jeffrey Sher QC. That much we know from a brass plaque affixed to the work. What we did not know until recently was that the artist was, in fact, Sher's maternal grandfather and that he painted work for his grandson c. 1961. In the previous edition of the *Victorian Bar News* (Issue 157 Winter 2015), *Off the Wall...* speculated that the work might have been painted c. 1930 as a study for White's much larger portrait of Sir Isaac Isaacs, which is now in the High Court of Australia collection. Sher corrected this in an entertaining letter to the editors, in which he explained the origins of the Bar's portrait and how it came into our collection (see letters to the editor from this issue).

The letter also describes (replete with a Dickensian moment concerning a crippled boy) how White's original

Joan Rosanove

portrait of Sir Isaac had been lost but was re-discovered by Sher and his instructing solicitor in the clubrooms of a Jewish sports club – but that is another work's provenance.

Joan Rosanove QC by Flora Lion

This portrait was donated to the Bar in 2014 by Joan Rosanove QC's daughter, The Hon. Mrs Margaret ('Peg') Lusink AM. It was commissioned by Joan and her husband, Mannie Rosanove, and painted in England in 1952, when Joan was 56 years old. As the work took shape over several sittings, Joan regarded it warily, reporting to Mannie, "*It is horrifyingly like me. Perhaps she'll add some flattering overtones*."

Joan's biographer recorded the reception of the finished work; first upon completion and then after time had mellowed both the painting and its subject:[1]

> *There was an informal 'viewing party' when it was finished. Florrie and Bert Nathan who were travelling with the Rosanoves were among the guests. Nobody seemed to think much of the portrait. One guest said to Florrie Nathan (an exceptionally pretty woman), "It's not even like you." Joan, overhearing this said to him, "Be fair. It's not supposed to be her. It's supposed to be me."*
>
> *Joan, Mannie and the family went off to dinner taking the portrait with them in the boot of the car, hoping it might be stolen. The portrait came home with the Rosanoves to Melbourne. It was duly consigned to the lumber room. More than fifteen years later it was rescued, hung at the new house the Rosanoves built behind "Little Medlore", and it was seen that Flora Lion had been looking inwardly at some Joan Rosanove of the future that she alone, at that time, could see: a serene and composed older woman, a wise half-smile on her face. Then everybody said, "Joan, it is exactly you!"*

After Joan's death, the portrait hung in her daughter's home alongside a portrait of Peg by Dudley Drew. It was given to the Bar by Peg, to replace a photographic portrait of Joan which had hung in the foyer of Joan Rosanove Chambers since around 2000. That photograph, well known to members of the Bar, portrayed Joan in her wig and robes puffing on her trademark black cigarette holder. It had been first published in 1951 on the cover of *People Magazine* under the headline *Joan Rosanove, Melbourne's Portia* with an accompanying profile on Joan, for which she was reprimanded by the Bar Council.

Peg Lusink

> "The portraits of mother (the Victorian Bar's first female barrister and first female silk) and daughter (Victoria's first female judge of a superior court) now hang side by side in the gallery."

When, in 2014, Peg happened to accompany a friend to a conference in Joan Rosanove Chambers, she was horrified to see that the *People Magazine* portrait had become the public face of Joan Rosanove QC. Ever practical, Peg offered the Flora Lion portrait to replace the photograph, which the Bar gratefully received. The original Lion portrait hangs in the Peter O'Callaghan QC gallery and a high quality photographic copy was produced for Joan Rosanove Chambers. Subsequently, Peg donated her own portrait to the Bar and the portraits

of mother (the Victorian Bar's first female barrister and first female silk) and daughter (Victoria's first female judge of a superior court) now hang side by side in the gallery.

Sir Edward Woodward AC OBE QC by Clifton Pugh

This portrait is on loan from Sir Edward's son Ted Woodward SC It was painted in 1972, when Sir Edward was 44 years old. At that time he was deeply involved in Aboriginal land rights activism, having been leading counsel for Yirrkala People in the first major Aboriginal land rights case, *Milipurn v Nabalco Pty Ltd* in 1968 and soon to become the Royal Commissioner inquiring into Aboriginal land rights in the Northern Territory (1973-74). Clifton Pugh's career was also on the rise. He won consecutive Archibald prizes in 1971 (Sir John McEwen) and 1972 (the Hon. EG Whitlam).

Ted Woodward recalls that period as a time when Ted Snr socialised with some of the stars of Australia's arts community. He remembers lively dinner parties at the family home in Balwyn with the likes of David Williamson, playwright, and Clifton Pugh and his wife Judith in attendance.

The portrait was not commissioned. Pugh asked Ted Snr to sit for him; an indication of their mutual regard. As the National Portrait Gallery's biography notes:

> *Reluctant to accept commissions for portraits, he preferred to paint people with whom he had developed some degree of spiritual, intellectual or imaginative connection.*

The work was completed over several sittings at the Pugh's bushland home "Dunmoochin". Sir Edward recalled that the sittings always "*began or ended with lunch*".

The portrait was ultimately purchased as a gift for Sir Edward by his wife Lois and hung in his study. He was very pleased with his portrait. His family thinks that the work captures his sightly iconoclastic

Sir Woodward AC OBE QC by Clifton Pugh

side, from the mischievous glint in his blue-grey eyes to his cravat in the brown tones fashionable in the 1970s.

An arresting feature of the painting is the sitter's hands. Ted Woodward recalls that his father was double jointed and that this pose with fingers intertwined was typical of him. As Clifton Pugh often made a feature of his sitters' hands, Ted Snr's natural attributes must have appealed to him. The signet ring had belonged to Sir Edward's father, Sir Eric Woodward, who had received it upon his appointment as the Governor of New South Wales in 1950. It is engraved with a rampant lion and the Latin phrase '*Virtus Semper Valet*' ('virtue (or courage) always prevails').

On viewing his father's portrait now installed in the Peter O'Callaghan QC Gallery, Ted Woodward remarked that it is appropriate that Sir Edward's portrait is within view of the portrait of Sir Daryl Dawson by Robert Hannaford. For years those two could be found on any Friday lunching at the old RACV Club, along with Sir Richard McGarvie (whose portrait by William Dargie is also in the Bar's collection), Ray Northrop QC and Gordon Spence.

1 Carter I, *Woman in a Wig: Joan Rosanove QC*, Lansdowne Press Pty Ltd, 1970, p 143.

FOOD AND DRINK

Rosa's Canteen

A review by SCHWEINHAXE, the Bar's resident undercover foodie

PHOTO COURTESY OF KRISTOFFER PAULSEN

Rosa's Canteen
Level 1, cnr Little Bourke Street & Thomson Street, Melbourne
(03) 9602 5491
Mon-Fri 12-3; 5.30-9

A motley group rocked up for lunch to Rosa's Canteen: two lawyers, a wine agent, a jetsetter—a constant traveller who doesn't drink wine—and his Italian girlfriend from Lucca, the heart of Tuscany. What better a bunch to sample Rosa Mitchell's new outpost in the heart of the legal precinct.

With a sleek, contemporary fit-out, up from ground level with a view out to a courtyard and through verdant plane trees to the Supreme Court at its northern end, Rosa's Canteen is smart, unfussy Italian with heart. With a one-page menu covering antipasti, pasta, mains, sides and desserts, brevity here is the soul of wit—Rosa's food is unfussy, unpretentious and damn good.

Our friendly, bearded waiter guided us through the offerings and we opted to share antipasti plates of calamari with lemon, chilli and parsley, a salumi plate, and cured kingfish with blood orange, caper leaves and wild fennel. Rosa's Sicilian heritage is certainly evident here in the ingredients and continues throughout the menu with other Sicilian staples, such as salted ricotta, cauliflower, saffron, currents and chicory. The cured kingfish was so tender, the sweetness of the blood orange perfectly complementing the fennel and capers.

For mains, the Italian from Lucca ordered, without hesitation, the typical Roman dish of spaghetti cacio e pepe (spaghetti with black pepper). She said it was bucatini rather than spaghetti, but in the same breath she says it's 'buono'. High praise indeed from a native. Her boyfriend ordered the fish of the day with pickled kohlrabi and stemperata (a vegetable side dish used as a flavouring, a little like a caponata) and gave it high praise, the John Dory being sweet and perfectly cooked. In true Italian style, vegetables play a main role at Rosa's—two others ordered the crumbed artichoke with peas, broad beans and buffalo ricotta. They were both unanimous in their praise: the salty buffalo ricotta complemented by the fresh, sweet broad beans with artichokes adding bitter, crispy notes. Magnifico!

Given wine with lunch is de rigueur for Italians, we were somewhat of a cultural anomaly. Two of our group were not really drinkers and I had pressing matters to attend to post-lunch. So it was left to just two of the group to enjoy the quality but succinct wine list, which focusses on Italian imports and local wines made from Italian grape varieties. They both opted for a Terre Di Val Bona Verdiccio di Matelica, an aromatic Italian white from the Marche region in central Italy. Its flavours of lemons and slightly bitter almonds were a perfect match with Rosa's dishes.

Sated after our antipasti and main, we thought could not leave without trying a little something 'dolce'. We opted for the most Sicilian of offerings—cannoli. We have the Sicilians to thank for bringing the dessert culture to Italy and we all agreed Rosa's cannoli was amongst the best we'd had: a mix of pistachio and fresh ricotta with a hint of honey, encased in crisp, flaky, melt-in-your mouth pastry. Not too sweet at all, just the perfect finale to the perfect lunch. A shame work beckoned for most of us but we agreed we would return!

PHOTO COURTESY OF RICHARD CORNISH

RED BAG BLUE BAG

BLUE BAG – a view from junior counsel

Dear Red Bag,

Just quietly, could you give me the word on how it works in the Essoign? Where should I sit? Does everyone else know each other? Are there any special rules to obey? Are there secret handshakes and traditions I should know about?

The only other clubs I've ever been a member of are the Geelong Football Club and the VIP club at Inflation Nightclub.

I get the impression that the Essoign Club is full of guys who went to elite single sex private schools where they learnt a whole lot of rules and behaviours that are like a foreign language to me.

Please help.

Blue Bag.

RED BAG – a view from senior counsel

Dear Blue Bag,

Private schools? School, schmool, whatever. Having been 'home-schooled' for the entirety of my primary and secondary education, I can only imagine what it must be like to have once 'belonged' to any such socially ambitious seat of learning. Presumably, you attended some school somewhere in this great southern land of ours. Did you play hockey, tennis, or do both? Or were you a library nerd who was interested in debating and represented the school in the annual FIRST Robotics Competition? Either way, if you went to school (private or public) you were probably well educated in the do's and don'ts of institutional behaviour, so I'm sure the Essoign Club at lunchtime will be a snack for you (excuse the pun).

Funnily enough, your question is rather timely. It was only yesterday that I was at the 'Swine' and it was full of men and women at the Bar, of all ages, contentedly grazing away on a range of appetising morsels, all seemingly enjoying each other's company. To me, dining at the Essoign Club (it is a 'club' isn't it?), is somewhat akin to dining 'at home'. Although lunch 'at home' for me during my school years didn't necessarily involve footwear, cutlery or meat, all of which are essential components of an Essoign lunch. The concept of collegiality enjoyed over a meal at the Essoign, is not too far removed from scoffing down a spicy vegetable borek and free trade coffee in the Agora in the fine company of my fellow Recumbent Bicycle Club members during my salad days when I was a student at La Trobe.

I'm sure everyone at the Bar has eaten with work or study colleagues before, unless of course they were called to the Bar from a Carmelite convent or have spent most of their lives meditating on some plateau in Tibet. In substance, the whole point of going to the Essoign is actually getting together and eating with your colleagues, great and small, rather than getting too carried away with matters of form. For goodness sake, even the odd High Court judge has been seen to reach for the chip bowl in the middle of the table (sans cutlery) after frenetically feasting on the carcasses of some of our learned friends on a special leave Friday.

There is a military tradition of taking the next chair available in the officers' mess, which once upon a time was also observed at the Essoign Club (which enabled barristers to rub shoulders with those much more senior or junior to themselves), however this tradition seems to have declined in recent years.

If there are any rules for this sort of thing, then the most important ones to follow at the Essoign are some of life's key lessons: don't be afraid to say hello and meet new people; be polite and thoughtful of others; don't be a bore, or boring; try not to eat with your mouth open; and, turn your phone off in the main dining room (could cost you a bottle or two if it rings in there before 2:15pm).

As for your observation that 'the Essoign Club is full of men who went to elite single sex private boarding schools', I suspect you might have the Essoign Club confused with the Savage Club. Being a woman, I can only speculate as to what goes on at the Savage. Very similar to the Lyceum I'm told.

And I so advise…

Red Bag.

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