ISSUE 159 WINTER 2016

VICTORIAN BAR NEWS

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International problems and perspectives

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Happy birthday Supreme Court

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ISSUE 159 WINTER 2016
VICTORIAN BAR NEWS

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Editorial

PHOTO BY NEIL PRIETO

New look

GEORGINA SCHOFF & GEORGINA COSTELLO, EDITORS

You may have noticed that the Victorian Bar is starting to look different and perhaps, to feel different too. For a start, in this 175th anniversary of the Supreme Court of Victoria, the Bar is finally farewelling the wig – not entirely, but its complete abandonment now seems almost inevitable. As a Bar we are very attached to our traditions. The wig, as you will see from the article we publish on page 38, is a relic of the 1600s and has been worn proudly in Victoria as part of our formal court robes since the late 1800s. We suspect that if the decision to do away with wigs had not been made for us by the Supreme Court, the Victorian Bar would never have been able to make up its collective mind, one way, or the other. So in this issue we celebrate the wig. You probably have a photograph like the one on the next page, of a young Amy Ross wearing her mother's wig and pretending to be a barrister. There is room for nostalgia and obituary in *Victorian Bar News*. Please send us your photos of wigs so we can publish them in the summer issue '*in memorium*'.

What else is different? Haroon Hassan's article on page 28 describes the new Castan Chambers, where "*end of journey facilities*", "*collaborative working spaces*" and "*hot desks*" provide a modern workplace to accommodate our modern working practices. You might squirm if you're sitting in a Chesterfield while you read this. How we work is changing too. Our interview in this issue with My Anh Tran and Sharon Burchell of the County Court's Commercial Division explores job sharing by judicial registrars and demonstrates that it can work well.

Even the Bar Dinner this year felt different. "*Who is Mark Costello?*", many asked – well, he is a fairly junior member of our Bar whose very entertaining speech at the Bar Dinner we publish on page 21. Mark is just one of our bright new ornaments, many of whom were at the Bar Dinner and whose faces you will see in the photographs of the evening which we publish on pages 12 to 25. They are represented by their articles and essays that we are also proud to publish: Ed Batrouney's essay on page 68 that won him a ticket to the Commercial Bar Conference in London this year; Dr Anna Parker's update on international family law (on page 48); and Adam McBeth's article on offshore detention (on page 43).

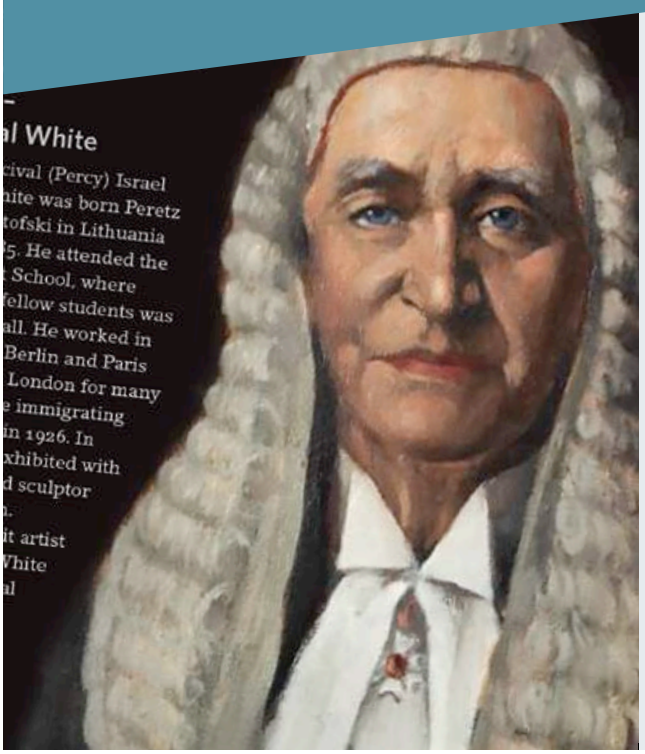
> "You probably have a photograph like this one, of a young Amy Ross wearing her mother's wig and pretending to be a barrister. There is room for nostalgia and obituary in *Victorian Bar News*. Please send us your photos of wigs so we can publish them in the summer issue *in memorium*."

What has not changed and, we hope, never will, is the collegiality and camaraderie with which we as a Bar approach our work as independent legal practitioners.

Part of the family

Victorian Bar News spreads its pages across diverse practice areas. We hope to publish content that interests the generalists and the specialists among our members. In this issue, we have focussed on family law. Following on from Dr Parker's piece on page 48, you'll find another family law article at page 52, by Celia Conlon. On page 85, Helen Dellidis welcomes the appointment of family law barrister Jillian Williams as a Judge of the Federal Circuit Court. We encourage our readers to submit articles about other specialised areas of practice that seldom feature amongst these pages. We wish you happy reading.

Letters TO THE Editors



Not the end of the matter...

Dear Georgina Schoff & Georgina Costello,

Reading Jeff Sher's excellent letter in your last issue regarding the fortuitous circumstances in which Percy White's painting of Sir Isaac Isaacs came to be hanging in the High Court in Canberra brought back some fond memories.

Your readers may be interested to learn that the coincidences outlined by Jeff were not the end of the matter.

The painting had originally been donated by Sir Isaac in 1932 to the Judaean League, the umbrella body of Jewish Sports Clubs, at a dinner where the keynote speakers included Maurice Ashkanasy, a future leading light at the Victorian Bar, and R.G. Menzies, then the Attorney-General.

In the late '70s, the painting's significance was not always appreciated. On one occasion it had to be rescued

> "When he saw the painting on his next trip to Melbourne, he immediately said he wanted it for the new High Court."

from the back of a truck collecting 'junk' from the rear of the Ajax squash courts in Alma Rd, where it was destined for the tip.

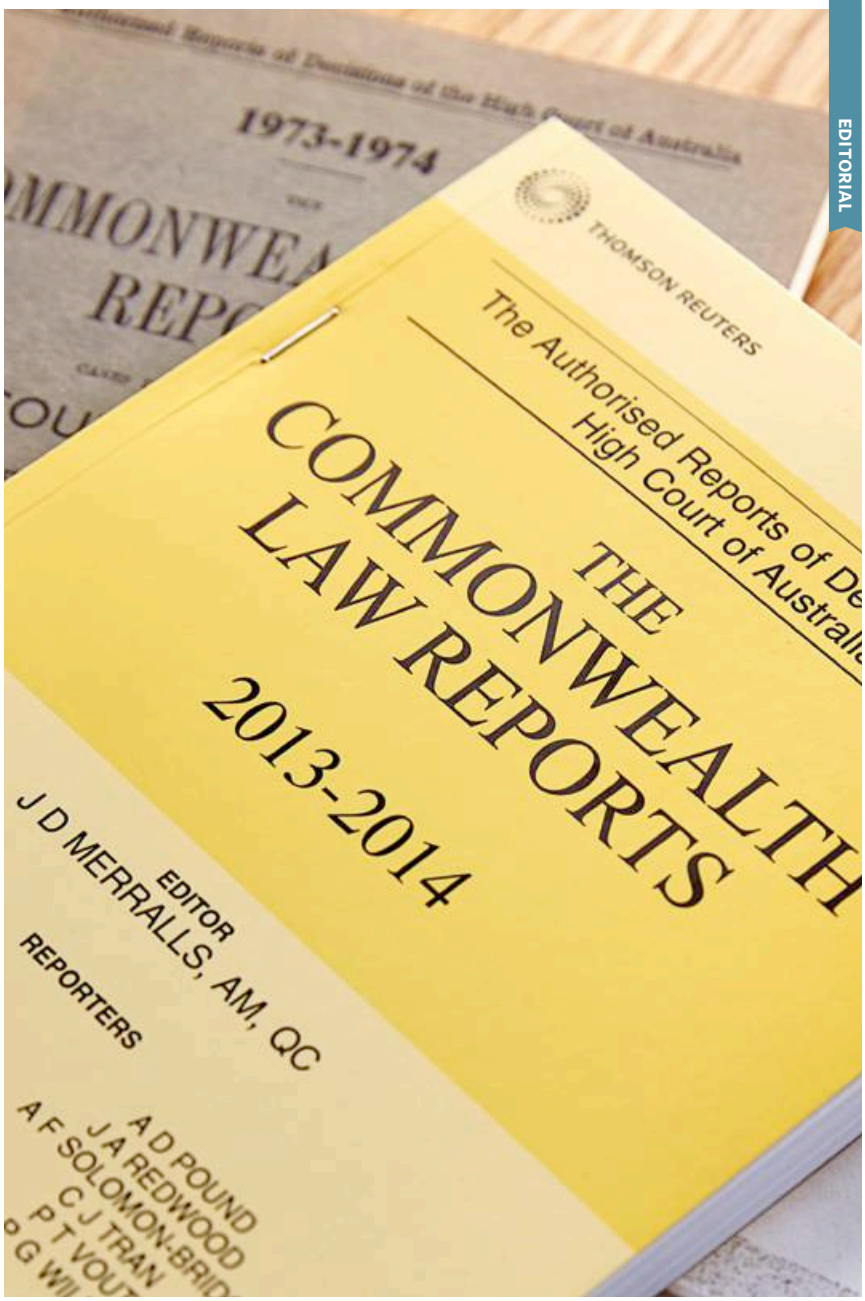
The time in the truck resulted in a small hole in Sir Isaac's face which needed minor repairs, overseen by Melbourne art dealer Joe Brown. The painting was then placed in the boardroom of the Judaean League during my presidency, alongside a painting of Sir John Monash. It remained there until the dinner recounted by Jeff at which the connection was made, and Jeff contacted Sir Garfield Barwick's associate.

The very next day after the dinner, I was in Sydney where Sir Garfield contacted me and asked to see the painting. When he saw the painting on his next trip to Melbourne, he immediately said he wanted it for the new High Court.

The Judaean League arranged an afternoon tea when Sir Garfield came to Alma Rd to present the club with a photographic copy of the painting by Athol Shmith. On that occasion Sir Garfield told a delightful story about Sir Isaac's funeral. He was buried on a very hot day in February 1948 and all the justices stood around the open grave in their full regalia. There was no compulsory retirement age in those days. Justice Starke placed his arm around a very frail old judge standing next to him and said, "Hardly worth going home is it?"

I wish you and your readership well.

Trevor Cohen.



Correction

Dear Editors,

"... errors slip through and the editor is seldom satisfied with the published result". May I correct two errors in The Commonwealth Law Reports, A Personal Reflection? One of the first publishers was Charles (not George) Maxwell. George Maxwell was a well-known, blind, criminal barrister. In their early years the reports were published by Maxwell and the Law Book Company separately yet printed in conjunction. Volumes bore the imprint of the publisher with whom a subscription was placed. The Law Book Company acquired the Maxwell business in 1921.

James Merralls

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*

President's Report

PAUL ANASTASSIOU

The legal industry and, within it, the Bar, faces continuing challenges in a rapidly changing and globalised legal services market. We see an increasing focus in civil proceedings on the use of alternative dispute resolution and the general trend is declining civil court filings, civil superior court work and criminal lodgements. Across practice areas, there is the observed growing trend of solicitors (particularly in large firms) taking over, or doing more of, the work that was historically the remit of counsel. In criminal law, there is the further significant challenge posed by chronically low levels of legal aid funding, and the development of an in-house model which has resulted in reduced briefing of members of the Bar in criminal matters.

The Victorian Bar continues to be a strong advocate for increased legal aid funding and has been strongly engaged in supporting the campaign for increased legal aid funding, 'Legal Aid Matters'.

In many areas of law, solicitors are increasingly delaying the briefing of counsel in matters in order to carry out more of the pre-trial steps themselves. In corporations, legal spending is often a prime target for corporate overhead reduction. In government, budgets are under pressure, leading to a reduction in the growth of legal expenditure. All of these things have the potential to, and do, impact the work available to the Bar and have the potential to impact the administration of justice in Victoria more broadly.

It is vitally important that we continue to communicate with the profession, government and the market more broadly to stress the benefits of engaging a barrister - 'deep' subject matter expertise, excellence in advocacy, strategic insight and fearless independent advice - all of which add up to cost effectiveness.

It is for these reasons that the Bar Council has continued its focus on business development and engagement with the market directly through initiatives such as BarristerCONNECT>>, the direct access portal, as well as direct briefing initiatives and the continuation of our highly successful external CPD and events programs. These events strengthen our relationship with practice area associations, including AILA and CIArb.

BarristerCONNECT>> has been well received by the Courts, Victorian Legal Aid and government as a positive access to justice initiative, providing rapid access to barristers in criminal matters in the city, suburban and regional Magistrates' Courts. Awareness of the portal is building and I look forward to this increasing as the marketing plan continues to be executed over coming months.

The success of our external CPD events program for the whole of the profession demonstrates the Bar's strength and standing in delivering continuing professional development and legal education of the highest standard. This is an area where the Bar has always excelled and continues to do so through the contribution of our individual members and the judiciary to our CPD sessions, workshops, conferences and readers' course.

The Junior Bar conference is the newest addition to our CPD program, with the inaugural conference being held in February this year. The event was the 'brain child' of Education and Policy Manager, Rachel Chrapot who, with her team and the Student Engagement Committee, brought the day to life. It was a resounding success and I thank the many members of the judiciary and senior members of our Bar who gave their time to teach the sessions and master classes on the day.

Much work was done in the planning and organisation of the International Commercial Law Conference held in London on 29 and 30 June, hosted by our Commercial Bar Association together with the Victorian Bar and the English Commercial Bar.

Following the success of our annual CPD conference last year, the Victorian Bar will this year partner with the Australian Bar Association in holding a two-day National Conference for all of the profession at the Melbourne Cricket Ground. Chief Justice French is to deliver the keynote speech. Another highlight of the conference will be a chief justices' panel, with every state chief justice attending, as well as the Chief Justice of the Federal Court of Australia and the Chief Justice of the Family Court of Australia. The Commonwealth and the Victorian Attorneys-General will be speaking, together with leading members from the Bars and the profession across Australia. This conference is an event not to be missed.

One of the biggest projects this year will be to redevelop the Victorian Bar website. Much effort has gone into developing a comprehensive scope of works. Consultation workshops have been conducted with Bar associations, the clerks and Bar committees, as well as continuing consultation with the Bar Council. We will also look to expand our external engagement program through a new legal education and continuing professional development program for the whole of the profession. I look forward to being able to make further announcements about this program in coming months.

Another business development initiative, completed this year, has been the expansion and refurbishment of the Victorian Bar Mediation Centre located at Douglas Menzies Chambers on levels three and (now) one. In partnership with BCL an additional purpose built level for the centre was constructed on level one and both levels one and three refurbished. The centre is now equipped with video conferencing facilities and additional meeting rooms available for hourly as well as daily bookings. I encourage members who have not yet seen the new facilities to take a moment to do so via the website www.vicbarmediation.com.au or contact Kirstin Green, the Bar's Manager of Operations, for more information.

Our constructive relationship with BCL continues as we commence planning a major works project to refurbish level one of Owen Dixon Chambers East. This refurbishment will provide a much-needed upgrade of facilities with modern and functional spaces for our expanding CPD, education and events programs.

Strong governance structures and practices are essential to ensure that the Bar Council, the Executive and the Bar Office are in the best possible position to fulfil their roles and achieve the Bar's core objectives. The Bar Council has commenced a review of its governance processes and procedures with a view to identifying areas for improvement to ensure that the Bar's resources and administration, as well as the significant voluntary contributions by individual members, are put to the best possible use.

The Bar welcomed the Victorian Government's Access to Justice Review this year, to which the Bar made its submission in February this year. I extend my thanks to the Chair of the Access to Justice Working Group convened by Bar Council, Chris Winneke QC, and all those on the working group for their efforts in liaising with the Department of Justice and producing the Bar's submission. The Government is due to issue its final report from the review in August.

> "The culture of participation and volunteer contribution at our Bar is as strong, if not stronger, than it has ever been."

The Bar's submission to the review detailed the work of both the Pro Bono Committee, the Duty Barristers Scheme Committee and the significant contribution that the Victorian Bar makes more generally to the delivery of access to justice through the pro bono services provided by our members. Adding to that significant body of work, the Pro Bono Committee has recently launched a new pilot scheme, the "Open Courts Act Duty Barristers' Scheme", which provides assistance to the Supreme Court of Victoria by counsel appearing pro bono, as amicus curiae in applications brought under the *Open Courts Act 2013* (Vic). The pilot, which commenced in May, will run for 12 months. I congratulate and thank the Committee, its Chair Pat Zappia QC and, in particular, Richard Wilson, for their work with the Supreme Court in developing and launching this initiative.

The excellent volunteer culture of our Bar cannot be overstated, both in relation to the Bar's external contribution to the administration of justice through the pro bono work of so many barristers, as well as our members' tireless contribution to the functioning of our college through standing committees and Bar associations. Without this reservoir of voluntary support the Bar would not be able to make the positive impact that it does to the administration of justice, nor meet the myriad demands from the courts and government agencies for participation in the functioning of the justice system. The culture of participation and volunteer contribution at our Bar is as strong, if not stronger, than it has ever been. We are all entitled to be justifiably proud of our great college as we continue to contribute well in excess of our means to so many vital activities that enhance our civil society.

Snapshot of a year

CEO's Report. SARAH FREGON

Reflecting on my first year in the role of CEO of the Victorian Bar causes me to think about the two questions I have been most asked over the last year:

Are you succeeding?

and *What do they do up there?*

I'll come back to the first question after addressing the second.

Almost certainly the most common question asked of me over the last year is "What *do* they do up there?" when asking about the work of the Victorian Bar team. I have endeavoured to explain this to various members in various ways. My advocacy may not have always been as persuasive as it ought to have been and it's obviously not efficient to take my message to one member at a time. So, with the opportunity of a dedicated article in the *Victorian Bar News*, I will start to explain. And, what better way to demonstrate the work of the team in an 'Australian Football League town' than by using statistics.

Many of these 'stats' to the right and on the following pages represent the "day-to-day" of what the team do, such as, the 21 bar council meetings prepared for and reported to, the 120-plus committee meetings coordinated, over 300 duty barristers briefed, over 800 mediation bookings coordinated, 100-plus CPD sessions held, two readers' courses, with over 190 course sessions run and 83 readers assessed, 13 barristers skills workshops conducted, 2059 practicing certificates and Bar subscriptions issued, over 300 certificates of good standing, 40-plus marketing and communications publications, 90-plus events managed, over 1600 email campaigns and 400,000-

plus email invitations to events and other activities.

Major Projects

In addition to the "day-to-day", over the past year we have completed several major projects and run major events including:

- The Victorian Bar Mediation Centre refurbishment and expansion;
- The Annual VicBar LIV 'All of Profession' Conference and our CPD events program;
- Development of our Communications Strategy;
- The Inaugural Junior Bar Conference;
- The ICC – applications process, the ICC jury workshops and advocacy assessments and delivery of the Online Knowledge Test;
- The first electronic vote for Bar Council elections;
- The direct briefing initiative with IAG;
- BarristerCONNECT>> developed and launched, and perhaps my favourite achievement;
- delivering the Total Permanent Disability (TPD) and Life Group Scheme.

The Victorian Bar team has been instrumental in executing these projects, however many would not have come to fruition were it not for the voluntary work and enormous contribution made by many members of our Bar. Collectively and individually, members contribute significantly to our achievements on a daily basis through their work and participation, whether on Bar Council, Bar Standing Committees, or though our Bar Associations. The support of the clerks has also contributed to our successes. BarristerCONNECT>> could not have proceeded without the support and cooperation of the clerks.

The success of the TPD and Life Group Scheme was a fine example of the power of the collegiality of the Bar at work and what can be achieved through the power of the collective.

VICBAR Values

This last year has also been one of significant development within the operations of the Victorian Bar team in respect of how we work. This, in turn, informs our approach to providing services to the members, our business development activities, and in our engagement with our key stakeholders, in demonstrating the value of the services provided by barristers at our Bar.

Within the team, we have developed and committed to VICBAR values by which we will work with each other and how we will operate in serving the members to support a strong and independent Victorian Bar. Our VICBAR values are: Versatility, Integrity, Collegiate, Balance, Accountability and Respect. These values have been established

as part of a broader review and enhancement of our internal human resources systems and policies through which our human resources framework will be set.

Financial efficiency, discipline and transparency have also been a focus over the past year and will continue to be so in the year ahead. Much work has been done to improve processes and reporting in this area. I thank BCL, in particular Peter Walker and Caleb Jansen, for their assistance over the past eight months in improving our financial services and for their ongoing commitment to achieving continual improvement in this area.

Our work in improving both human resources and financial management processes is both timely and aligned with the work of the recently established Governance Review Working Group. The work of the Governance Review is critical to ensuring that the Victorian Bar is best placed to operate effectively, efficiently and is positioned to meet the challenges we face in a rapidly changing, increasingly global and highly competitive legal services market. I look forward to continuing to work with the Bar Council, the Governance Review Working Group and with my team on this important project.

As a membership organisation, the majority of our revenue comes from member subscriptions. I am committed to ensuring that those funds are used efficiently and effectively. To do this we must continue to pursue all reasonable savings initiatives and prioritise expenditure in accordance with commercial principles and in alignment with our strategic objectives.

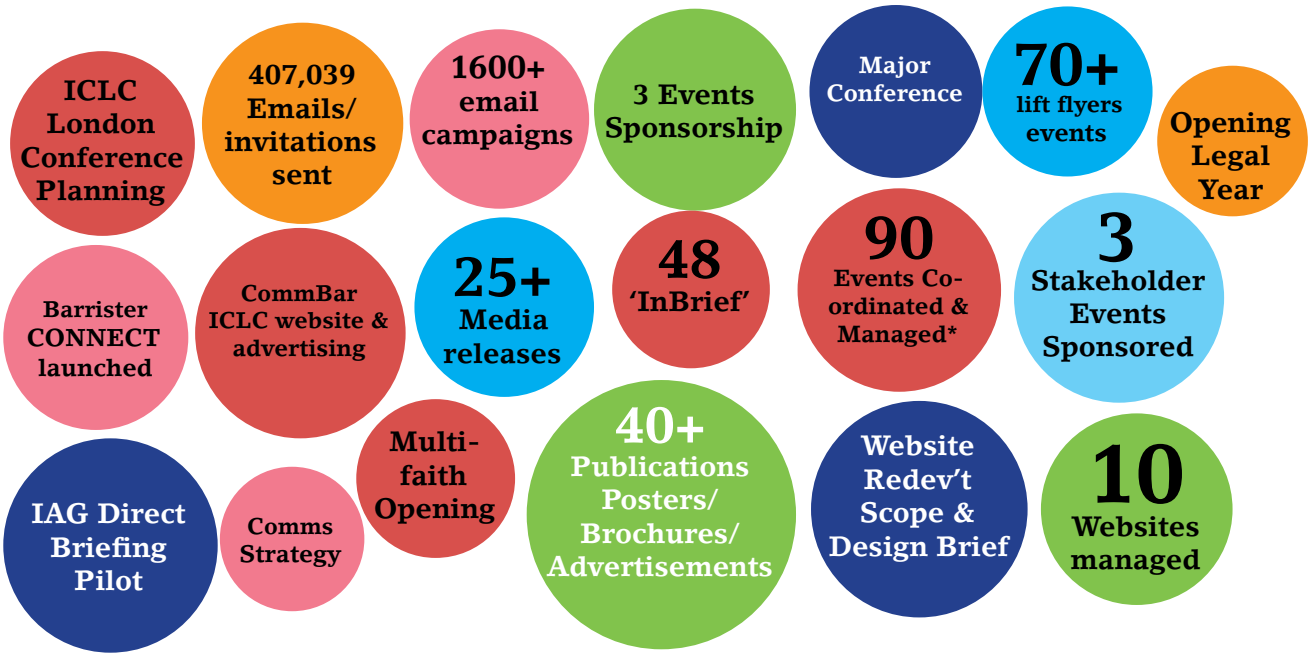
We must also pursue appropriate business development initiatives to reduce our reliance on member subscriptions revenue so far as we are able. Our business development initiatives have been primarily directed towards showcasing the inherent value proposition of engaging with the Bar and the expert services Barristers provide.

The year ahead

Over the past year, my focus has been to raise the profile of the Bar, demonstrate the value proposition of engagement and to position the Victorian Bar as the first choice for the provision of specialist advocacy, analysis and advice. Raising awareness of the advantages of direct briefing and direct access, our new and continuing legal education initiatives and our events program are all directed towards the achievement of this core objective.

Our most well established business development, marketing and communications tool is the Victorian Bar's website. It has been over five years since the last refresh of the website and redevelopment is needed. A significant amount of work has been done over the past six months to prepare a detailed scope of works and compile a comprehensive design and development brief to redevelop the Bar's website. Digital Marketing Coordinator, Stephen Holland, and the website redevelopment team are to be commended for their excellent work and dedication to this project. The design and discovery stage has now commenced, including extensive

Marketing & Communications



stakeholder engagement within and outside the Bar.

Many months have been spent planning and organising the upcoming CommBar | VicBar | Combar International Commercial Law Conference in London. The Victorian Bar Marketing and Communications team, led by Sally Bodman, have been working with the Conference Organising Committee, and in particular the committee's Chair, Paul Hayes, to organise what was a fantastic event and resounding success.

Plans are now well advanced for the first joint ABA | Victorian Bar National 'All of Profession' Conference to be held on 27 and 28 October 2016 at the Melbourne Cricket Ground. This also promises to be a stellar event. A truly exceptional lineup of speakers from the judiciary, each state Bar and the broader profession from across the country will descend upon Melbourne. A remarkable panel with every chief justice (state and federal) will follow, with opening remarks from the Federal Attorney-General and the keynote address from Chief Justice French. We are delighted to be partnering with the ABA for this first joint national conference and to have the experienced assistance of ABA Vice President Will Alstergren QC in organising this event.

And, finally, there will be more to come over the coming months in the area of legal education with a new online project in the final stages of development. Watch this space!

So, back to the first question: *Are you succeeding?* That is for others to assess in the fullness of time. It does seem appropriate, however, to note that success, when achieved, does indeed have many fathers.

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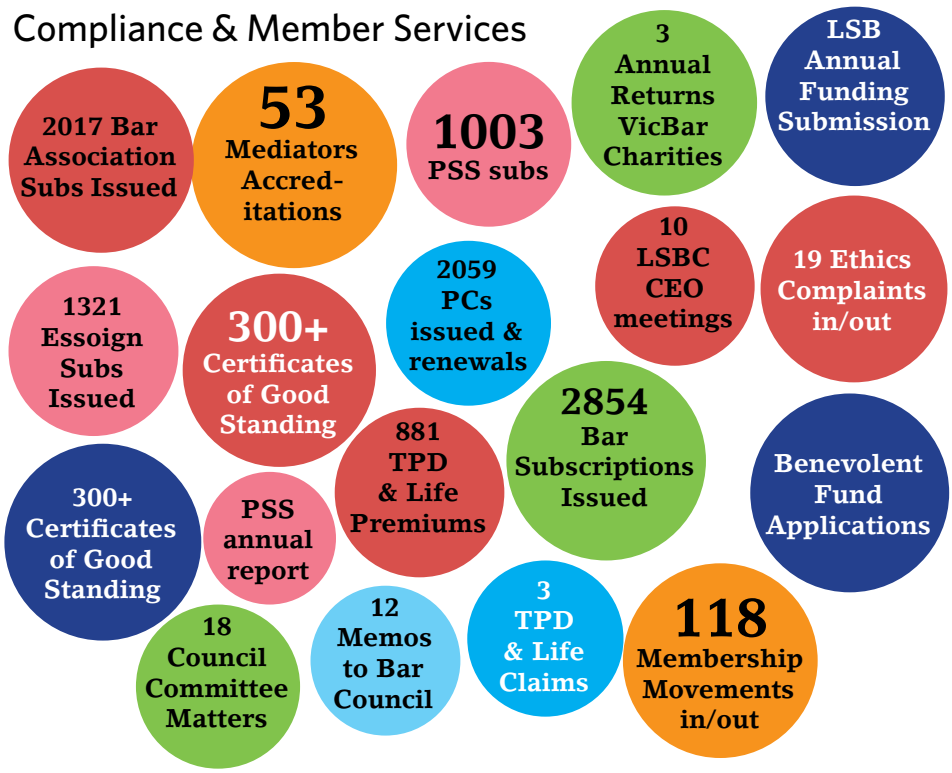






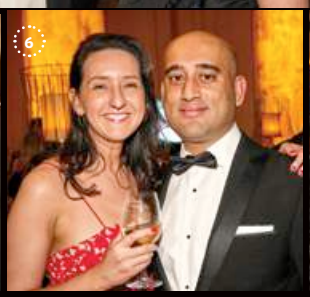


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2016 Victorian Bar Dinner

MYER MURAL HALL, MAY 27 2016

A day in the life of the Chief Justice

SPEECH OF THE HONOURABLE CHIEF JUSTICE MARILYN WARREN AC

Good evening.

I am thrilled to speak to the Victorian Bar, my Bar, of which I have been a proud member for 31 years.

In fact, quite relevant to this fact and to the new members of the Bar who signed the Bar Roll on 5 May, I am the first Chief Justice who is an alumnus of the Victorian Bar Readers' Course. So to the new barristers I say, the sky is the limit, and to the rest of the Bar, watch out for them.

Last year the Bar dinner was entertained by the Lex Pistols. The band has performed on the same stage as Ross Wilson of Daddy Cool and Mondo Rock, Ella Hooper of Killing Heidi, Vika and Linda Bull of the Bull Sisters, the Rockwiz Orchestra and other stars and rock legends.

Let me introduce the band:

» on drums – *the Principal Judge of the Criminal Division of the Supreme Court, Justice Lex Lasry;*
» on saxophone – *Judge Alistair McNab of the Federal Circuit Court;*
» on guitar – *John Champion SC, Director of Public Prosecutions for Victoria;*
» on base – *Michael Cahill, Deputy Chair of the Criminal Bar Association;*
» also on guitar – *Michael Galvin QC with Paul Connor and Justin Wheelahan of the Bar;*
» and there are non-legal musicians and singers who perform pro bono, in the Bar's tradition.

There is a time at Bar dinners called 'the judges' Cinderella hour'; that is, when we make a quick exit before generous, even garrulous, barristers decide to give us a 360 degree performance review.

Last year the Lex Pistols had started playing. No one was on the dance floor. The hour came for judges to depart when Chief Justice French leapt up. He took a detour to the dance floor. I followed and we danced with our partners.

You need to know that the Chief Justice is a rocker from way back — in his youth he also had his own rock band. Suddenly, when a particularly rocky number started, the Chief Justice slid across the dance floor and cut in. An event then occurred, totally unprecedented in the legal and constitutional history of the country. The Chief Justices of the High Court of Australia and the Supreme Court of Victoria danced… together.

The Chief Justice is a cool one, as we know, with special moves. Now, I have been rocked by the High Court on occasion, even rolled, but never this. As the Chief Justice sent me into a double twirl and I spun towards the dinner tables only to be double jived back, I thought, 'What will happen? Goodness there will be

> “An event then occurred, totally unprecedented in the legal and constitutional history of the country. The Chief Justices of the High Court of Australia and the Supreme Court of Victoria danced… together.”

a photo on the cover of the Bar News with the banner “Chief Justices Rock”. The tabloids… or, worse still, social media, will pick this up.’

I need not have been concerned. In fact, no barristers took any notice whatsoever. That is because the Bar dinner is a night for the judiciary and the Bar to celebrate what we do, not who we are, to acknowledge that we are all in this together, this thing called the administration of justice.

Come to think of it, where were all you aspiring barristers? A golden opportunity was wasted. How often do you get the chance to dance with a Chief Justice?

The Lex Pistols will perform again tonight. So later, as David Bowie said, ‘Let’s Dance’.

I reflected on what speaking technique I would adopt tonight. I thought I might take some guidance from the High Court justices. Justice Crennan used clever overheads and digital illustrations. Justice Nettle, now does he have a technique. Thirty minutes without a note. Justice Gordon, well, we know there is a strong nexus between Justice Nettle and Justice Gordon. Her Honour spoke here last year. She rose to the dais wearing a white sleeveless top. I thought ‘Where are her notes?’ I suspected in the pocket of her elegant full skirt. No! Justice Gordon reached the podium, gripped the lectern on either side and away she went. At this stage I thought ‘… bare arms … hmm … I wonder?’

There was a singer of the 1960s, Dusty Springfield (think *Just Wishin’ and Hopin’, Anyone Who Had a Heart,* and *The Son of a Preacher Man*). She could not remember the words of songs. Ms Springfield was also short sighted. She overcame her performance handicap by writing the lyrics on her palms and inner wrists. She would then engage in very dramatic hand and arm movements as she sang, picking up the song lines as she went along. No one knew. I thought I had Justice Gordon pinned - the Springfield technique. But this dais is made of Perspex. Nowhere to hide, nowhere to run. From where I could see – no writing on the High Court flesh.

I then twigged. Justice Nettle’s favourite motor vehicle is an Aston Martin. James Bond drives one. Bond has an inventor come gimmick innovator working for him called Q.

I noted that when speaking, Justices Nettle and Gordon’s line of vision was straight ahead. They both wear glasses. Yes, that is the solution! Their glasses are made by some Q-like inventor. Their speeches run across their vision in a way that is invisible to all save to them. A variation on Google glasses.

How we might marvel at their Honours’ cleverness, poise, brilliance and modern style! However, I will use a neo classical technique — notes.

I have observed that at these dinners the Bar likes to be entertained, so, I thought a couple of jokes would go over well.

I gathered some expert advice from within the Court. I asked former Justice John Coldrey and Justices Whelan and J and T Forrest to morning tea. I told them I was speaking at this dinner. I needed a couple of jokes and would they oblige?

Justice Whelan said ‘You’re doing what? Is it too late to withdraw?’ There was silence. I said ‘Yes I am speaking but I need your help.’ He said, ‘Don’t do jokes, whatever you do, don’t do jokes.’

More silence.

I must have started to look forlorn. Justice J Forrest said, ‘Look, you need to understand, we have copyright in our comedy.’ (I did not know he knew anything about intellectual property).

Kind and compassionate John Coldrey said, ‘Oh, I could lend you my sex in the Supreme Court story?’

I said ‘No, I’ve heard that one before and I do not think it is funny.’

More silence.

Justice T Forrest then said: ‘Look, I suppose I could give you the joke about the very unhappy accused that I told at the Criminal Bar’s farewell for Judge John Nixon?’

Immediately Justice J Forrest said: ‘Don’t be ridiculous. The Bar would be shocked by all the profanity.’

A pause.

Justice J Forrest then said: ‘CJ… [he calls me that when he is serious or he wants something]. CJ, leave the jokes to us, the masters of comedy. You do the things you are stronger at — corporations law, statutory interpretation, judicial health and well-being,’ (I think, ‘that will go over really well’.) He says, ‘Seriously, we are looking after you.’

I close down the discussion.

I visualise myself standing here, no gimmicks, no jokes. What can I talk about?

Then the AH-HA! moment comes. There is one topic I can speak on authoritatively as the only living expert on the planet. A day in the life of the Chief Justice of Victoria … I think I just heard the sound of my Supreme Court colleagues sliding forward nervously in their seats. Dear colleagues, do not fear, all I will say is entirely fictitious, hypothetical and imaginary … well, partly.

The starting point is to choose which ‘day in the life of’. The Boomtown Rats summed it up with *I Don’t Like Mondays*. By Tuesday, everyone is warming up. The Easy Beats sang *Wednesday Just Won’t Go*, but not for me. It is usually the crescendo of the week. Thursday we all have *Friday On My Mind*. Friday is just Friday, Wednesday is my choice.

My Wednesday starts early-ish, in lycra, with a short run, followed by a bike ride into the city, so a sort of mini biathlon. Along the bike route I encounter Associate Justice Gardiner.

Wednesday is corporations day. We discuss the booming list. I peel off from the peloton.

Arriving in chambers, judges and associates are everywhere in the corridors wearing lycra and track shoes or with damp hair. Justices Osborn and Macaulay are just back from a swim, Justices Ferguson and Hargrave have walked in, Justices Ashley and Redlich are in from the gym and Justices Lasry and Almond have parked their bikes. By 8.30am or so, the lycra disappears and the civilian wear is donned.

At my desk I find I have an early email sent at 7.09am from Justice Beach. He is up to date with his judgments, has completed next week's appeals and has nothing to do. He has seen that there are two homicide trials and a defamation trial all needing a judge. He has started looking at the files and would like to help, to do all of them, simultaneously. Will I agree? How can I possibly say no?

This Wednesday I am on an appeal with a self-represented litigant. I am apprehensive that we may miss something and justice may not be done. The person is in serious trouble. Then my associate comes into my room to say the Bar's generous pro bono scheme has come to the rescue. Mr Zappia QC will appear for the self-rep. I know then things will be covered. A few minutes later the associate returns, it seems that overnight Mr Holdenson QC has come in for the other party. He has four authorities no one else had thought of and they are precisely on point.

I have an hour or so to consider them. Some rapid reading is called for. I put my head down.

Then an email comes up, it is the Principal Judge of the Common Law Division, Justice J Forrest. Now, one thing is for sure, his Honour is highly organised, likes to organise everyone else and loves lists. In his Division he already has 12 individual lists.

The email says:

'Dear CJ [I think to myself, 'he wants something'].

> "The Bar dinner is a night for the judiciary and the Bar to celebrate what we do, not who we are, to acknowledge that we are all in this together, this thing called the administration of justice."

We are seeing a new growth jurisdiction – sport litigation. We should establish a new sports list. It would have a racing sub-list of which, I, [J Forrest J] will be in charge. Any thoughts?'

I ring him: 'Won't Justice Cavanough be disappointed if he doesn't run the racing list? Isn't he the racing expert?'

A firm 'No!' is the reply. 'He never, well hardly ever, picks a winner!' I say: 'Didn't he pick the straight six recently?' J Forrest J says: 'Yes, but he got the tips from someone else.' I say: 'I will think about it.' Justice Forrest continues, 'We could also include an AFL sub-list, with Justice T Forrest in charge — after all at the Bar he got Swan, Barry Hall, a grand final reprieve.'

I suggest this new growth jurisdiction was decimated years ago by Justice Hayne and others in the Court of Appeal in the Diesel Williams case. But I am told a new North West, Inside Passage has been found. Justice Ginnane with Justice McDonald think industrial and employment law will provide the big breakthrough. Again, I say, 'I will think about it.'

Word travels fast in the Supreme Court. There is a knock and in come Justices Croucher and Beale. They have heard there is to be a new football list and wish to volunteer for the Richmond list. As criminal and evidence specialists I point out that these cases are actually about judicial review and administrative law. Justice Croucher quickly tells me he was a top admin law student at Monash. I tell Justice Croucher that his Tiger tail is showing. 'Let's put this on hold.'

My email sounds. Justice Beach again. He has settled both homicide trials and, also, for good measure the defamation trial. What else can he do? I ask for a memo on this new 'Sports List' thinking it will occupy him until at least tomorrow.

I have been distracted from my appeal. Back to the authorities. A few minutes later the phone goes. My PA says Justice Beach wants to speak to me. I cannot believe it! How can he have finished so quickly! My PA says, 'No, no, it's the other one, Justice Barry Beach.' What joy! His Honour has heard I am in the Practice Court the next week and wanted to give me a couple of tips. Where would a Chief Justice be without her Beaches?

Time is ticking, only a few minutes' reading time left. I am through the additional authorities and robe up and off to court. We are straight into the appeal at 10.30am. Counsel are excellent and all issues are covered. We pay homage to the Bar's pro bono scheme and acknowledge the resourcefulness of counsel. Justice is done. We finish by 12.40pm, so some time to spare before my lunchtime meeting.

On returning to chambers, a message, Justice David Beach again! He has heard there is an urgent matter in the Practice Court and a bail application in the Criminal Division. He is happy to take both, this afternoon. He will have the Sports List memo done shortly.

I field some emails and phone calls and then my meeting.

At lunchtime on Wednesdays, the Court's Leadership Group meet. For the Court, leadership is not about the power of one but the might of many — me with President Maxwell and Justices Hargrave, Lasry and J Forrest and Associate Justice Derham with the Court CEO. This way, we all keep in touch and have a finger on the pulse. Justice Hargrave speaks of how to manage the burgeoning Commercial Court. Problem-solving

and reform are at the forefront. One member has another new reform idea that counsel have no speaking rights whatsoever and only speak when spoken to. The rest of the group lean forward and suggest that would be controversial. Let's have some consultation first.

The leadership group also talks about barristers and what is happening across the court. Now and again there is great excitement when a new star of the Bar is identified.

We wind up at 2pm, as I have an afternoon appeal. The matter is a novel one under the Human Rights Charter with constitutional overtones. It will be 'Dream Court'. We are sitting a bench of five: Justices Pamela Tate, Anne Ferguson, Elizabeth Hollingworth and Karin Emerton with me presiding. At the Bar table we will have Rachel Doyle SC for the moving party, Wendy Harris QC for the first respondent, Rowena Orr QC for the second respondent, Fiona McLeod SC for the third respondent, Melinda Richards SC for the State Attorney-General intervening and Kristen Walker SC for the Commonwealth Attorney-General intervening. The silks' juniors are all women. I reflect as court is being opened, 'My, my, my, how things have changed'. When I started at the court in 1998 there was only Justice Balmford and me. Women were hardly ever seen as counsel in appeals. This year, 2016, marks the 20th anniversary of the first female judge appointed to the Supreme Court.

In the appeal the written and oral submissions are first-class. I reflect that these advocates represent the excellent standards and qualities anticipated from the Victorian Bar in every respect. The appeal moves quickly and we finish by five-to-four.

On returning to my chambers I have a few calls and, most importantly, a quick discussion with the President of the Bar on the senior counsel applications which are about to be launched. In many, many respects, with the support of the Bar, the appointment of senior counsel is one of the most important things I do.

Next I change out of robes and into civilian wear, again.

It is almost 4.30pm when I have a meeting of the Courts Council. The Council is responsible for the new self-governing administration regime for Victorian courts and the tribunal — Court Services Victoria. I chair the Courts Council which involves the Chief Judge, the Chief Magistrate, the Presidents of VCAT, the Children's Court and the Coroner's Court plus a non-judicial member. The Council manages almost a billion dollars in real estate, about half a billion in funding and employs about 1500 staff. It services around 500 Victorian judicial officers.

> "There is one topic I can speak on authoritatively as the only living expert on the planet. A day in the life of the Chief Justice of Victoria"

The meeting, it is all dollars, buildings and people. We wrap up after two hours.

This year the Supreme Court marks the 175th anniversary of the first sitting, a day when the first five barristers were admitted by the new Supreme Court judge. The Victorian Bar and the Supreme Court have a shared history.

Court Services Victoria gave the funding for the Supreme Court's recent anniversary illumination and what a sight that was! The main, historic building was displayed as never before. The lighting technician had me choose the colours. I was placed one evening at the front of Owen Dixon East standing next to a man with a two-way radio as the colours were called up from the lighting pallet. First colour was green. No! Next, purple. No! Now red is the Supreme Court colour, so next up the building was awash with scarlet from the top of the dome down to William Street. It looked not like a place of justice but a house of ill-repute, a bordello even! That would never do. Imagine the jokes upstairs at the Essoign Club. Eventually we settled on red with gold highlights.

Following the Courts Council I head back to my chambers. Time is moving on. It is quieter now. I clear up some emails and calls. I receive a domestic enquiry: 'When am I coming home? The dog wants a walk'. I respond 'I'm on my way – soon'.

Later I change into my lycra (my fifth wardrobe change for the day). I head out onto the road. It is dark and has been raining. The bitumen glistens under the street lights. I engage with the cadence of the bike as it rolls along and I reflect on the day. I reflect that next week I have admissions — the Court admits about 1400 new lawyers each year. I resolve to speak to the new lawyers about all the values of the Victorian Bar: independence, integrity, protection and defence of the rule of law, defence of the individual against the State and pro bono support to justice.

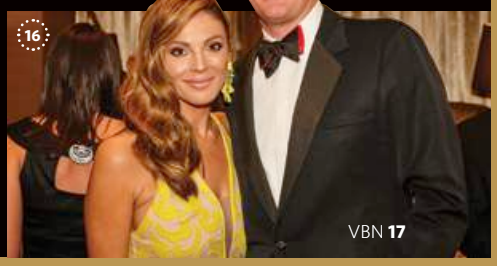
Suddenly at a red traffic light my phone sounds. I pull the phone out thinking it might be the Attorney-General (we have been chasing one another all day). No — it is not the Attorney: as Men at Work sang, 'Who can it be now?' Yes, Justice Beach. He will have the final sports list memo on my desk at 7.08am tomorrow. Incidentally, he has heard there is a serious injury claim that needs a judge and he is happy to take it over. He has a new interpretation of the Accident Compensation Act - he wants to surprise some of his favourite common law counsel. Now he is heading home. On my bike I reflect on what a privilege it is to be a Victorian Judge working with the Victorian Bar. I ride off into the night, a tired but happy Chief Justice.

And that's my Wednesday, my 'day in the life of'.

Thank you for listening.

Enjoy the night. See you on the dance floor.

1. John Karkar QC, Maria Myers AC, Allan Myers AC QC.
2. Jan Martin, Svetlata Todorovski 3. Andrew Traghardh, Alison Umbers
4. The Hon Chief Justice Marilyn Warren AC, Mick Heeley
5. Evelyn Tadros, Hadi Masloum 6. Holly Renwick, Nik Dragojlovic
7. Sarah Fregon, Jennifer Batrouney QC. 8. Daniel Lorbeer, Spike Buchanan 9. Raini Zambelli, Emma Murphy 10. Emrys Nekvapil, Kathleen Foley 11. Myles Tehan, Natalie Hickey. 12. Adam McBeth, Sophie Mariole, Nicholas Phillpott 13. Attorney-General, the Hon Martin Pakula MP, James Peters QC 14. His Hon. Judge McInerney, The Hon. Justice Nettle
15. Lucy Davis, Christine Willshire, Naomi Lenga 16. Elle Nikou, Adam Baker

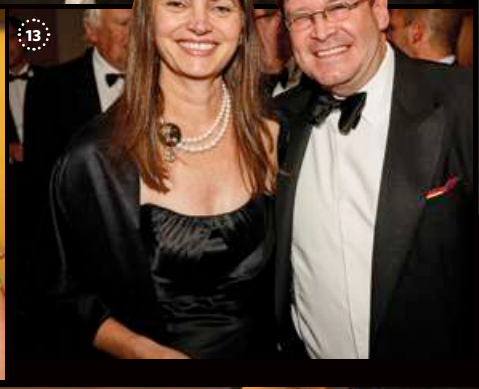












1. Kirstin Green, William Alstergren QC, Courtney Bow, Sarah Fregon 2. Paul Anastassiou QC, Barbara Myers 3. Anthony Strahan, Kate Beattie. 4. The Hon Justice Gordon, David O'Callaghan QC, The Hon Justice Santamaria, 5. Samantha Renwick, Anna Parker 6. David O'Callaghan QC. 7. Michelle Williams QC, Nanette Rogers SC 8. Kess Dovey, Catherine Dermody 9. Philip Cadman, Martin Garrett, Daniel Nguyen. 10. Tiphanie Acreman, The Hon Chief Justice Marilyn Warren AC, Dimitri Ternovski, Nicholas Elias, Tim Jeffrie 11. Paul Halley, Abhi Mukherjee 12. Catherine Kusiak, Monika Paszkiewicz 13. Penny Neskovcin, Timothy McEvoy 14 Daniel Diaz, Michael Bearman 15. Anna Parker, Catherine Fitzgerald, Adam Purton 16 Patrick Tehan QC, Rachel Waters, Simon Pitt, Tom Storey 17. Georgina Costello, Melanie Szydzik, Fiona Forsyth. 18. Tamieka Spencer-Bruce, Ben Ihle, Elizabeth Ruddle, Claire Harris. 19. Kim Bradey, Raph Ajzensztat 20. Nawar Hassan , Daniel Nguyen, Christopher Horan QC, 21. Judge Jillian Williams, William Thomas 22. Paul Anastassiou QC 23. Stephanie De Guio, Claire Cunliffe, Yasser Bakri 24. Eliza Tiernan, Vicki Compton, Julia Lucas, Marissa Chorn, Michelle Jenkins 25. Jennifer Batrouney QC (at lectern) 26. Sarah Fregon, Tully Fletcher 27. Kingsley Davis OAM, Eleanor Coates, Mitch McKenzie, Terence Guthridge, Nicholas Jones



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2016 Victorian Bar Dinner

MYER MURAL HALL, MAY 27 2016

Voice of a new generation

MARK COSTELLO

Chief Justice French, Chief Justice Warren, Chief Justice Allsop, Your Honours, Distinguished Guests, Honoured Guests, ladies and gentlemen.

For many years this speech was the responsibility of the junior silk. It was imposed as a kind of sadistic proof of the old adage "*good things come to those who wait*". People deferred Silk applications to decrease the risk of standing here.

That is no longer the tradition. Instead, in the Catholic tradition, I'm to receive all of the pain and none of the pleasure. It's a tradition most junior barristers have some familiarity with.

Why I've been given the honour is no doubt a mystery to you. Lord knows, it's a mystery to me.

Bar Presidents, like trustees, don't give reasons for their decisions. Although, apparently last year Peters QC gave at least some explanation to his choice, Stephen O'Meara QC, when he told him that he was the "voice of a new generation".

The current President conferred no such distinction on me. But even if he did, in Bar terms I'd be the voice of a generation still in utero.

So, while our President, Onasis QC, I mean Anastassiou QC, sits there like whatever the Greek equivalent of a Sphinx is, knowing exactly why I'm standing here, I don't. Worse, most of you are no doubt wondering "who is he?".

Who is he?

I don't acknowledge the reality of that question out of false modesty. Or even as a simple reflection of the fact that with a touch over 2000 members, it's simply not possible to know everyone.

No, my awareness of the question has rather more to do with the fact that my anonymity is so great, people don't know that I'm me even when I'm in the same elevator as them.

One convenient aspect about life in ODCW is that the Bar's notices are hung in the lifts. I always thought that was terrific; until the Bar Dinner notice came out and listed me as one of the speakers.

A few times on my way up to level 22 someone in the lift, having read the notice about the Bar Dinner, turned to me in the polite way that barristers do and asked "who's he?".

It occurred to me that this was a rare opportunity to – in the political speak of the day – 'set the narrative' about myself.

I varied my answers. So don't be surprised to hear that:

I was the youngest advocate to argue a case unled in the High Court since 1924; or

I'm the only junior who's beaten R J Stanley QC in three consecutive jury trials; or

Merralls QC has certified me as the second reincarnation of Owen Dixon.

That none of that is even remotely true should not dissuade your mildly alcohol affected minds from retaining at least one of those pieces of information and repeating it as a fact on Monday.

But my favourite moment in the lead-up to this dinner came late one afternoon, a month or so ago, when two older Silks – both in a state of mild aggravation and smelling ever so slightly of jet fuel

> “Why I was chosen remains a mystery. Presumably Anastassiou thought that I could tell a war story at least as well as an old Silk, or a young Silk pretending to be an old Silk.”

and grape juice – got into an elevator on the ground floor with me.

One instinctively put his spectacles on and started pursuing the notices. The poster for the dinner attracted his attention. Then the commentary started:

“Well obviously the CJ should speak, can’t understand why she doesn’t insist on exercising the right more often … But what about this bloke Costello. Obviously a tradition-hating trendy. Bad enough we have a few bloody ratbag SCs, but this communist won’t even allow his postnominals to be printed on the notice.”

All too quickly the lift arrived at their floor. As they left the elevator the slightly less inebriated of the two turned to me and said – in the way older Silks do – “you’d agree wouldn’t you?”. I’d worked with Silks before. I knew it wasn’t a question.

Our dear leader

So, I can’t really answer who I am or why I’m here, except to say that I’m Mark Costello and like all good juniors, I’m here because a Silk told me to be.

Why I was chosen remains a mystery. Presumably Anastassiou thought that I could tell a war story at least as well as an old Silk, or a young Silk pretending to be an old Silk.

Frankly, I wouldn’t want to enquire too deeply into Paul’s mind. Though I don’t doubt that it’s full of very interesting stuff.

One wonders if the number for Mossack Fonseca’s client hotline is in there. He may have memorised his various landholdings across Victoria, large parts of Switzerland and the entire island of Lefkada in Greece; but it’s more likely that he’s bought a supercomputer to store that much data.

In fact, I’m told by a Greek friend that Paul acquired so much land in Greece during that country’s debt crisis that a recent article in *Neos Kosmos* – Melbourne’s Greek language newspaper – about the possible restoration of the Hellenic Monarchy, named Paul as a possible future King of Greece.

That was surprising. He’d always given me the impression that he already was.

But I shouldn’t spend too much time speaking about Paul. As he said:

> *Don’t spend too much time on me. The speech is only 20 minutes. If you want to spend three or four on me, that’s fine. Eight at the most. And if you want to mention same cases – and I’m not saying that you should – you might think about:*
>
> *Matthews v SPI Electricity 42 VR – Caleo’s named as appearing but the argument was all mine;*
>
> *ACCC v Active Super 92 ACSR; and*
>
> *BOSI v ANZ Bank 84 ACSR*
>
> *But you just do what you think’s right, son.*

But, whatever his reason, chose me he did and, unsurprisingly, none of my elevator experiences filled me with much confidence. Nerves set in a little.

Friends

But friends are a constant source of encouragement. Having confided to a friend at the criminal bar to being a little apprehensive, I was told:

> *don’t get too worried about it mate; you’re a commercial junior, it’s not like anyone will expect any advocacy.*

Not exactly the pep-up I’d hoped for.

It’s a comment that’s pretty reflective of the internal competitiveness of the Bar. Notwithstanding the hegemony of paperwork, advocacy is still, I think, the primary measure of a barrister’s worth.

It’s why criminal lawyers tease common lawyers about the size of their juries and their relaxed standards of proof. And the common lawyers disparage commercial barristers about their lack of juries and ignorance of the laws of evidence. And commercial lawyers sneer at public lawyers about the near absence of any evidence – let alone the laws of evidence – in their proceedings, not to mention the absurdity of starting a proceeding to obtain relief that does no more than tell your opponent how to do your client over properly the next time.

And all the while, the public lawyers look with a kind of paternalistic bafflement at everyone else; and then turn back and stare at their Supreme Court Prizes.

As the weeks rolled by and tonight came closer, I tried to summon a little courage. I said to myself, if Menzies argued *Engineers* at 26, I’m sure I can do the Bar Dinner at 34. That settled me a little. It became my mantra.

Then I repeated my mantra to a colleague. She responded:

> *Mark – you’re not Menzies. And the Court was barking arguments at him that he was embracing. You won’t want to embrace what they yell at you if you stuff it up.*

That was sobering.

Later I separately discussed it with Richard Niall, Stephen Donaghue and Kris Walker. They were all firm in their belief that arguing a case in the original jurisdiction of the High Court is an easier gig than this one.

I only say that so that Chief Justice French, Justices Nettle and Gordon can keep it in mind next time one of them appears.

On that front, I suspect that appearing in the High Court has become slightly more difficult since Nettle J’s appointment. His ability to communicate by mental telepathy first with Hayne J, and now with Gordon J, presents a further obstacle to the advocate.

There weren't the same sorts of problems when I was an associate in the days of the Gleeson Court. There was no mental telepathy. It was well acknowledged that Gummow J could read minds, but it wasn't a cause for concern; everyone knew that he had absolutely no interest in what anyone else was thinking.

The honoured guests

The only real instruction I was given was that the burden of the non-judicial speech is to announce the Honoured Guests and perhaps note a Distinguished Guest or two. As you will have gathered from the slide show, there are many.

I should start by thanking Chief Justice Warren for her remarkable speech tonight. There are all sorts of risks in speaking on the same night as the Chief, not least of which are what to say and what to wear. I ummm-ed and ahhh-ed for a while. Clearly I couldn't wear my wig. But was a dinner suit modern enough?

I don't mind admitting that it was a real relief when I arrived tonight, saw her Honour and realised that our outfits didn't clash.

This is Gordon J's first dinner as a sitting member of the High Court.

Of course her Honour spoke at last year's dinner. I'm not sure if I thought it then, but it now occurs to me that her elevation was a fair reward for the speech.

It's been suggested to me that there's a risk in mentioning her Honour. And it is true that she is seriously intimidating. She has that rare ability of a five-foot-something person to look down on someone a foot taller than her.

But for all her ferociousness, all who know her Honour well speak of her loyalty, generosity and kindness. She has the constant capacity to surprise. For example, tonight I found out a rather cute habit of hers that I didn't previously know about. Apparently, a bit like Matt Preston with his cravats, Gordon J names all of her handbags. This one's called Ken.

I'm not sure if the fact that I am in the same chambers as Ken makes that joke more or less advisable. I'd decided not to use it until last week, when in a pretty obsequious attempt to curry favour with him, I suggested that I might take up the same theme that he had two years ago and entitle my speech "Lessons I have Learned". He responded:

> *well at least it'll be quick.*

The handbag joke went back in.

The Commonwealth Attorney-General is here tonight. It gives you some understanding of just how stressful it is to be in the Senate, when even in a double dissolution election, you can attend an avowedly non-political dinner in another state only a few weeks before polling day.

But of course, we're delighted that you managed to make the time to attend Mr Attorney. And we trust that you've been comfortably seated there at table 18C.

Since we're a non-political body it behoves me to mention that the Shadow-AG, the Hon. Mark Dreyfus MP QC, is here, as is the Victorian Attorney-General, the Hon. Martin Pakula MP and the State Shadow Attorney, Mr John Pesutto MP. We are grateful for their attendance.

Julian McMahon – who is Victoria's Australian of the Year – is an Honoured Guest tonight. He won the award for his truly inspiration work defending those charged with capital offences and in opposition to the death penalty. There are few contested issues of public policy that can unite the Bar in the way that opposition to the death penalty does. We salute you Julian.

Six of tonight's Honoured Guests have received civil honours. Reserve Magistrate Levine from the Children's Court received an OAM. Lionel Robbards QC and Lasry J were honoured with AMs, as was the legendary the Hon. John Batt – who returns to the Bar Dinner after a long absence.

The biggest gongs went to President Maxwell and Allan Myers, who each received, what was and is now again Australia's highest civil honour, being made Companions of the Order of Australia.

It's worth noting that receiving an AC is a particularly rare feat for a practising barrister. So Allan Myers can be doubly proud, as can the Bar.

Like most people in the room I've met Allan several times. As with most people in the room, Allan has no idea we've met.

The first time was in a trial in my first year at the Bar. It was a technical case about equitable assignments of choses in action. Allan appeared for the plaintiffs. It was an experience.

Though I'm from Queensland I had of course heard the expression "more front than Myers". But sitting in that court room it became very apparent to me that I had never truly appreciated the force and accuracy of the statement until that day.

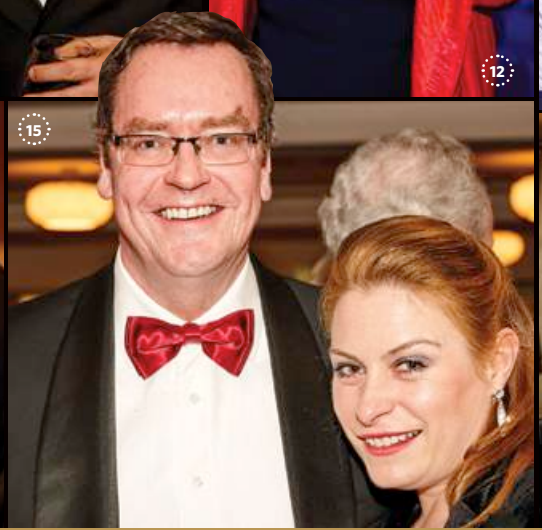
Fittingly, the other Alan – Alan Archibald QC – is also an honoured guest tonight as one of the four 45ers at the dinner. He is joined by Gerald Lewis QC, Christopher Connor and Clive Rosen.

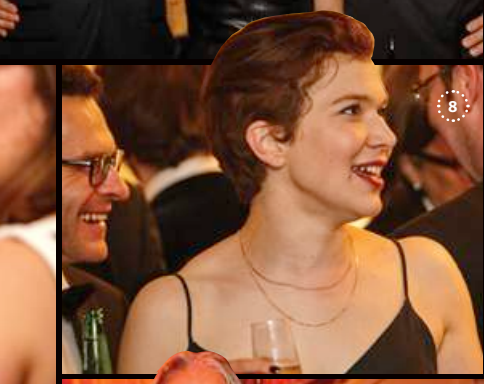
In a profession where survival is a meaningful measure of success, the 45ers are remarkable. It's worth considering what 45 years means in a real sense. In the same year these gentlemen came to the Bar, the floppy disk was invented. Dot matrix printers were not invented until the next year. Incredibly, the first word processer was not invented until two years later. And – and I can't quite believe this – post-it notes weren't invented for another four years.

It will be immediately apparent from that list how much has changed in legal practise over the past 45 years. Except if you walk into Archibald's computer-less chambers, when you realise almost nothing has changed.

It's fitting that both Al(l)ans are honoured tonight. Generations of commercial silks have clung on for dear life, waiting for the rivers of gold to start to flow upon one of them

1. Nik Dragojlovic, Bradley Holmes 2. Hadi Mazloum, Jesse Rudd 3. John Champion SC, DPP, His Hon Judge McNab 4. Olaf M Ciolek, Sarala Fitzgerald, Rudi Kruse 5. Paul Connor. 6. Nick Elias, Tim Jeffrie, Tiphanie Acreman 7. Tamieka Spencer-Bruce 8. Stella Gold 9. John Richards QC, Gina Liano 10. Katharine Gladman, Dermot Connors 11. Ben Murphy, Carl Moller. 12. Michelle Williams QC 13. Dinner guests dancing and musicians playing 14. Anna Robertson, Tom Storey 15. David Gilbertson QC, Andrea Mapp 16. Roisin Annesley QC, Simon Wilson QC, Barbara Myers





accepting judicial appointment or retiring to their estates.

Generations more have fled to the bench in the realisation that the Al(l)ans are stayers.

Others have put their children through law school and a gruelling regime of physical and psychological training in the hope that at least the second generation will be there when one of them retires. Of course even that is a fool's hope.

There are a number of new Judges here tonight. From the Supreme Court Justice Jane Dixon and Justice Keogh. From the County Court, the State Coroner Judge Hinchey. Justice Moshinsky from the Federal Court. And Judges Wilson and Williams from the Federal Circuit Court.

While barristers and High Court Judges are fair game, it would be reckless for someone so early in their career to start telling tales about judges that I could actually appear before. Though many of their friends and frenemies rang with stories.

Obviously Justice Moshinsky was the wildest of the bunch. Someone even called me to say that, as a barrister, he was almost late to court once.

Victoria's new Solicitor-General – Richard "The River" Niall QC – is an honoured guest.

I'm in chambers with Richard, so again there's some delicateness required, particularly given what I've already said about Ken Hayne.

Richard made his name at the Bar as Tonto to Debbie Mortimer's Lone Ranger. But even before her Honour rode off into the judicial sunset, Tonto was kickin' ass and taking names.

Richard knows how to win. Unfortunately, that's not the role of a State Solicitor-General. Their job is to go to Canberra so that the High Court can explain why they're wrong and why the Commonwealth Solicitor-General is right. I'm not sure he's suited to it.

Observing Richard from close quarters it's become clear to me that being S-G is quite different from life as a civilian. For example, normally barristers that read the *Herald Sun* claim only to do so for the footy coverage. But if you're S-G you take it as instructions.

But irrespective of his victories and losses since becoming S-G, or those that he has in the future, there's one thing everyone agrees on. Richard is undoubtedly the most popular Solicitor-General since Stephen McLeish.

Conclusion

If I don't sit down soon I'm likely to be shot by a Lex Pistol. But before I do I would like to offer some thanks and impart a little advice.

Thank you to all who have contacted me and come in support tonight. In particular, my chamber mates, who have filled two tables and even had a wait list. A more natural reaction might have been to ask me to move to another floor.

The second is to Paul, for the opportunity. I'll forgive you one day.

Finally, while I have only five (and not 45) years at the Bar, the amount of learning year-on-year is so significant that, at least against those here tonight who signed the Bar Roll earlier in the month, I might have at least one or two useful observations to make.

The ***first*** is that this is a hard job. It can easily become all consuming. Keep friends and family around you that will keep you in check.

The ***second*** is to closely observe the traits of those you admire and – without seeking to impersonate them – use those traits as a guide. Be like Wendy Harris QC and don't let any opponent, no matter how senior, intimidate you. Be like Hon. Ken Hayne AC and care deeply about identifying the right question. Be like Tony Kelly QC and care deeply about assisting the court. Be like Mortimer J when she was at the Bar and find improbable ways to win. Be like Gordon J and read everything. Three times. Be like Alan Archibald QC and – despite 45 years of hard labour – still care about winning. Be like Peter Hanks QC and after a life in the law still find the intellectual interest in it.

But most of all, don't be like me and allow yourself to be forced into speaking at the Bar Dinner.

Afternoon tea at Government House

A reception for female rural and regional practitioners*

EMMA PEPPLER

The Governor of Victoria, Linda Dessau AM, recently hosted an event for female rural and regional legal practitioners at Government House in the Royal Botanic Gardens. Members of the Bar, including female barristers with rural and regional practices, were also in attendance.

The tinkling of a baby grand piano greeted attendees on arrival. Governor Dessau delivered a thoughtful speech. Afternoon tea was served and guests were free to roam around Government House to admire the décor of the grand rooms. This elegant setting provided an opportunity to discuss and focus on two important topics, namely the challenges of rural and regional practice and the place of female practitioners in the profession generally.

Practice in rural and regional areas can be isolating at times. The large network of nearby colleagues taken for granted by those practising in Melbourne's legal precinct does not exist. The event was therefore important in building networks for rural and regional practitioners.

In her remarks, Governor Dessau discussed the place of female practitioners. Her Excellency (who signed our Bar Roll in 1978) reflected upon an article she wrote for *Victorian Bar News* in its winter 1981 issue. The article is entitled "A Necessarily Short History of Women at the Bar" and it sets out biographical details of the early women of our Bar[1]. Governor Dessau observed in that article that there had been a relative inundation of women joining the Bar. Forty-nine women had signed the Bar Roll since 1975, with the total number of women on the Roll in Victoria in 1981 being 53. Referring to the "sudden swell of women at the Bar" Her Excellency wrote at the time:

> *The natural extension of this trend is undoubtedly that the number of women at the Bar in Victoria, will in the near future, be directly commensurate with the number of women admitted to practice in Victoria.*

It is interesting to reflect, as Her Excellency did, that significantly more women have since come to the Bar than the "inundation" perceived at 1981. And yet, the "near future" envisaged has not yet arrived, in that the number of women at the Bar is not commensurate with the number of women admitted to practice in Victoria. The figures are revealing: as at May 2016, there are 2,100 barristers at the Victorian Bar, 577 of whom are female (27.5 per cent). For silks, 37 of 313 are female (11.8 per cent). Yet for about the past 20-to-30-years the gender of law graduates has been broadly equal. There is not space in this article to examine these statistics further, but it is something for us all to ruminate upon.

On behalf of the barristers and practitioners who attended the event on 3 March 2016, may I extend our thanks to Governor Dessau, for the delightful afternoon at Government House, and for the ongoing support for female practitioners across this great State.

* The event took place on 3 March 2016. The Victorian Bar was represented by our President, Paul Anastassiou QC. Thanks should also go to Jennifer Batrouney QC, who was responsible for suggesting the event; and to Sally Bodman of the Bar Office for assisting with co-ordination.

[1] The article has been republished on page 80 of this issue of *Victorian Bar News*.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1. Emma Peppler, Nerida Wallace, Steven Sapountsis, Jennifer Batrouney QC, Belinda Wilson. **2.** Caroline Counsel, Her Hon. Judge Morrish. **3.** Jennifer Batrouney QC, Ella Thompson, Paul Anastassious QC, Her Excellency, Linda Dessau AM. **4.** Leonie Auld, Katherine Anderson. **5.** Judith Benson **6.** Jennifer Batrouney QC, Ella Thompson, Her Excellency, Linda Dessau AM, The Hon. Chief Justice Marilyn Warren AC. **7.** Wendy Harris QC, Barbara Osafo-Kwaako. **8.** Emma Peppler, Simone Bailey, Margot Harris, Barbara Myers.

Castan Chambers

Launching Level 15 HAROON HASSAN

I knew relatively little about Ron Castan AM QC when I signed the Bar roll. Sadly, he had passed away just as I was beginning my legal career. What little I knew I had read or heard about from researching arguably his most famous case, *Mabo & Ors v State of Queensland (No.2)* (1992) 175 CLR 1.[1] However, I have been fortunate enough to spend time with those who shared chambers with Ron (and counted him as a friend). I have also had the opportunity to meet his extraordinary family. In doing so, I have had the chance to learn a little more about a legend of our Bar.[2]

Robert Richter QC (Ron's first reader) spoke at the launch of Level 15 of Castan Chambers last November. Present were members of Ron's family (including his wife Nellie), many of his readers and his colleagues from the Bar and beyond. Robert spoke warmly of his former mentor and of the crucial role that chambers plays in the life of a barrister. He stressed the important role that colleagues in chambers can play in making our time at the Bar rewarding.

Steven Castan (Ron's eldest son and a member of our Bar) spoke on behalf of the family about his father's time in the law:

> *Dad's values as a person and a lawyer will no doubt resonate for those who work within the newly minted Castan Chambers. Dad believed that through the law one could bring justice and equality to the fore, and could create change for the better for clients of all walks of life. Even more so, he truly believed that through the many streams of law, particularly constitutional and administrative law matters, one could bring change for the better of the country itself….*

In her gracious reply on behalf of the members of our floor, Helen Symon QC eloquently acknowledged the significance and enduring nature of Ron Castan's legacy.

Four silks and 16 junior counsel (not counting readers) make up Level 15. At a personal level I'm pleased to note that our floor is a reflection of the diversity that is slowly but steadily emerging within the Victorian Bar. There are six women on the floor (one silk and five juniors). Three of our members are of Asian heritage. The members of Level 15 have expertise in a variety of areas

1. Amanda Jowett, Kathleena Smith, Adrian Muller, Michael Kontoudis 2. Family members of the late Ron Castan AM QC
3. The Hon. Susan Crennan AC QC, Garry Brinkworth, James Peters QC 4. Robert Richter QC, Ron Merkel QC.

of practice including: industrial and employment law, crime, common law, commercial law, constitutional and administrative law and, fittingly for a chambers named after Ron Castan, human rights law.

Establishing new chambers

The traditional view of chambers conjures up images of private rooms, dark mahogany furniture complete with the obligatory Chesterfields and plush carpets. Sombre and learned surrounds befitting the serious and often solitary work of counsel. One can still find examples of this traditional aesthetic in chambers dotted around the legal precinct. At the risk of offending the traditionalists, I ask rhetorically whether that sort of environment is fit for purpose for counsel working in the 21st century?

Since the turn of the century, the trend has, been away from traditional offices towards collaborative working spaces. That trend has, in part, been driven by a desire to minimise overheads as competitive pressures on lawyers abound. It is probably fair to assume that an open-plan workspace would be anathema to the majority of the Bar. Level 15's design was not quite that radical but there was a definite emphasis on collaborative space.

> "At the risk of offending the traditionalists, I ask rhetorically whether that sort of environment is fit for purpose for counsel working in the 21st century?"

As those that have been through the process before will attest, establishing new chambers can throw up unique challenges. It has been remarked (often through gritted teeth) that trying to get barristers to agree on anything is like herding cats.

The task of achieving consensus fell to a sub-committee comprised of Ray Finkelstein QC, Helen Symon QC, Sam Ure, Adrian Muller, Sarala Fitzgerald and Siobhan Kelly. They ably took over stewardship of the design process with architect Christopher Hansson and the team at BCL. I am immensely grateful for all their efforts. Other members of the floor also lent a helping hand through the establishment of an art committee (to source and purchase communal artwork for the floor) as well as a social committee (but more about that later).

The value of collaborative and communal spaces in chambers

As Steven Castan remarked at the launch of chambers:

> *Dad believed that a person is unlikely to achieve effective change solely on their own, that being surrounded by like-minded helpful colleagues in an inclusive environment stimulated the likelihood of finding solutions to the many complex and seemingly intractable problems that one might face. In chambers, and at the Bar, Dad found an inclusive and open environment.*


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Those who have already visited our floor will have experienced the open and collaborative spaces where colleagues, instructors and clients alike can meet and confer informally. The design of Level 15 was intended to be both flexible and innovative. As a floor we enjoy one another's company and wanted to ensure we could enhance an already strong spirit of collegiality. We also wanted chambers to be a welcoming and comfortable space for clients and instructors as opposed to being intimidating. Overall, the design has been a great success and has helped to strengthen the professional and personal relationships on the floor. That is also consistent with Steven's reflections about his father's experiences at the Bar.

The large and modern kitchen is at the heart of our chambers. The kitchen is the site of a weekly chambers lunch (a tradition Alan Goldberg and Ray Finkelstein shared with Ron Castan and the other esteemed members of their chambers many years ago). Apart from ensuring interaction between the members of the floor it is often an invaluable opportunity to learn from colleagues' past experience or to gather "intelligence". The kitchen is also the centre of operations for our social committee and is also the scene of many other impromptu celebrations and gatherings.

Next to the kitchen is a large elevated conference table which is used for more formal functions, chambers meetings and informal discussions outside of the confines of individual chambers. On the western side of the floor is another collaborative space featuring comfortable armchairs and a coffee table ideal for group discussions.

Whilst some members of the floor have migrated to exclusively "digital libraries", a shared collection of law reports and texts is spread around the floor and is available for any member of chambers to browse. The design of chambers ensures that reading and collaborative spaces are never too far away from each part of the collection.

Three large open-plan workstations have also been provided for our Practice Support Manager and the personal assistants privately employed by various members of the floor. In addition there are two "hot desks" available for visiting clients and instructors to set up and work whilst visiting chambers. They are also available for use by research assistants, readers and work experience students as required.

A nod to healthy living

Last but not least, the design committee wanted to ensure that our chambers contained high quality end of trip facilities to cater for the many members of chambers who ride, jog and walk in each day. Two large shower rooms, space for personal storage and drying racks mean there is no excuse not to get in one's recommended dose of daily exercise. In the unlikely event they are both occupied the building also contains a sizeable end of trip facility on the ground floor to deal with any overflow.

1. Rose Singleton, Clytie Shimmin and Maya Narayan 2. Emily Porter, Fiona Forsyth, Fiona Ryan. 3. Katherine Anderson and others. 4. Philip Cadman, Daniel Snyder, Nicole Papaleo

After a refreshing shower many of our more health conscious members can be seen raiding the fridge to prepare healthy breakfasts or snacks for the working day ahead. The kitchen is often a hive of activity during breakfast and lunch times as there is plenty of room for people to sit, eat and chat to one another rather than being isolated in chambers.

An emphasis on open spaces and light

The design of Level 15 also aims to maximise the use of light and space in order to create a welcoming and functional space for us all to work in. The bold and striking design of the glass and steel doors of each chamber (a common feature throughout all three levels of Castan Chambers) maximises the light that flows into the common areas.

The majority of rooms have large floor-to-ceiling windows overlooking the Supreme Court, CBD and Flagstaff Gardens, depending on their orientation. There is also a large, dedicated conference room (available on a first-come-first-served basis) which is utilised by all members of the floor, regardless of seniority. There are also two spacious internal rooms that are presently occupied by former readers. In time, those rooms might serve as additional dedicated meeting rooms, which would permit mediations to be held on the floor.

The abundance of open space and the use of wooden floorboards and bench tops adds warmth to common areas and helps foster collaboration and discussion between members of chambers and guests, which is a feature that is often sorely lacking in more traditional chambers layouts. It is also more in keeping with the contemporary design principles that are increasingly found in the work spaces of our principal clients, the solicitors' branch of the profession. That is not to say that we have thrown out the baby with the bathwater. All chambers on the floor are well suited to confidential conferences as well as quiet reflection and study.

A fitting tribute

Walking into our new chambers each morning is a genuine pleasure. Each individual room reflects the unique personality of the barrister who occupies it. It is a refreshing contemporary take on traditional barristers' chambers that affords privacy and yet encourages collaboration. It allows us to truly enjoy the place that we work. Most importantly, it is a space that actively cultivates and promotes two of the most important qualities of our bar, collegiality and camaraderie.

I am sure that Ron Castan would approve.

1 See also Louise Martin's article "Mabo –The case that made history" VBN No. 152 (Spring 2012). Ron Castan argued a number of landmark cases in the High Court including Koowarta v Bjelke-Petersen (1982) 153 CLR 168 and Commonwealth v Tasmania (1983) 158 CLR 1.

2 Sam Blakshi's excellent article about his late grandfather, which is available for download online.

Junior Bar Conference

BRAD BARR & NATALIE HICKEY

The inaugural Junior Bar Conference was a raging success. sixty-eight barristers of up to five years' call attended the conference, taking the opportunity to hear from judges, silks, external consultants and other junior barristers about topics of interest to the junior Bar.

Held on 19 February 2016 in the Neil McPhee Room in Owen Dixon Chambers East, the Junior Bar Conference provided specialised workshops and networking opportunities for junior barristers, as well as some precious CPD points.

Rachel Chrapot, a driving force behind the conference and the Bar's Manager of Education and Policy, explained that the aim was to cater for the needs of junior barristers, to bring them together, and to keep costs down because members of the junior Bar can often find larger conferences unaffordable.

With oversight of the readers' course, Rachel had also observed that, after the intensity of the readers course, members of the junior Bar could feel a little lost. She said, *"I felt the junior Bar needed a place where they could ask questions and everyone in the audience would go "hey yeah I have had that issue too!"*

A dedicated working group that included Rachel Walsh, Leana Papaelia, Erin Gardner and Katherine Brazenor provided input into the conference program.

The conference commenced with a well-attended breakfast in the Essoign Club. It was a perfect way to start the day, not just because of the fresh fruit and croissants, but because it enabled participants to meet and mingle with members of the Victorian Bar Council and each other. The start of the calendar year often requires people to make the effort to re-engage with each other. The Junior Bar Conference was the ideal occasion to let this happen naturally.

Rufus Black, Master of Ormond College at the University of Melbourne, then had conference participants spellbound by his presentation on the Victorian Bar's "Performance, Challenges and Opportunities in the Post GFC Legal World". Black's optimistic take on the Victorian Bar's position in the current legal market and its prospects in the future led to a collective sigh of relief. Unsurprisingly, one topic of great interest to the conference participants was Black's statistical comparison of income distribution at the Bar between practice areas, seniority and gender. Whilst it appears true that "crime doesn't pay",

the figures suggest that Children's Court barristers would gladly assume the earnings of criminal law barristers. Black urged junior barristers to consider increasing their charge-out rates, arguing that barristers mark themselves down compared to their solicitor counterparts, in circumstances where barristers offer a speciality skill-set which should be appropriately financially rewarded.

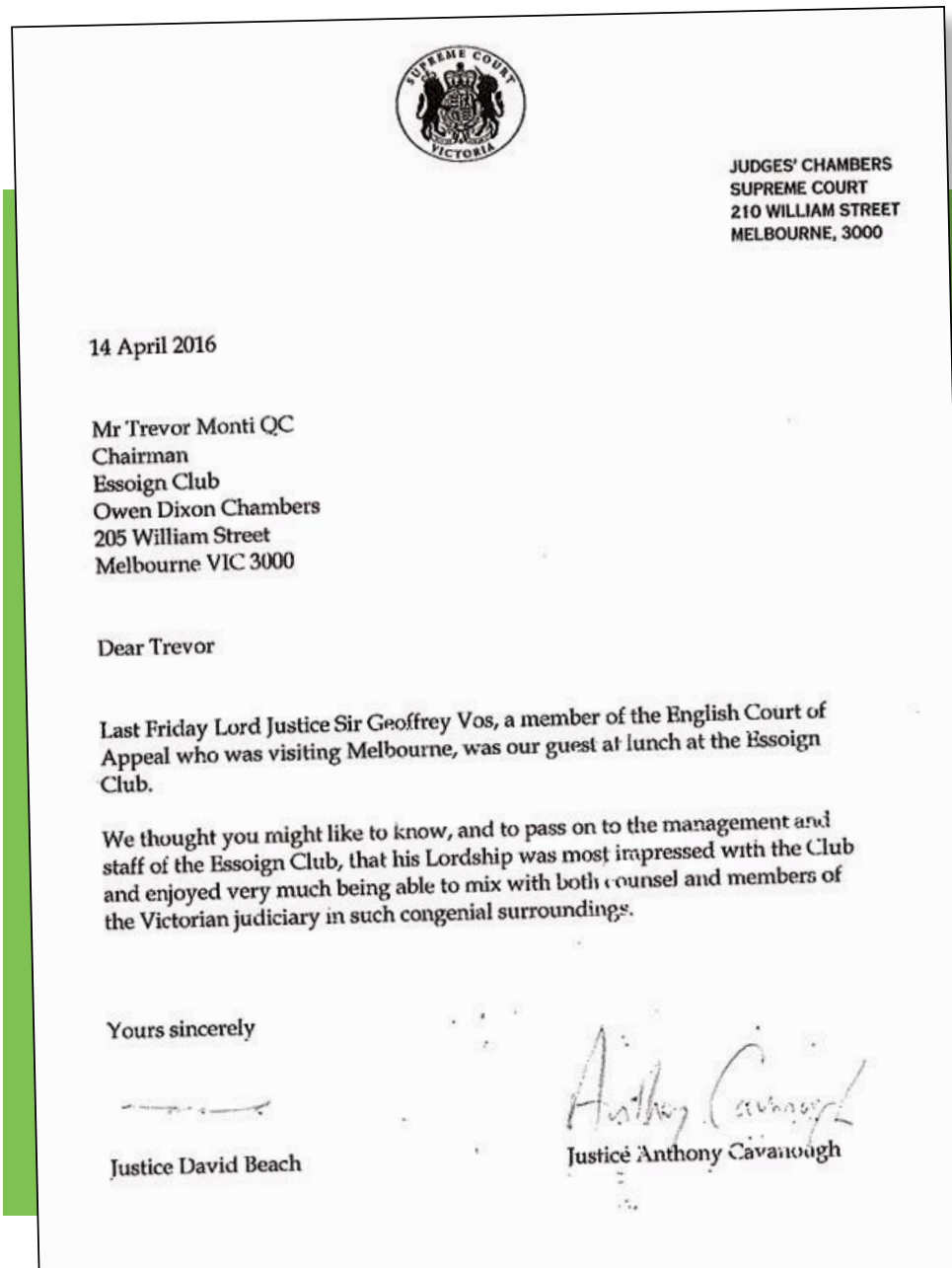
Participants then attended one of three "master classes". Justice Priest of the Court of Appeal and Elizabeth Brimer presented a session on dealing with objections. Justice Priest entertained attendees with numerous anecdotes illustrating when to object, and when not to do so. Brimer engaged in some gentle jousting with her co-host about appropriate 'objections etiquette' depending on the occasion.

Justice Elliott of the Supreme Court and Justin Graham educated their group of junior barristers about effective methods of proofing witnesses. Of course, a master class wouldn't be a master class without war stories and this session was no exception. An enlightening part of the discussion concerned when to distribute a proof of a witness' evidence and the potential pitfalls of doing so in final rather than draft form. Those in attendance will give greater thought in future to the most prudent way to proof witnesses.

Justice Macaulay of the Supreme Court and Andrew Hanak provided advice about how to manage a day in court. Much of the emphasis was on preparing for court, in order to make the actual time in court more manageable. This included preparing substantively as well as organising the relevant documents and liaising with instructing solicitors.

Following a delicious buffet lunch at which the participants had the opportunity to network with silks, Justice Redlich of the Court of Appeal chaired a session about ethical issues for junior barristers. Ted Woodward SC, Charles Shaw and Lisa Hannon provided practical advice about how to deal with ethical issues that arise both inside and outside the court room.

Adrian Finanzio SC chaired the final session, at which Laura Keily, Rachel Walsh and Amanda Burnnard answered the age-old question, "What are solicitors looking for?" The answer, my friends, may only be revealed to those who attend future Junior Bar Conferences.



SUPREME COURT VICTORIA

JUDGES' CHAMBERS
SUPREME COURT
210 WILLIAM STREET
MELBOURNE, 3000

14 April 2016

Mr Trevor Monti QC
Chairman
Essoign Club
Owen Dixon Chambers
205 William Street
Melbourne VIC 3000

Dear Trevor

Last Friday Lord Justice Sir Geoffrey Vos, a member of the English Court of Appeal who was visiting Melbourne, was our guest at lunch at the Essoign Club.

We thought you might like to know, and to pass on to the management and staff of the Essoign Club, that his Lordship was most impressed with the Club and enjoyed very much being able to mix with both counsel and members of the Victorian judiciary in such congenial surroundings.

Yours sincerely

Justice David Beach

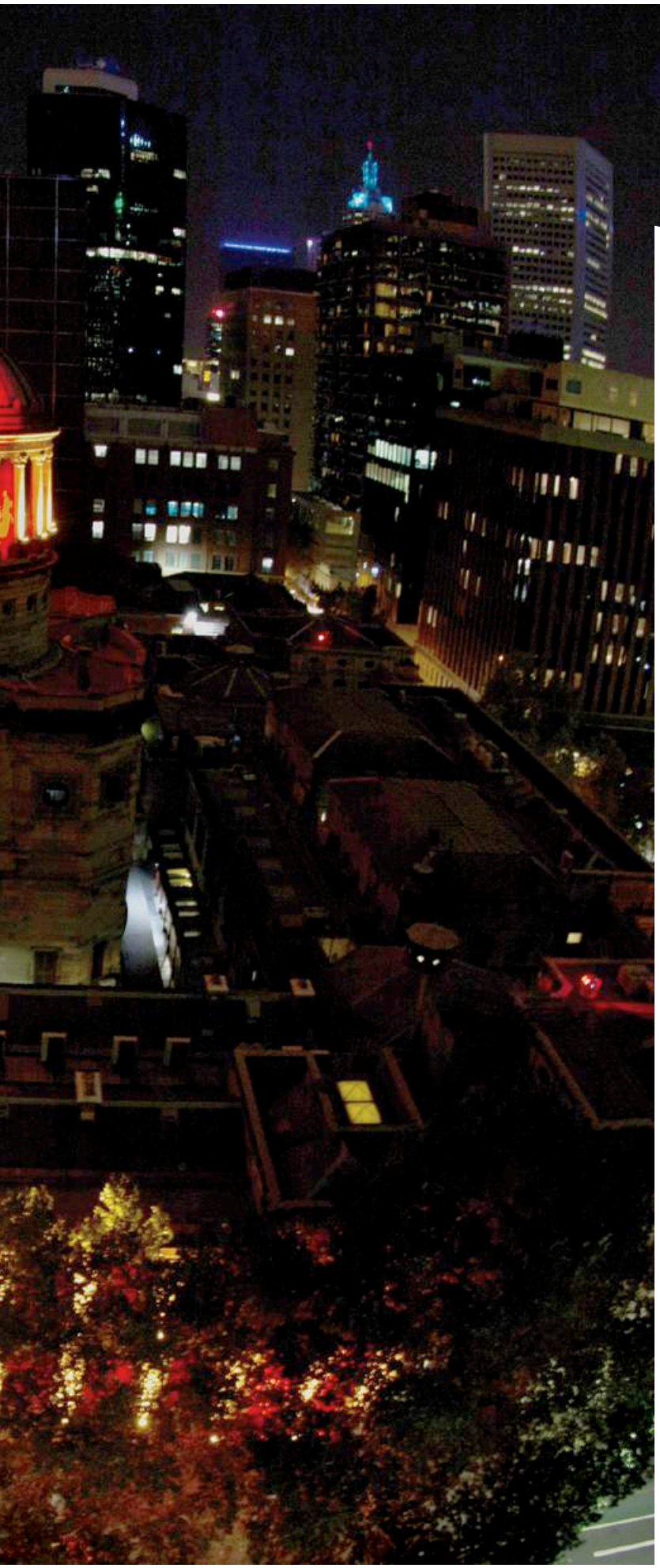
Justice Anthony Cavanough

Essoign Club

As an example of the importance of the Essoign Club to both Members of the Bar and the Judiciary, we are pleased to publish a copy of a letter forwarded to the Essoign Club from Justices Beach and Cavanough in relation to the visit to the Club recently by an English Court of Appeal Judge.

We encourage all Members of the Bar who have not yet become members of the Essoign Club to do so, so they can utilise the great services provided by the Club.

VBN



The Illumination

Celebrating the 175th anniversary of the first sitting of the Victorian Supreme Court

JUSTIN WHEELAHAN

Walking down William Street on a dark April evening, as the Melbourne sky turned a Hensonesque hue of blue, I looked up to see Lady Justice projected onto the unfortunate scatological pantone of brown, which is the Telstra telephone exchange building. She was on a slight angle and precarious, as if she had just tripped over, with the Sword of Justice hanging over the Court of Appeal like the sword of Damocles.

The solemnity and solidity of the Supreme Court, with its classical copper green architectonic dome, pregnant with reason, steeped in history, reminiscent of the Dublin Four Courts, was all of sudden iridescent, disrupted, and more reminiscent of the Rainbow Serpent Festival. The sandstone superstructure was swept away in a blaze of confected psychedelic cellophane colour. The dome was red and the windows were yellow. All that was solid was melting into air. All that was holy profaned. "What the hell is going on?" I thought.

After making some inquiries, I realised that I could relax; everything was in its right place. The occasion for the illumination of the Supreme Court was its dodransbicentennial. Perhaps the occasion lacked the symmetry of a bicentennial, or even a sesquicentennial, but the 175th anniversary of the first sitting of the Supreme Court was a milestone to celebrate nonetheless.

And celebrate we did. On 27 April, the Illuminati gathered in the Essoign Club — ocular pole position to watch the switch being flicked on the illumination of the Court — in celebration of its 175th anniversary. The event was convivial and well attended.

The President of the Bar Association, Paul Anastassiou QC, welcomed the Chief Justice of the Supreme Court, Marilyn Warren, and noted that viewing the illumination from such a vantage point was a fitting occasion to mark the paramount relationship between the Bar and Bench,

PHOTO COURTESY OF MATTHEW TOWNSEND

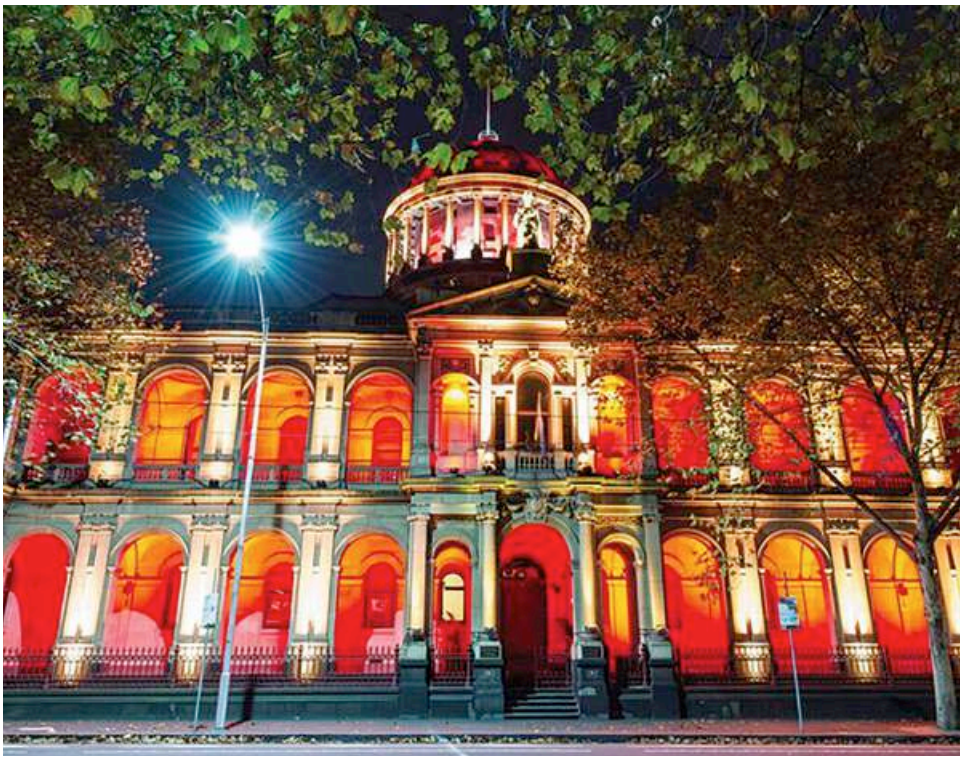


PHOTO COURTESY OF SIMON TISHER

from which arises mutual respect, and the unassailable comity between counsel and courts.

The occasion also marked the launch of a new book, *Judging for the People, A Social History of the Supreme Court in Victoria 1841-2016*, a collaboration between the Supreme Court of Victoria and the Royal Historical Society of Victoria and edited by Simon Smith.

Judging for the People commemorates the 175th anniversary of the first sitting of the Supreme Court of Victoria presided over by John Walpole Willis, as resident judge of New South Wales sitting in the Port Phillip District, admitting five barristers (including Redmond Barry) sitting in a small brick building on the corner of Bourke and King Streets.

The preface to the book, authored by the Chief Justice, no less, boasts that "this is not merely a book written by lawyers for lawyers", and it isn't.

Each chapter explores different fascinating aspects of social history of the court, such as its design, the controversial appointment of John Willis, the Court's development from a colonial outpost of Sydney to Federation, through to the post-war years and modernity. Other chapters examine the Court's work on divorce law, social policy, capital crimes, the fourth estate and the many court staff working behind the scenes, from librarians to judicial barbers. A manuscript and archive collated by the late Peter Balmford became a rich source of material for the book.

The book is full of fun facts. For example, John Willis laid the foundation stone to the Second Supreme Court (that held one of the Eureka trials in 1855 and the trial of Ned Kelly in 1880) in an elaborate Mayan-like ritual:

> *The stone was set in place, knocked three times by a maul with both Willis and the Worshipful Master of the Freemasons and then strewn with corn from a cornucopia and appointed with oil and wine poured from silver vases.*

The 1873 competition that conceived the current Supreme Court plans was an inauspicious beginning for a forum free of bias. The head of the Public Works Department, which was under investigation by a Royal Commission at the time, maintained that Public Works architects could not enter the competition. The winner, Alfred Smith, however, had been assisted by Arthur Johnson, who was an architect employed by Public Works and the judge of the competition. The public was outraged, Smith's award was withdrawn and Wardell was required to make the decision again. He selected Smith's winning entry.

There is also an interesting account of *A v A* [1962] VR 619, a case in which Judge John Barry had to decide whether a mother had willfully deserted a husband. The wife had pursued a lesbian relationship with another married woman in rural Victoria, with an alleged deleterious effect on the child of the marriage. The question to be decided was whether the wife had repudiated the marriage after the husband had asked the wife to leave the matrimonial home. The wife had claimed that a passage in Betrand Russells' *On Why I Am Not a Christian* justified her in satisfying her homoerotic propensities. The husband wrote to the philosopher to describe his unhappy domestic situation and invited him to answer a number of questions.

The report states "the petitioner told her it was unfair that she did not desire sexual intercourse with her husband on the ground that they were getting too old when her sexual needs were being satisfied by Mrs R. The petitioner handed to her a copy of Betrand Russell's letter to him of 24 November, and he read it to her." Russell's reply was as follows:

> *Dear Mr ——,*
> *Thank you for your letter of November 16. My attitude about homosexuality is that it should be regarded no differently from heterosexual relations. When I say that it is a matter only for the two people immediately concerned, I should include a husband or wife as immediately concerned; and the children also, obviously are concerned. Very often these family considerations would make extra-marital homosexual relation undesirable, but, if one party to a marriage is deeply and seriously in love with someone else, it is hardly possible for the marriage to remain happy, and sometimes divorce would be best. One cannot make general rules in such matters.*
>
> *Yours Sincerely*
> *Signed Bertrand Russell*

Sage advice indeed. There really is something in this book for everyone.

LIV-Vic Bar and Bench Golf event

24 March 2016, Peninsula Kingswood Golf Club

Ian Dunn (Captain of the LIV team) presenting the Sir Edmund Herring memorial trophy to Gavan Rice (Captain of the Vic Bar team) after the Vic Bar won the annual LIV-Vic Bar Golf event, held this year on 24 March 2016 at Peninsula Kingswood Golf Club.

Farewell to the wig

GEORGINA SCHOFF

The notice published by the Supreme Court was short. It read: "Judges of the Supreme Court of Victoria will cease to wear wigs in all matters, trial and appellate, as and from 1 May 2016." In that way, a tradition that dates back to 17th century England of judges and barristers wearing wigs in court appears to be drawing to a close in Victoria. Many will welcome this decision to do away with a feature of our court attire that can appear out of harmony with our times, perhaps even ridiculous. Indeed, the resolution might be applauded as a fitting way to mark the 175th anniversary of the Victorian Supreme Court.[1] Others will mourn this sartorial symbol of our honourable profession. Whatever the case, the wig ought not be consigned to history without commemoration.

In 1635 in England, a royal decree (known as the Judges' Rules) required judges to wear black or violet robes on normal occasions, and red robes for Saint's Days, and when sitting in criminal matters. Wigs were not worn, but coifs—a white skull cap of pointed lace—were. Although barristers were not subject to the Judges' Rules, the 1635 rules of the Inns prescribed that barristers' "dress on all occasions is to be in gowns of a sad colour" as a mark of their respect for the court.[2] The wig only came later to the Bench and Bar after King Charles II, restored to the English throne in 1660, brought the fashion with him from the court of Louis XIV of France where the perry-wig or "perruque", often ludicrously large [3], had been virtually obligatory for men of social rank. So, too, it soon was in England.

Upon the death of King Charles II in 1685, the Bar went into mourning, donning a black cloth robe with wide, open sleeves and a mourning hood over the left shoulder. That mourning robe is said to be the genesis of the gown that barristers in the United Kingdom and Australia still wear over their bar jacket and jabot.[4] Today, the 'mourning hood' is merely suggested by the flap of fabric at the left shoulder of the gown worn by junior counsel, sometimes referred to as a 'money bag'. There are other flourishes too. Queen's Counsel and Senior Counsel wear gowns of silk to distinguish them from junior counsel, whose gowns are made of wool.

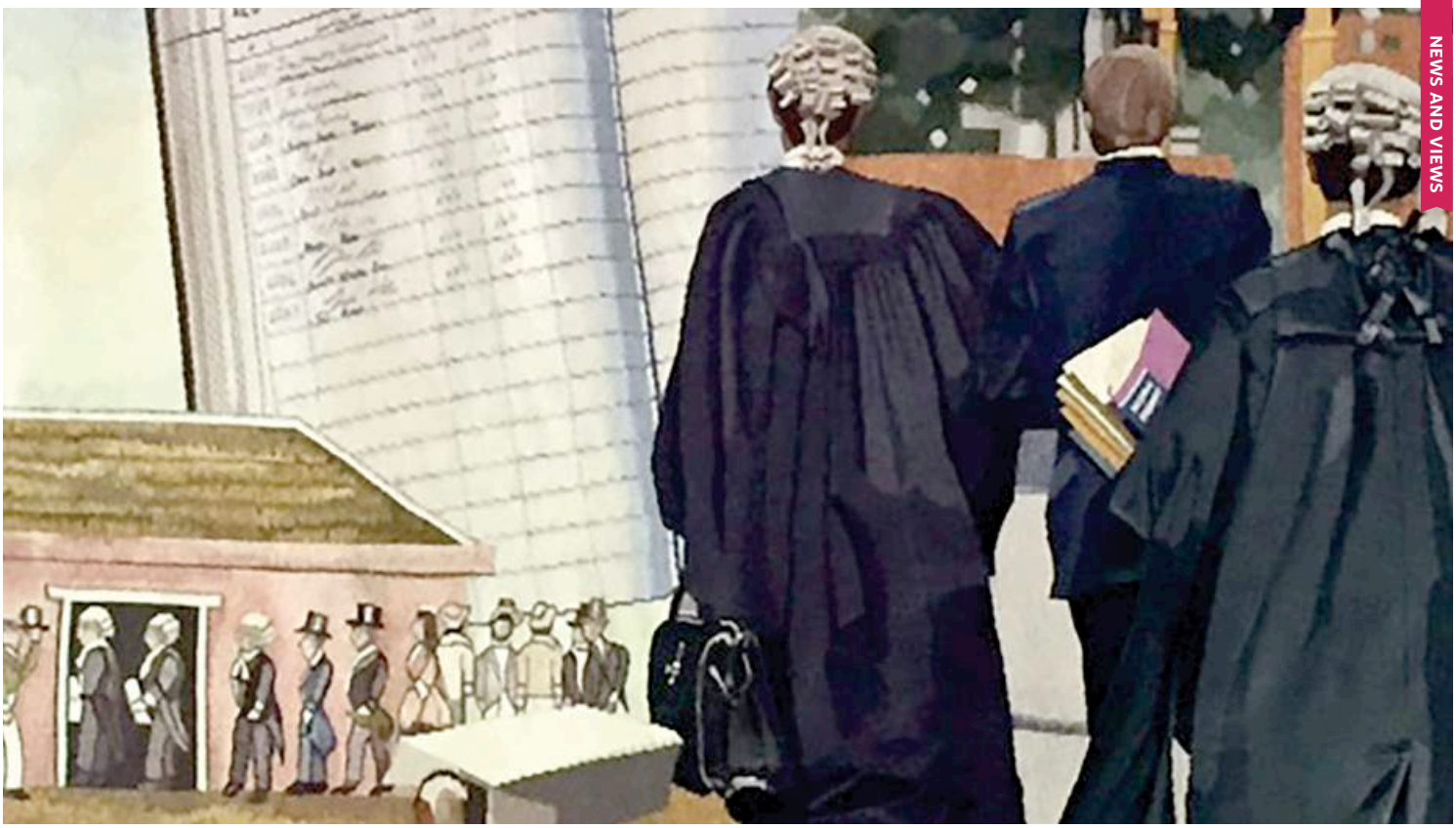
Although steeped in tradition, barristers' robes have evolved with the times. In 1822, Humphrey Ravenscroft patented the 'forensic wig'. The inventiveness of this white horsehair wig abided in its fixed curls, which did not require frizzing, curling or the use of hard pomatums and powders; in the forming of "curls in a way not to be uncurled; and also for the tails of the wig not to require tying in dressing, and, further, the impossibility of any person untying them".[5] This ingenious invention was applied to wigs worn by both the Bench and the Bar and also comes in a full-bottomed style worn by justices in many jurisdictions (and our learned friends in New South Wales) on ceremonial occasions.

Before the advent of the forensic wig, it was necessary for barristers to wear a 'wig or powder bag' tied or buttoned to their gowns at the back into which the tails of their wigs were tied to protect the gown from the powder and pomatums used to care for the wig. Some might be surprised to learn that the rosette, worn buttoned to the gowns of Queen's Counsel and Senior Counsel in Victoria, is a stylised nod to that obsolete wig or powder bag.[6]

In Australia, some judges initially questioned the practicalities of wearing heavy robes in Australia's hot climate. In a notable exchange with two English barristers who had arrived bewigged for a case before him in 1846, Justice Cooper of the Supreme Court of South Australia remarked:

> *If anyone is justified in wearing a wig, it is myself; for in summer I am tormented with the flies settling on my bare head. But I fear that, if I were to adopt it, I should be still more fatigued than I am already by the long sittings which I frequently have to endure.* [7]

Perhaps because the flies were worse than the heat, traditional English court attire was soon firmly entrenched and the wig has been worn by barristers in the State of Victoria since at least the 1860s.[8] An illustration of the opening of the first Supreme Court building (a cottage in King Street) in 1841[9] shows barristers entering the court holding their briefs. Their wigs identify them as barristers. In this way, our robes have served to distinguish



> “The mere recital of this history suggests that the gowns that barristers wear are just as anachronistic as the wig.”

barristers from other members of the legal profession.

The mere recital of this history suggests that the gowns that barristers wear are just as anachronistic as the wig. But whilst the wig seems no longer fashionable, there is general agreement that some kind of formal court attire continues to be appropriate for both judges and barristers in trials and appeals.

Robes are worn, not merely out of respect for the tradition of the law and the courts, but also because they emphasise the objectivity of the law and deflect personal attention from the judges and barristers who play such a fundamental part in the judicial process.[10] Like almost every aspect of the court room—from its design and furnishings to its rituals and procedures—the attire of judges, counsel and court officials can serve to underline the formality of the occasion. It was for this reason that the Commonwealth Parliament enacted section 97(4) of the *Family Law Act* (1975) to prohibit the wearing of robes by judges and counsel in matrimonial proceedings, which were intended to be less formal. As the justices of the High Court acknowledged in *Russell v Russell*, in a decision upholding the constitutional validity of that provision, robes are worn by the court as a mark of dignity and status and bring a formality to proceedings that the parliament had sought to dispense with.[11]

Whether our robes should be worn with wigs is a slightly different, but related, question. Apart from questions of tradition and sartorial elegance, the only argument that might particularly apply to wigs as part of our robes is that they maintain a level of anonymity. It was for that reason that the Commonwealth Parliament repealed section 97(4) in 1987 after one justice was shot, and the homes of others, and the Parramatta Family Court were bombed. Many barristers and judges will tell you that they have not been recognised in the street by witnesses or jury members who have 15 minutes earlier been in the same courtroom with them. This is a comfort to some judges and barristers and seems to be the reason they are still worn in many criminal jurisdictions.

Once upon a time, it would have been unthinkable to wear robes without a wig—but we have done so in many courts for many years now.

In 2008 the Lord Chief Justice of England and Wales handed down a practice direction, which introduced new civil robes for the judiciary in civil and family cases in England and Wales. The new robes are worn without wigs save in criminal matters.[12]

Following the reforms, the Bar Council of England and Wales carried out two surveys of the profession and consulted with the specialist Bar associations before adopting a revised guidance on court dress, which was published on 2 June 2009. The Bar of England and Wales did not abandon their wigs. They were retained as part of formal court dress for barristers appearing in the Court of Appeal, the House of Lords and the Privy Council, for civil trials in the High Court and the County Court, and for all criminal

matters in the Crown Court (except bail applications).[13] The guidance stressed the importance of adopting a consistent practice throughout the courts of England and Wales. The effect of the revised guidance was that whilst justices hearing civil trials and appeals in the UK did not wear wigs, counsel appearing before them did. In criminal trials, wigs were worn by justices and barristers alike.

Subsequently, in 2011, the President of the Supreme Court of the United Kingdom announced that advocates before that court and the Judicial Committee of the Privy Council may, by agreement, dispense with any or all of the elements of traditional Court dress. A press notice issued by the Court noted that the development would further underline the Court's commitment to providing an appropriate environment for the consideration of legal issues and was in line with the Court's goal to make the legal process as accessible as possible.[14] Of course, members of the Judicial Committee of the Privy Council have always worn business suits and have never worn wigs.

In Australia, the nature of our Federation means that uniformity is rare. Court attire for justices and barristers varies from jurisdiction to jurisdiction. Whilst the justices of the High Court adopted simplified robes and abandoned their wigs in 1988, barristers who appear before that court have continued to wear what is customarily worn in the Court of Appeal in the Supreme Court in the State in which they ordinarily practice. As a result, counsel appearing before the Court are not uniformly robed. Those from Victoria, for instance, have previously appeared in wigs whilst those from NSW wear their robes without wigs.

Justices of the Federal Court wear robes without wigs as do counsel who appear before them.

In New South Wales, court attire to be worn by barristers is governed by the court attire policy issued by the Supreme Court.[15] Robes are worn with wigs if appearing before the Court of Criminal Appeal, and in all criminal and civil trials. Robes are worn without wigs only when appearing in the Court of Appeal.

In 2009 wigs were abandoned entirely in Western Australia. As for the other States and Territories, much depends on whether the case is of a civil or criminal nature. For instance, in Tasmania, the ACT and the Northern Territory, wigs play no part in a civil case, but may be worn in criminal trials.

Until the Chief Justice's resolution this year the practice in the wearing of wigs in the Supreme Court of Victoria was not uniform. It was a matter for an individual justice to decide whether to wear a wig and counsel generally followed suit.

The judges of the County Court gave up the wearing of wigs in all common law matters in 1996 but retained them in crime. By a convention agreed with the former Chief Judge of the County Court, members of the Common Law Bar Association continued on occasion to wear their wigs in that Court, even when the presiding judge did not. Where counsel could not agree, senior counsel had the final call, ensuring uniformity of attire at the bar table.

The now repealed *Legal Profession Act* 2004 (Vic) provided that, despite any rule of practice or custom to the contrary, it was not necessary for a barrister to robe in order to appear before any court or tribunal in any civil proceeding not involving a jury or in any summary criminal procedure.[16] Nor could the Bar require that a barrister appear robed in any such proceeding.[17] The LPA was silent on the question of robing in trials before juries. The *Legal Profession Uniform Law*[18], which repealed the LPA, makes no reference at all to the question of robes.

Section 9A of the *Supreme Court Act* 1986 (Vic) gives a power to the Chief Justice to determine all matters pertaining to the robing of judges of the court. The Act is silent as to the robing of barristers. However, what counsel wear is a matter of practice and procedure and falls within, at least, the inherent jurisdiction of the Court.

In *Russell v Russell* the majority of the High Court held that section 97(4) of the *Family Law Act* 1975 (Cth), which prohibited the wearing of robes in state courts exercising jurisdiction under the Act, was a valid exercise of Commonwealth power because it concerned a matter of procedure that was incidental to the exercise of the jurisdiction conferred.[19] As Stephen J explained, if the aim of the Act was to dispense so far as possible with formality, then the prohibition of the wearing of wig and gown was properly incidental to the power and constitutionally valid.[20] Barwick CJ and Gibbs J, who dissented on the question of validity, did so on the basis that it was within the inherent jurisdiction of the state courts to decide how their judges should dress and what dress they would expect of those who appear before them as representatives of the parties.[21]

In Victoria, the notice to the profession, which originally announced the Chief Justice's determination under section 9A, did not refer to the robes that counsel should wear.

In a memorandum dated 22 April 2016 the President of the Victorian Bar, Paul Anastasiou QC, informed members of the Bar of the Chief Justice's determination. The memorandum acknowledged that there is a range of diverse, and in many cases, strongly held views amongst members of counsel as to the circumstances in which wigs ought to be worn (if at all). However, it said, whilst the Chief Justice's resolution did not constitute a directive to the Bar, the key consideration in so far as the Bar Council was concerned, was the fundamental importance that the Bar promote and maintain mutual respect and comity between counsel and the courts.

The memorandum stated that, accordingly, at its meeting on 21 April 2016, the Bar Council had resolved that members of the Bar appearing before the Supreme Court should follow the practice of the presiding judge with respect to robing, including the wearing of wigs. The resolution of the Bar Council allowed for an "exception" in cases where the judge would not be wearing a wig, but where leading counsel for each party considered that there were circumstances justifying the wearing of wigs and agreed to appear in wigs. The resolution noted the Bar Council's expectation that there would be uniformity at the Bar table.

The Common Law Bar Association interpreted the Bar Council's resolution to mean that it was a matter for leading counsel to decide whether to wear wigs in a particular matter (as they have been doing for some years in common law matters in the County Court). That approach was not tolerated by at least one Justice of the Court who would not accept the appearances of counsel wearing wigs.

On 26 May 2016, the Principal Judge of the Common Law Division resolved the uncertainty when he published a notice informing the profession that the judges of the common law division have resolved, pursuant to the Court's inherent jurisdiction, to direct that legal practitioners not wear wigs in any Common Law proceeding.

So is it farewell to the wig in Victoria? We are yet to know whether the County Court too will cease completely the wearing of wigs. But for most of us, our wig wearing days are probably over.

1. The Chief Justice's resolution to end the wearing of wigs by judges in the Supreme Court was made on 21 April 2016, almost exactly 175 years since the first resident Supreme Court judge, Judge John Walpole Willis, took his place on the Bench in Victoria on 12 April 1841.
2. McQueen, Robert 'Of Wigs and Gowns: A Short History of Legal and Judicial Dress in Australia' (1999) 16(1)Law in Context 31: *Misplaced Traditions: British Lawyers,Colonial Peoples.*
3. See, for example, Hogarth, William *The Five Orders of Perriwigs as they were Worn at the Late Coronation Measured Architectonically* 1761.
4. Ede & Ravenscroft of London, robe makers and tailors since 1689, www.legal.edeandravenscroft.co.uk.
5. *London Journal of Arts and Sciences*, 1822, Vol 4, p 120.
6. *Wigs and Robes: A lasting tradition,* Victorian Law Foundation, 2010, p 8.
7. Dr John Emerson, Law School, University of Adelaide "Why are you wearing a wig?", November 2004, first published in the Law Society Bulletin of South Australia, www.courts.sa.gov.au
8. *Wigs and robes, a lasting tradition,* Victoria Law Foundation, p 3.
9. Drawn some years later in 1875 by Wilbraham Fredrick Evelyn Liardet. The illustration is reproduced by the tapestry which hangs in the Lonsdale Street entrance of Owen Dixon Chambers West, see the photograph above.
10. This was powerfully illustrated recently when perhaps the most glamorous barrister in the world, Amal Clooney, was asked what she was wearing by a reporter as she entered court. She responded "Ede & Ravenscroft".
11. *Russell v Russell* (1976) 134 CLR 495, per Barwick CJ at 506; Gibbs J at 519-520; Stephen J at 531-532.
12. Practice Direction (Court Dress) (No 5) and Amendment No 20 to the Consolidated Criminal Practice Directions (Court Dress), 31 July 2008
13. Court Dress: Revised Guidance from the Chairman of the Bar Council of England and Wales, Desmond Browne QC, 2 June 2009
14. Press Notice, The Supreme Court of the United Kingdom, 21 November 2011
15. Supreme Court of New South Wales, Court Attire Policy, issued by JJ Spigelman AC, Chief Justice of NSW on 20 September 2007.
16. Section 3.2.7(1).
17. Section 3.2.7(2).
18. Applied in Victoria by the *Legal Profession Uniform Law Application Act* 2014 (Vic)
19. *Russell v Russell* (supra) Stephen J at 531-532; Mason J at 536; and Jacobs at 555.
20. (supra) at 531-532.
21. *Russell v Russell* (supra) per Barwick CJ at 506 and Gibbs J at 519-520.

ODE TO THE WIG

Goodbye dear bonnet of horse hair,
That famous counsel used to wear
With robe of black and jabot lace
While arguing their client's case.
So, change of costume will advance,
Perhaps designed, perhaps by chance,
'Till courts convene, a case to hear,
With counsel in the latest gear,
Disputes o'er crimes and civil wrongs,
The Bar in T shirts and in thongs.

Peter Heerey

Offshore processing

ADAM McBETH

Four years after the Howard Government's Pacific Solution was dismantled, the Gillard Government responded to a growth in the number of boats of people seeking asylum in Australia by reintroducing the policy of offshore processing in 2012.

Offshore detention as a deterrent

Immigration detention is ostensibly a form of administrative detention. It is permissible for the executive arm of government to detain a person for so long as is reasonably necessary to facilitate the processing of his or her visa application or deportation.[1] If the detention crossed the line to become punitive in nature, it would violate the separation of powers, given that detention as a form of punishment is a judicial function that may only be exercised by a court.

The premise for the introduction of offshore processing is that it will act as a deterrent to prevent people trying to reach Australia by boat. The promise that no person arriving by boat without a visa will ever be resettled in Australia, even if determined to be a genuine refugee, is a key part of the strategy. It has been promoted with Australian government advertising in Asia and the Middle East under the slogan: "No Way – you will not make Australia home".

Although not explicitly part of the policy, it seems that resettlement in any developed country is also out of the question. The Turnbull Government has recently rejected offers from New Zealand to resettle 150 refugees from the offshore processing centres, on the ground that "settlement *in a country like New Zealand* would be used by the people smugglers as a marketing opportunity".[2]

The expectation of harsh conditions in the detention centres is another crucial part of the deterrent strategy.

Legal framework

The Commonwealth entered into a Memorandum of Understanding with Nauru on 29 August 2012[3] to facilitate the transfer of asylum seekers from Australia to Nauru, where they were to be held while their refugee status was assessed. An equivalent MOU was signed with Papua New Guinea on 8 September 2012.[4]

Any person who had "travelled irregularly by sea to Australia" or had been intercepted at sea by Australian authorities while trying to do so, and who had undergone health, security and identity checks in Australia, and who was authorised to be transferred under Australian law, was liable to be transferred to Nauru or Manus Island. Asylum seekers were first transferred to Nauru in September 2012 and to Manus Island in November 2012 under these arrangements.

In both cases, the arrangement has been designed to vest formal legal authority in the host governments, while the practical arrangements

ILLUSTRATION BY GUY SHIELD

> "Both the High Court of Australia and the Supreme Court of Papua New Guinea have had to consider the question of control over certain aspects of the centres."

were the responsibility of Australia. For instance, the Manus Island centre is established as a "relocation centre" by instrument published by the PNG Minister for Foreign Affairs and Immigration, pursuant to the PNG Immigration Act, and is formally overseen by an Administrator appointed by the PNG Minister.[5] A joint committee co-chaired by representatives of the Australian and PNG Immigration Departments is vested with "responsibility for the oversight of practical arrangements required to implement" the arrangement.[6] However, the contractors who run the centre do so under contracts with the Commonwealth. Equivalent arrangements apply to Nauru.

The contracts include provision of "garrison services", which include responsibility for accommodation, food and beverage, hygiene, safety and security, and general daily needs of the detainees. At various times, those services have been provided by G4S, Wilson Security and Transfield (now known as Broadspectrum).

All funding for the construction and maintenance of the centre, as well as the costs of the transfer, ongoing detention, living costs, health and related costs within the centre, is provided by the Commonwealth, which also meets the costs of the refugee status determination process. Given this mixed model of formal and practical control over the management of the centres, both the High Court of Australia and the Supreme Court of Papua New Guinea have had to consider the question of control over certain aspects of the centres. Those cases are considered below.

Nauru: *M68*

To give effect to the offshore processing arrangement with Nauru, the Australian parliament enacted section 198AHA of the *Migration Act*. That section applies in the context of a regional processing arrangement and purports to give the Commonwealth power to:

(a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
(b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
(c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.

The constitutionality of that section – and thus the power to transfer people to Nauru under the arrangements purportedly authorised by that section – was challenged in *Plaintiff M68/2015 v Minister for Border Protection & Ors*.[7]

In a 6:1 decision (Gordon J dissenting), the High Court held that section 198AHA was a valid exercise of the aliens power in section 51(xix) of the Constitution, and in turn that it authorised the transfer of asylum seekers to Nauru, the funding of the centre, and the rest of the offshore processing scheme under the MOU.

Central to *M68* was the question of whether the plaintiff was in fact detained in Nauru. Shortly before the High Court hearing, the Nauruan government gazetted its intention to implement "open centre arrangements", which would allow the people residing at the centre to leave the centre and move freely about Nauru for the first time.

As to the period before the "open centre arrangements" commenced, the majority held that it was the government of Nauru alone—not the Commonwealth or its agents—that detained the plaintiff. French CJ, Kiefel and Nettle JJ said, "… it is very much to the point that the Commonwealth could not compel or authorise Nauru to make or enforce the laws which required that the plaintiff be detained."[8]

Bell and Gaegler JJ both found that the Commonwealth had detained the plaintiff, but joined the majority in finding that the detention was authorised by section 198AHA.

In dissent, Gordon J also found that the Commonwealth had detained the plaintiff on Nauru. Her Honour emphasised the contract between the Commonwealth and the private contractor then providing "garrison services" at the centre, Transfield. Gordon J found that "Transfield owed obligations to the Commonwealth and the Commonwealth took the benefit of those obligations. … [T]he Commonwealth, by contract, procured and obliged Transfield to detain the Plaintiff."[9]

Manus Island: *Namah v Pato*

In *Namah v Pato & Ors* [2016] PGSC 13, the Supreme Court of Papua New Guinea held that the PNG law authorising the detention on Manus Island of asylum seekers transferred from Australia was unconstitutional. Unlike Australia – which remains the only developed country without constitutional or comprehensive statutory protection of human rights – the PNG constitution contains a number of human rights guarantees. Among those is the right in section 42 of the constitution to "liberty of the person".

That section provides that "no person shall be deprived of his personal liberty" except in nine enumerated circumstances, relating primarily to criminal legal process (arrest, remand, sentence of imprisonment), as well as involuntary mental health treatment and quarantine. In a migration context, section 42(1)(g) provides that a person may be deprived of personal liberty "for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the

purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea".

After the *Namah* proceeding commenced in 2014, the PNG parliament passed an amendment to the constitution, inserting a new sub-paragraph (ga) into section 42(1). The new paragraph purported to permit the deprivation of liberty "for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the Minister responsible for immigration matters, in his absolute discretion, approves".

The PNG constitution can be amended by an Act of parliament, provided that certain manner and form requirements are met, such as approval by two-thirds of parliament. Since the attempt to amend the constitution was itself a law that purported to restrict human rights set out in the constitution, the Supreme Court held that the provision relating to laws restricting rights was relevant. That provision includes a requirement that the restrictive law be "reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind".

The Supreme Court held that the Minister had failed to discharge that burden, with the result that the amendment was unconstitutional. As a consequence, the ongoing detention of asylum seekers and those already assessed to be refugees was unconstitutional and unlawful.

Shortly after the Supreme Court's ruling, the processing centre at Manus Island was opened, allowing those residing there to leave if they wished. However, given that the centre is in the middle of a naval base, the detainees are not free to leave on their own. Buses have been chartered to transfer people between the centre and the town, although as a practical reality, it is still necessary to reside at the processing centre.

One potentially significant finding of the PNG Supreme Court in *Namah* is that the Manus Island detainees were detained by the joint efforts of Australia and PNG. In the lead judgment, Kandakasi J found: "This is confirmed by the very fact of their forceful transfer and continued detention on MIPC [Manus Island Processing Centre] by the PNG and Australian governments. It was the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the MIPC against their will."[10]

The PNG Supreme Court did not engage in the detailed analysis of the Australian High Court in *M68* on the question of which entity or entities were detaining the detainees. But its finding is potentially significant in terms of the Commonwealth's responsibility towards people detained abroad as part of its offshore processing programme.

In contrast, the Supreme Court of Nauru dealt very differently with a similar application to that in *Namah*. In *DWN042 v Republic of Nauru*[11] – the Supreme Court of Nauru's first decision relating to the offshore processing regime – the appellant argued that detention on Nauru was contrary to Nauru's constitutional protection of liberty, except, relevantly, "for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru". That application was struck out, on the basis that the Court had no jurisdiction to consider the constitutional question in the context of a refugee appeal, and that it was frivolous and vexatious.[12]

Treatment in detention

The elephant in the room in relation to offshore detention is the standard of treatment of the people held in those locations. The United Nations High Commissioner for Refugees concluded in a November 2013 report that the conditions on Manus Island at that time did not comply with international law.[13] Specifically, it found that the situation constituted arbitrary and mandatory detention under international law; did not provide a fair, efficient and expeditious system for assessing refugee claims; and did not provide safe and human conditions of treatment in detention.

The UNHCR also reported significant health concerns, some of which derived from very cramped conditions in extreme heat and humidity, while others related to a lack of hygiene. The death of Hamid Khazaei in 2014 from a bacterial infection, following a long delay in evacuation for medical treatment after sustaining a cut leg on Manus Island, has been well publicised.[14]

Mental health problems in relation to people detained for lengthy periods with no certainty as to when or how their situation might be resolved, particularly when many are fleeing trauma abroad, have long been acknowledged. Indeed, Australia was held by the United Nations Human Rights Committee as long ago as 2002 to have breached its international obligations in relation to the psychological damage caused to people in prolonged immigration detention.[15]

There have further been serious concerns about the safety of detainees at both locations. The killing of Reza Berati when a group of PNG locals, police and security guards stormed the compound at Manus Island has been the most prominent example. In Nauru, the Moss Report, commissioned by former Immigration Minister Scott Morrison, focused on claims of sexual assault of detainees, including by staff employed by the contract service providers. Several such incidents were substantiated by the report, while the review also concluded "that there is a level of under-reporting by transferees of sexual and other physical assault".[16]

Accommodation at the processing centre in Nauru is in the form of "vinyl 10 x 12 metre canvas marquees", which can accommodate between 22 and 40 people "in dormitory-style configuration with

> "The elephant in the room in relation to offshore detention is the standard of treatment of the people held in those locations."

bunk beds".[17] At the time of the Moss Report, air conditioning was provided only for marquees with children under 4 years of age. Tent-style accommodation, with no fans or air conditioning and very little privacy, remains in place on Nauru for those who have not yet been determined to be refugees. Those who have been determined refugees for the most part have access to solid walled housing, often air conditioned. On Manus Island, tent accommodation was replaced with solid walled buildings in 2013, though the conditions at the centre after the changes were still described by the UNHCR as "harsh".

Future legal developments: a duty of care?

There is at least one case afoot in the Supreme Court of Victoria—*Kamasaee v Commonwealth & Ors*—alleging that the Commonwealth and/or its contractors were negligent in their treatment of detainees on Manus Island. The existence and scope of a duty of care in those circumstances will be crucial to the outcome of the case. Following, the *Namah* decision, Mr Kamassaee may seek to amend his claim to plead damages for false imprisonment at the Manus Island Centre. PNG lawyer Ben Lomai has also launched litigation in PNG on behalf of a number of asylum seekers on Manus Island.

On a much narrower set of facts, Bromberg J recently held in *Plaintiff S99/2016 v Minister for Immigration and Border Protection* that the Minister owed a duty of care to a refugee in Nauru. The plaintiff was raped while she was unconscious from an epileptic fit and became pregnant. His Honour held that the Minister had assumed responsibility for the plaintiff when he took steps to procure a safe and lawful abortion for her.[18] While it was not necessary to find a broader duty of care on these facts, Bromberg J found it pertinent that the applicant, as a person who had been determined to be a refugee and was then living outside the detention centre, "was dependent on the Commonwealth for her very existence," since she had no means of survival independent of the Commonwealth and its contracted service providers.[19]

The issue arose because the Minister's proposed remedy of transferring the plaintiff to Port Moresby for an abortion was potentially unlawful in PNG and potentially unsafe, particularly in light of the plaintiff's medical complications arising from her epilepsy and from what Bromberg J described as "caused by a cultural practice to which she was subjected as a young girl." His Honour found that the Minister owed the plaintiff a duty of care to procure a safe and lawful abortion for the plaintiff and granted an injunction to restrain the Minister from failing to discharge that duty.[20] Interestingly, because the time to discharge the duty had not yet arrived, the Court ordered a relatively rare *quia timet* injunction to restrain a future breach of duty, on the ground that there was a reasonable prospect that the Minister would breach his duty, potentially resulting in harm of a severe magnitude to the plaintiff.

In circumstances where the delineation of responsibility for those intercepted, transferred to and accommodated (if not detained) at offshore processing locations is extremely hazy as between the Commonwealth, the host governments and the private contractors, there are sure to be many more cases in the near future seeking to test the boundaries of responsibility for these lives.

1 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

2 Helen Davidson, 'Turnbull rejects New Zealand offer to take 150 refugees from detention', *The Guardian Australia*, 29 April 2016, http://www.theguardian.com/australia-news/2016/apr/29/turnbull-rejects-new-zealand-offer-to-take-150-refugees-from-detention (emphasis added).

3 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed 29 August 2012. That MOU was later superseded by an MOU with the same title signed on 3 August 2013. The 2013 Nauru MOU remains in force.

4 *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer and Assessment of Persons in Papua New Guinea, and Related Issues*, signed 8 September 2012. That MOU was later superseded by the *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, signed 6 August 2013. The 2013 PNG MOU remains in force.

5 *Immigration Act 1978* (PNG), ss 15B-15D.

6 2013 PNG MOU [23].

7 [2016] HCA 1.

8 *M68*, [34] (French CJ, Kiefel & Nettle JJ).

9 *M68*, [323] (Gordon J).

10 *Namah v Pato & Ors* [2016] PGSC 13, [39].

11 Appeal No 12/2015, 20 May 2016. For readers' interest, members of the Victorian Bar appeared for both sides: Matthew Albert for the appellant and Angel Aleksov for the Republic of Nauru.

12 *DWNo42 v Republic of Nauru*, [20]-[22] and [26].

13 UNHCR, *Monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013* (26 November 2013), http://www.refworld.org/docid/5294aa8b0.html

14 See ABC *4 Corners: Bad Blood*, aired 26 April 2016, http://www.abc.net.au/4corners/stories/2016/04/25/4447627.htm

15 *C v Australia*, Human Rights Committee, Communication No 900/1999, UN Document No CCPR/C/76/D/900/1999 (28 October 2002), [8.4].

16 Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru*, (Moss Report), 6 February 2015, [16].

17 Moss Report, [2.9].

18 [2016] FCA 483, [243].

19 [2016] FCA 483, [252].

20 *S99*, orders 1 and 2.

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International family law in the spotlight

DR ANNA PARKER

A number of well-publicised events in recent years have brought widespread public attention to the issue of international family law disputes. Most recently, a failed child recovery attempt in Lebanon resulted in a mother, child recovery agents, and members of the *60 Minutes* television crew being arrested and detained in a Beirut prison. In 2012 four Italian girls were returned to Italy against their will and over the strong objections of their Australian mother. The case of baby Gammy, a child conceived through an international surrogacy arrangement and born in Thailand in December 2013 with Down syndrome, also attracted headlines.

As technology advances, the world grows more connected and countries such as Australia become more multicultural; family law matters with international aspects are becoming increasingly common. In some such cases, there is little that can be done under Australian family law to protect the interests of Australian parties and children. In other cases, the law offers various means of attaining just outcomes across international borders. This article explores the problems that can arise in international family law matters, the solutions offered by Australian and international law, and the limits to those solutions.

International Child Abduction and Retention

As technology aids the development of international relationships, global business provides overseas employment opportunities, and international travel becomes more readily accessible, children are increasingly born into families with

ties to multiple countries. As a result, international child abduction and retention are becoming increasingly common.

The ease with which an abducted child can be recovered from another country and returned to Australia is affected by a number of factors, most significantly, whether the country to which a child is taken is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction ('Hague Convention').[1] The Hague Convention provides a process by which a parent or other person with 'rights of custody' can seek the return of a child to his or her country of habitual residence. The basis of the Convention is that the most appropriate forum for the determination of a dispute regarding a child is the country of the child's habitual residence, and the child should be returned to that country pending determination of such a dispute.

Subject to certain exceptions, if an application is filed within one year of the removal or retention of the child overseas, a return order must be made.[2] The exceptions to this general rule include consent or acquiescence of the party seeking the return order; grave risk that the return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation; and the return of the child being contrary to principles relating to human rights or fundamental freedoms. The best interests of the child is a relevant consideration, but unlike most child-related proceedings, it is not the paramount consideration.[3]

Even where each of the countries involved in an international child abduction dispute is a signatory to the Hague Convention, there is certainly no guarantee of an easy return of a child to his or her country of habitual residence, even where a return order is made. So much was made clear in another highly publicised child abduction case in 2012, this time involving children who had been brought to Australia. The case involved four Italian sisters whose forcible removal from Australia by the Australian Federal Police to be returned to Italy, where their father resided, was filmed and widely broadcast. Their visible distress led to significant public outcry.

The girls had been raised in Italy and had been brought to Australia by their Australian mother in 2010, purportedly for a month-long holiday, but had not returned. The girls' father brought an application for their return pursuant to the Hague Convention. The mother opposed the father's Hague Convention application, but was unsuccessful, and a return order was made by the Family Court of Australia.[4] The mother appealed, and the Full Court of the Family Court dismissed her appeal.[5] The children's maternal aunt, as their litigation guardian, appealed to the High Court, arguing that the children ought to have been heard and had not been afforded procedural fairness. That appeal was also dismissed.[6] Following the dismissal of the first appeal, the mother and the children went into hiding. The limited extent to which the children's strong wishes and distress at being required to leave their mother were taken into account in the course of the proceedings, in circumstances where the best interests of the child is not the paramount consideration in proceedings related to the Hague Convention, was the subject of widespread public criticism.

Countries that are not signatories to the Hague Convention are under no obligation to return abducted children to Australia, and in most such countries, Australian court orders are not recognised and cannot be registered or enforced. Where a child is abducted and taken to a country that is not a signatory to the Hague Convention, Australian courts exercising jurisdiction under the *Family Law Act 1975* (Cth) ('FLA') can take measures such as imposing penalties on the abducting party: unauthorised removal of a child from Australia where there are court orders in place or proceedings pending is an offence punishable by imprisonment,[7] as is contempt arising from non-compliance with an order requiring that a child be returned.[8] An Australian court may also make orders restricting the rights of the abducting party pending the children's return (for example, by preventing the party from departing from Australia). Such measures are, however, of limited utility if the abducting party is and remains outside Australia.

In countries in which Australian court orders are not recognised non-citizens often have limited rights or options for legal recourse. In some cases, gender dictates limitations on legal rights and options. Parents whose children are abducted to foreign countries may end up with no realistic means of obtaining legal remedies. This is the situation in which the mother involved in the *60 Minutes* incident found herself. In that case, the two young children, who lived with their mother in Australia, had travelled to Lebanon with their father. The mother alleged that she had consented to them travelling there for a holiday and that the father had failed to return them. Lebanon is not a signatory to the Hague Convention, and the mother's rights within the Lebanese legal system were extremely limited. As a result of the desperate circumstances in which she found herself, she engaged child recovery agents to take her children from their father. In what is now a well-known set of circumstances, the operation failed, and the mother, the recovery agents, and members of the *60 Minutes* crew who had travelled to Lebanon to film the operation and who are alleged to have funded it, were arrested and detained. In return for her release and that of the *60 Minutes* crew, the mother was required to relinquish the care of the children to their father in Lebanon and return to Australia without them.

A similar plight was faced by Jacqueline Gillespie (now Pascarl), whose children were abducted in

ILLUSTRATION BY GUY SHIELD

> “In countries in which Australian court orders are not recognised non-citizens often have limited rights or options for legal recourse.”

1992 and taken to Malaysia by their father, who was a Malaysian prince. Malaysia is not a Hague Convention country, and Ms Gillespie had limited legal options available to her. She was not reunited with her children until after they reached adulthood. Circumstances such as these can lead to desperate and at times dangerous measures being taken outside the legal system, such as the recruitment of child recovery agents.

As a result of these difficulties, it is prudent to be cautious about allowing children to undertake international travel where there is a risk of abduction or retention. Courts with jurisdiction under the FLA can take measures to prevent children being removed from Australia, including granting injunctions, placing the children's names on the Watch List maintained by the Australian Federal Police, which prevents their removal via authorised points of departure, and making provision for safekeeping of children's passports.

International Surrogacy

The case of baby Gammy, born as a result of an international commercial surrogacy arrangement, has also brought significant public attention to the complexities of the international aspects of family law in recent years . Media reports shortly after Gammy's birth suggested that his intended parents had returned to Australia with his twin sister, abandoning Gammy in Thailand. This sparked widespread outrage. There was a further public outcry following subsequent reports that Gammy's intended father had been convicted of child sex offences. The claim that the intended parents had abandoned Gammy was ultimately found not to be accurate when the matter proceeded before the Family Court of Western Australia.[9]

The recent case of a Victorian man sentenced to 22 years in prison for sexual abuse, including abuse of his infant twin daughters, who had been conceived through an international surrogacy arrangement, shone further light on this vexed issue.

Australian laws relating to surrogacy are complex. Each of the states and territories (except the Northern Territory) has legislated in relation to surrogacy arrangements and the legal parentage of children born of such arrangements.[10] The FLA also provides for recognition of orders relating to parentage of these children.[11] Commercial surrogacy, in which the surrogate receives a payment or reward, is prohibited in all Australian jurisdictions with surrogacy legislation, which has the effect of greatly enhancing the demand for international surrogacy arrangements amongst Australian residents, particularly for male same-sex couples and women struggling with fertility. The legislation in force in the Australian Capital Territory, New South Wales and Queensland has the effect of prohibiting residents of those jurisdictions from engaging in surrogacy overseas.[12] There is no such prohibition in Victoria.

International commercial surrogacy involves significant ethical concerns, including the risks of exploitation of surrogates, commodification of children, and human trafficking, and concerns regarding children's rights to know and experience their cultural and biological identities. It also carries risks of complications, such as the surrogate's refusal to relinquish the child and the consequences if the child is born with a serious health condition, both of which were reported to feature in the Gammy case. International surrogacy is also fraught with complex legal issues, including varying rules in different countries as to who may undertake surrogacy arrangements and the enforceability of such arrangements. The degree of recognition of intended parents as legal parents and the ability to have them recorded on a child's birth certificate can vary significantly from country to country. Visa and immigration concerns exist, both for intended parents travelling overseas to participate in such arrangements and for the children born of surrogacy arrangements being brought into Australia. On return to Australia, the intended parents must contend with processes for obtaining legal recognition of their relationship with the child, such as obtaining orders relating to the child under the FLA. In many cases, the combined effect of Victorian, Federal and foreign laws can facilitate the successful engagement of Victorian couples in international surrogacy arrangements, but this is by no means a straightforward process.

Other International Disputes

Other important but less publicised aspects of family law practice involving international issues include:

- Property settlement proceedings brought in Australian courts exercising jurisdiction under the FLA involving assets located overseas or transactions involving foreign nations;
- Spousal maintenance, child maintenance and child support disputes where one party resides outside Australia;
- International parenting disputes, including cases involving care arrangements for children whose parents live in different jurisdictions and cases involving proposals for the international relocation of children;
- Forum disputes;
- Matters relating to recognition, registration and enforcement of foreign orders and agreements in Australia;
- Cases involving enforcement of Australian orders and agreements overseas; and
- Disputes over the validity of foreign marriages and divorces.

Australia is a signatory to a number of conventions and agreements, and has also enacted a number

of domestic laws, to facilitate international cooperation in relation to a range of family law matters, including intercountry registration and enforcement of orders and agreements.[13] The extent to which cooperation with foreign jurisdictions can be obtained in international family law matters depends greatly on whether those jurisdictions are parties to agreements with Australia covering the subject matter of the dispute.

Conclusion

Public attention has been drawn to the varied, complex and in some cases extreme and tragic issues facing parties and children involved in international family law disputes. In particular, the issues of international child abduction and international surrogacy have been the subject of widespread public interest and debate following high profile cases in which attempts to overcome international legal barriers have led to disastrous results.

Such high profile cases represent only a small subset of the many and varied aspects of international family law practice. Australian and international law provide many avenues for protecting the rights and interests of parties and children in multijurisdictional family law disputes. There can also be significant limitations on the extent to which legal remedies can be found in family law cases involving two or more jurisdictions. The extent to which the law can aid parties involved in international family law issues greatly depends on the issues involved, and the jurisdiction to which the issue relates.

1 The Hague Convention has been incorporated into Australian law by the *Family Law (Child Abduction Convention) Regulations 1986*.

2 *Family Law (Child Abduction Convention) Regulations 1986*, reg 16.

3 *De L v Director General, NSW Department of Community Services* (1996) 187 CLR 640.

4 *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485.

5 *Garning & Director-General, Department of Communities (Child Safety Services)* [2012] FamCAFC 35.

6 *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest* [2012] HCA 47.

7 *Family Law Act 1975* (Cth) ss 65Y, 65Z.

8 *Family Law Act 1975* (Cth) s 112AP.

9 *Farnell & Anor and Chanbua* [2016] FCWA 17.

10 *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA), *Births Deaths and Marriages Registration Act 1996* (SA), *Assisted Reproductive Treatment Act 1988* (SA); *Assisted Reproductive Treatment Act 2008* (Vic), *Status of Children Act 1974* (Vic); *Surrogacy Act 2008* (WA).

11 *Family Law Act 1975* (Cth) s 60HB.

12 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54.

13 For example, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children; *Child Support (Registration and Collection) (Overseas-Related Maintenance Obligations) Regulations 2000* (Cth); *Family Law Act 1975* ss 70G-70N, 89, Part XIIIAA.

War and peace: Balancing the forensic needs of unhappy families

CELIA CONLAN

"All happy families are alike; each unhappy family is unhappy in its own way."

Many over the decades have pondered Tolstoy's famous quote; most particularly family lawyers, I suspect. It certainly provided inspiration to me on a recent trip to New York. I set out to investigate whether the substance of our Antipodean family law conflicts are replicated by our common law neighbours in the "land of the brave".

Ultimately I did not succeed in investigating this matter to any significant degree because in reality, such a task would require a lengthy period of observation and analysis rather than an afternoon of diversion. But to borrow very liberally from Tolstoy, I did form the more superficial view that each unhappy Family Court is unhappy in its own way.

It was a straightforward endeavour to secure a window into the litigious realm of family breakdowns in the state of New York. The Family Court at Kings County (Brooklyn) is one of the busiest courts in the state, so I made contact via the court website. One week before my trip, I received an email advising me to attend a contested custody hearing on the following Monday at 2.30pm in Part 44 presided over by a referee.

Referees play a similar role to Family Court registrars of old in that they attend to more rudimentary, fact-based disputes of families in conflict. They sit in the Family Law Court in New York and hear matters concerning child protection, juvenile crime and custody. Referees are administratively appointed. Divorce judges sit in the Supreme Court and are appointed through a process involving three nominated candidates from the mayoral office and three from the New York Bar. The judges have power to determine property disputes, divorces and associated custody disputes. The two courts are both state-based but in practice function quite independently from each other.

Parties in dispute about only parenting issues can utilise the following options:

a) The Hear and Determine Option – A referee hears the parenting matter and hands down judgment. This is the most popular option with advantages of shorter waiting times, less formality and fewer costs. Decisions may be appealed straight to the appellate court.

b) The Hear and Report Option – A referee hears the evidence and refers the matter to a judge for decision. This option is rarely used, which is not surprising. Given the quality of the evidence, it would be very difficult for a judge to make a decision based largely on transcript from these trials, for reasons explored below.

In Australia the introduction of greater access to alternative family dispute resolution pathways in the wake of the significant amendments in 2006 to the *Family Law Act* 1975 resulted in mediators playing a larger role in family law conflicts. The Australian system also provides for Family Consultants to undertake a preliminary assessment of a family and report back to a judge with their observations and recommendations. In this way, we have effectively outsourced a significant aspect of the role undertaken by the referee in the New York system.

Our family law courts endeavour to provide litigants with expeditious pathways to the resolution of conflict for matters that are not otherwise suitable for, or able to be resolved through, alternative dispute resolution. A matter in the Federal Circuit Court, at least in theory, could resolve with as little as two court events: an interim hearing and a final hearing. The obligations for disclosure and the requirements for the filing of evidence in proper form such as affidavits and financial statements minimise the risks of ambushed applications and matters derailing in a confusion of irrelevance. But these obligations can also add significantly to the delays and costs associated with litigating even a small conflict. Further, it is no secret that the Family Division of the Federal Circuit Court is over-burdened and under-resourced. Even with the most efficient forensic preparation, matters can become paralysed in the inevitable gridlock of too many requiring the intervention of too few.

Back in New York, the courtroom was set out completely as I had anticipated except that I could see through an open door to an office space. The Referee's Associate moved between the courtroom and the office, often leaving the door ajar, despite the trial being in session. At the back of the court where I was seated I could clearly hear phones ringing from the office and usual office goings on, including the associate chatting to staff just beyond view. At one stage in the trial when all participants including the Referee, the lawyers,

the witness and the parties were speaking at once (a common event), a man poked his head around the door from the office with mild interest and then went back to work. His unsolicited appearance through a door immediately to the left of the Referee as she attempted to yell over the husband to make a ruling, was of no interest to anyone but me.

I was astonished at the casual nature of the proceedings. They appeared to lack any formality at all. At one stage, I had such an irritated throat that I felt obliged to leave the courtroom. Prior to exiting, I briefly bowed to the Referee only to have the bow politely returned with some confusion and hesitation, not merely by the Referee but also by her Associate and the witness in the stand. We all exchanged bewildered glances, no one really certain what had just occurred - a most peculiar moment.

This lack of formality in many ways did enhance the experience, at least for me. When I entered the courtroom at 2.30pm sharp, the Referee was already seated at the bench. She looked up introduced herself and immediately engaged me in conversation. The Referee informed me the trial should have recommenced at 2.30pm but the lawyers and parties were nowhere to be seen. The matter was part heard from three months prior when mother's lawyer requested an adjournment to consider some of the evidence. The Referee informed me that adjournments are unusual and she had suggested last time that the two lawyers get together in the interim period to resolve this matter because it seemed there was very little genuinely in dispute. The Referee had heard nothing from them and wondered aloud at where they might be, but she did not seem unduly concerned about their absence.

We then commenced the first of two enjoyable and interesting exchanges. We discussed shared parental responsibility, or joint legal custody, and how best to manage it in high conflict matters. In Australia, this concept has traditionally been referred to as guardianship and concerns a parent's involvement in decisions relating to the long term care, welfare and development of a child. There appears to be a significant degree of discretion about this matter in New York state with divorce judges recently experimenting with, and apparently ultimately abandoning, a concept of "spheres of parental responsibility" being divided between feuding parents. For example, parent A may have responsibility for education and parent B may have responsibility for medical issues. The Referee had no interest in this approach, and was apparently under no obligation to adopt it. She generally preferred to order joint legal custody to the parents but with a default to the primary carer in the absence of agreement. Equal time regimes do not form part of the family law landscape in New York and the Referee was somewhat incredulous about how such regimes could possibly work between Australian parents in conflict. I gathered her general approach was to order physical custody to the primary carer with the other parent spending alternate weekends (one or two nights) with the children and some time in the holidays. The Referee told me she had no hesitation in ordering overnight time for infants, providing the parent had capacity. She was dismissive of any requirement to introduce overnight gradually for young children and observed that such an approach could see a child being the subject of uncertainty and litigation for years and this was a far greater risk to any child, including an infant. The Referee explained to me that the allocation of a child's time between his or her parents may be determined by the capacity and resources of each parent and which parent is likely to provide the best

ILLUSTRATION BY GUY SHIELD

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“The witnesses were effectively left to their own devices in determining what the court should know and this resulted in some rather impressive, if irrelevant, speech making.”

environment to maximise the child’s capacity to thrive. She provided an example of one parent being better educated and living in a better area particularly in terms of access to good schools. But, like Australia, the best interests of a child will be determined by a global assessment of all their particular circumstances.

At approximately 2.50pm, 20 minutes late, the father’s lawyer unapologetically strolled into court and directly addressed the Referee, “How much time is this set down for?” She indicated to him two hours and he replied, “I can only do one, I have my son’s softball game at 4.30pm.” The Referee introduced me and told the father’s lawyer I would be observing for the afternoon. The father’s lawyer, looked me over and said to no one in particular, “I don’t think I am happy about that.” By the end of the day, I concluded his reluctance at having his performance observed was justified. The Referee ignored him and continued a discussion with me about overnight time. The father crept into court and slid into a seat at the Bar table next to his lawyer.

The mother’s lawyer turned up at 2.55pm without her client, who had been briefly detained in security for questioning. She also abruptly and unapologetically addressed the Referee by asking, “Where were we up to?” The Referee reminded the mother’s lawyer that the matter was adjourned because she, the mother’s lawyer, had wanted to consider some of the evidence. The mother’s lawyer looked at the Referee blankly, “Did I?” The Referee, from an excellent device that produces a typed electronic version of viva voce evidence almost instantaneously, read back the relevant transcript from the last court date. The mother’s lawyer shook her head; no bells were ringing for her. The Referee sighed and reminded her that the lawyers were also supposed to speak in the interim to see if the matter could be resolved. The mother’s lawyer stated with certainty that no discussion had taken place but took the opportunity then and there to start speaking to father’s lawyer about what the mother would concede. The Referee suggested they take the conversation outside but the father’s lawyer observed that it would be quicker to just finish the trial and reminded the Referee he had a softball game to get to. I wondered what the clients made of their lawyers’ indifferent candour.

The trial re-commenced with the lawyers and the parties all seated at the Bar table. The parties were sworn in and the matter proceeded in a standard trial format. The dispute concerned the allocation of legal and physical custody of a four-year-old boy between his parents. The parties were not in a relationship at any stage but the child had spent overnight time each alternate weekend with his father on at least a semi-regular basis. The parties agreed this should continue with additional time in the holidays. The father’s case also included an application for joint legal custody in relation to decision-making on the basis that the mother was negligent. While this issue was raised in submissions, it was not pursued at all in the ensuing torture of evidence.

The father alleged at one stage that he had not seen the child at all since June, at his own election. It was not clear why this was so and no one asked about it. The father testified to currently living in a refuge and indicated that this was not a proper environment for a child. The mother later testified that the child had been consistently seeing his father and continued to see his father each alternate weekend and that the father’s “friend” of nearly four years provided accommodation, transportation and care to the father and child. The father’s “friend” testified that she was not the father’s “friend” and he did not live with her. The alleged “friend” later conceded she regularly bathed the child before she left for work at 7am and that she purchased most of the child’s clothing.

The evidence tumbled out in a mess of partially finished sentences and contradictions. The parties and their lawyers interjected with prompts and objections and no one appeared to have a grasp of even a basic chronology of events. The evidence-in-chief of each witness was compromised by nervousness, the interjection of other parties, and the lack of coherence in questioning by the lawyers who both seemed as confused as I was about how the evidence was falling. The witnesses appeared unable to recall dates for any of the disputed events. The Referee valiantly attempted to corral events into some sequence by asking the witnesses about whether the child was sitting, crawling or walking at the time of an alleged event. There appeared to be a complete dearth of documentation with not so much as a proof of evidence, let alone an affidavit, available to assist the court in clarifying the chronology of facts in dispute between the parties. The witnesses were effectively left to their own devices in determining what the court should know and this resulted in some rather impressive, if irrelevant, speech making and preaching by each witness about their own virtues and the other witnesses’ deficits. On a positive note, no one appeared particularly troubled or distressed by any of the evidence and the atmosphere in the courtroom could be described as congenially combative.

At the conclusion of the evidence, the lawyers made submissions to the Referee. I discovered at this stage that the mother was the

applicant and the main issue before the Court was whether the mother should have sole legal custody. The mother's lawyer provided a succinct and well-reasoned précis of why sole legal custody was appropriate, focusing on the parties' ineffective communication and the father's historical lack of financial support of the child and lack of interest in any long term decisions concerning the child. The mother's lawyer made no submissions about the child's time with the father.

The father's lawyer in response submitted that the father should have increased time with the child because the mother was neglectful, but then added the father would not seek to exercise the contact orders until the father is "back on his feet". The submissions made on the father's behalf were confusing and underwhelming. The Referee then indicated to the parties that she would reserve her decision. The father and his lawyer departed without so much as a nod to the bench.

I thanked the Referee for letting me sit in but she asked me to stay for a chat about the case and I then had the privilege of continuing the earlier fascinating discussion. She spoke frankly about the mediocre quality of the evidence and the advocacy. The Referee said to me, "What am I supposed to make of all this – they didn't illicit enough evidence for me to make orders." The Referee was not clear as to whether time between the child and the father was or wasn't happening because neither lawyer cross examined the witnesses about that issue and neither of them made submissions about the present regime of time. The father's living arrangements were unclear and the Referee surmised that neither the father nor his "friend" wanted to be on the record about this issue. The mother seemed untroubled by the father's living arrangements and appeared to support the father's ongoing relationship with his son. But now the child was approaching school age, the mother wanted sole legal custody so she could nominate the school of her choosing and this issue had formed the catalyst for the proceedings.

> "Any benefit to the parties of a process that dispenses with applications quickly and at minimal cost to the parties can be lost if meaningful or cogent evidence is lacking."

The Referee indicated that she reserved her judgment because she was likely to award sole legal custody to the mother, primarily because it was clear that these parents barely knew each other and had refrained from any meaningful communication for the duration of their child's life. The Referee suspected the father's lawyer was only going through the motions (a generous concession) and would appeal in any event. In the ordinary course of events she would have handed down an ex tempore decision awarding joint custody with a default to the primary carer. Most matters that came before her were commenced and concluded within two months with only two court events and she was at pains to explain that she usually ran a far more streamlined process. When I described to her the current delays our system was experiencing, the Referee expressed surprise and wondered how the parties managed to function under such protracted stress.

Unhappy families do share a common element: an absence of effective communication. It is this feature that reluctantly drives these families to seek somewhat crude remedial relief for their private struggles through litigation. A satisfactory result can be achieved if all participants use their best efforts to understand and to be understood. Effective communication is the key to any satisfactory resolution of conflict in unhappy families; if parties cannot achieve it in their private negotiations, their only hope is that their advocates achieve it through the court process. Any benefit to the parties of a process that dispenses with applications quickly and at minimal cost to the parties can be lost if meaningful or cogent evidence is lacking. The trial I observed highlighted this risk. On the other hand, while the Australian family law jurisdictions through their inclusion of affidavits and other written evidence mitigate this risk, our matters can be unduly complicated by excessive documentation and assessments resulting in a blow out of costs and timelines in already under-resourced courts.

Our former federal treasurer, Peter Costello once remarked, "(the) law is a very blunt instrument when you are working on relationships."[1] This appears to be a global truth. The possibility of achieving any sort of satisfactory process is either at risk of being hampered by unreasonable delays in an effort to secure superior quality of evidence, or by the confusion of expedited applications, unstructured proceedings and inadequate evidence.

On a positive note, I had not expected to have the opportunity of speaking to anyone at the Family Law Court in New York, let alone the presiding judicial officer. It was a privilege and a pleasure to exchange information and experiences with her. The Referee's genuine commitment to and passion for her role was inspiring and I left the court with a renewed vigor for my own role as a family law barrister.

The assistance of unhappy families in a forensic context remains a work in progress, everywhere. There is much to observe and learn about what is and isn't working in various jurisdictions.

1 Taken from Transcript of an interview between the Hon Peter Costello MP, Treasurer with Sally Loane at 2BL on Friday, 27 June 2003 at 9.05 am

A Moroccan odyssey

Building Riad Emberiza Sahari

ALEXANDRA RICHARDS

It is now over three years since I boarded a plane to come to Morocco to take on a venture which has proved to be one of the most difficult of my life.

I first came to Morocco as a tourist in December 2010. I visited this country seven times over the following two years. I fell in love with its extraordinary geographical diversity and ancient imperial cities.

The beauty of the country captivated me. When I think of Morocco, I call to mind its biblical architecture, streetscapes, desert scenes, crescent moons, starlit heavens and Marrakech; bewitching and beguiling, the "Red City" rising up out of the desert with its palm groves, ancient Medina, golden lights and glamorous venues. Then, the people, pacifist and tolerant, albeit streetwise, with a mischievous sense of humour. And also the beautiful weather: palm trees fronding snow covered alps, brilliant blue skies, and every shade of verdant green and grey. I was enthralled by this exotic and quixotic land of vast contrasts and vast contradictions.

I woke up one morning in a riad in the Marrakech Medina and thought, "If only I could own a riad and operate a small hotel and do something different for a change from my life as a barrister." I remembered Alan Goldberg QC once saying to me: "Every barrister should take a sabbatical at least once every 11 years."

I had been a practising lawyer for more than 30 years

and, apart from the usual holidays, had taken no time out. I was stale and somewhat disenchanted by the toll of the years.

Having so decided, I returned to Australia from that particular visit on a mission to work and work in order to make my goal possible. In my ODCW 17th floor chambers (those of Henry Jolson QC, sadly passed), I became almost a recluse in my determination to turn my dream into a reality.

In July 2012 I signed a contract for the purchase of a large unrenovated riad (unrenovated being my first big—no, huge—mistake) in the Marrakech Medina. The property settled in September 2012 (another visit) and I spent that month in Marrakech, meeting and seeing the work of builders, receiving quotes, and deciding on a contractor for the works. The building works began in November 2012 and I left Australia the following month.

The riad was a large one and of grand proportions (unlike most Medina riads). Its sole owners had been a well-to-do and well-known old Moroccan family who had built it in the 18th century.

The renovation process

The renovations were extensive, including the construction of two suites and ensuites, two new terraces and passage ways and parapets, the enlarging of existing rooms by demolition of walls, and the construction of the numerous ensuites, new kitchen, pool, fountains etc. Apart from the magnificent carved cedar salon ceiling, every square centimeter of every wall, floor, column, ceiling and terrace of the riad was reconstructed and finished with either the fabulous marble powder traditional Moroccan hand-polished tadelakt or the beautiful zellij mosaics (handmade in Fez).

The renovations quickly transformed the original dream into a nightmare. *War And Peace* could be rewritten. My Australian friends and family who kept up with the sagas urged me to put pen to paper. I resisted. The experience was too epic and too painful to commit to writing, I felt at the time. This is my first written account other than through email exchanges.

I completed the renovation and reconstruction of the riad after:

- four stop-work orders;
- two demolition orders;
- one set of legal proceedings;
- a thief and a scoundrel for a contractor;
- untrained workers;
- thousands of government and "Commission" visits and inspections (all with a view to the requisite covert passing of the only commodity that talks);
- an architect who falsified the plans (causing nine months of daily visits to various decentralised authorities); and
- thousands of lesser happenings which would be considered significant in developed countries.

It was the excruciating unknowing and the constant fear and anxiety, which almost undid me. Multiple factors were complicit: I could not speak Darija, a mélange of local dialect and Arabic; I had only my then frail knowledge of French (not that the contractor or workers could speak French); I knew nothing about the culture; I was a woman on my own and not only single, but also a European woman—as all non-Moroccans are referred to. I must, by definition, be rich, which produced much hand-rubbing, gleeful responses and a race to "assist".

On occasion, when one of numerous "official" envoys arrived, I would hide in darkened rooms deep within the bowels of the riad to the insistent banging of the front-door knockers. The contractors would open the door and I would remain in hiding until the newcomer's departure. Aside from my aversion to these "officials", any unnecessary disclosure that the owner was a single, European woman would amount to pure folly.

Afterwards, my older daughter who visited Morocco during the height of the renovations and difficulties said to me: "I never believed you could pull through for I could see no way out; I could only keep silent." My younger sister said something similar.

My family and friends in Australia and friends in Marrakech kept me within an inch of my sanity.

I was indeed very fortunate to meet quickly a handful of American and French expats in Marrakech (Marrakech has a large international community) who have supported and helped me, consoled and cajoled me, and made me laugh at critical moments (occurring almost daily). At one point when I faced physical threats, one very good French friend here said to me: "Be brave,

> “Once I realized this, the theme came readily: the beautiful Sahara. I sought to bring its tranquility, soft gentle breezes and colours, reminiscent of Sahara sands and oases, into the riad.”

Alexandra.” He added: “It is easy to be brave when you have no choice.”

Precisely! With the riad deep under metres and metres of rubble, all my money had been buried with it. I simply had no choice but to founder on.

The renovations took over two years to complete (an initial estimation of nine months, but that occurs all over the world). My motto became and remains “Never say never; and, never say always”, echoing Talleyrand on love and politics.

The creative process

It was then time to furnish and decorate the riad. This was the good bit. I love decorating and this was something that a barrister’s life denies. Whilst the law is a creative and challenging profession in its own way, absent is the ongoing satisfaction resulting from the creation of a physical object of beauty that one can stand back from, appreciate and admire.

Lighting was a particular challenge: in all, 143 light fittings had to be installed and located. Most of them were found in the souk for Moroccans (Marrakech’s flea market named Bab Khmeiss). The scouring of this market has become a small addiction. Comprising 99.5 per cent true rubbish, it is a delight to find something of beauty with a price of a negligible amount—post-negotiation.

I am proud of the riad named RIAD EMBERIZA SAHARI and its decoration. Visit the website www.riademberizasahari.com and read the reviews on Tripadvisor; there are many comments attesting to the beauty and tranquility of the riad, its design and decoration.

Also satisfying is that the whole of the riad, its renovation and reconstruction were of my making. Other than a person who did plans for authorisations (a whole other story), I had no draftsperson and no interior designer.

At the beginning, the design and décor of the riad confounded me. It took time to appreciate that the design needed to be cohesive and required a theme. Once I realized this, the theme came readily: the beautiful Sahara. I sought to bring its tranquility, soft gentle breezes and colours, reminiscent of Sahara sands and oases, into the riad.

I have learned much: I know about pools and filtration systems, pressure pumps, construction patterns, electricity issues, plumbing, washers, painting colours, floods and drains, heating and cooling, woodwork, mosaics, plans, authorisations, Moroccan bureaucracies, retail buying (only the finest linen and mattresses), kitchens, menus, hiring and firing, being the client (yes, I have an advocate here), tourism, tour agencies, online travel agencies, excursions, chauffeurs, website designs, planners and schedules, motor engines including my 4WD which I can now accurately diagnose and sometimes repair. Before, I knew nothing about these practical affairs.

I thank my barrister training for my ability to adapt so readily to change. My decades at the Bar stood me in good stead for these

trials and tribulations. I commend to like-minded members of the Bar an adventurous course; the only regrets are for the things we wished we had done and not for those that we did. I, most certainly, have yet to regret the decision to take on Riad Emberiza Sahari.

So my life as an hotelier? Unsurprisingly, running a hotel business is different to life at the Bar: it is always frantic. Rather than one large brief (as my practice tended to be at any one time) there are a million and one smaller things occurring simultaneously and requiring attention. But these things are not so weighty and the responsibility not so pressing. A mistake in this game will ultimately fall on the business's reputation and therefore on me and *not* the client. I find relief in this.

Returning to the Bar

When the riad is fully and firmly established, I shall return to the Bar. I have retained my practising certificate and Bar subscriptions. I have completed some pro bono legal work from Marrakech in relation to the Human Rights Commission Inquiry into Child Detention. I have also taken on some taxation and commercial advice work. Court work is not open, of course.

Flexibility, adaptability and the ability to keep a straight face: upon my return to the Bar I am sure these attributes will help. I also suspect not much can take me by surprise anymore.

Does that mean that I have become hardened? Yes. But I have also become more complete. I feel more capable of the greater emotions of life and of the lesser ones: I love more, laugh more, cry more, hate more and am embittered more.

Living in a Muslim Country

People often ask me how I find living in Marrakech in a Muslim society. I have found that to do so brings with it an understanding and a certain tolerance of Islamic culture and

religion. Still, I am an anti-theist, a feminist and anti the veil. However, Morocco is unlike some countries in the Middle East in that here women do wear jeans and do not wear veils, particularly in the new City outside the Medina walls. Women do wear veils in the Medina but burqhas and hijabs are rare.

The hotel has now been fully operational for a little over a year; it opened at Easter 2015. The guests and my staff are the best part of the business aside from the riad's physical beauty. I am thrilled with the riad's success: as at the date of writing Tripadvisor has Riad Emberiza Sahari rated No 19 out of 1174 riads in Marrakech, the majority of which are European owned and operated. The ratings go up and down all the time according to the reviews posted. This is always a challenge, sometimes a cause for celebration and sometimes for commiseration. But that's life … especially in Marrakech!

Juvenal (Satire VI, lines 347–8).
Translation from Latin: "Who will guard the guards themselves?"

Is the High Court helping to fight corruption?

STEPHEN CHARLES

Victorians may not realise that our state has the worst and least effective Government integrity system in Australia. Until recently it had no anti-corruption commission; an FOI system subverted by governmental practices enabling exemption from disclosure; no regulatory system requiring disclosure of political donations (we have to rely on inadequate Commonwealth legislation); a protected disclosure act which fails to protect whistle blowers;[1] and an *Audit Act* that prevents the Auditor-General from making proper investigations by "following the dollar".[2] With no effective integrity system, it is hardly surprising that corruption has gone undiscovered in Victoria, and that many may have believed that there was little corruption in the public service and that our state was pretty "clean" compared with New South Wales.

Any such belief must have been rudely shattered by IBAC's investigation, *Operation Ord*, into the Education Department which oversees $4 billion of the state school system's annual budget. The public disclosures of *Operation Ord* have already demonstrated that millions of dollars have been transferred to so-called "banker schools", and used by senior officials as a slush fund to pay for travel, food, alcohol and other expenses. At least six schools have been involved and several senior officials of the Department. Similarly last year in IBAC's *Operation Fitzroy*, we learnt that two Transport Department project officers awarded $25 million of public money over a seven-year period to companies they had set up, making a personal profit of over $3 million, the work carried out being allegedly shoddy. Evidence from one of the officers was that a culture had developed within the Transport Department of turning a blind eye to improper relationships between staff and contractors.

Anyone who believed Victoria was clean and largely free from corruption before these disclosures cannot have been following the very damning reports from the Ombudsman, George Brouwer, in the years before IBAC was set up. Over a 10-year period, Mr Brouwer repeatedly in his reports to Parliament drew attention to matters such as: the conduct of councillors at the Brimbank City Council; the problems of conflict of interest which pervaded local government; repeated examples of public officers misusing their position to obtain a personal benefit; maladministration in the Victorian Building Commission; and the prevalence of complaints demonstrating conflict of interest both in local government and the public sector. Mr Brouwer's report in March 2014 on conflict of interest in the Victorian public sector is of particular significance, including a number of case studies demonstrating the loss to the community such a conflict of interest causes.

Given that corruption is insidious, usually secret, and hard to identify and eradicate, there are unsurprisingly numerous issues which, in recent times, have cried out for investigation by a body such as Victoria's Independent Broad Based Anti-Corruption Commission (IBAC). The position is made worse in Victoria by increasing secrecy over governmental policy development and decision making, and the process of arriving at government contracts. But even so, areas of concern ripe for an IBAC investigation would include: urban planning, for example the Windsor Hotel and Phillip Island debacles; and the practice known as "flipping" when a developer obtains a permit for a city property and later sells it to a second developer at a massive profit created by the issue of the permit; the enormous time and expense of the development of Myki and the desalination plant; the activities of some construction unions and their interaction with public officials; public-private-partnerships; political funding; and the East-West Link side-letter.

Before the 2010 election, Ted Baillieu's then opposition party promised Victorians that if elected it would establish a broad-based anti-corruption commission modelled closely on the NSW Independent Commission Against Corruption (ICAC). ICAC was introduced in 1988 by the Greiner Government. It is a body with great powers and it has been very effective. Until recently, its powers of investigation were thought to be almost unlimited. The *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) defines "corrupt conduct" in such a way as to include any activity that could adversely affect the exercise of official functions by a public official and a wide variety of particular offences. The ICAC's jurisdiction is defined in such a way as to entitle it to investigate any allegation or complaint or any circumstances which in the Commission's opinion imply that corrupt conduct or conduct connected with corrupt conduct may have occurred, may be occurring or may be about to occur. ICAC is plainly entitled to investigate

ILLUSTRATION BY GUY SHIELD

> "IBAC's difficulties start with the definition of "corrupt conduct" which is very narrowly defined."

allegations amounting to misconduct in public office by a public official, including a minister. ICAC's entitlement to investigate upon suspicion of corruption, if it remains practically unlimited, would make it very difficult for an investigated party to obstruct or delay an investigation.

A good example is the investigation of the Obeid family in *Operation Jasper*, the nature of which is expounded in full detail on ICAC's website. The inquiry investigated various activities of the NSW Minister for Primary Industries and Mineral Resources, the Hon. Ian Macdonald, which had the effect of opening a mining area in the Bylong Valley for coal-exploration, including whether the Minister's decision to do so was influenced by Mr Obeid or members of his family. This decision was not based on, indeed was contrary to, recommendations of the Minister's departmental officers.

At the outset of the investigation, ICAC merely had suspicions that some unidentified corruption might have occurred. At the opening of the public hearing it was alleged that the Obeid family had deliberately organised their business affairs so as to disguise their involvement with the relevant land, including through multiple layers of discretionary trusts and $2 shelf companies, the names of which were repeatedly changed. ICAC had investigated these matters for many months, during which more than 100 witnesses had been interviewed, search warrants had been executed, computer hard drives seized and downloaded, and tens of thousands of documents seized and assessed for relevance. Even then, on one view, the Minister's decisions might have been explained solely as bad government. The inquiry was to investigate whether the Minister's decisions were explained by corruption, since it was alleged that their effect was that the Obeid family was likely to profit by up to $100 million.

It is necessary to remember when examining the IBAC provisions, that, unlike most criminal offences which are investigated by a police force and prosecutorial bodies, the hidden nature of corruption makes investigation difficult. And when any investigation of suspected corruption commences, well-funded suspects will take any step they can to obstruct or delay the investigation, which in turn enables documents or evidence to be hidden or destroyed. So much was repeatedly obvious when the Painters and Dockers Commission of the 1980's conducted by Frank Costigan QC began to uncover evidence of the money-laundering and other activities of those involved in the "Bottom of the Harbour" schemes.

The IBAC legislation at first glance might indeed be thought modelled on ICAC - it contains powers in the investigation of corruption which are similar to ICAC's; powers which in the 1980's horrified many of those considering the activities of Costigan's Royal Commission, or the setting up of a National Anti-corruption Body which he recommended. Many still share the view that to grant an anti-corruption body such powers is completely inconsistent with a whole series of basic civil liberties which have been hard-won since the 16th century in the English law courts, starting of course with the preclusion of torture and the rule that evidence obtained by torture could never be used against the victim.

IBAC's difficulties start with the definition of "corrupt conduct" which is very narrowly defined. A "relevant offence" is defined in s.3 of the IBAC Act as "an indictable offence against an act" or one of three common law offences, in effect bribery of a public official or perverting the course of justice. The definition of corrupt conduct concludes with the words "being conduct that would, if the facts were found beyond reasonable doubt at a trial, constitute a relevant offence." IBAC's jurisdiction is then limited by s.60(2) which requires it not to conduct an investigation "unless it is reasonably satisfied that the conduct is serious corrupt conduct."

Misconduct in public office is an indictable offence at common law, not by statute, and is therefore plainly NOT covered by the definition of relevant offence. This is a very surprising omission since misconduct in public office is at the heart of conduct by public officials which would be likely to attract the attention of an anti-corruption body. But worse, the effect of s.60(2) of the IBAC Act is that IBAC must not conduct an investigation – at all – unless reasonably satisfied that the conduct is "serious" corrupt conduct (not defined). The requirement that IBAC must be able to articulate those facts, which if proved beyond reasonable doubt, would constitute a relevant offence, means that before IBAC can commence an investigation, it must be able to state clearly the facts, amounting to serious corrupt conduct, that it wishes to investigate. It is no wonder that in his 2014 report to Parliament, the IBAC Commissioner made complaint as to these provisions. The IBAC Commissioner, when his investigators wish to commence a preliminary investigation, would first have to ask them to specify the indictable offence involved.

The obvious consequence is that, if circumstances similar to those involving in the Obeid family arose in Victoria, IBAC could be prevented from carrying out any investigation using IBAC's extensive powers unless it had much better information as to what had occurred than was available to ICAC when it commenced to investigate the Minister's grant of mining licences in the Bylong Valley.

It should be noted that the Victorian legislation does not at present even grant IBAC jurisdiction to commence preliminary investigations. Sensibly the IBAC Commissioner has presumed an entitlement to make preliminary inquiries, but if a suspect became aware that any investigation was being conducted, even at a very preliminary stage, there remains the prospect that the suspect would be entitled to seek a Supreme Court injunction asking for a halt to any such investigation with the inevitable consequent delay and obstruction and possible loss of evidence.

Before the last Victorian election, the Coalition Government tabled amending legislation which was never reached. The Andrews Government has now introduced an Amending Bill, not yet debated, which broadens the definition of "corrupt conduct" by including the offence of misconduct in public office and reduces somewhat the threshold before which IBAC may conduct a full investigation. The Bill requires IBAC to prioritise its attention to investigating and exposing corrupt conduct that IBAC considers may be serious or systemic. The Bill authorises IBAC to conduct preliminary inquiries and while doing so to require the principal officer of a public body to provide any relevant information to IBAC and any person to attend and produce documents. There are additional useful provisions such as entitling IBAC to make certain delegations, and to apply to the Magistrates' Court for search warrants.

The Amending Bill, if passed, will be a good start to providing Victoria with a more effective IBAC. But it is only that. Those who drafted both the Coalition's amendments and the Amending Bill assumed that IBAC has no power to make preliminary inquiries. This assumption is incorrect. In *Murphy v Lush* (1986) 65 ALR 651, the High Court said that "no one requires special authority at law simply to make inquiries". It was always inexplicable that

> "The Amending Bill, if passed, will be a good start to providing Victoria with a more effective IBAC."

IBAC's jurisdiction did not include misconduct in public office, and equally so that IBAC was not entitled to investigate a complaint unless it was able to articulate facts which if proved beyond reasonable doubt would constitute one of the narrow range of relevant offences, which also constitute serious corrupt conduct. The reality was that IBAC required a well-informed insider's complaint before it could investigate. The Baillieu Government clearly did not fulfil its preselection promise to produce an IBAC closely modelled on the ICAC. The version enacted was an IBAC stifled by the thresholds deliberately built into the Act and hamstrung by a very narrow definition of corrupt conduct.

Even after the amending Bill is enacted, IBAC will be in a much weaker position than ICAC. IBAC will be entitled to conduct a preliminary inquiry, but not to proceed to a full inquiry until a threshold has been passed. That threshold requires IBAC to "suspect on reasonable grounds that the conduct constitutes corrupt conduct". IBAC must therefore, have a degree of knowledge of the conduct, sufficient to have reasonable grounds to enable it to identify the facts which would constitute one of the relevant offences that constitute corrupt conduct. It will no longer be necessary for IBAC to establish the required state of mind (mens rea) for the relevant offence, which it is now entitled to assume, but IBAC must still be able to articulate the other facts necessary to establish a relevant offence. If IBAC remains unable to use its full powers at the outset of an investigation it will be hampered in the preliminary phase of an investigation by the difficulty of knowing what information to seek from a departmental head, or what documents to seek from other persons.

Victoria will not have a properly armed and empowered IBAC until a much broader definition of "corrupt conduct", including misconduct in public office, is introduced. Secondly, all thresholds for commencing a full investigation, using IBAC's full powers, should be eliminated. Any division between a preliminary and a full investigation should be removed. In effect, Parliament must trust the Commissioner and his staff not to investigate trivial or frivolous complaints, the matter being left to the Commissioner's discretion.

Margaret Cunneen SC is a Deputy Senior Crown Prosecutor in New South Wales. In 2005 she was Crown Prosecutor in the horrifying case of a young woman who was raped by 14 men over a six-hour period. After a long trial, in which every possible point was taken, a number of them were convicted and long sentences were imposed. Cunneen's work was rightly regarded as heroic. Sometime later she gave a lecture to students at the University of Newcastle in which she raised the question whether the pendulum had swung too far to the right in the direction of protection of the rights of the accused. Her speech caused headlines, great antagonism in the judicial community, and some have said that it delayed her promotion to Senior Counsel for a number of years. Consequently she was seen in some legal quarters as a tall poppy that had to be lopped.

In 2014 ICAC sought to investigate Cunneen and her son and his girlfriend over an allegation that, with intent to pervert the course of justice, she and her son counselled his girlfriend to pretend to have chest pains to prevent police officers obtaining evidence of the girl's blood alcohol level at the scene of a traffic accident. The girl had been involved in the accident, but had not been drinking, and did take a breath test and no alcohol was shown on it. It has been alleged that ICAC was tipped off to the matter by a hostile member of the family.

Ms Cunneen took proceedings seeking a declaration that ICAC did not have power to conduct the inquiry. The most relevant section of the *ICAC Act* is s.8(1) which says "corrupt conduct" is "any conduct of any person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly, the exercise of official functions by any public official," and which could involve certain kinds of misconduct listed in the sub-section, including perverting the course of justice. The alleged conduct did not concern the exercise of any of her duties as a prosecutor. ICAC contended that the conduct was corrupt because it could adversely affect the exercise of official functions by the investigating police officers and by a court that would deal with any charges arising out of the accident.

The principal argument in the High Court (*ICAC v Cunneen* [2015] HCA 14) was directed to the meaning of the expression "adversely affect", which appears in several places. There were said to be only two possibilities, either it means adversely affect or could adversely affect the probity of the exercise of an official function by a public official, or it means adversely affect or could affect the efficacy of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner, or make a different decision from that which would otherwise be the case.

The majority chose the former, which they said accorded with the ordinary understanding of corruption in public administration. The latter interpretation, in their view, would result in the inclusion of a broad array of criminal offences and unlawful conduct which had nothing to do with the ordinary understanding of corruption and enabled ICAC to exercise its extraordinary coercive powers in areas ranging well beyond the ordinary understanding of corruption.

The majority then proceed to instance a number of examples of criminal or unlawful conduct which might affect an honest public official's behaviour, for example –

(a) a public authority losing money through relying on the advice of a fraudulent stockbroker;
(b) a thief stealing one or more of a public authority's vehicles;
(c) telling lies to a police officer to deflect the officer from instituting a prosecution –

and a number of others, in each case then leading to some adverse impact on the public authority or official's activities.

The High Court relied on the principle of legality, coupled with the lack of a clearly expressed legislative intention to override basic rights and freedoms on a sweeping scale. The majority concluded that the provisions of the *ICAC Act* operate more harmoniously on the footing that the Act is directed towards promoting the integrity and accountability of public administration in the sense of maintaining probity in the exercise of official functions.

> "Many lawyers prefer the interpretation of the *ICAC Act* given by Gageler J, as being the more probable and convenient of the alternatives."

The dissentient, Gageler J, considered that ICAC was entitled to investigate if the criminal conduct had the potential to impair the efficacy of an exercise of an official function by a public official. In his opinion the ordinary grammatical meaning of "could adversely affect" included situations where the conduct would affect the efficacy of the exercise of an official function. He agreed with Bathurst CJ, the dissentient in the Court of Appeal in New South Wales, that conduct which could impair the Court's capacity to do justice in the particular case was conduct which could adversely affect at least indirectly the exercise by the Court of its official functions.

Next, Gageler J pointed out that the reasoning of the majority had the potential to exclude from the definition of "corrupt conduct" the case of fraud on a public official or of conspiracy to defraud a public official which involved no wrong doing on the part of the public official, no matter how widespread the conduct or detrimental its effect; thus, state-wide endemic collusion among tenderers for government contracts, or serious and systemic fraud in the making of applications for licences or permits, would be excluded from ICAC's jurisdiction. In his view it was improbable that ICAC was to be denied the power to investigate serious and systemic fraud of this kind. He examined the legislative history of ICAC, that it had carried out a number of investigations on the wider basis (efficacy) preferred by Bathurst CJ and himself, after which the *ICAC Act* had been amended without any indication of comment or parliamentary disapproval on such an interpretation of the legislation. The Act on the whole in his view showed that it permitted ICAC to investigate over a wide area, having the discretion to refrain or disengage from a particular investigation of conduct which ICAC assessed to be trivial, or where it was thought to be neither serious nor systemic (cf. *ICAC Act*, ss 12A and 20(3)).

Many lawyers prefer the interpretation of the *ICAC Act* given by Gageler J, as being the more probable and convenient of the alternatives. In the High Court the tide of argument turned, as Janet Albrechtson contended in a scathing attack on ICAC in the *Australian*, when Nettle J asked ICAC's counsel whether it was sufficient to be corrupt conduct merely because someone lied to a police officer,

to which ICAC counsel agreed. The majority had seen a mass of politicians on both sides of politics having their reputations destroyed by ICAC and this spooked them and took them one step too far.

ICAC bears some responsibility for what has happened. ICAC for years has had a rule of thumb to have at least one public hearing a month. There had been a history of grand statements in opening by ICAC counsel, before any evidence had been tendered. Particularly in the field of political donations, reputations (e.g. the NSW Premier, Mr O'Farrell) had been destroyed, almost by accident, when no allegation of corruption had been made against the person named. The Commissioner, former Justice Megan Latham, was recently quoted telling young lawyers at the NSW Bar that inquisitorial litigation is "fantastic", "you are not confined by the rules of evidence, you have a free kick, you can go anywhere you want and it's a lot of fun" and later, that questioning a witness in an ICAC hearing is "like pulling wings off a butterfly". These comments, caught on a video, were likely to upset many, as they did. ICAC itself was doubly at risk in pursuing Cunneen. She was not acting as a prosecutor, a state official, even if she made the suggestion that was alleged against her. But on any view that conduct, if corrupt, was plainly not systemic, nor could it be seen as serious corruption. If anyone at ICAC took it seriously, it should have been simply referred to the police or the Chief Crown Prosecutor to consider. To pursue it before a public ICAC hearing was guaranteed to provoke the hostile reaction it has produced in the community, Bar and the High Court.

The reaction of the NSW Government was swift. Premier Baird said that Parliament would legislate to validate past investigations, and do so retrospectively, and it has done so. This was vigorously criticised in the community and particularly by *The Australian* newspaper, on the grounds that ICAC was out of control, and granting retrospective immunity to ICAC in effect endorsed unlawful conduct in public administration, and that unlawful conduct has no place in the public sector. But the effect of such legislation is merely to validate past investigations and findings which otherwise might have to be carried out again, and also to leave the State possibly open to actions for substantial damages.

> "The answer to the question involved in the title to this article is that the High Court is plainly not helping to fight corruption."

In the absence of corrective legislation, the High Court majority's reasoning would have the following consequences. ICAC would have no power to investigate State-wide endemic collusion among tenderers for government contracts. It would have no jurisdiction to investigate serious and systemic fraud in the making of applications for licences, permits or clearances under health and safety laws; or for licences to permit exploitation of State-owned natural resources. It surely cannot be right that potentially widespread and systemic corruption should be beyond the reach of ICAC's investigatory powers.

The anti-corruption commissions of both Victoria and Queensland will also be seriously affected and inhibited by the High Court's decision in the Cunneen case. In both cases the relevant legislation makes frequent use of the phrase "adversely affect" and the opening words in the *IBAC Act* definition of "corrupt conduct" are that corrupt conduct means conduct of any person that "adversely affects the honest performance by a public officer". However, in the case of IBAC, both major parties have promised at least substantial amendment of the legislation. Plainly the draughtsman of any such amendments must ensure that the Victorian legislation cannot be interpreted in the way the High Court has decided in the Cunneen case. As to ICAC itself, its reaction was that the High Court's narrow interpretation of the legislation would severely restrict its investigative capabilities, and that it expected to lose at least 30 per cent of its present work. Many past and present ongoing investigations were likely to have been found invalid and ICAC's findings invalidated, if the amending legislation had not been passed. The question whether the ICAC legislation should be amended to broaden it in the future was left by the Premier to an Independent Panel headed by former Chief Justice Murray Gleeson AC (the Panel's Report was delivered on 30 July 2015).

The answer to the question involved in the title to this article is that the High Court is plainly **not** helping to fight corruption. On the contrary, it is making it substantially more difficult to expose and eradicate widespread corruption. But it is not the High Court's task to fight corruption, rather it is to interpret and lay down the law, and to act as a balance and brake on the excesses of Australian governments. Of course, from time to time there will be people who strongly disagree with the High Court. Jerrold Cripps, a past Supreme Court judge and former ICAC Commissioner, said the Cunneen decision overturned two decades of understanding of what ICAC could investigate. Those who conspired to stop public servants from discharging their duties would no longer be captured by the legislation. He continued "I wonder whether the courts when they make these decisions ever think about the implications". There will be many who agree with Jerrold Cripps.

1 See *Protected Disclosure Act 2012* (Vic) and its predecessor, *Whistleblowers Protection Act 2001* (Vic).

2 *Audit Act 1994* (Vic).

Seeing double: Judicial Registrars Burchell and Tran

GEORGINA COSTELLO
AND JUSTIN WHEELAHAN

It is just over a year now since the Governor-in-Council appointed Sharon Burchell and My Anh Tran to be Judicial Registrars of the County Court of Victoria. Such appointments would ordinarily be unremarkable, but these were, in one respect, ground breaking. There is only one position of Judicial Registrar in the Commercial Division of the Court and it is "work-shared" between Judicial Registrars Burchell and Tran. Judicial Registrar Burchell works three days per week and Judicial Registrar Tran works two days per week. This bold experiment with job-sharing, which VBN believes is the first in any Australian jurisdiction, seems to be working well.

The job-sharing model has worked because it consists of mediations, orders on the papers, pre-trial directions, some interlocutory disputes and enforcement applications, which can usually be heard in a day and easily compartmentalised between the Judicial Registrars.

The set-up also has the advantage that if one hears a mediation, the other can hear further applications and directions in the same proceeding, avoiding the possibility of being conflicted. Burchell and Tran share precedent orders and have developed a working relationship that appears seamless. This relationship is facilitated by a constant: their shared associate, Simon Bobko, who works full-

time. Each Judicial Registrar hands the relay baton to Mr Bobko at the end of the day and any message to the other is conveyed through him.

Both Judicial Registrars speak positively of the support they have received from the Commercial Division. Judicial Registrar Burchell told Bar News:

> *It is a really innovative division, with a focus on providing practical and expeditious resolution of disputes. Right from the start, the division was willing to explore the possibility of a job share and to embrace the benefits to the Court that could flow from our proposal [to job share].*

As stated on the County Court's website, nearly 50 per cent of all civil initiations in the County Court are now within the Commercial Division. More than 2,600 cases are initiated in the Division each year. The Division has no monetary limit on its jurisdiction, and offers prompt trial dates and a team of specialist commercial judges. The Division:

> *... aims to provide a fast, cost-effective and fair alternative for the resolution of commercial disputes. This is achieved through a reduced need for costly interlocutory appearances, the availability of trial dates within six months of first administrative mention, extremely low rates of not reached cases and fast average time to judgment.* [1]

Judicial Registrar Tran told Bar News, "The cases we deal with range from simple debt collection matters to complex contractual disputes and multi-million dollar property development disputes" It is "diverse and challenging" she added.

Before applying for the shared appointment, Burchell and Tran were both members of our Bar practising in commercial and public law. Judicial Registrar Burchell worried that the unpredictable time demands of her career at the Bar might impede her from spending enough time with her family. She attended a seminar on barristers returning to the Bar after parental leave and the prospect of working part-time. The advice was gloomy:

> *Be prepared to break even and just be around to maintain your profile.*

Looking to return to the Bar after an extended maternity leave, JR Tran says she was faced with a difficult choice:

> *Whilst I am in awe of women who can combine a successful full-time practice as a barrister with raising a young family I knew it was not for me. But nor was I that keen on trying to maintain a part-time practice or going in-house.*

She says there is a real need to provide options to barristers who, for whatever reason, don't wish to conform to the traditional model of unpredictable and long hours at work. "I love the fact that I can be part of the administration of justice while still fulfilling commitment to family," says JR Tran.

Judicial Registrar Burchell, a mother of two, is relieved to be able to job-share the role with JR Tran, who also has two children.

In her university days in Western Australia, JR Burchell was awarded the Sir Ronald Wilson Prize in Law and the Vice Chancellor's commendation for Academic Excellence from Murdoch University in Western Australia. After graduating, she moved east and was an associate: first with now-retired Justice David Habersberger of the Victorian Supreme Court; and then with Justice Kenny of the Federal Court. She then worked as a litigator at Blake Dawson Waldron (now Ashurst). At the Bar, she read with Samantha Marks (now QC).

Judicial Registrar Burchell had a fast-paced practice as a commercial and administrative law barrister for 11 years before her judicial appointment, including appearances in High Court migration cases, representing Telstra and Opes Prime in the Supreme Court and a brief for the mine operators in the Hazelwood Mine Fire Inquiry in the Latrobe Valley. In 2014, JR Burchell won the Lawyers' Weekly Women in the Law Junior Counsel Award.

With science and law degrees from the University of Melbourne, as well as a BCL from Oxford University, JR Tran was a brilliant student. She was awarded first class honours in law, and received a stack of academic prizes, including the Corrs Chambers Westgarth Prize for Intellectual Property; the Clifford Chance Prize in Civil Procedure; the Melbourne Abroad Scholarship to study law at McGill University; and an Exhibition in Psychology in 1995. JR Tran was an articled clerk and solicitor at Freehills and a researcher at the Victorian Court of Appeal.

Judicial Registrar Tran began her career at the Bar reading with Pamela Tate (now Justice Tate). JR Tran went on to develop a successful commercial and administrative law practice and held positions of responsibility in the Commercial Bar Association. Her work at the Bar included complex international construction arbitration matters, property law cases and intellectual property work.

JR Tran's father hails from Vietnam. He came to Australia at the age of 17 under the Colombo Plan, speaking English he had taught himself listening to a vinyl record. JR Burchell also shares Asian heritage through her Chinese Singaporean born mother. On 6 May 2015, the Asian Australian Lawyers Association issued a press release congratulating JR Burchell and Tran and stating that it was encouraging to see more cultural diversity in judicial appointments.

The Judicial Registrars say they have been warmly welcomed and mentored by the County Court judges they work with, especially the Judge in Charge of the Commercial Division, Judge Maree Kennedy (now a Justice of the Supreme Court).

VBN commends the County Court for its progressive and meritocratic appointment of these two eminently capable lawyers. The decision to appoint Judicial Registrars Burchell and Tran brings collaboration, diversity and legal acumen to the County Court's Commercial Division.

1 https://www.countycourt.vic.gov.au/commercial-division (accessed 10 June 2016).

Are the legal risks faced by company directors in Australia intolerable?

ED BATROUNEY*

The risks faced by Australian company directors have never been greater. The decision of the Federal Court in *ASIC v Healy*[1] (**Centro**) still looms large in the collective memory of Australian boardrooms and amongst non-executive directors in particular. Importantly, however, company directors in Australia remain protected by fundamental safeguards, including the role of the courts as the arbiter of the standards required by directors, the operation of the business judgement rule, and recognition that misconduct on behalf of a company is not of itself capable of imposing personal liability on directors.

As basic as these safeguards may seem, they are under

threat in the financial services sector in England and Wales. In that jurisdiction, the fallout from various scandals in the financial services sector, and public and political pressure for "personal responsibility", has led to the establishment of a new regulatory framework that seeks to impose personal liability on directors and senior managers for misconduct that occurs within their areas of responsibility.

Seen in this context, Australia's regime, whilst demanding of directors, cannot be regarded as imposing intolerable risks. Australia should, however, resist any push to follow an approach based on the premise of personal responsibility. The safeguards jettisoned in England and Wales are fundamental to an effective, fair and balanced approach to corporate governance in Australia.

The standards required of company directors in Australia

The courts are responsible for articulating and applying the standards required of Australian company directors according to contemporary community expectations.[2] As Tadgell J has observed, as the size and significance of corporations have increased, so have the standards the law has required of directors.[3] One of the consequences of these changes has been the erosion of the distinction between the standards required of executive and of non-executive directors. It is now accepted, for example, that there is a core irreducible requirement for *all* directors to be involved in the company's management and to take all reasonable steps to be in a position to guide and monitor the company's management.[4]

More recently, the Federal Court in Centro restricted the extent to which directors, including non-executive directors, may rely exclusively on management processes and external advice when performing their duties. The ultimate finding in Centro was that the directors of the Centro group breached their duties by failing to apply an enquiring mind and sufficient scrutiny to the content of the company's financial statements. The directors relied entirely on a process that involved preparation of the company's financial accounts by suitably qualified people internally and an audit performed by a top-tier accounting firm. Although the directors were not required to personally scrutinise each line of the financial statements, they were required to "apply their own minds to, and carry out a careful review of, the proposed financial statements" to ensure that the information they contained was consistent with their knowledge of the company's affairs.[5]

Two crucial findings in Middleton J's reasoning in Centro were the directors' overall responsibility under the Corporations Act for the company's financial statements and the magnitude of the deficiencies in the company accounts.[6] Further, Middleton J drew little distinction between the roles of executive and non-executive directors, both of whom he regarded as being at the "apex of the structure of direction and management of the company".[7] In these circumstances, the finding that directors cannot rely exclusively on others when performing certain tasks imposes a significant burden on non-executive directors, particularly when contrasted with previous statements of principle that there is scope for directors to rely on others in the absence of actual or constructive knowledge that their reliance is misplaced.[8] In the absence of any delineation of the circumstances in which directors may rely exclusively on management's processes and external advice, prudent directors are now in a position where they should exercise independent judgement when performing their duties, including when reviewing and relying on work performed by others. This imposes a significant burden on non-executive directors, and gives them reason to be more challenging in their dealings with management and executive directors.

Although the standards required of directors have become increasingly onerous, Australian company directors remain protected by several fundamental safeguards. First, the courts are the final arbiter of the standards required by directors. The courts, as opposed to the regulator, are entrusted with the task of determining what constitutes the proper performance of a director's duties in each particular case.

Secondly, directors are entitled to rely on the 'business judgement rule' in response to any allegation that they acted without the appropriate level of care and diligence.[9]

Thirdly, directors in Australia are not subject to any overarching obligation to ensure that the company's affairs are conducted in accordance with law. The general statutory duties in the Corporations Act cannot be used as a back door to impose accessorial liability on directors.[10] This means that the mere fact of misconduct, or the risk of misconduct, on behalf of a company, cannot be used to impose liability on directors. Instead, as Beach J recently confirmed,[11] in determining whether a director has failed to act with due care and diligence, Australian courts balance the magnitude and risk of foreseeable harm from the director's conduct against the potential benefits that could reasonably accrue from the relevant conduct.

England and Wales

In contrast to Australia, directors and senior managers in financial institutions in England and Wales are subject to a regime that seeks to hold them personally responsible for failings that occur within their areas of responsibility. Under the Senior Managers Regime, which came into operation in March 2016, all key responsibilities within financial institutions are specifically assigned to directors and senior managers.[12] The measures used to allocate

ILLUSTRATION BY GUY SHIELD

individual responsibility to directors and senior managers include defined statements of responsibility, the use of personal attestations and a responsibilities map that ensures that all areas of responsibility are allocated to a responsible director or senior manager. Significantly, directors and senior managers must take reasonable steps to prevent regulatory breaches in the area of the firm for which they are responsible, the so-called 'duty of responsibility'.

The new regime is based on the recommendations of the UK Parliamentary Commission on Banking Standards (PCBS), which was established in the aftermath of the global financial crisis.[13] The PCBS attributed some of the blame for failures and scandals in the banking sector to a lack of responsibility and accountability on the part of directors and senior managers, particularly in large, complex institutions. The PCBS made a number of recommendations that focused on addressing a perceived 'accountability firewall', which enabled directors and senior managers to avoid regulatory action by relying on the layers of delegated management within large financial institutions.

The imposition of a 'duty of responsibility' in Australia should be avoided. Indeed, the underlying premise of the Senior Managers Regime – the public and political desire to hold individuals responsible for failings that occur within an organisation – is a worrying trend in corporate governance and, ultimately, an ineffective way of improving the quality of corporate decision-making. This is not to say that the conduct of directors in the event of corporate collapses and related events should not be closely examined. However, it is vital that directors are empowered to consider competing considerations when performing their duties and that the standards required of directors reflect the realities of collective decision-making within publicly listed companies. It is therefore reassuring that in *ASIC v Mariner* the Federal Court confirmed that Australian law expects directors to take "calculated risks" and that courts will consider the magnitude and risk of foreseeable harm against the potential benefits that could reasonably accrue from the relevant conduct, before finding that a director acted without due care and diligence.[14]

The standards expected of directors in Australia have become increasingly exacting and, as a result, the distinction between the standards required of executive and non-executive directors is in danger of being eroded. In these circumstances, the task of directors, and non-executive directors in particular, has never been more demanding. However, seen in the context of the developments in England and Wales, the current approach in Australia does not impose intolerable legal risks on directors of public companies. Importantly, directors in Australia remain protected by the business judgement rule and the courts' willingness to empower directors to take calculated risks and balance competing considerations, including by weighing the risk of foreseeable harm against the potential benefits that might accrue from their conduct.

1 [2011] FCA 717.

2 ASIC v Rich (2003) 44 ACSR 341, 358.

3 *Commonwealth Bank of Australia v Friedrich & Ors* (1991) 5 ACSR 115. According to his Honour: 'As the complexity of commerce has gradually intensified (for better or for worse) the community has of necessity come to expect more than formerly from directors … In response, the parliaments and the courts have found it necessary in legislation and litigation to refer to the demands made on directors in more exacting terms than formerly; and the standard of capability required of them has correspondingly increased… I think it follows that [a director] is required by law to be capable of keeping abreast of the company's affairs…'

4 *ASIC v Healey* [2011] FCA 717, [166].

5 Ibid, [13].

6 Corporations Act, ss 295–297 and s 344. *ASIC v Healey* [2011] FCA 717, [132].

7 *ASIC v Healey* [2011] FCA 717, [13].

8 *AWA v Daniels* (1995) 37 NSWLR 438, 502; *ASIC v Adler* [2002] NSWSC 171, [372]. In *AWA v Daniels* (1995) 37 NSWLR 438, 502, Rogers CJ said 'a non-executive director does not have to turn him or herself into an auditor, managing director, chairman or other officer to find out whether management are deceiving him or her.'

9 Corporations Act, s 180(2). The business judgement rule is available where a director has made a business judgement, in good faith and for a proper purpose and in circumstances where they have 'informed themselves of the subject matter of the judgement to the extent they reasonably believe to be appropriate'.

10 *ASIC v Mariner* [2015] FCA 589, [444]; *ASIC v Maxwell* [2006] NSWSC 1052, [104], [110].

11 *ASIC v Mariner* [2015] FCA 589, [451].

12 See https://www.fca.org.uk/news/fca-publishes-final-rules-to-make-those-in-the-banking-sector-more-accountable.

13 Parliamentary Commission for Banking Standards, "Changing Banking for Good", June 2013. http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/changing-banking-for-good-report/.

14 [2015] FCA 589, [451].

* Ed Batrouney was one of four finalists who presented their essays to a judging panel of The Hon. Susan Crennan AC, Crutchfield QC and The Hon. Justice Digby QC. As the winner, Ed flew to London to present at the London 2016 International Commercial Law Conference. The London conference was a joint undertaking of CommBar, supported by the Victorian Bar, and the Commercial Bar Association of England and was convened at London's Inner Temple on 29 and 30 June 2016. It is an exciting initiative of the Melbourne and London commercial Bars and brought together commercial dispute resolution lawyers from Australia, the UK and Asia. In addition to members of the two Bars, leading members of the judiciary and distinguished international arbitrators spoke at the London conference.

Lament for 'Cape' Kennedy

The following poem by Campbell Thomson was short listed for the Peter Porter Poetry Prize and published in the *Australian Book Review's* March edition. The poem was inspired by work Campbell did as a barrister appearing for applicants in a native title case in the Wimmera.

Djirritch Djirritch
the black and white
willy wagtail
fate's messenger
did not tell me you'd gone
but your cousin phoned.

Kids walking to school
found you
flat on your back
on the pavement frost
eyes open
looking for that emu in the Milky Way
but the coroner saw
no evidence of foul play.

I saw you leave
the Dimboola Hotel at closing time
with half a slab
the doctor warned against
with your clapped out guts
at only half three score and ten
but your missus wouldn't let you see your son
what else was there to do.

They haven't taken down the pictures
plastered on your bed room walls
of Elle Macpherson smiling down
over and over again
and no one will stay there for a while
but you pissed yourself laughing
when the skies opened on your funeral
in the middle of the worst drought in a century.
I remember you skinny and shy
beanie, five days growth and
'fuck you' painted on the uppers of your boots
taking me up the river
to show me the *Bullitch*
bent over with age
with the footholes
chopped out by your great uncles
climbing high for honey
and on the other side
the scar from where they'd peeled off a canoe.

No foul play?
What about the feller
shot by the *Namatji* squatter
not far from where they built the mission church?
What about Dick-a-Dick
left in Sydney to walk home
after the first real Ashes tour?
What about Uncle Nyuk
run down in his horse and cart
by the publican drunk and driving home?
What about Vicky and Bubbles
farmed out to *Namatji* families
who tried and failed to make them white?
What about the bosses in Canberra now
whose law won't recognise
your lore along the river?

Your bag of bones rots in a cheap coffin
in Dimboola cemetery
while you roam around Lake Wirregrin
waiting for it to fill again
for the *Beal* to blossom and seed
and for the black and white cockatoos
to fly the same way.

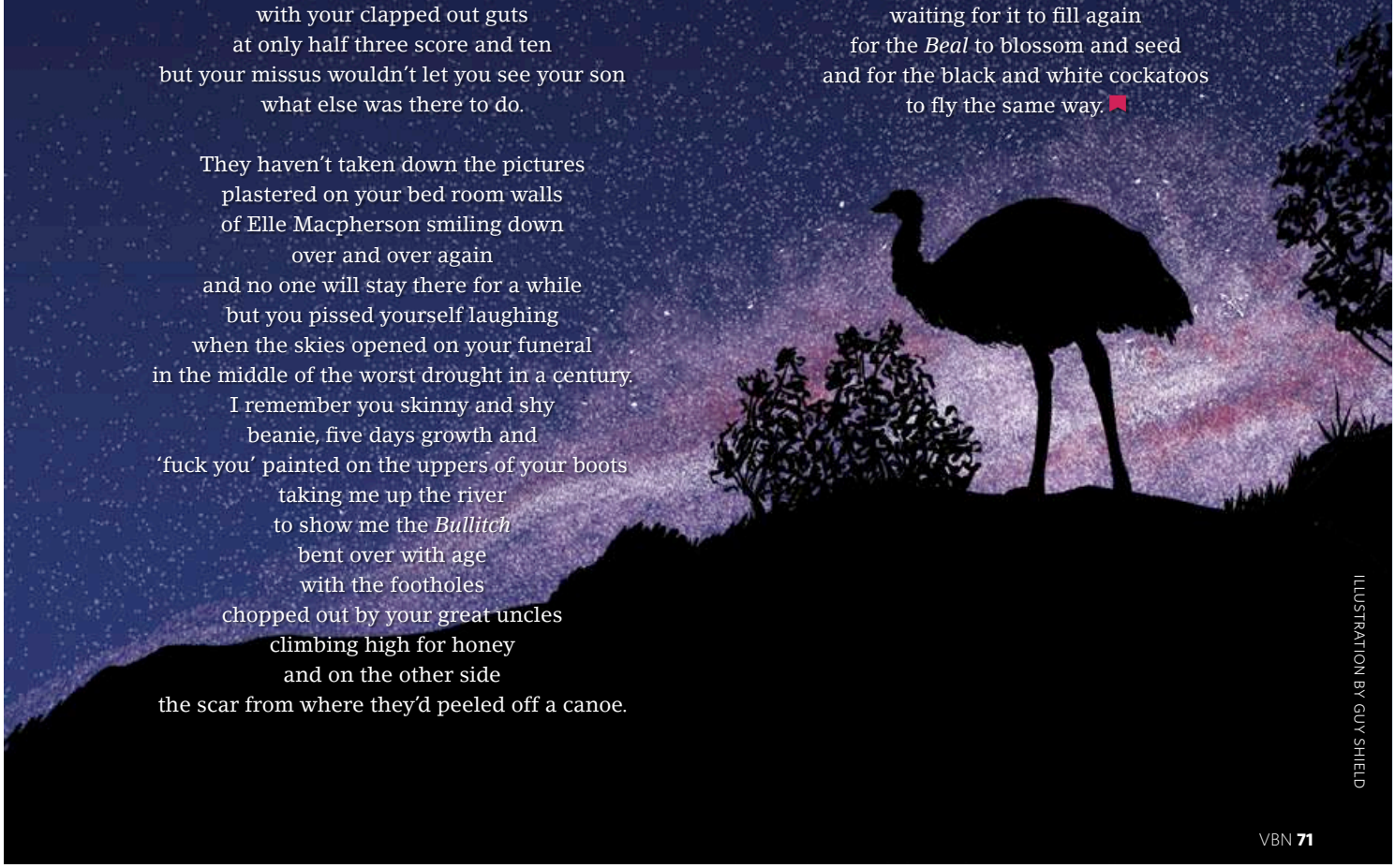


ILLUSTRATION BY GUY SHIELD

Wigs on Wheels

MICHAEL SIMON, CONVENER WOW

In my capacity as convener of Wigs on Wheels (WOW), I have had the opportunity of reading the Victoria Law Foundation's *Bike Law* booklet, which was published in December 2015. It is a booklet that provides new cyclists with a good knowledge of the road rules and instructions on how to ride their bikes safely. Some more experienced cyclists will also benefit from the information provided.

The numbers of cyclists has increased enormously in the past 10 years, with over one million Victorians now riding a bicycle every week. That often places bike riders and motorists in some conflict as to who has right of way on the roads. For example, on the weekends on Melbourne's scenic Beach Road, there is a large number of vehicles all seeking to use the existing two lanes in both directions. A lot of accidents occur on that road partly due to a breach of road rules and partly caused by poor driving and poor cycling.

Australians have not been overly committed to cycling until recently, which has meant that many motorists believe bikes should not be ridden on 'their' road. That situation is exacerbated by constant complaints that cyclists don't pay road taxes. In Europe bicycles have been on the roads well over 100 years. Car drivers ensure that they wait until it is safe to overtake and the Europeans are much more likely to give way to cyclists. There are no calls for a bike tax to be imposed.

The Victorian legislation covering bicycles is not well known or understood by many cyclists. *Bike Law* will enable cyclists to become better informed and safer on the roads.

Currently there is a campaign to legislate that cars travel a minimum distance of one metre from a cyclist when overtaking, which is essential to avoid accidents caused by both bikes and cars travelling too close together. WOW encourages every cyclist to support that campaign.

In New South Wales the government has substantially increased penalties for not wearing helmets to $319. And the penalty for running a red light is now $425. From March 2017 there will be a penalty of $106 if a cyclist does not carry identification on them whilst riding. It is WOW's view that rather than impose fines, cyclists should be provided material such as the Victoria Law Foundation's *Bike Law* booklet so they are aware of their obligations and understand the complicated rules of riding.

On page six of the booklet there is a reference to obtaining bicycle

insurance. I recommend that insurance be taken out, or that cyclists join a bicycle network, which provides insurance if a member is injured, if a member injures someone else or if property is damaged by a member. WOW also recommends that all cyclists should have an ambulance subscription.

One matter not touched in the booklet is tram tracks. They are a curse for all cyclists especially in the wet. They should be avoided if possible, but if not then ridden over carefully. Whilst I am not in possession of any statistics, my experience tells me many Victorians have fallen whilst riding over Melbourne's tram tracks.

WOW highly recommends the publication and hopes that all cyclists carefully follow the advice it contains.

Safe cycling.

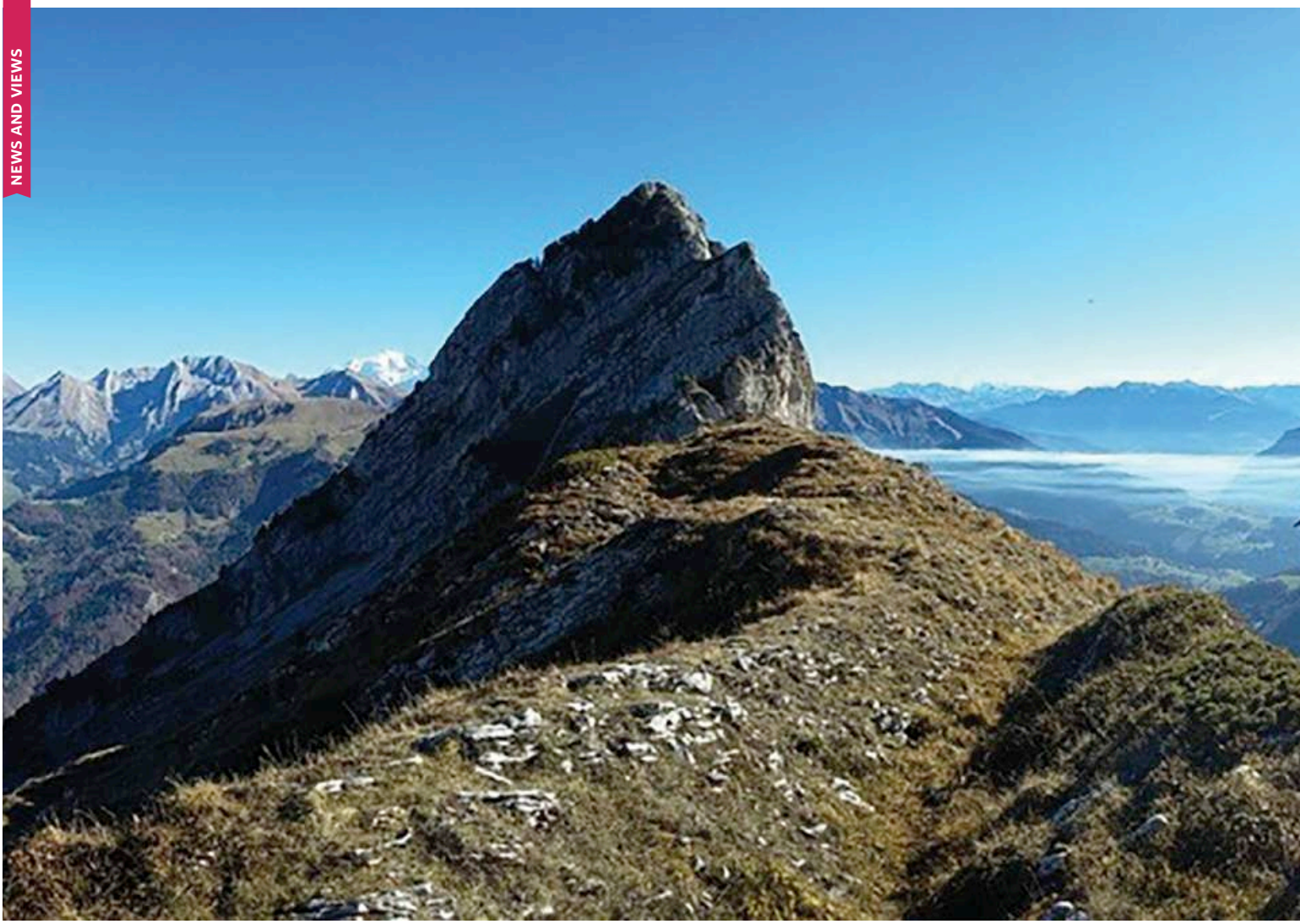
You can read and download Bike Law at http://www.victorialawfoundation.org.au/publication/bike-law/read

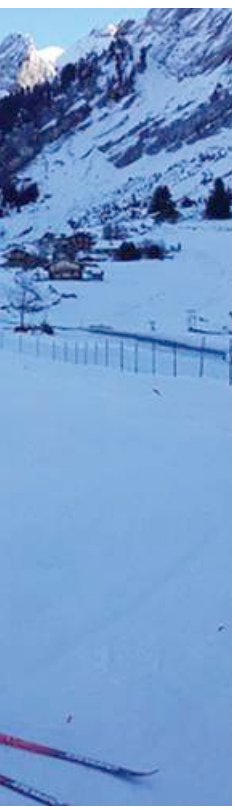
About Wigs on Wheels

Wigs on Wheels, or the Victorian Bench and Bar Bicycle Users Group, was established in 2008 with David Levin appointed its first convenor. The original purpose of WOW was to support cycling among members of the bench and bar and encourage the bar to provide more bike parking along with bathrooms for those who ride to work. WOW negotiated with Barristers Chambers and obtained additional bike parking in the carpark; bathrooms have also been added to Owen Dixon Chambers East on most floors. The group occasionally rode together, but now competes on a 'friendly basis' online, with each member recording the longest distance ridden, most elevation and highest average speed achieved each week. If you're interested in finding out more about WOW contact Michael.Simon@vicbar.com.au

Bike riding laws you may not be familiar with

- You must give way to cars turning left at an intersection.
- You must give way to cars leaving a roundabout.
- If there's a bike lane you've got to use it.
- You must face forwards and have at least one hand on the handlebars.
- You can't hold a mobile phone while you're riding.
- You can do a hook turn at any intersection - unless a sign prohibits it.
- 'Dinking' a mate on your bike is illegal.
- You have to keep to the speed limit.
- You need lights and a reflector if you're riding at night or in bad weather.
- You have to stop behind a tram at a tram stop.
- You have to give way to pedestrians on a shared path.





French Sabbatical

In the latter part of 2015, Michael and Penny Rush and their two children (Tom aged 9, and Sabina aged 8), spent five months living in France. *Victorian Bar News* asked Michael to contribute to this edition by reflecting on his experience.

In May 2006, after completing the readers' course and signing the roll of counsel, I waited quietly in chambers for my first brief to arrive. I soon lost patience. I began asking my mentor questions about his recent adventure around Australia with his wife and three young children. He spoke about the trip with such enthusiasm that, upon returning home that evening, I immediately told Penny about it and we began hatching a plan: in 10 years' time we would take a sabbatical and spend six months in Europe.

Over the subsequent years I became more circumspect about this idea. I established a practice at the Bar that I enjoyed immensely, and we had new responsibilities, including children and a mortgage. Penny soon realised that my doubts were creating inertia, and she took small, incremental steps to turn the idea of a sabbatical into reality.

It was in mid-2014 that I first spoke to colleagues in a serious way about taking time off. Fortunately, I was, at that time, working with silks and instructing solicitors who were both encouraging and obliging – despite the prospect that I might abandon them mid-way through the preparation of a case or on the eve of trial. Their advice to nominate a date and stick with it was right. There would always be a reason to equivocate and delay. As things transpired, a number of the cases I was working on settled or were adjourned.

We ultimately left for France in late August, 2015. We lived in a small town called Veyrier-du-lac, situated on the edge of Lake Annecy, about 5km from the larger and historic town of Annecy itself. It was ideally situated in Europe; about 45 minutes from Switzerland (and Geneva airport), a little over one hour from Italy, and a few hours to Germany or to Paris by TGV. Not only is the area visually stunning, but encourages a very active outdoors lifestyle, of which we were able to take full advantage.

Tom and Sabina attended the local primary school, which was a challenge for them but they coped admirably. The school days were quite long (8.30am to 4.30pm), and involved some adjustment from what they were used to in Australia, including having to sit down for a three-course meal each lunchtime (including foie gras on one occasion), learning to write in French script, and being introduced to a rather different pedagogical and disciplinary system.

It was through our children's school friends that Penny and I, in turn, met local families and became actively involved in village life. Because of Veyrier's proximity to Geneva, the town, despite its size, was home to many young professionals who were neither provincial in their views nor attitude to us. That enhanced immeasurably our sense of belonging and overall enjoyment.

Veyrier's proximity to Geneva and other parts of Europe also facilitated weekend travel to new and exciting places for Tom and Sabina. On one occasion, after Saturday morning soccer, we packed an overnight bag and asked the kids: "shall we have pizza in Italy tonight?" The suggestion was met with great enthusiasm.

There were two particular standout aspects of the trip. First, being able to spend time as a family without the distractions of work or the usual demands on our time (including the driving from one sporting event or birthday party to another). Secondly, for me and Penny, having unstructured time to ourselves. To wake up and, after walking the children to school, being free to decide whether to indulge in a book, hike in the mountains, have lunch together, or visit the market, among other possibilities.

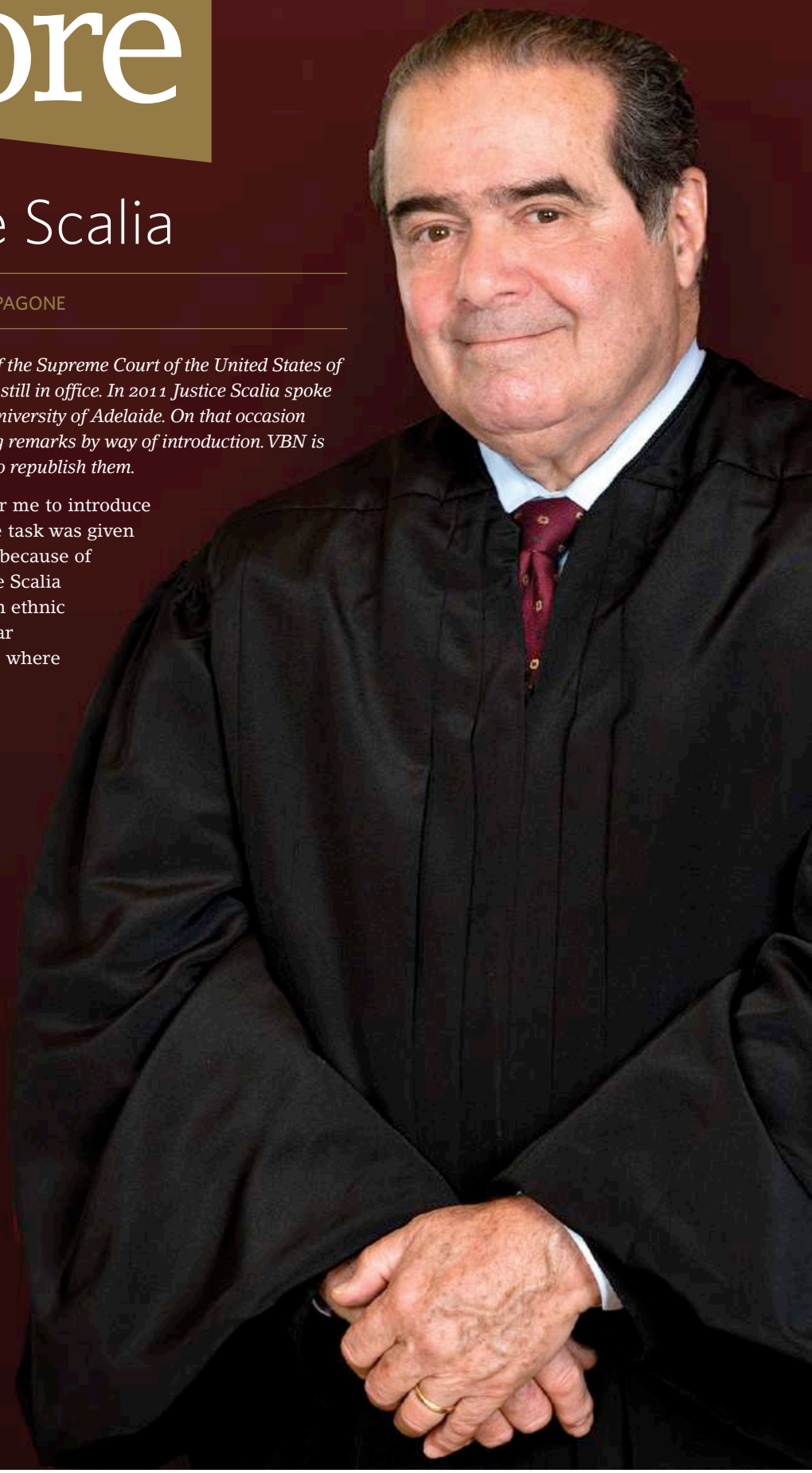
Our five months abroad passed quickly. I was fortunate to be able to return to work in January to some cases I had previously been working on. Other opportunities also emerged. It was apparent that I hadn't been much missed, and many barristers and solicitors didn't know I had been away. Penny too, having resigned from her job in July last year, has returned to work, and Tom and Sabina are happily reunited with their old friends and familiar surrounds at school and home. That all tends to suggest another extended trip, perhaps in a decade or so from now, might be something to start planning for.

BAR Lore

Justice Scalia

TONY PAGONE

The famous jurist Justice Antonin Scalia of the Supreme Court of the United States of America, died on 13 February 2016, whilst still in office. In 2011 Justice Scalia spoke at an advocacy conference hosted by the University of Adelaide. On that occasion Justice Tony Pagone delivered the following remarks by way of introduction. VBN is grateful for his Honour for permitting us to republish them.



It is a daunting privilege for me to introduce Justice Antonin Scalia. The task was given to me by Justice Tom Gray because of the coincidence that Justice Scalia and I both share a common ethnic background and a particular interest in advocacy: that, no doubt, is where my qualification for the task and our similarities end. What makes the task of introducing his Honour particularly daunting is that he comes with a formidable, and at times intimidating, reputation. It is also difficult to know what one might say about his Honour to an Australian audience. His Honour has a rich and complex history, and has made a rich and complex contribution to American jurisprudence. Some of that is likely to be known by some in an Australian audience whilst others may know little about him. A good deal of what the public thinks it knows about his Honour may also be misinformed and perceived through the prism of politics, partisanship and prejudice.

His Honour was born in New Jersey on 11 March 1936 and was an only child. His father, Salvatore, had arrived in America in 1920 at the age of 17 with his family from the Sicilian village of Sommatino. His father became a scholar of romance languages and taught his son, the future justice, "to value the words of a text".[1] His mother Catherine was born in the United States

but was also of Italian heritage. In 1974 his Honour became an assistant attorney general of the United States a few days before President Nixon's resignation.[2] In 1982 President Regan first appointed his Honour to a position on the appeals court in Washington DC and in 1986 nominated him for the seat on the US Supreme Court which he continues to occupy.

His Honour's role as a member of the United States Supreme Court, and perhaps his personality, have placed him in the centre of many of the great controversies of a great nation. Many here will have heard of the incident with his Honour involving then Vice President Dick Cheney and a duck shooting expedition, and of course most of us will be aware of some of the controversy surrounding the decision in the *Gore v Bush* case. Such controversies, and the role of the Supreme Court in the United States, appear to have made his Honour somewhat of a household name. Indeed, I came across an unexpected reference to him as I was thinking about what I might say in this introduction. At the time I was sitting in an airplane on a long haul flight pondering this event and paying little attention to a then recently released cop comic movie I had selected in the entirely accurate expectation that it would be undemanding. The film, "The Other Guys", has little enduring value but early in the film includes a reference to Justice Scalia. The reference to his Honour was fleeting but enough to show that his Honour is an icon to some as an influential conservative in modern American life.

There seems no doubt that his Honour has become an icon in the eyes of friend and foe. It is hard to pick up any reference to him, his judgments or his extra judicial writing that does not reflect a strong view for or against him. *The New York Times* of 3 January 2010 carried an article by Jeffrey Rosen which began:

> *Love him or hate him, Antonin Scalia has had greater influence on the way Americans debate the law today than any other modern Supreme Court justice. Conservatives hail Scalia as the founding prophet of their true faith – the Jurisprudence of Original Understanding – and the leader of the opposition to moral relativism and judicial imperialism in the age of Obama. Liberals scorn Scalia as a show-off and intellectual bully who is quick to betray his constitutional principles when they clash with his fervent belief as a crusader in the culture wars.*[3]

"Love him or hate him, Antonin Scalia has had greater influence on the way Americans debate the law today than any other modern Supreme Court justice."

Much that is written about the man often ascribes his views to causes that may not bear close scrutiny and which may brush aside the intrinsic strength of argument of his Honour's positions. There is, in any event, no doubt that we have before us a man of some significance.

The principal qualification for his participation in this conference, however, is not his political views or his role as a movie icon, but, rather, his skill, experience and advocacy of advocacy. His skills are legendary and by all accounts have at times been devastating.[4] There are many accounts of his Honour sparring with counsel in court and of the demolition of arguments presented by skilful advocates in their own right.[5] It is hard not to have an envious admiration for the fresh directness of some of the exchanges between his Honour and counsel appearing in the Court. In the 2007 case testing the constitutional rights of prisoners in the US naval base at Guantanamo Bay in Cuba his Honour's blunt and direct question to the former US solicitor general was this:

> *Do you have a single case in the 200 years of our country or, for that matter, in the five centuries of the English empire in which habeas [corpus] was granted to an alien in a territory that was not under the sovereign control of either the United States or England?*[6]

After more sparring counsel offered another argument introduced with "I'll take one more chance, Justice Scalia". To which his Honour promptly replied: "Okay, try them. I mean, line them up".[7]

A commitment to advocacy and the careful crafting of words is not new. His biographer records accounts by his Honour's colleagues from the 1970s of his Honour (then a young lawyer working in the Nixon administration), with fountain pen fussing and fussing over language.[8] His ease and mastery of words, and of their expression, create powerful and effective images that impact like a stealth bomber. His criticism of the use of legislative history to derive the meaning of a statute provides an example. In a speech given in the mid-1980s his Honour noted that the use of legislative history as a technique for statutory interpretation was relatively new to the United States common law adding:

> *Some creatures that seem pleasant and tractable in their infancy – tiger cubs, for example – are better abandoned when they reach their full natural development. Now that legislative history has reached its adulthood, perhaps it is time to reconsider whether we want to live with it.*[9]

His Honour may not have used many words in that passage, and his technical legal analysis may have been economically brief, but what was conveyed in those few words was a sense that a technique of legislative interpretation was both dangerous and uncontrollable but that its supporters may see it naively as friendly and tameable.

Such command of language has had a powerful effect upon US jurisprudence during his Honour's

> “Such command of language has had a powerful effect upon US jurisprudence during his Honour’s tenure on the Supreme Court.”

tenure on the Supreme Court. A dominant theme in US constitutional jurisprudence has been the extent to which the written instrument must be read to give effect to its original intent.[10] In some respects the kernel of that debate was put by Justice Scalia when he asked rhetorically: Would anyone vote for a constitution which said:

> *Those general norms set forth in this document … do not refer to the people’s current understanding of what is embraced by those terms, but rather shall bear the meaning assigned, from time to time, by unelected and life tenured committees of lawyers.*[11]

By referring to these passages I would not wish to be thought to be agreeing with him. Whether I do or not is, of course, wholly irrelevant. My point is rather to draw attention to the skill with which his Honour directed debate and analysis by the choice of words and by their expression.

It is a skill that his Honour has exercised with legendary wit and self confidence. His biographer recorded an exchange between Senator Specter and Justice Scalia before his confirmation hearings. His Honour was making a courtesy visit to the Senator before the hearing and the Senator had thought of asking the nominee a question that might stump him. The question was, “What is the difference between a shifting use and a springing use”. The nominee’s answer as recorded by Senator Specter was as follows:

> *Well, I’ll tell you, Senator. It’s like these two guys who were riding in taxi cabs that had a collision in mid town Manhattan. And while the drivers were exchanging information, the passengers started to talk. And one said, “What do you do?”. And the other guy said, “I’m a lawyer”. The first passenger said, “Hey that’s interesting. So am I. Where do you work?”. “I work on Wall Street”. “Hey, you know, I do too. Which firm?”. The other passenger named a firm. The other passenger rejoined that he worked there also adding “I’m in property law section”. “I’m in property, too. What do you do?”. “Shifting uses”. “Well, that’s why I don’t know you: I’m in springing uses”.*[12]

According to Specter the answer had the effect of making him forget the question. It also had the effect, through humour and personality, of controlling the discussion.

A few years ago, Justice Scalia joined with Professor Bryan A Garner to co-author a book on advocacy.[13] In it the authors provide valuable guidance on the art of persuasion by unpicking and laying out for view and analysis the techniques, elements and material which together make up the process of persuasion. It provides an invaluable guide for advocates in any jurisdiction. The book reveals a deep and close attention by the authors to advocacy in all of its detail and precision. The one omission, and it is a large omission, is the absence of any discussion or advice about the single most important skill of advocates: ambush and surprise. I only mention that because in these introductory remarks about his Honour I have not been able to foreshadow what his Honour may be saying to us: that is to be our surprise and in that tactic we see again his Honour’s great mastery and skill of the art. We are very privileged indeed to be hearing from someone who has made so close a study of the art and who himself has been so effective a practitioner of the art.

1 Joan Biskupic, *American Original* (Sarah Crichton Books, 2009) 17.
2 Ibid 33.
3 Jeffrey Rosen, “A Man of Influence,” *The New York Times*, 3 January 2010.
4 E. Lazarus, *Closed Chambers* (Random House, 1998) 276.
5 Biskupic, above n 1, 213-15, 300-17.
6 Ibid 311.
7 Ibid 311.
8 Ibid 89.
9 Ibid 94.
10 Antonin Scalia, *A Matter of Interpretation* (Priceton, 1997).
11 Quoted in *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1, [772] (Callinan J).
12 Biskupic, above n 1, 118-9.
13 A. Scalia and B.A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson/West, 2008)

A step back in time

From the archive of past editions of *Victorian Bar News*.

From the Winter edition of Victorian Bar News, 1981:

THE JABOT

We were very taken with the sight of Gibbs C.J. on the cover of Autumn '81 Bar News wearing his jabot. Was it really so much more convenient than the butterfly collar and bands? Sir Harry apparently got the idea of the jabot from judicial collegues in South Africa. On his return he canvassed the idea amongst his brethren.

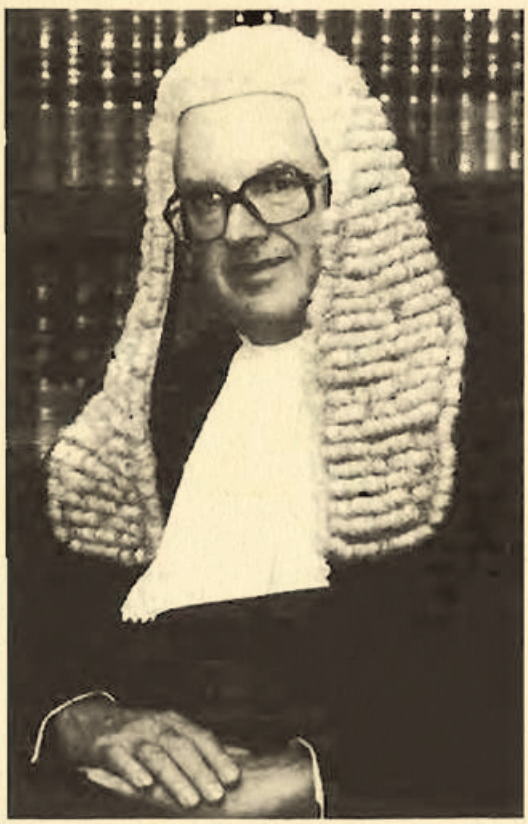
Lady Aickin ran some up by way of experiment. After implementation of the Justices' suggestions, she developed the design presently worn by the High Court bench.

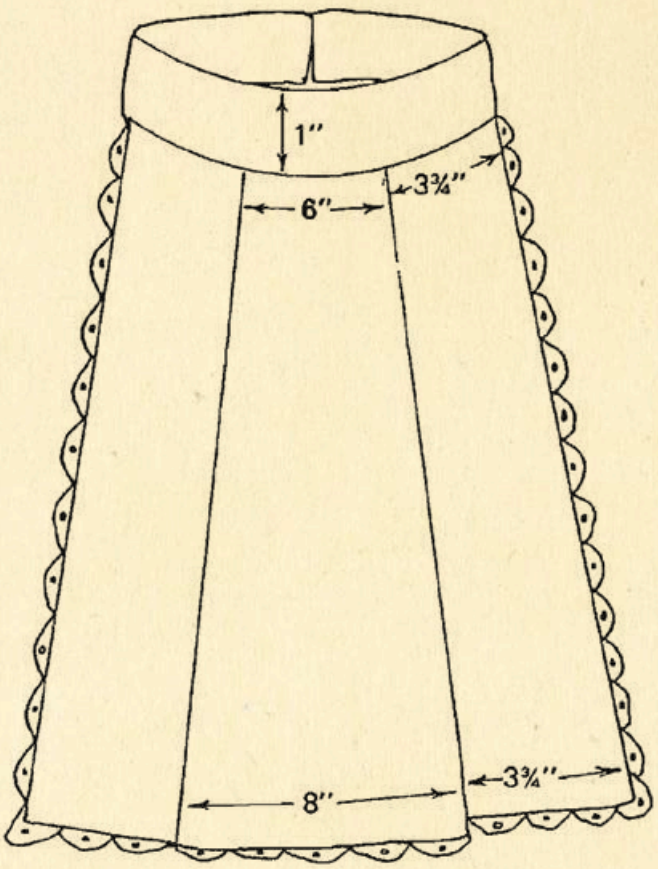
She has been kind enough to send the pattern to us.

Lady Aickin explains that the great advantage of the jabot is that no special shirt is required. Presumably one could wear under it a T -shirt or no shirt. The size of the neckband suffices for a collar. It is highly recommended for those who expect to fit multi luncheon engagements between court appearances. It would then be simply a matter of jabot off, tie on.

We understand that Mr. Ravensdale, the regalia man, sells the jabot for $22.00

Will the jabot be worn by members of the bar assuming its advantages? That depends of course of its reception by the judges on its being first worn. Judges assume the power to regulate the dress of those who appear before them. Horrific stories have filtered through, of English barristers here wearing garb acceptable in British courts being taken to task because a judge picks up a stripe or two in the small part to be seen of the body of the shirt material.





Pleat is ¼" deep throughout

From the Winter 1981 edition of Victorian Bar News:

A NECESSARILY SHORT HISTORY OF WOMEN AT THE BAR

Amidst the 300 pages of Arthur Dean's "A Multitude of Counsellors: A History of the Bar of Victoria"[1], the topic of women at the Bar is covered definitively as follows:-

> "This period (1921-1939) marks the arrival at the Bar, of the first woman Barrister. Mrs. Joan Rosanove signed the Roll in 1923, but she returned to solicitor's practice in 1926, to return to the Bar in 1949, and she has since remained on the Roll, taking Silk in 1965. Miss Beatrice McCay signed the Roll in 1925, but she left on her marriage to Mr. G. Reid, the present Victorian Attorney-General. Miss Marjorie King signed the Roll in 1932, but she, too, married and left the Bar."[2]

The author's succinct coverage of the topic is not surprising given that the work was published in 1968, at which time only eight women had ever signed the roll as Barristers in Victoria and accordingly, did not then constitute a class worthy of definition or analysis.

Joan M. Rosanove was admitted to practice on the 2nd day of June 1919 and was the first woman to sign the Bar Roll on the 10th September 1923. She took No. 207 on the Roll. Her biographer, Isabel Carter in "Woman in a Wig: Joan Rosanove, Q.C."[3] records that her first appearance was in a divorce application in the Practice Court, some seven weeks after signing the Roll and that it was reported by the "Evening Sun" as follows:-

> "Looking very attractive in a neat bombazine gown and wearing the traditional wig and white bands, Mrs.Joan Rosanove, nee Lazarus, caused quite a flutter in the Practice Court today when she rose to make an application to a pending divorce suit.
>
> There are many legal ladies in practice in Melbourne but rarely is one of them seen in Court".

Another paper noted:

> Looking trim and business-like, and not the least bit incongruous, Mrs. Rosanove, nee Joan Lazarus, appeared as Counsel in the Practice Court today.
>
> Her brother barristers cast approving glances upon her as she strolled into Court in the conventional wig and gown of the profession. Later, when she argued her case before Mr. Justice Mann, admiration of her eminently legal mind was added to admiration of her appearance.

It was frankly admitted that she was there on terms of equality - even superiority in many cases - with members of the stronger sex.

"In her first High Court appearance, as a young barrister, Mrs. Rosanove's unique position at the Victorian Bar was summed up with the concise wit, which was her hallmark. As only junior Counsel appearing without a Leader and in response to playful questioning by a senior member of the Bar to the following effect, "And with whom is my learned friend appearing?" she replied "I am appearing with myself. I am the leader of the female Bar".[5]

On the 23rd April 1926, Joan Rosanove's name was, at her own request, removed from the Bar Roll. She recommenced practising as an amalgam at Westgarth, until signing the Roll again subsequently, as Number 428 on the 7th October 1949.

During her absence, only two other women had joined the Victorian Bar. Beatrice (Bixie) W.McCay, had signed the Bar Roll on the 10th June 1925 and was number 224 on the Roll . Miss McCay remained at the Bar for only a few years, the entry beside her name on the Roll notes simply:-

> "Married. Mrs. G. Reid. Died 14/6/72."

Margery King joined the Bar on the 11th May 1932 as number 290 on the Bar Roll. She was removed from the Roll at her own request on the 10th March 1939. She too had married.

Upon her return to the Bar in 1949, Joan Rosanove read with Edward Ellis. When he subsequently moved to practise in Western Australia, she took over his room in Selborne Chambers, where she had been unable to obtain accommodation during her previous time at the Bar. Her first case, upon her return, was a few days after signing the Roll. She appeared in the Divorce Court before Mr. Justice Dean with whom she had been admitted to practice in 1919.

In 1959, Allayne Kiddle signed the Bar Roll (Number 599). It is noted that she transferred to the non-practising list on the 21st July 1966.

M.C. (Molly) Kingston (Number 655) admitted to practice in 1933, signed the Roll on the 8th February 1962 and read with Asche, now Mr. Justice Asche, Senior Judge of the Family Court of Australia. She enjoyed a busy practice until her retirement of the 30th November 1978. It was during this period, on the 16th November 1965 and after many applications, that Joan Rosanove became Victoria's first (and to date, only) female Queen's Counsel. (In South Australia, Roma Mitchell had taken Silk in 1962 to become Australia's first female Queen's Counsel, and later in 1965, she became the Commonwealth's first female judge.) It was also during this period that what had previously been a mere trickle of women commencing to practise at the Victorian Bar, became a, steady, though modest, flow.

Anne Curtis signed the Bar Roll on the 25th July 1963, "resigning"

(according to the notation beside her name on the Roll) on the 21st April 1966. Then followed Lynette R. Opas who, signing on the 12th October 1967 as Number 832 on the Roll, is currently the most senior practising female barrister at the Victorian Bar. Like Kingston, Opas read in the chambers of Asche.

On the 21st March 1968, Paulette D. Parkinson, (nee Bisley) joined the Bar. Two more women joined in 1970, one Fay M. Daly who remains in active practice, the other R.M. Armstrong, a parliamentary Counsel. In November,1971, Jan Lewis (later Wade) signed the Roll as a Parliamentary Counsel. She remains on the Roll although she was, on the 9th November 1979 appointed Commissioner for Corporate Affairs. Shortly after, in December 1971, Katherine P. Hurst joined the Bar. She is most remembered walking with her two German Shepherd dogs between chambers and the flat she rented in Lonsdale Street, until her death in May 1976.

In 1972, Mary Baczynski, B. M. Hooper and Margot Rosenbaum signed the Bar Roll, the latter being removed at her own request on the 27th October 1977. BA Cotterell and L.Lieder commenced in 1973, Marie McRae in 1974 and J.L. Sparks, Betty King and Margaret (R.M.) Lusink (Joan Rosanove's daughter and Mrs. Justice Lusink on the Family Court of Australia since 1976) each signed the Roll in 1975.

Since 1975, there has been a relative inundation of women joining the Bar. For the first time in the history of the Bar, consistent numbers of women have commenced practice. In 1976, seven women signed the Bar Roll, a further four women in 1977, eleven in 1978, seven in 1979, thirteen in 1980, and to date, seven in 1981. There are currently 53 women on the Roll in Victoria.

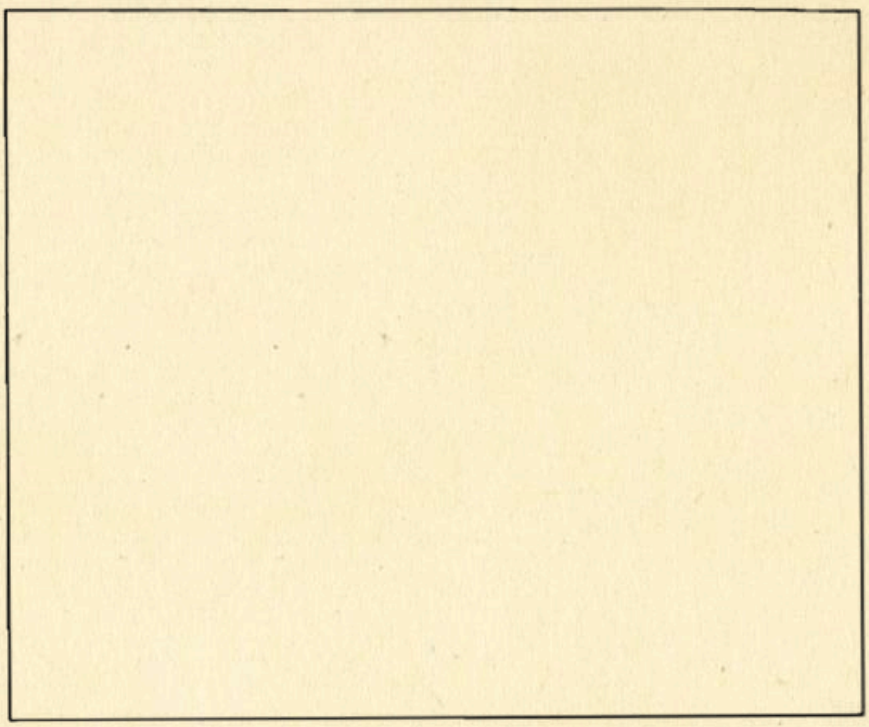
The Law Institute of Victoria has not compiled statistics as to the number of women practising as solicitors in this State, in the past or presently . Whilst it appears that, compared with their male colleagues, a disproportionately low percentage of women admitted to practice in this State has in past joined the Bar. The continuing increase in the number of women graduates, together with the vast and consistent increase in the number of women joining the Bar during the past six years, suggests a healthy and irreversible trend to the contrary. The natural extension of this trend is undoubtedly that the number of women at the Bar in Victoria, will in the near future, be directly commensurate with the number of women admitted to practice in Victoria.

The sudden swell of women at the Bar in recent years is evident. What a purely empirical study does not reveal, however, is the changing attitude of women and to women, at the Bar. Whilst in the past female barristers had been expected and indeed may have expected, to practice exclusively in the area of family law, such is no longer the case, as women begin to excel in any chosen area of practice. Similarly, whilst almost folkloric stories abound of women barristers in lace collars, or coloured stockings not being "seen" by some members of the judiciary, robing room dilemmas and discrimination of every genre, such will necessarily fade as by sheer force of numbers woman at the Bar are no longer a recognisable minority group. One can take heart from the Bar Dinners of 1980 and 1981. If in 1980, Mr. Junior Silk commenced with "Gentlemen....." and in 1981,with the inclusion of "Bar persons....."one can look forward to 1982 for a simple and apt "Members of the Bar. ....".

DESSAU

1. FW. Cheshire Publishing Pty. Ltd. 1968
2. ibid. at page 192.
3. Lansdowne Press Pty. Ltd. 1970.
4. ibid. at page 34.
5. ibid. at page 36.

CROC. IS NOT WELL
SO PLEASE DRAW YOUR OWN CARTOON BELOW



Back of the lift
Adjourned Sine Die

Victorian Bar News *acknowledges the retirement of the Hon. Michael Rozenes AO QC as Chief Judge of the County Court. A tribute will be published in the next issue*

Federal Court of Australia

The Hon. Justice Shane Marshall

Bar Roll No. 1672

On 21 November 2015, Shane Raymond Marshall retired as a judge of the Federal Court of Australia after 20 years on the Court—one of the longest periods of service since the Court was established in 1976.

His Honour was educated at that rich source of legal talent: St Bede's College, Mentone (think Justice Tony Cavanough, Justice Kevin Bell, Judge David Brookes, Neil Young QC, Tony Southall QC, Michael Fleming QC).

After completing degrees in law and economics at Monash University, where his Honour's thesis was on the topic of discrimination on the grounds of union membership, he served articles at Maurice Blackburn & Co and practised as a solicitor before signing the Bar Roll on 19 November 1981.

With that background, it is perhaps not such a surprise to learn that his great-great-grandfather, Peter Alexander, fought alongside Peter Lalor at the Eureka Stockade and died of wounds received.

His Honour's appointment to the Federal Court in 1995 coincided with appointment to the short-lived Industrial Relations Court of Australia. (Fortunately the concept of super-specialised courts, like fairground booths, seems to have been abandoned.)

His Honour's work on the Federal Court was largely in the industrial area, although he sat on important environmental cases in Tasmania and a major native title case in Western Australia.

In recent years he was the Federal Court judge responsible for Tasmania and was very popular with the profession and court staff "down south".

In the words of Law Institute of Victoria President Katie Miller, speaking at his farewell ceremony last November, as a judge his Honour was "fair, courteous, respectful and smart", a verdict that would be echoed by members of the legal profession who appeared before him.

In the course of his judicial work, his Honour became much involved with legal and judicial education in Timor-Leste. His Honour has also spoken out frankly on the largely overlooked problem of mental health issues in the legal profession and the courts.

In his spare time his Honour is a supporter of the Collingwood Magpies.

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.*

I scoured my thesaurus to find an adequate adjective: "keen"? "avid"? "zealous"? "fanatical"? "maniacal"? None seemed to do justice to his devotion to the black and white.

It may be no more than a dream, but perhaps one day Collingwood may, like South Melbourne and Fitzroy, leave Melbourne. It could become the first international AFL team, playing as the Dili Dashers.

The Bar wishes his Honour a long and active retirement.

PETER HEEREY

Supreme Court of Victoria

The Hon. Justice Betty June King

Bar Roll No. 1177

Betty June King QC retired as a judge of the Supreme Court of Victoria on 14 August 2015.

Forty years earlier, at the age of 24, her Honour had become the 24th woman to join the Victorian Bar.

Ironically, her Honour gained a measure of celebrity during her 10 years' service on the Victorian Supreme Court for preventing the television series *Underbelly* from airing during the trial of one of its protagonists, Carl Lewis. (Her Honour later spoke out against prominent defendants, their family members, and judges being treated as celebrities.) For this, and her prohibition of the airing of an episode of *Today Tonight* featuring Judy Moran and Carl Lewis's mother during the trial of Evangelos Goussis for the murder of Lewis Moran, when addressing the jury trying Goussis's case, she called herself the "queen of banning things".

That self-deprecating label comes nowhere close to encapsulating her Honour's distinguished career. But to stay on banning for a moment: in a rare interview given to the Young Lawyers Section of the LIV, her Honour recalled being thrown out of court for wearing a pale green suit with matching stockings and shoes.

Her Honour was educated at University High School. She then studied law at Melbourne University. She joined the Bar in the year following her graduation.

Her Honour became the first female prosecutor in Victoria in 1986 and was later appointed the first female Commonwealth prosecutor. In 1992 her Honour was appointed Queen's Counsel. She was once again among the first women to obtain the distinction. During the late 1990s, her Honour became a member of the National Crime Authority and chaired it during her commission.

In 2000, her Honour was appointed as a judge of the County Court of Victoria. Her Honour served in that role until her elevation to the Supreme Court of Victoria on 21 June 2005.

At the end of her interview with the LIV, her Honour remarked, "Unprepared is the worst thing you can be"; then she added, "And don't forget to shine". No doubt her Honour will continue in this spirit in her life after the law. The *Victorian Bar News* joins with the Bar in congratulating her Honour on her retirement.

VBN

Silence all stand

Supreme Court of Victoria

The Hon. Justice Andrew Keogh

Bar Roll No 3271

Justice Andrew Keogh is the youngest of six children to Kathleen and Victor Keogh. He was educated at St Joseph's College, Mildura, before moving to Melbourne to study economics and law at Monash University.

After graduating, his Honour cut his teeth as a lawyer in country New South Wales and Victoria, practising there for more than a decade before coming to the Victorian Bar.

His Honour commenced the Bar readers' course in September 1998, reading with Tim Tobin..

In his early days at the Bar his ability in the VCAT jurisdiction earned him the sobriquet 'The Professor'. On any given day, he would have multiple briefs in more than one list, and likely in all five. His prominence in that area led to the introduction of the 'Keogh amendment' limiting the number of lists in which a practitioner could be briefed on the one day.

Throughout his time at the Bar, Justice Keogh's understated style was used to maximum effect. His calm, forensic cross-examination undid many a witness, drawing a sequence of concessions before the end point dawned on the witness by which time it was, of course, too late.

His Honour took silk after only 11 years, in 2009. His last major case was the Kilmore bushfire class action, *Matthews v AusNet*, which at nearly half a billion dollars was the largest class action settlement in Australian history. The case was massive and complex, legally and factually. Before the settlement, the litigation involved a fiercely contested 16-month civil trial.

At his Honour's welcome, he described it as a "once in a career" case that was "near the death of him". His Honour was instructed by the plaintiffs and his role was primarily focused on the scientific and technical expert evidence, on which he was opposed by Jonathan Beach QC, now Justice Beach of the Federal Court.

That scientific evidence involved 10 experts, many of whom were the international leaders in their field, covering areas as diverse as metallurgy, fracture mechanics, civil engineering and involving very advanced modelling. It was of such extreme complexity to warrant the trial judge, Justice Jack Forrest, appointing two eminent independent scientific expert assessors to assist him. Keogh SC – it might be said unhindered by a formal science education – managed to master the technical details of the case to the admiration not only of his colleagues but also such that after the trial he received congratulations from one of the eminent experts instructed by the primary defendant.

His Honour made a very significant contribution to the Bar, serving on the Committee of the Common Law Bar Association for 10 years. He also served on the Lennon's List Committee, including through some challenging times. He chaired that Committee from 2013.

His Honour was always gracious, generous and approachable. His chamber's door was described as a revolving one given the many barristers that would drop in for advice and guidance. He was an excellent mentor, always willing to help and offer sage advice.

Outside of the law his Honour is a keen runner, cyclist and tennis player. He is also ferociously competitive at table tennis and his joy in victory has been described by some as unjudicious. His Honour is married to Rebecca Dal Pra of our Bar. He has three children, none of whom have followed him into the law, instead choosing engineering, the arts and aeronautics. He is immensely proud of them. His Honour is a committed Tigers fan, a clear indicator of his loyal and patient nature, good humour and tenacity, attributes that will no doubt serve him well in his new role.

MELANIE SZYDZIK

Federal Court of Australia

The Hon Justice Mark Moshinsky

Bar Roll No 3026

On Tuesday, 3 November 2015, Mark Moshinsky QC was sworn in as a judge of the Federal Court. At his Honour's welcome on 11 November 2015, Allsop CJ remarked that his Honour was the first Federal Court judge to be sworn in on Melbourne Cup Day and said that, in his opinion, this disregard for public holidays and horse racing were admirable judicial traits.

His Honour has outstanding academic qualifications. From being dux at Wesley College, his Honour completed a first class honour's degree at Melbourne University, winning the Supreme Court Prize in 1988. After being awarded a Rhodes Scholarship, his Honour attended Oxford University where he obtained a BCL in 1991, again with first class honours.

His Honour was an articled clerk and then a solicitor for 2 years at Arthur Robinson & Hedderwicks (now Allens Linklaters).

His Honour signed the Bar Roll on 30 November 1995 following the birth earlier that day of his first daughter, Danita (now a law student). The challenges of balancing family life with a busy practice were concepts not unfamiliar to his Honour given that he and his two brothers had grown up watching their mother, Ada Moshinsky QC (now retired), do just that throughout her successful career.

His Honour's particular interest in the areas of constitutional and administrative law led him to read with Susan Kenny (now Kenny J of the Federal Court).

His Honour's practice flourished from the start and he very quickly became a favoured junior of many of the leading silks at the Bar.

His Honour's abilities as a superior court advocate in his own right were also demonstrated very early on in his career, including appearing unled (in 2001) against a leading silk and prevailing in an application heard over 6 days before Warren J (as she then was) and making (in 2002) the reply submissions in the High Court in the case of *Austin v The Commonwealth* due to his leader in that case being appointed to the Supreme Court during the interval in the hearing of that matter. His Honour's leader was Geoffrey Nettle QC (now Nettle J of the High Court).

In 2007, after 12 years at the Bar his Honour took silk and seamlessly transitioned from a leading junior to a leading silk. In the short time that he was able to take readers, his Honour had four, (Michael Borsky, Michael Rush, Aaron Weinstock and Albert Dinelli).

As silk, his Honour appeared in the Supreme Court, the Federal Court and the High Court in matters in the fields of constitutional law, administrative law, taxation, superannuation, competition law, intellectual property, human rights and commercial law. His Honour's experience and areas of expertise made him eminently suitable for appointment to the Federal Court. The many notable cases in which his Honour appeared, both as a junior and then as silk were referred to in the addresses given by the profession at his Honour's welcome and are not repeated here. A visit to the Federal Court website to read the transcript of the welcome reveals not only details of these notable cases but the humility and modesty shown by his Honour in his response.

His Honour's final appearance as silk was in the 2015 Victorian Royal Commission into Family Violence where he appeared (with two juniors of our Bar) as counsel assisting the Commission. The Commission, chaired by the Hon Marcia Neave AO

(formerly Neave JA), heard evidence from some 219 witnesses over a five week period.

In addition to his busy practice, his Honour made a significant and sustained contribution to the Bar. His Honour was a member of the Bar Council from 2006 to 2011 and its Chairman from 2010 to 2011. During his Honour's time on Bar Council he was involved in the development of a five year strategic plan for the Bar, the preparation of a report on the civil justice system and the purchase of Owen Dixon Chambers West. Significant projects during his year as Chairman of the Bar Council included the introduction of a revamped Bar readers' course, a review of the clerking system and the holding of the inaugural Victorian Bar CPD Conference.

His Honour was also a reporter for the CLRs from 1998 to 2007 under the editorship of Jim Merralls AM QC. Indeed, his Honour is the 25th reporter of the CLRs to be appointed to a superior court.

While conducting a busy practice, his Honour also found time to make a contribution to academic life through teaching at Melbourne University, including co-teaching as a Senior Fellow with Stephen Donaghue QC in both 2013 and 2015, a week intensive Masters Course in the aptly named subject *Judicial Power in Australia*.

Outside of the law, his Honour enjoys a very close family life with wife Sidra and their daughters Danita, Amira and Hannah of whom his Honour spoke with pride and admiration in his response. The closeness of his Honour's relationship with his parents, siblings, parents-in-law and extended family was also clearly evident at the welcome. His Honour and Sidra are vibrant and engaging conversationalists and share a keen interest in books and art.

His Honour is measured, disciplined, courteous and calm as well as being unfailingly polite and patient. In addition to having a disregard for public holidays and horse racing his Honour has the essential judicial traits of knowledge, wisdom and experience. All those who appear before his Honour will know that, whatever the result, they will be fully heard and that they and their clients will be treated with respect and courtesy.

His Honour's appointment took place a few months after his 50th birthday and followed a distinguished 20 year career at the Bar. His Honour has a strong and demonstrated commitment to public service. He will undoubtedly make a significant and lasting contribution to the Federal Court, of which the Court, the profession and the wider community will be the beneficiaries.

GREG AHERN

Federal Circuit Court

His Hon. Judge Joshua Douglas Wilson QC

Bar Roll No 2124

Dr Joshua Douglas Wilson QC signed the Bar Roll in March 1987 after having been associate to the Honourable Justice Marks and, before that, a solicitor with Arthur Robinson & Co (now Allens).

His Honour read with Ross Robson QC (now Justice Robson of the Supreme Court) and quickly developed a busy commercial practice.

The late 1980s and 1990s were heady days at the Commercial Bar and his Honour was at the centre of all that activity. It was not unknown for him to attend commercial list directions hearings on a Friday with at least six briefs under his arm. He would arrive in chambers early on a Friday morning and prepare a list of the briefs that he had that day so that he could keep track of the matters when they were called and the party for whom he appeared.

His Honour soon developed a reputation as a hardworking and astute advocate. That led to briefs in substantial causes and arbitrations. He was briefed to appear with John Digby QC (now Justice Digby of the Supreme Court) in the long-running commercial arbitration over the construction of Parliament House in Canberra. His Honour's skill and hard work led to many subsequent briefs as junior to John Digby QC.

His Honour was also a versatile advocate and was briefed to appear with Ross Robson QC in the Avco Financial Services licence hearing. This was a challenging brief, which required him to be across the minute detail of a vast number of loan files. His Honour's diligence and hard work ensured that his leader had all the material needed to obtain their client's credit provider licence. The Parliament House arbitration and the Avco licence hearing led to his Honour developing lifelong friendships with Ross Robson and John Digby.

Whilst maintaining a busy practice, his Honour also managed to undertake a Master of Law and then a PhD, with a thesis in extradition law.

He took silk in 2008 and quickly developed a broad leader's practice in commercial law, as well as common law. His Honour was a great contributor to the Bar through his teaching of advocacy to the readers' course and to the Victorian and New South Wales Bars, as well as teaching at the English Bar.

Whilst the Bar has lost an able and honourable advocate, the Federal Circuit Court has gained an astute legal mind, whose work ethic and fairness will be a great asset to that Bench.

STEWART M ANDERSON

His Hon. Judge Alister Ronald McNab

Bar Roll No 2005

Sometimes choirboys from St Pauls' cathedral become judges. Young Alister McNab did.

But not before becoming an accomplished musician, playing clarinet, flute and especially the saxophone. And spending most Tuesday nights at The Rising

Sun hotel in South Melbourne, lending his talent and passion to a sensational big band. Or playing with the Lex Pistols, or more recently the Melbourne Lawyers Orchestra. Along the way performing with the likes of Al Martino, Ricky May and James Morrison. Enthusing his many friends and family with his love of everything from the baroque to jazz.

So, too, he developed a passionate addiction to crime fiction, and much else. His friends regaled with observations of works by Jonathan Franzen, Nicholson Baker or David Sedaris. A copy of the *New Yorker* always on hand, or a work by William Morris on the Arts and Crafts Movement.

Epicurean interests arose. A Chinese cooking course with the famous Elizabeth Chong undertaken at her home. Equipment acquired and techniques perfected for the smoking of meats and fish. Sausage casings filled. A discerning familiarity developed with Melbourne's less pretentious restaurants. And becoming an aficionado of offal and founding patron of the (now defunct) North Melbourne Organ Meats Festival.

There grew a love of gardening and a knowledgeable appreciation of the layout and plantings of Melbourne's magnificent public parks and gardens, from which inspiration (and cuttings) were taken to create his own beautiful home garden.

A gap year included work at a pub in Aberystwyth Wales. It determined his future. Several men gathered at the bar wore immaculately tailored suits. On learning they were lawyers, young Alister had found his calling. Few can rhapsodise so lyrically about the functionality of the double-vented suit.

Then marriage to Lisa and the birth of three children: Stella (16), Daniel (14) and Roy (10). And the realisation that children teach as well as learn.

On 18 May 2016, Alister Ronald McNab was sworn in as a Judge of the Federal Circuit Court.

Braided together with his rich life has been a legal career commencing with articles at (then) Williams Winter and Higgs from 1986 to 1987. He was admitted to practice in 1988 and signed the Bar Roll in 1990 reading with Peter Murdoch QC.

His impressive practice has been a varied one. Commercial law, discrimination law, human rights, insurance, trade practices and especially industrial law. He appeared regularly in the Federal Court, Federal Circuit Court, Supreme Court, County Court, Magistrates' Court, the Industrial Relations Commission, Fair Work Australia and the Victorian Civil and Administrative Tribunal.

He is held in high esteem by all who know him in the profession. He was a popular and valued member of Aickin Chambers, attested to by his room there now to be used for conferences and called "The McNab Room". He was a fearless advocate, thorough in his preparation and attuned to the needs and concerns of his clients.

He shared his legal expertise with students through the lecture programs at the Melbourne Business School and lecturing in Indonesia on intellectual property through a Department of Foreign Affairs and Trade funded project.

He is a valued mentor and friend to many.

Judge McNab will bring a wealth of legal and life experience to the court.

We congratulate his Honour on his appointment, and wish him well.

DENIS MEEHAN

Her Hon. Judge Jillian Williams

Bar Roll No 4120

On 29 February 2016 Jillian Williams was sworn in as a Judge of the Federal Circuit Court of Australia, which, being a leap year, made it 33 years to the day since she was admitted to practice on 1 March 1983.

Born in Sydney at a time when women were not expected to seek achievements beyond the domestic sphere, her Honour had the benefit of a role model in her now 90-year-old mother, who forged a successful career outside of the home. Her parents' encouragement of focus and hard work has been pivotal in a life characterised by industry and dedication.

It is an admitted fact that as a student her Honour would read the dictionary as recreation. This love of words and reading saw her graduate from the University of Melbourne in 1982 with a Bachelor of Arts and a Bachelor of Laws.

Articled to the great Leon Gorr, a senior taxation partner at Herbert Geer & Rundle, her Honour began her career in commercial practice but her interest in human stories saw a gradual move into family law. As a solicitor her Honour had broad experience in both city and regional law firms, including as partner for many years with her husband John Williams, now barrister, in their law firm on the Mornington Peninsula. In private practice her Honour was a member of the Victorian Law Institute's Children and Young Persons Committee and a founding Chair of the Child Representative Subcommittee. All this while raising two children, establishing a successful local winery and reducing her golf handicap to an enviable 18.

In 2005 her Honour was appointed as a Registrar of the Family Court and the then Federal Magistrates Court. In recognition of her work ethic and diligence, her Honour was given the serious responsibility of Magellan Registrar, working with judges in cases involving allegations of sexual or serious physical abuse. Her Honour also served as Secretary of the Family Law Rules Committee, undertaking important policy and practical work with judges and the Commonwealth legislative drafting office.

Upon coming to the bar in 2008, her Honour read with Joe Melilli and Ian Mawson QC and swiftly established a busy practice, developing a reputation for carrying the pressures of difficult and complex cases lightly and with grace. The many Senior Counsel to whom her Honour was either junior

or opposed speak of their high regard for her meticulous preparation and fearless advocacy. As a barrister, her Honour was a generous contributor to the Bar, serving as chair of the Paul Holmes List Committee and serving in the Committee of the Family Law Bar Association.

The speeches at the welcoming ceremony recognised her Honour's intellect, integrity and compassion, qualities that made her a respected member of the legal community and will serve her well on the bench.

The Bar wishes her Honour success in the challenges of her new role and hopes that she continues to find time to enjoy the quiet of reading, golf and walking her dogs.

HELEN DELLIDIS

Vale

Victorian Bar News *acknowledges the death of Ross Ray QC, a former chairman of our Bar. An obituary will be published in the next issue of* VBN.

Thomas Victor Hurley

Bar Roll No 1548

Thomas Victor Hurley was born on 15 February 1952, the son of Thomas Henry Hurley and Yvonne Brandon (née Capon) Hurley. Tom was married to Shelley, his wife of 22 years, and was the father of Alexandra Kate, Thomas Samuel Martin and Emily Charlotte.

Tom grew up in Deepdene, holidaying at Point Lonsdale with brothers Richard and James, and sister Jenny.

Tom was educated at Glamorgan, Geelong Grammar, Toorak and Melbourne Grammar.

Tom studied law and commerce at the University of Melbourne, living at both Ormond and Trinity Colleges. Tom threw himself into all aspects of university life. He ran for the Student Representative Council and was elected. He became publicity officer for the SRC. He was elected to become the education vice-president of the Australian Union of Students. Tom was seen as a genuine person. Tom was able to straddle the various factions and was seen as a person of integrity.

Tom did his articles at Russell Kennedy and Cook. He was admitted to practice as a barrister and solicitor in March 1979. Tom came to the Bar and read with Roger Gillard QC, signing the Bar Roll in March 1980.

He was for many years the editor of the Victorian Administrative Reports and the High Court and Federal Court notes distributed to the constituents of the Law Council of Australia. He also edited the Federal Court judgments in the Law Institute Journal.

At the start of his life as a barrister, Tom was part of a group of young barristers on the sixth floor of Four Courts Chambers. He then was part of the tenth floor of ODCW from its inception in 1986 and remained there until his death.

Tom became stage manager for Tin Alley Players, with productions of Six and a Bit Wives of Henry VIII and Dr Jekyll & Mr Hyde.

In 1984, Tom stage managed the Bar Review, and made all the sets, revealing a hitherto unknown talent with his hands.

Tom's practice was general in that he would do all types of civil work throughout his career. As a result of his work as editor of the Victorian Administrative Reports, his practice tended in the last few years to be in immigration law, almost always acting on behalf of the refugee/immigrant. In doing this, Tom always acted with compassion and often pro bono. In 2012 he won the Ron Merkel QC award for pro bono work. This pro bono work often led him to the High Court, representing the applicant.

Whether as a barrister or colleague Tom always acted in his unique and most charming way with his unique personality. Even defending a rapist/murderer who had come to Australia as a 2-year-old, and was due to be deported at the end of his sentence, Tom would describe him as "not a bad bloke". Tom's "fault" was that he could see good in all people.

Tom's unique character and personality made him a personality of the Bar. The Bar and the legal profession have lost a character in the death of Thomas Victor Hurley.

ANDREW N. BRISTOW

The Hon. John Augustine Keely QC

Bar Roll No 508

John Keely was born on 2 October, 1925. He died on 21 December 2015. He was a good man, an outstanding barrister and an admired judge. Humble, cheerful, positive, courteous and respectful, he used his talents to the full. Never all that comfortable in the company of the exalted, he had great sympathy for ordinary men and women. His faith was his core, his family and the law his passions.

His father was a Clerk of Courts (later Prothonatory of the Supreme Court). After schooling at the Jesuits' St. Patrick's College in East Melbourne, John too went into the Courts Branch and, like a number of other Catholic boys, entered the law by way of a part-time course at Melbourne University while working in the Law Department. He undertook articles at Maurice Blackburn & Co., then was associate to Sir Raymond Kelly (Chief Judge of the Arbitration Court), then read with Cliff Menhennitt and he was away. It was not long before he established himself as a leading industrial barrister, appearing principally in the Conciliation and Arbitration Commission and the Industrial Court. He appeared in most of the National Wage Cases and many of the major industry cases of the 1960s and 1970s. In the Industrial Court he did union rule cases. He appeared with or against

many of the great barristers of the time: Daryl Dawson, Keith Aickin, P.D. Phillips, Oliver Gillard, Dick Eggleston and Dick McGarvie to name a few—all QCs and all destined for high office. John took silk in 1969. He never lacked work; governments, instrumentalities, big corporations and unions all sought his services.

John brought a powerful searching mind to all his work. His preparation was relentless: every fact verified, every hypothesis tested. On one occasion, having sent his junior home at 1am, he rang an hour later to inform him that he had found a major error in a graph and had instructed the eminent economist who had prepared it to redo it so it was ready for presentation later that morning. In industrial disputes, when in conference, John would make it clear that once the instructions were set in motion the client would need to commit to seeing them through right to the end. So armed, into battle; he loved the contest. His voice was deep and full of colour and he revelled in the interchange between Bench and Bar: firm, respectful, courageous. His cross-examinations were forceful, persistent and effective.

John was a founding judge of the Federal Court in 1977 and he served on it for 19 years. His first appointment was restricted to the Industrial Division, although later he also took an appointment to the General Division. Industrial law cases continued to be the ones he enjoyed most. John's judicial manner was kind and courteous, always giving counsel encouragement and time to develop their arguments. However, once again facts were probed, arguments tested, weaknesses exposed. He had an innate sense of fairness and was fearless in moving to prevent and remedy exploitation. If on occasion he used colourful language, it was no more than a reflection of the ardour of his spirit.

John and his remarkable wife Maureen had seven children. Their home was full of love and a sense of order and self-discipline. The children were encouraged to use their brains, to pursue knowledge and express themselves. Structured debate at Sunday lunch helped instil a commitment to help the less fortunate. That they have done so is perhaps John's greatest legacy.

PATRICK DALTON

His Hon. Judge Leo Lazarus

Bar Roll No 429

Leo Sydney Lazarus was born on 20 May 1922. He died on 26 February 2016.

Leo was educated at Melbourne Grammar School and the University of Melbourne. He matriculated at 16 and graduated BA (Hons) in Classics. Leo interrupted his law studies to serve in the 4th Brigade of the 2nd AIF. He saw active service in New Guinea and New Britain.

Upon graduation, Leo served his articles with his sister, Pauline Lazarus, in the firm of their late father, Louis S Lazarus in Collins Street, Melbourne.

Leo signed the Bar Roll in 1949 and read with Oliver Gillard, later Sir Oliver Gillard QC, a justice of the Victorian Supreme Court. Leo had an extraordinarily broad practice and devoted over 16 of his 27 years at the Bar to serve without a break on the Bar Council. At the time of his appointment to the County Court he was the Chairman of the Bar Council.

There were very few more popular members of the Bar in his time of service. This was principally because he was regularly consulted by fellow practitioners in a wide range of areas, given his depth of knowledge of the law, advocacy and tactics.

Leo served a further 18 years on the County Court and retired in May 1994.

Leo had a distinguished time as judge and barrister, but perhaps the thing that marked him out was his popularity with fellow barristers and fellow judges. He was very accessible in both roles as an adviser to colleagues.

Leo had a very wide range of interests including painting, a skill which he considerably honed in his retirement.

He was master to seven pupils, four of whom took silk. He was so revered by those pupils that until shortly after his retirement, they gathered with him annually to celebrate his life and their involvement with him. Such long-term involvement by readers is an extraordinary tribute to his generosity.

Leo's family invited the Bench and Bar to a farewell ceremony at the Essoign Club which was very well attended by approximately 70 members of his family, the Bar and the Bench. Given his retirement was 22 years ago, this was possibility the ultimate testament to the love and respect in which he was held by all those whose lives and practices and judicial roles crossed his path. His most outstanding characteristic was his generosity with his time and the depth of his wisdom.

RON MELDRUM,
ONE OF THE LUCKY PUPILS.

John Fraser Roberts

Bar Roll No 1548

John Roberts and I began at the Bar more or less together. We commenced our reading in Selborne Chambers and completed our reading in the new Owen Dixon Chambers.

Upon completion of our reading period, we together looked for rooms in Chambers. That was not too difficult in 1961, as the Bar had a new building and there were fewer than 200 barristers in active practice. We settled on the seventh floor. John took room 701; I had room 705.

John was a busy practitioner. He began in Petty Sessions but fairly soon developed a practice in County Court trials. In time, John took on personal injury work. Personal injury work became the greater part of his practice.

Apart from when one or other of us was away on circuit, or I was off

on some other activity, John and I spoke almost every day. I had an armchair in a corner of my room and I can still picture John sitting there. It was an almost daily occurrence. We discussed many subjects: our work, issues at the Bar, events in the wider world, our families and – almost always – "the bush".

Despite his busy practice John`s heart was always in the country. He grew up in northern Victoria. Between finishing school at Geelong College and starting his law course at Melbourne University, he spent a year or two jackarooing in the Western District.

In 1970 John purchased a small farm at Upper Beaconsfield. "Upper Beac" was from then on very frequently the subject of our discussions. Over time John expanded and developed his property. He ran cattle; prices, weather conditions and plans for further development became a staple of our discussions.

After some years John began to grow peonies. John travelled Victoria, collecting bulbs to add to his collection. He became something of an expert. In time he became a significant producer and his peonie blooms were sold at Victoria Market.

John was always busy. In addition to his practice and his farm he had a portfolio of investment properties; he was an astute investor. But the farm was always the top priority. On a Friday evening, when a few of us would be having a quiet drink and reflecting on the week, John would pop in, offer a quick goodbye and be off to Upper Beac.

At Christmas 1992-93 my wife and I were overseas. In January when I walked back into my room I saw John`s cup and saucer on my desk. Alongside was a note: it read "gone bush".

From that time on, John rarely came to the city. Our conversations thereafter were mainly by phone. John cared for his wife through long illness. After her death, he remained at Upper Beaconsfield until his own health impacted upon him. John died in November 2015.

I still have the cup and saucer.

GRAHAM HARRIS

Gonged!

Australia Day Honours 2016

Allan James Myers AC, QC
The Honourable John Michael Batt AM
Lionel Philip Robberds AM, QC
Dr Michael Charles Pryles AO
Dr Michael William Duckett White OAM

Other appointments

Arnold Kiel Loughman - appointed Attorney-General of the Republic of Vanuatu

Victorian Bar readers

MARCH 2016

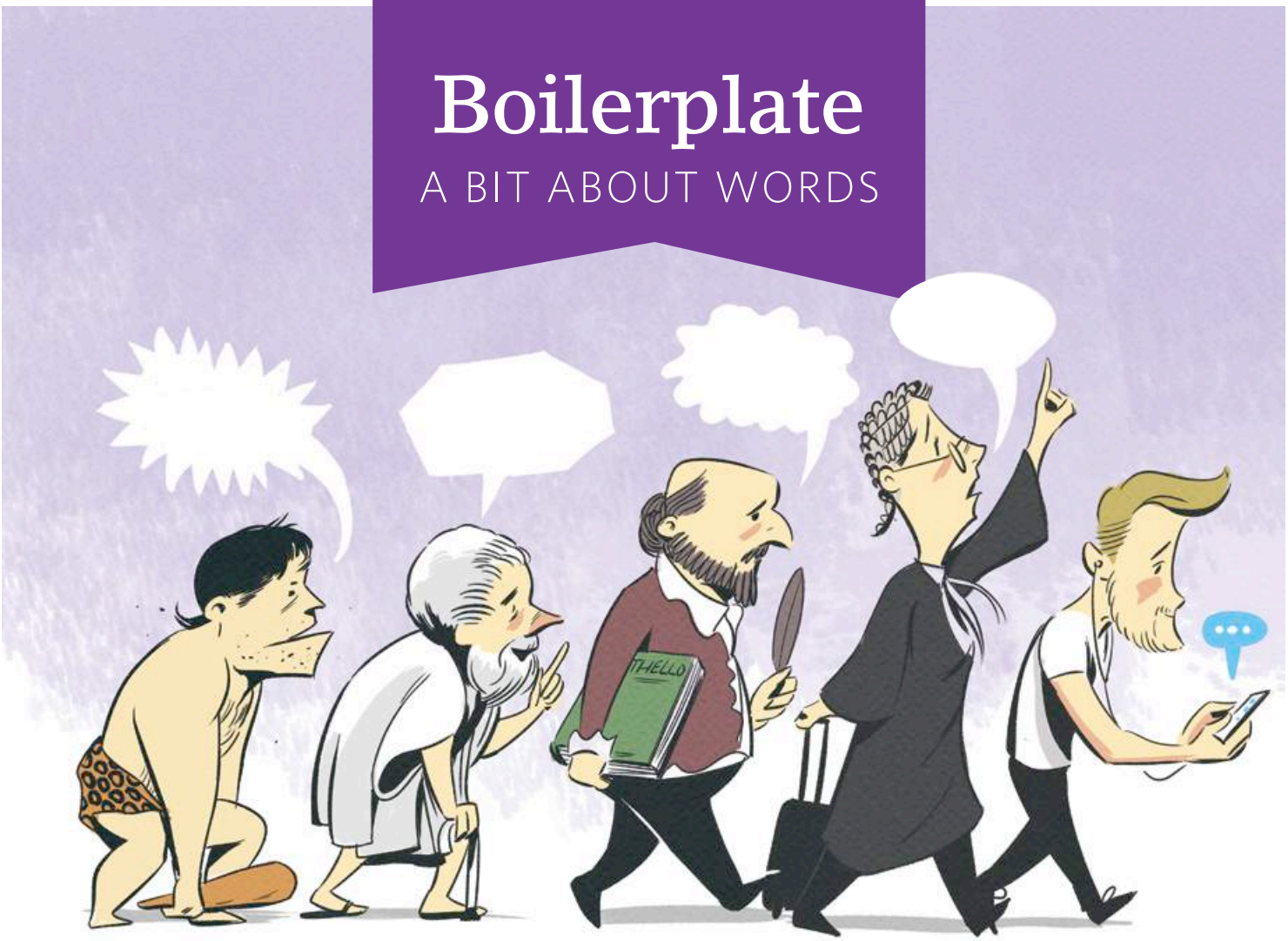
BACK ROW: James McComish, Laurence White, Patrick Donovan, Israel Cowen, Robert Forrester, Michael Allen, Gary Taylor, Adam Purton, Timothy Jeffrie, Marcus Finlay, Rachel Chrapot

MIDDLE ROW: Wendy Pollock, Jacqueline Papson, Julia Lucas, Jack O'Connor, William Thomas, Joel Ruffles, Gareth Redenbach, Daniel Kinsey, Christine Willshire, Thomas Storey, Rudi Kruse, Michelle Jenkins, Peta Smith, Catherine Fitzgerald, Anna Parker

SEATED: Naomi Lenga, Victoria Compton, Brett Harding, Lisa Mendicino, Marissa Chorn, Anna Lord, Simon Weir, Jennifer Cowen, Daniel Diaz, Rachel Waters, James Waters, Eliza Tiernan, Natasha Crowe

Boilerplate

A BIT ABOUT WORDS



Development of Language

JULIAN BURNSIDE

The use of language to communicate ideas is the defining characteristic of the human species. It is so much a part of our mental landscape that we rarely recognise how extraordinary language is.

The human race has achieved many remarkable things - we have discovered most of the basic principles which make the physical universe what it is. Euclid's geometry, Newton's mechanics, Einstein's relativity and Planck's quantum mechanics are all discoveries which shed light on the inner workings of the physical world which, in their own realms, are triumphs of the human intellect.

The capacity for language stands apart from these discoveries. There is no language inherent in the physical universe. Language is not a principle waiting to be discovered. Rather, language is mankind's own invention. As Samuel Johnson once said, "... words are the daughters of earth, but things are the sons of heaven".

How language evolved is a matter of speculation. It is tempting to think that the same neural architecture which permits or encourages language may also be associated with other forms of communication such as music and art. It is a striking fact that all human societies about which anything is known have this in common, that they have developed language, music and various of the visual arts.

At their foundation, each of these activities has a common core: the desire to communicate. Painting, sculpture, music and words are different modes of communication. It is interesting that the other senses - touch and smell - have not developed into significant modes of communication. Even though the sense of smell is governed by a much more ancient part of the brain than language, and must once have been very important to humans, it has not developed the sophisticated and subtle communicative powers of speech and vision.

ILLUSTRATION BY GUY SHIELD

(Those who are interested to pursue this line of speculation would enjoy *Perfume* by Patrick Susskind - a book which convincingly portrays a person for whom the sense of smell was more developed and more powerful than speech).

Given an impulse to communicate, and given vocal organs capable of a range of sounds, it remains profoundly mysterious that language has evolved in a way which permits subtle and abstract ideas to be communicated with great accuracy. It is one thing to postulate the development of verbal signs which denote such things as *danger*, *pleasure*, *dinosaur* or *tree*. It is much more difficult to explain the intellectual process which enables humans to conceive, understand and use verbal tags for such abstract notions as *love*, *philosophy*, *probability, mortgage*, *heaven* and *metaphor*.

The puzzle becomes even more teasing when you take into account the suggestion that language and experience are deeply inter-related, and in complex ways. Aldous Huxley and others have postulated, convincingly I think, that experience generates language; but language moderates experience. So, the Inuit have 16 different words for snow and can distinguish 16 different sorts of snow at a glance, because their experience makes the distinctions useful. We, who have only one word for snow (skiers have several more), have some difficulty in perceiving the differences between various types of snow, because we do not have the linguistic tags to mark the distinctions.

Edward de Bono did some interesting experimental work in this area. He showed a group of students various simple diagrams, which they had to describe unambiguously in words. The diagrams were all capable of being resolved into I-beam shapes. The I-beam quickly became the fundamental unit of description.

De Bono then produced a diagram which, although similar in appearance to the others, was not wholly comprised of I-beam shapes: it had some T shapes and some L shapes in it. The students, who had become adept at describing the diagrams in words, were incapable of completely describing this new set of diagrams. Their experience in the tests had taught them the language of the I-beam, but that same language prevented them from perceiving other similar, but different, configurations.

> “It may be that my internal experience of red matches your internal experience of *middle C played on a piano*.”

As a matter of common experience, it is difficult to form and manipulate an idea for which we have no verbal tag. Most professional jargon and private code are an attempt (conscious or not) to assign verbal tags to ideas or experiences which have a shared relevance within the limited group.

Huxley speculates that language is a record of past experience, which limits future perception (see *Adonis and the Alphabet*). Those who have studied Einstein support his theory. Einstein did not speak until he was five years old. He was thought to be a backward child, which turned out to be unduly pessimistic. However, it has been suggested that his late development of language enabled him to develop more highly than most his ability to think abstractly rather than verbally. That fact has been put forward as an explanation of his ability to conceive his theory of relativity, which has no connection with ordinary experience.

Whether that is true or not, it is important to recognise the link between experience, language and perception. Whilst it is easy to see how verbal tags such as *noise* or *me* or *water* can be developed and shared with little risk of misunderstanding, it is not self-evident that useful tags for abstract ideas will be universally effective in communicating unambiguous ideas. Take two very different examples. If you and I agree that a letterbox is red, can either of us be sure that the internal physiological experience which we both identify as *red* is the same experience? All we can be sure of is that we agree to call the same external phenomenon by the same name. It may be that my internal experience of *red* matches your internal experience of *middle C played on a piano*. Timothy Leary's experiments with LSD demonstrated, if nothing else, that the link between external stimulus and internal experience is, to say the least, variable.

If we cannot be confident that *red* means the same for you and me, how is it possible that we can agree on the meaning of words whose intended signification involves one or more layers of metaphor? Suppose you asked a group of people to explain the meaning of: *bourgeois*, *democracy*, *interest*, *industry*, *culture*, *communism*. What level of agreement would you expect if the people asked to explain the words were: a Russian worker, an English conservative politician, an Eskimo, a biologist and a factory owner?

Almost certainly, each would have an understanding of each word coloured substantially by their individual experiences and circumstances. The differences between their respective understandings of the words are likely to be substantial.

Oliver Wendell Holmes once said, “A word is not a crystal, transparent and unchanging. It is the skin of a living thought, and changes its meaning and significance according to the time in which, and the circumstances in which, it is used”. Those of us who use language as our principal tool of trade would do well to bear that in mind. The communication of an idea is not complete, and not useful, unless the meaning received corresponds with the meaning intended.

MUSIC

A new album from The Avalanches - local legends of plunderphonics

ED HEEREY

The term "plunderphonics" was coined by Canadian avant-garde composer John Oswald in his 1985 essay "*Plunderphonics, or Audio Piracy as a Compositional Prerogative*". It refers to taking one or more existing audio recordings and altering them in some way to make a new composition, a sound collage or musical montage.

Sixteen years ago, Melbourne's own The Avalanches released their first album "*Since I Left You*", widely regarded as a classic of the plunderphonics genre.

The album was laboriously crafted through the late 1990s from countless samples of snippets from a bewildering range of old vinyl records, ranging from long-forgotten R&B records to golf instructionals, Liza Minelli, Sesame Street and even Madonna's "*Holiday*".

Founding band-member Robbie Chater described the process thus, "Luckily, there were so many $2 records in op shops around at the time that once you had a sampler you didn't need much money to have access to all these fantastic sounds. It seemed like such a fantastic way to create exciting sounds, and cheaply."

The result is a lush, joyous album of 18 tracks with a cruisey, '60s cocktail vibe, building to a party crescendo with tracks such as "*Electricity*" and some priceless dark humour in the classic "*Frontier Psychiatry*". If you missed it first time around, then "do yourself a favour . . ."

Chater's "conservative" estimate is that the album included over 3,500 samples, but no-one really knows. "We were really unorganised and were just sampling on the fly as tracks progressed," Chater explained. "We had no idea the record would get such a wide-scale release so we saw no need to keep track of what we were using — we were definitely guilty of harbouring a 'no-one's going to listen to it anyway' sort of attitude. Plus that was in our days of getting kinda, um, lubricated so who the f*** knows. It's all kinda fuzzy!"

The band may not have anticipated the success of their first album, but they had already attracted plenty of attention from early single releases and anarchic live shows, including support slots with The Beastie Boys and Public Enemy. The launch of "*Since I Left You*" in November 2000 was a major music industry event, with *The Face* and other UK media flying to Melbourne to cover it – held on a boat cruise on Port Phillip Bay.

Ten years later, *Triple J* convened a panel of Australian musicians and industry experts to vote on the greatest Australian albums of all time. "*Since I Left You*" topped the list, ahead of INXS's "*Kick*" and ACDC's "*Back In Black*".

Since at least 2005, rumours have circulated that The Avalanches were working on a new album, with the band itself issuing little teasers from time to time.

In January 2007, the band stated via its website that roughly 40 tracks were being considered: "it's so f****n' party you will die, much more hip hop than you might expect, and while there is still no accurate estimated time of arrival, we're sure you're gonna love it when it arrives. ... it's ended up sounding like the next logical step to [*Since I Left You*], we just had to go around in a big circle to get back to where we belong. And one day when you least expect it you'll wake up and the sample fairy will have left it under your pillow."

That enthusiastic announcement was followed by a long and tedious process of obtaining clearances for the use of other people's copyright. And over nine years later, the wait was finally over.

On 2 June 2016, in a tightly co-ordinated strategic launch, the band unveiled their new album "*Wildflower*" and released their first single "*Frankie Sinatra*". The next day they played a DJ set at the Primavera Festival in Barcelona.

The full album could be pre-ordered but was not fully available until 8 July. Until then, fans just had to make the most of the first single. Their first real live show was at Splendour in the Grass in Byron Bay on 22 July (was their live shows mix DJs with percussion, bass guitar and other live instruments and vocals).

The initial reaction to "*Frankie Sinatra*" was not universally positive. ABC broadcaster Virginia Trioli immediately cast her verdict by Twitter: "You're kidding, @zanrowe ... We waited 16 years for that?@ TheAvalanches." After such an extraordinarily long gestation, it is not surprising that expectations would be sky-high and the result anti-climactic for some.

My verdict? Thumbs up. The bedrock of "*Frankie Sinatra*" is a big-tent circus stomping bass riff (is that in fact a tuba?). Laid on top is the usual pastiche of weird and diverse samples centring on a couple of lines from "*Bobby Sox Idol*" by 1940s Calypso singer Wilmouth Houdini, backed by a mad swirling clarinet. Added to this are guest rap vocals from radical left-field US rappers

Danny Brown and MF (Metal Face) Doom, then a bridge dragging us momentarily off on a wistful journey into "*My Favourite Things*" from "*The Sound of Music*". Then it's back to business with the circus stomp closing out proceedings.

To experience the full insanity behind the song, log on to vevo.com and search for "*Frankie Sinatra*" to see the film-clip. Words cannot adequately describe what you will see.

The full album release includes a total of 21 songs with guest appearances from Dirty Three's Warren Ellis, Mercury Rev's Jonathan Donahue, Jennifer Herrema of Royal Trux, Father John Misty, Toro y Moi, Camp Lo and Biz Markie. Indeed, some high-profile collaborators failed to make the final album and wound up on the cutting room floor, most notably Luke Steele from Empire of the Sun/The Sleepy Jackson.

So, all in all, a newsworthy release by a local act with a global following. Worth checking out.

And a post-script: what is the legal and moral status of "plunderphonics" anyway?

> "The Avalanches achieve a fresh and distinct creation which is truly greater than the sum of its very many sampled parts."

No such issue arises to the extent that The Avalanches have obtained permission from relevant copyright owners - which seems to be the case for the great majority of the material they have sampled. Their use of "*Holiday*" was one of few such samples ever permitted by Madonna. A sample from "*South Pacific*" was pulled from "*Since I Left You*" when clearance was not forthcoming from Rogers and Hammerstein, but those copyright owners eventually turned around and allowed use of "*My Favourite Things*" in "*Frankie Sinatra*" – indeed Rogers and Hammerstein are credited as co-songwriters (a high price to pay for a bridge?). Clearance from such big-time copyright owners speaks to the respect held by The Avalanches in the music industry.

To the extent The Avalanches' work includes unauthorised sampling, the question of copyright infringement focuses on the part taken from each work. In many cases the part taken is so small that the copyright owner would probably struggle to cross the threshold requirement to prove that a "substantial part" of the prior work was copied.

Morally, the sampling of so many tiny snippets is not comparable to the type of case where one whole song copies another - such as Pharrell Williams' "*Blurred Lines*" copying key elements of Marvin Gaye's "*Got To Give It Up*". Instead, The Avalanches achieve a fresh and distinct creation which is truly greater than the sum of its very many sampled parts. If the band ever reads this, I will defend them *pro bono** in court should the need ever arise!

*Actually, I will require two signed albums and a back-stage pass.

ILLUSTRATION BY GUY SHIELD

Conduct & Etiquette

Use of the Professional Qualification and Post Nominals SAM HORGAN

The *Legal Profession Uniform Conduct (Barristers) Rules 2015* came into operation on 1 July 2015. Rule 10 provides:

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

The Rule is a restatement of Rule 119 of the *Practice Rules* made by the Bar Council pursuant to the *Legal Practice Act 1996*. There appears to be no similar rule in the 1979 Restatement of Basic Rulings[1]. The Rule is related to the rules against advertising and touting and is similar to a rule applying to barristers of the Bar of England and Wales in 1975.

It is said that the purpose of this Rule is to prevent a barrister misusing his position and description as a barrister for purposes not properly related to that professional qualification. The Good Conduct Guide gives an example of counsel using his facsimile letterhead in a private dispute with a government body. The Rule may be breached where the barrister's intention is discerned as being to misuse the professional qualification.

An Ethics Committee Bulletin in 2014 warned against contravention of the Rule by use of emails including an electronic sign off, identifying the person as a barrister and showing their chambers address. The Ethics Committee Bulletin warned that it is not appropriate to include professional qualifications or to identify as a barrister when communicating in respect of a private dispute.

It is recommended that the only way to be certain not to fall foul of the Rule would be to maintain an alternate email signature for private use which does not refer to the sender as a barrister or as a member of chambers or with a particular clerk. Such private email signature should be used for all matters which are not incidental to the conduct of the profession of barrister. There can

be no objection to including in that signature the address of the barrister or the existing telephone number or email address. There is nothing unusual or unreasonable in conducting one's private business by use of the vicbar email account. More so, it would be both unusual and unreasonable for a professional person to be required to maintain a separate private email account.

A difficult question arises in relation to the Rule and the use by senior counsel of the post nominals QC or SC. Of course, it would be wrong for senior counsel to book a restaurant in his or her name using post nominal (with the intention of achieving a table, or a better table) or for senior counsel to include his or her post nominals on a Transfer of Land (with the intention of increasing the value of the land given the status of the subsequently registered proprietor). Misuse by the use of post nominals and as a consequence "the professional qualification" is a matter for good judgment and common sense. There is no need to be prescriptive about the occasions appropriate and inappropriate for the use of post nominals.

Aside from the Rule in question there has long been an issue over whether judges returning to practice at the bar may utilise and revert to the rank of Queen's Counsel .

Other rules of conduct may be breached by use of the professional qualification or post nominals. It is sufficient to mention the prohibition against engaging in conduct which is likely to diminish public confidence in the legal profession or the administration of justice or otherwise to bring the legal profession into disrepute (Rule 8(c)); the prohibition in engaging in another vocation which is liable to adversely affect the reputation of the legal profession or the barrister's own reputation (Rule 9(a)). There are also provisions which prevent a barrister from acting (other than on his own behalf) in certain prescribed capacities (Rule 13).

Quite apart from Rule 10 it is useful to recognise the rule of etiquette that it is inappropriate for senior counsel or junior counsel to place an indication of that status (whether by reference to letters patent or the post nominals QC, SC or otherwise) on written submissions to the court. Similarly, there is a firm rule of practice that post nominals are not used when signing pleadings. It is said that it is unnecessary to do so and that the profession is aware of status of barristers who might settle pleadings and submissions. A similar theory has backed the practice (often ignored) of removing any reference to post nominals on door plates and floor directories in chambers. Again, it is said that fellow practitioners are aware of the status of the barrister and, by the time they have entered chambers, so are your clients aware.

1. As set out in Gowans - Professional Conduct, Practice and Etiquette (1979, The Law Book Company Limited) at pp 16-21.
2. Conduct and Etiquette at the Bar – Boulton (6th Edition, Butterworths 1975).
3. Good Conduct Guide - Professional Standards for Victorian Barristers, Annesley (2006, Victorian Bar Inc.) at page 155.
4. Bulletin 1 of 2014 issued by Symon QC as Chair.
5. J.D. Merralls QC – Reversion is Impossible (1994) 89 Vic B.N. 53; cf Keith Mason, Lawyers Then and Now (2012, Federation Press) at 141-3.
6. JD Heydon – Reciprocal Duties of Bench and Bar (2007) 81 ALJ 23 at 32.

BOOK REVIEW

On The Edges of History

NICHOLAS FRENKEL

Michael Sexton - the Solicitor-General for New South Wales - has produced a fascinating memoir reflecting his experiences in the law and politics.

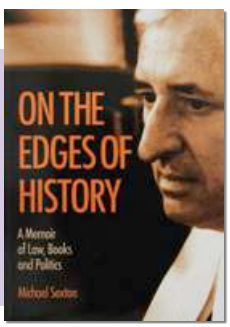
Born and raised in Melbourne and educated at the University of Melbourne and the University of Virginia, the author travelled extensively, worked in the Commonwealth Attorney-General's department and as a ministerial advisor during the Whitlam government, worked in academia, joined the New South Wales Bar ultimately taking silk, and was appointed Solicitor-General.

Michael has appeared in a number of well-known and controversial cases, especially involving criminal law and media law. The book is particularly interesting because the author makes observations on a variety of topics in a very forthright manner. Civil libertarians and proponents of the current criminal justice system, for example, may find the book makes for uncomfortable reading.

The text is full of interesting and entertaining anecdotes involving legal luminaries (many from Melbourne) and political luminaries (particularly from the Australian Labor Party). Many of the author's first impressions, including of political operators such as Graham Richardson, are hilarious.

Michael's memoir provides real insight into the blurring of the line between the law and politics, especially during the Whitlam years.

On the Edges of History: A Memoir of Law, Books and Politics
By Michael Sexton
Connor Court Publishing 2015



OFF THE WALL....

Lewis Miller: Portrait of an artist

SIOBHÁN RYAN, ART & COLLECTIONS COMMITTEE

The Victorian Bar's latest commission, a portrait of the Honourable Susan Crennan AC QC, will be unveiled at the Peter O'Callaghan QC Gallery later this year. In this edition, Off the Wall profiles the artist, Lewis Miller.

When Lewis Miller was accepted into the prestigious National Gallery School (now known as the Victorian College of the Arts) at the age of 18, his father Peter told him, "You might make no money. You might make a bit, but it's a nice way to spend your life." Peter Miller spoke from experience. He had attended the Gallery School himself under the Reconstruction Training Scheme after serving in Papua New Guinea during World War II and had pursued a career as an artist. Lewis recalls that in the days after his acceptance, his father took him into his studio and taught him a few things about painting that have stayed with him forever.

Peter Miller's words were prescient. From heady days in the 1980s Melbourne and Sydney art scenes, to time in Iraq as Australia's Official War Artist, with some plum commissions and an Archibald Prize along the way, Lewis Miller's talents have indeed afforded him an interesting life.

Miller completed his postgraduate studies at the VCA in 1982. He held his first solo exhibition in 1986 at 200 Gertrude Street Gallery. During the 1980s he mixed with artists from the Roar Studios collective, such as David Larwill, but his practice was largely solo. He was represented by the flamboyant Sydney gallery owner Ray Hughes from 1989 to 2002, and by Stuart Purves (Australian Galleries) since 2002.

He has entered the Archibald Prize most years since 1989 and has been shortlisted 16 times. He won the award in 1998 with a portrait of Allan Mitelman, a fellow artist and Miller's teacher at VCA. "*Portrait of Allan Mitelman No. 3*" was the third portrait of Mitelman that Miller had entered over the years. The painting in oil and charcoal is enormous, measuring 2.1 metres by 2.4 metres, but barely contains Allan Mitelman's face, which is dominated by distinctive eyeglasses and a cocked eyebrow.

Winning the Archibald Prize immediately changed Miller's life. Among the jobs that flowed was a commission from Dr James Watson, a Nobel Prize winner who as a young biologist had discovered the double helix molecular structure, with Francis Crick and Maurice Wilkins. In 1998, Watson was the lead scientist on the Human Genome Project. He invited Miller to his research facility at Cold Spring Harbour in New York State to do portraits of the scientists who were mapping the human genome. Miller estimates he has made over a 100 portraits for this and a second commission in 2003.

Lewis Miller self portrait (James Farrell Self Portrait Award 2007)

The portraits, which are pencil drawings done from life, capture some of the greatest thinkers of our age. Their faces are finely etched and their clothes rendered simply and truthfully, including a seemingly disproportionate representation of slip-on shoes and sandals with socks. Among the works is a touching drawing of Sir Fredrick Sanger (1918-2013), one of only four people to win the Nobel Prize twice (in 1958 for discovering the structure of proteins, especially insulin; and in 1980 for determining base sequences in DNA). Sanger, then in his 80s, peers at the artist and viewer with a look of resignation, his loose trousers secured by a leather belt, his hands gnarly with arthritis.

Miller has a continuing tenure at Cold Spring Harbour. Last year he returned for a week to draw more portraits. Dr Watson will publish the portraits next year in a book to be called "Faces of the Genome".

Other significant commissions have included Mr Sydney Baillieu Myer AC, Sir Edmund Hilary KG ONZ KBE, the Honourable Justice Kim Santow OAM, Chief Justice Robert French AC, Prime Minister Malcolm Turnbull, Lucy Turnbull AO and the Honourable Bernard Teague AO.

In 2003, Miller spent three weeks as an Official Australian War Artist with Coalition forces in Iraq. He recalls the experience as being "endlessly interesting and endlessly frustrating". A major frustration for the portrait artist was being unable, for security reasons, to paint the faces of the Special Air Service soldiers on his tour. He doesn't know where his war work ended up. Somewhere in the War Memorial archives in Canberra, he thinks.

Apart from his life model, Hazel, whom he has painted for over 21 years, Miller's most constant subject is himself. He paints self-portraits roughly twice a year, relishing the challenge of capturing his reflection in reverse. Self-portraiture "keeps your hand in", he says, "…and besides, I'm always here".

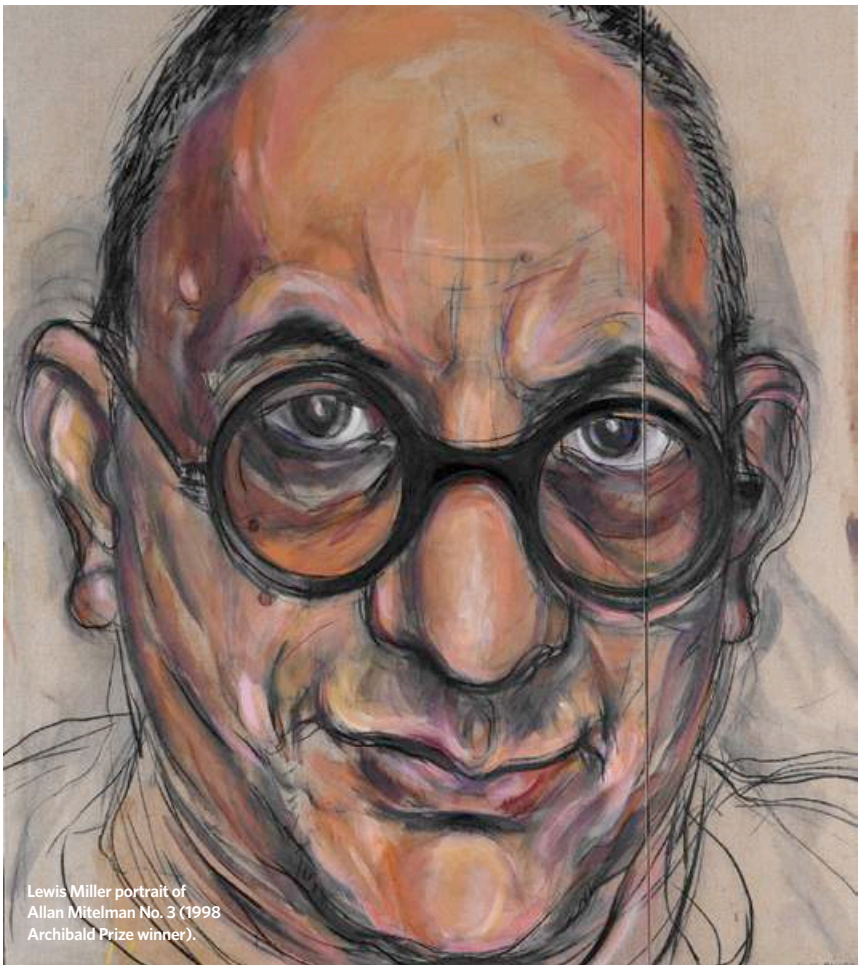
The Hon. Justice Susan Crennan AC QC

Last year, Lewis Miller was commissioned by the Victorian Bar to paint a portrait of Susan Crennan upon her retirement from the High Court. The process took about nine sittings over three months at Miller's studio in St Kilda. Miller prefers to paint his subjects in his studio; "in my territory" is the way he describes it. Backgrounds of interiors or gardens are forsaken for the subtle shadows cast on the grey walls of the studio. By turning the emphasis back on the sitter, Miller believes the true character is revealed. Pointing to prints of the masters Rembrandt and Velasquez posted on the studio wall, he notes that there is not a lot going on in the background. So, too, in the portrait of Susan Crennan; the focus and interest is in her face, with only her clothing (a favourite shawl) and ornaments (her Companion of the Order of Australia badge and an heirloom pendant) giving the clues to her status which, in another artist's work, might have been conveyed in a busy backdrop.

Miller encourages conversation with his sitters. It gives him the best chance of getting life into the face. He says his conversations with Crennan flowed freely and were entertaining, so much so that he had to shut her up to get her mouth right. "Lawyers" he says, "are very good conversationalists, but scientists talk a different language altogether". By now, Miller has painted enough portraits of lawyers and scientists to make these distinctions. In 2008, he painted Chief Justice Robert French. They were also stimulating sittings and Chief Justice French still sends a Christmas card each year. Last year he painted the Honourable Bernard Teague for the Law Institute of Victoria. He has also painted a full length portrait of Simon Wilson QC (c.1998).

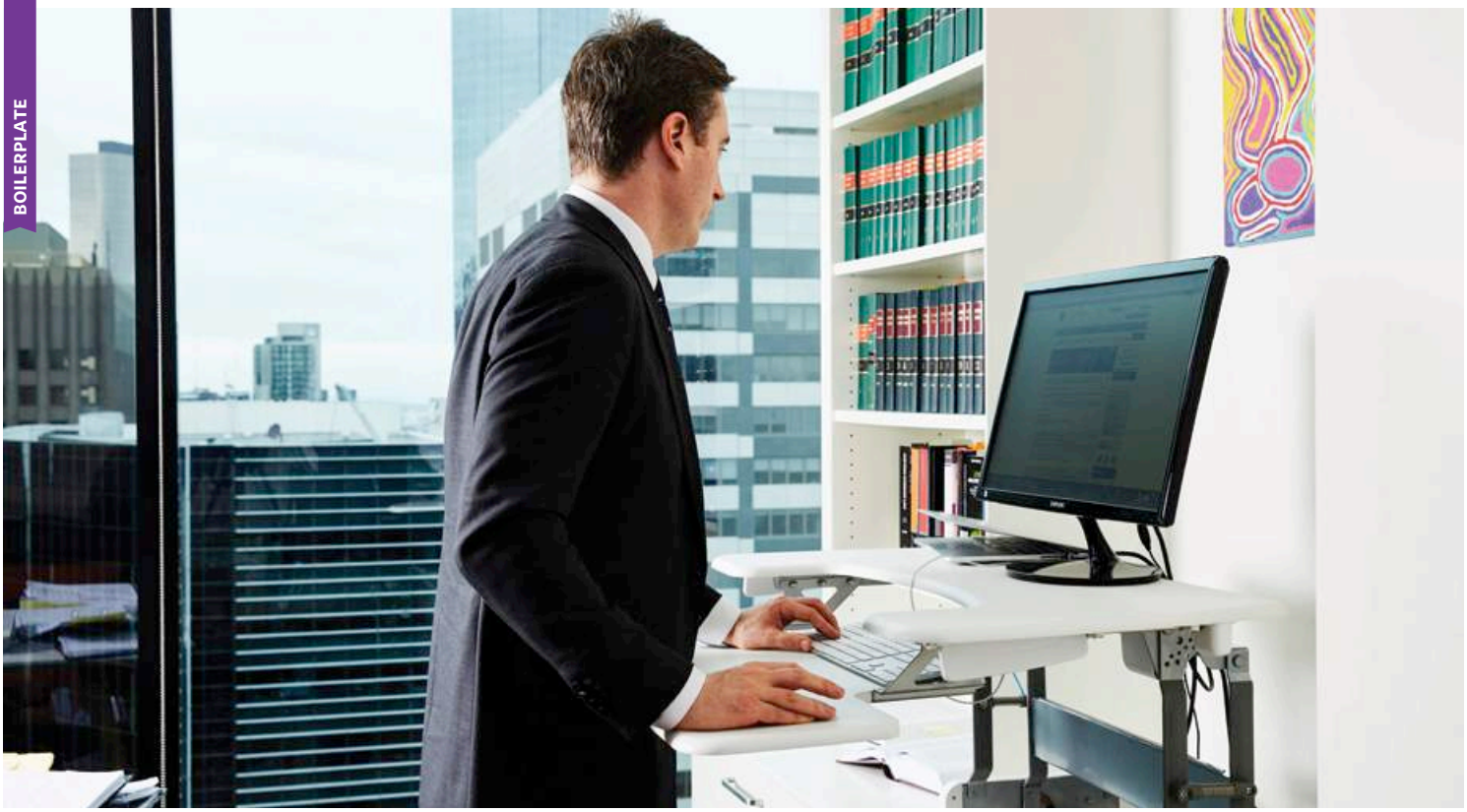
Miller says that the size of the portrait was important to Crennan. She didn't want a Mitelman extravagance, just a medium sized painting. In fact, Crennan and Miller took measurements of the Bar's portrait of the Hon. Robert Menzies by Ivor Hele and made hers the same dimensions.

There is always music in Miller's studio. When I visited, Bob Dylan's 1970 album "Self Portrait" was playing. For Crennan, it was Van Morrison and The Chieftains – a nod to her Irish heritage.



Lewis Miller portrait of Allan Mitelman No. 3 (1998 Archibald Prize winner).

> "Lawyers" he says, "are very good conversationalists, but scientists talk a different language altogether".



Height adjustable desks

MATTHEW TOWNSEND

Barristers may not work with heavy machinery or radioactive materials, but ours is a dangerous workplace by reason of the extended time we spend behind a desk.

A literature review in the Annals of Internal Medicine found that "Prolonged sedentary time was independently associated with deleterious health outcomes regardless of physical activity". These included higher rates of type 2 diabetes, cancer, and cancer-related deaths. So, even if you go for a 10k run in the morning, don't expect your exercise to shield you from the effects of being seated all day.

There is one small but significant thing we can do to mitigate the effects of being seated for much of the day. And that is, to buy a height adjustable desk. I haven't used the expression 'stand-up desk' because standing all day without the option of sitting down would be a step too far for most people. And even small adjustments to the desk in the standing position can reduce muscular fatigue.

Height adjustable desks have a number of benefits:

» a good height adjustable desk will allow you to fine tune or optimise the height at which you work. This is particularly important when operating a keyboard;
» working while standing allows you more opportunities to make small movements to your neck, shoulders and legs, which improves blood flow to your muscles;
» pressure on the lower back seems to be reduced when standing compared to being seated for long periods of time; and
» standing apparently burns more calories than remaining seated, although I suspect the benefits here are marginal.

I've had a height adjustable desk up in chambers for a couple of years now. It was purchased from UCI furniture in West Melbourne (uci.com.au) for just over $2,000, installed, and can be adjusted from the height of a standard desk to a height at which a person 2m would find comfortable.

My experience has been that I use the height adjustable desk in the seated position for an hour or so, but am able to stand or move around for the rest of the day.

An unexpected benefit of a height adjustable desk is that has increased my productivity, for it requires far less mental energy to refer to a resource elsewhere in chambers if you don't have to stand up to fetch it. And the activities we seem to spend more time doing these days, courtesy of the emailed brief – printing, stapling, sorting and hole-punching – can be done far more efficiently, if you're already on your feet.

I'm in ODE 1304/5 if anyone wishes to have a look.

townsend@vicbar.com.au

FOOD AND DRINK

Bar Idda

A review by SCHWEINHAXE, the Bar's resident undercover foodie

Bar Idda
132 Lygon Street, Brunswick East
(03) 9380 5339
Mon-Sat 6pm-10pm. Sunday 5.30pm-10pm.
The taste: Sicilian
The bite: It's in Brunswick East
Things to chew: Spices, citrus, slow-cooked meat
Things to sip: Ancient grape varieties from an ancient land

It was a winter's night in Melbourne. The cure: Bar Idda – a restaurant not a bar – promising a unique experience that celebrates Sicilian food and culture.

Having been to Sicily a few years back, I was expecting fresh fish, slow cooked meat, unusual grape varieties, a bit of noise, a great time and a mangy dog after the scraps! Bar Idda delivered– minus the dog. It is in Lygon Street in Brunswick East. Let the vibe of the joint wash over you, like a wave from the Ionian Sea. Relax!

Brunswick East is eclectic and Bar Idda stands amongst all the action, with The Alehouse Project just down the road. Bar Idda is set in an old Victorian shop front, with large windows to the street. There is colourful outdoor seating in the European café style. Inside, there are hanging plants, and a small 1970s TV set is showing an Italian TV show. The table is set with a beautifully embroidered tablecloth set under glass. The cutlery, glasses and plates are trattoria style. Waiters abound in their smart uniforms touched off with a very smart apron. The service is excellent.

Before our friends arrived, I managed to sneak in a pot of Season's Harvest from Temple Brewing ($7) and Schweinhaxette had a glass of 2013 Benanti Bianco di Caselle DOC, a wine made from carricante grapes ($14). The beer tasted like an orchard. Schweinhaxette told me that carricante is a grape variety that has been grown for thousands of years on the slopes of Mt Etna at 900 to 1,000 metres above sea level. It was dry, finely textured, complex and very food-friendly, so when our friends arrived, we ordered a bottle ($73) to help us through the antipasti.

We decided to share the food. This meant we ordered too much! We devoured 30 grams of capocollo salumi ($15); sarde beccafico (baked stuffed sardines, soused onion and caciocavallo, $16); mulinciani (baked layered eggplant, passata, buffalo mozzarella, basil and pecorino, $12) and calamari fritti (semolina and spice fried calamari, patatine, wild greens and salmoriglio, $18). The highlight was the calamari. The fried coating of semolina and spice, combined with the fresh wild greens, was lovely.

We skipped the primi plates and went straight to the secondi and contorni. We had a bottle of 2013 COS Cerasuolo di Vittoria Classico DOCG ($88), a wine made from Nero d'Avola and frappato grapes. It was from the south east of Sicily. It was a delicate and pretty wine that would also appeal to lovers of pinot. Finely balanced, not big and bold, but also not too sweet.

We then smashed into salsiccia (barbecue house-made pork, fennel and chilli sausage with relish and autumn greens) ($20); purpetti dolce (beef, almond, pine nut, currant and cinnamon meatballs with passata, $18); agnello all'eoliana (Aeolian four-hour roasted lamb shoulder with fennel cream, $29); barramundi (with roasted almonds) together with sides of caponata (sweet and sour friend eggplant, zucchini, celery, capers and green olives, $12) and agrumi (roast fennel, blood orange and pink grapefruit, black olive and capers, $12). I enjoyed hacking into the lamb shoulder so that it could be shared. This added to the festive nature of this place and our experience within it!

Done? No, we then shared cannolo (a cinnamon shell with walnut cream and a quince delight on the side, $12) and pere sciroppate (vermouth-preserved pears, walnut cake, chocolate gelato and orange crostoli, $12). With the other little bits and pieces (sparkling water, coffee etc) the bill was $405.50 for four people.

We were given a card with the bill that contained the recipe for the purpetti dolce – nice touch. We were being asked to continue the Sicilian experience at home!

RED BAG BLUE BAG

BLUE BAG – a view from junior counsel

Dear Sage Silk,
Since coming to the Bar last year, my standing amongst my extensive family has changed. I am now treated as an honoured confidant. Indeed, I am overwhelmed by the extent and complexity of some of their legal problems, many of them having nothing to do with the rather specialised area of intellectual property in which I hope to practise. How do I deal with these constant requests for advice and how do I reconcile them with my overriding duty to maintain independence?

Judicious Junior

RED BAG – a view from senior counsel

Dear Judicious Junior,
You must, of course, refuse to accept a brief where it would be difficult for you to maintain professional independence by reason of any connection with the client. Your difficulty, however, is that none of your extensive family will actually brief you. They will just corner you at the next wedding, birthday, bar mitzvah or (dare I say it) funeral and not let you leave until you have recited subdivision 719BA of the Income Tax Assessment Act 1997 (Cth).

Let me tell you about my cousin the tradie. "It won't take long", he said. "No more than an hour", he pleaded. "But this is not my area of expertise", I said. Well, those sure turned out to be wise words. Six months and many sleepless nights later, I was still attempting to rectify the default that had been registered on his credit report.

In the end, it was actually my cousin the tradie who fixed the entire mess. "To hell with the fancy pants barrister", he said. "I'll just sort this out myself." And sort it out he did. One email and one phone call was all it took for him to achieve more than I had in six months!

The moral of the story: five years of law school and many years in practice is nothing compared to flunking year 10, attaining no formal qualifications, half-completing countless apprenticeships, not being able to hold a job for more than a year and breaching god-knows-how-many regulations on each building job. Long live my cousin the tradie, who knows how to get things done!

I've come to the conclusion that the only way to avoid family harassment is to avoid your family altogether. You can find plenty of excuses not to attend great aunty Ethel's 107th birthday celebrations next week!

Sage Silk

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and we will swap it out for you.

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For the past 8 year, Ludlows has donated a complete set of robes to readers from the Pacific Islands who complete the Melbourne readers course. We look forward to the coming September readers course where there will be two international readers.

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