ISSUE 160 SUMMER 2017

VICTORIAN BAR NEWS

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ISSUE 160 SUMMER 2017
VICTORIAN BAR NEWS

Editors: Georgina Schoff QC and Georgina Costello.
Victorian Bar News Editorial Committee: Georgina Schoff QC,Georgina Costello,Anthony Strahan,Maree Norton,Annette Charak,Justin Wheelahan,Catherine Pierce,Brad Barr,Jesse Rudd,Natalie Hickey,Justin Hooper,Georgie Coleman,Denise Bennett,Sally Bodman
Contributors: (In alphabetical order) Lachlan Armstrong QC, Simone Bailey, Jennifer Batrouney QC, Julian Burnside AO QC, Annette Charak, the Hon Stephen Charles QC, Georgina Costello , Graeme Davis, The Hon Justice John Digby, the Hon Ray Finkelstein AO QC, Garry Fitzgerald, Kathleen Foley, John Glover, Justin Hannebery, Penny Harris, Harron Hassan, Sam Hay, Paul Hayes, Robert Heath, Ed Heerey QC, the Hon Peter Heerey AM QC, Natalie Hickey, Will Houghton QC, The Right Honourable Sir Robin Jacob, Anthony Krohn, Angela Lee, Benjamin Lindner, Peg Lusink, Peter Matthews, Hadi Mazloum , Ron Merkel QC, James Merralls AM QC, Frances O'Brien QC, Justin O'Bryan, Michael O'Connell SC, Charles Parkinson, Dr Vicky Priskich, Siobhan Ryan, Siobhan Ryan, Rohan Scheid, Georgina Schoff QC, Meredith Schilling, Geoffrey Steward, Robert Taylor, Campbell Thomson, Matthew Townsend, Peter Willis QC, Christine Willshire and Richard Wilson.
Photo contributors: Peter Bongiorno, Annette Charak, George Coleman, David Cook, Justin Hooper, Hannah Pelka-Caven, Jim Peters QC, Catherine Pierce, Neil Prieto,John Rickard, Adam Rollnik, Jesse Rudd, Siobhan Ryan, The Hon Justice Joseph Santamaria, Meredith Schilling, Georgina Schoff QC, Stephen Sharpley QC, Geoffrey Steward, Anthony Strahan, Campbell Thomson, Jeff Thornton, Jeremy Twigg and Michael Wheelahan QC.
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Sally Bodman
The Victorian Bar Inc.
Level 5, Owen Dixon Chambers
205 William Street, Melbourne VIC 3000
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Email: sally.bodman@vicbar.com.au
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LEFT TO RIGHT: Georgina Schoff QC, Justin Wheelahan, Catherine Pierce, Georgina Costello, Jesse Rudd, Brad Bar, Sally Bodman, Maree Norton and Natalie Hickey (Absent: Annette Charak, George Coleman, Justin Hooper and Anthony Strahan).

Editorial

PHOTO BY NEIL PRIETO

Making history

GEORGINA SCHOFF & GEORGINA COSTELLO, EDITORS

Victorian Bar News serves many purposes. When first published, it brings our members up to date with recent events and the current news and views of our Bar. The photos of our members around town help us put faces to names, as do the pictures of new silks, new readers and new Bar Council members.

In the longer term, Victorian Bar News is a record for posterity: a history of the Victorian Bar. Sometimes this is not apparent until one has cause to read an issue from years gone past. But in this issue, where we publish both an article written by James Merralls AM QC and an obituary for him, history seems to have turned the pages. Vale Jim.

In this issue, we also publish an article by Charles Parkinson announcing the commission of a proper history of the Victorian Bar to be written by the renowned historian Dr Andrew Yule. This commission is a grand and useful undertaking for our Bar. As Parkinson suggests in his article on page 62, by looking to the past, we may see how to go forward.

Still on the topic of history, our readers will be unable to put down the Hon Stephen Charles' article on the 1986 Commission into the conduct of Justice Lionel Murphy. Charles, who was among the counsel assisting the Commission, recounts (in as much detail as he is permitted to) the extraordinary circumstances of that unfortunate episode in Australian legal history, and the questions of law that it raises. Charles is a regular and brilliant contributor to Victorian Bar News and to so much else at the Victorian Bar. We are grateful to him.

Another Victorian Bar commission is the portrait of one of the giants of our Bar, the Hon Susan Crennan AC QC. This portrait was unveiled recently and now graces the walls of the Peter O'Callaghan QC Gallery, taking its place in the Bar's pictorial history. We cover that event on pages 14.

This issue, in fond remembrance of our wigged history, we have included photos of children dressing up in the wigs and gowns of

various judges and barristers. Wearing wigs is now a mere memory for most of us, but the gowns are here to stay, and below you can see some future lawyers trying on the idea of being a barrister.

You may notice a lot of red, white and blue in this issue and on its cover. We hope you will forgive us for football in summer, but we thought it important to celebrate this year's victory of the underdog. We know you will enjoy Rob Heath's terrific article about the beloved Bulldogs and how some members of our Bar saved them from being relegated to history.

The red white and blue also suits another theme of this issue: in this year of Trump (perhaps also an underdog), we are pleased to publish two articles about the United States. Lachlan Armstrong QC's insightful discussion of the difficulties besetting the possibility of gun control in the United States of America, and Campbell Thomson's sharp observations of American courts, capture something of present day America.

We wish you a safe and pleasant summer processing the highs and lows of 2016, before the Bar begins the next year in its history.

Letters TO THE Editors

Wigs—The London scene

A colleague from the U.K, who wishes to remain anonymous, aka The Rt. Hon. Sir Robin Jacob QC, formerly of the Court of Appeal of England and Wales, is a keen reader of *Bar News*. He writes:

Fine Ode to the Wig by Peter Heerey in last Bar News. Echoes of Wordsworth, or even Keats.

Our LCJ got rid of wigs, gave us a new uncomfortable (wool - too thick) gown. They have stripes depending on rank - CA gold, HCJ red,

Circuit judge purple and registrars/ masters pink, my dear. When gathered together we look like a Southern Baptist Choir. Nothing like law reform.

Remember Astbury J: "Reform? Reform? Aren't things bad enough already?"

The Bar refused to take its wigs off and carry on as normal. So solicitor advocates went out and got wigs too.

Kids in Wigs
1. Hugh Roberts (aged 2) filling in for Arthur Roberts in 1983.
2. Connor Heerey
3. Mathilda Wilson, daughter of Anna Wilson
4. Emma Heerey
5. Justice Mandie in chambers with grand-daughter Rania.
6. Kathryn Ross, daughter of Georgina Costello.
7. Lachie Curtain, grandson of David Curtain QC, in 2016.

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*

Message from the Bar Council President

JENNIFER BATROUNEY

It will be an honour for me to lead our Bar in 2017. In doing so, I will work collaboratively with the new Bar Council members and the Bar's capable CEO, Sarah Fregon, for the benefit of all counsel.

The recently elected Bar Council is an outstanding team comprised of leading barristers from all fields of practice. While many have served on Bar Council before and bring this valuable experience to the table, we also have many new members – and their fresh perspectives will be important as we tackle the issues confronting the Bar and the wider legal profession.

My vision for the Victorian Bar is to ensure that the Bar and its members continue to thrive. The Bar Council with my leadership will advance the professional excellence and performance of Victorian barristers by giving them the support they need to continue to produce high quality work. We will promote barristers' distinctive skills amongst clients, solicitors and the broader community.

While we look to BCL to enhance our built environment, we will continue to provide a variety of services to members of the Bar to enhance their physical, mental and financial wellbeing. The Victorian Bar is a warm and collegiate community and we will nurture this by facilitating mentoring amongst our members.

The Victorian Bar must continue to be a strong, independent and authoritative voice to safeguard the rule of law. The work we do - both as barristers and on Bar Council – matters greatly to our society and our justice system. We will work collaboratively with civil society and legal institutions to support the justice system in Victoria and federally, and to advocate for improved access to justice. It will be a busy year and I relish the opportunity to make my contribution to the great institution that is the Victorian Bar.

Finally, I pay tribute to the excellent work of the outgoing President, Paul Anastassiou QC. One of the highlights of his Presidency for me was the function he organised in Broadmeadows where her Honour Michelle Gordon and Chief Justice Marilyn Warren encouraged schoolchildren to dream that one day, they too could hold one or the highest judicial offices in the land. It was an inspirational day – I hope to be able to emulate this function next year. Paul is a great friend and mentor to me and I look forward to his ongoing support throughout my term.

I wish all our members a safe and enjoyable break over the summer and look forward to working with all of you in 2017.

AROUND Town

The London 2016 International Commercial Law Conference

VBN

A joint undertaking of CommBar (Commercial Bar Association of Victoria) and the aptly named ComBar (Commercial Bar Association of England and Wales) produced the inaugural London 2016 International Commercial Law Conference (ICLC) which took place at the Inner and Middle Temples in London over two days in June 2016.

The conference happily coincided with the Supreme Court winter vacation, and featured an impressive range of speakers from the commercial benches and Bars of Melbourne and London led by Chief Justice Warren, Lord Clarke, The Hon Susan Crennan AC QC, Lady Justice Arden, Lord Justice Jackson, Justice Jonathan Beach, Justice Digby, Dame Geraldine Andrews and His Honour Judge Wilson. Over 150 delegates participated in a solid conference program comprised of eight business sessions which addressed pertinent topics such as 'The Cost of Commercial Justice', 'New Frontiers in Investment and Finance Litigation' and 'State Courts and International Commercial Arbitration: A Comparative Analysis', to name a few.

Adding unexpected colour to the experience was that the conference occurred the week after the Brexit vote.

The theme of the event, The Future of International Commercial Dispute Resolution, therefore assumed a sense of immediacy not predicted by the organisers nor, to be frank, by most of the attendees. Panel sessions involved impromptu future-gazing about how the commercial legal world might look – in the next 12 months and in the years ahead.

The conference had been launched in an assumed context of globalisation. But in a disrupted world where 'local' is the new 'global', the future for commercial disputes and their resolution is more opaque than ever before.

These matters, and many others, provided the delegates with ample scope for an exchange of views at the Gala Dinner in Middle Temple Hall (a candle-lit black tie event attended by nearly 200 people) and the Drinks Reception in Temple Church Courtyard. They were memorable and special occasions the attendees will not easily forget.

Special thanks are due to the London 2016 ICLC Organising Committee and the Bar Office, for making this ambitious event happen. Not only is it the first time an Australian state bar or specialist bar association has conducted a legal conference abroad, but the London 2016 ICLC has also positioned the Melbourne commercial bar alongside our London counterparts on the world stage at a time when the practise of commercial dispute resolution is becoming more global in nature. The London 2016 ICLC was an unqualified success. Hopefully, it will be the first of many such undertakings pursued by the Victorian Bar and CommBar in the future.

1. Philip Crutchfield QC addressing a crowd of conference attendees 3. Datuk Professor Sundra Rajoo 4. Paul Anastassiou QC and Paul Hayes 5. Daniel Crennan SC, Raini Zambelli, Andrew Bailey and other dinner guests 6. The Hon Susan Crennan AC QC 7. Samantha Marks QC and Simon Marks QC 8. William Alstergren QC, Paul Anastassiou QC and Sandra Anastassiou 9. The Gala Dinner, Middle Temple Hall 10. Barbara Myers 11. Natalie Hickey and Chris Fox. 12. Chief Justice Marilyn Warren AC and Lord Clarke 13. Laurence Rabinowitz QC 14. Laurence Rabinowitz QC and Philip Crutchfield QC











1. Wendy Harris QC and Justin Wheelahan with students trying on robes
2. Paul Anastassiou QC and The Hon Justice Gordon 3. Students. 4. The speakers, members of the Bar, councillors and students 5, 6 & 7. Students 8. David O'Callaghan QC and student 9. The Hon Chief Justice Warren AC and students 10. Students trying on robes 11. Students

The Bar in Broadmeadows: an event with Hume City Council

ANGELA LEE, CO-CHAIR, STUDENT ENGAGEMENT COMMITTEE

On 16 August 2016, students from the northern suburbs heard inspiring speeches from the Hon Chief Justice Warren AC and the Hon Justice Gordon about the importance of the legal system and the sense of fulfilment that one can achieve through a career at the Bar.

The Hume Global Learning Centre in Broadmeadows was filled with around 200 Year 11 and 12 students, teachers and parents from eight different schools for a Student Information Session, "Future Careers in the Law". The event was hosted by the Victorian Bar and the City of Hume.

The session was the initiative of the President of the Victorian Bar, Paul Anastassiou QC. He expressed his commitment to reaching out to students from all walks of life, encouraging anyone with an interest in law to have the self-belief to follow that path.

Mr Anastassiou's message was clear – the Victorian Bar is open to all comers on merit, irrespective of socioeconomic background, ethnicity, gender or religion: "The law is open to anyone … Talent and hard work are the criteria for a career in the law".

Cr Helen Patsikatheodorou, the Mayor of Hume City Council, welcomed the opportunity for young people who attended to engage with two of Australia's highest judicial officers, who both spoke fondly of their time at the Victorian Bar.

Chief Justice Warren described it as "the best job I ever had" and explained that at the Bar "you work in an environment that applies the highest values". Her Honour likened the work of a barrister to a scriptwriter where "you make your own movie script and then you get to act the part out".

Justice Gordon told the students that working as a barrister is "unbelievably intellectually challenging" because "each case is different" and "the subject matter you deal with is only limited by the breadth of human activity". Her Honour highlighted the attributes of a barrister as including the ability to be a listener, an inquisitive learner and of course, the desire to give something back to society.

Barristers Angela Lee, Shaun Ginsbourg and Hadi Mazloum spoke about their paths to the Bar, the life of a barrister, and the support, mentoring and work experience available by the Bar's Student Engagement Committee (SEC).

Afterwards, the students mingled with their Honours, members of the Bar and university representatives. Several gowns were made available and it was great to see the students trying them on and taking 'selfies' dressed as barristers.

Mr Anastassiou, a native of the north-western suburbs, targeted the City of Hume, one of Australia's most diverse metropolitan areas. He noted that, "the Bar has a growing number of people from diverse backgrounds and cultures and among the Bar we speak more than 37 languages … We want to ensure we continue to grow and reflect the communities we act, serve and work with". This is important because the law mirrors societal values. As Justice Gordon said, the legal profession shapes our legal system because barristers in particular "choose the cases that come before the courts for us to hear and determine".

The SEC was established in 2010 with the objective of 'demystifying' the Bar by providing young Victorians with a better understanding of the work of the Bar, and of the pathways to becoming a barrister. This is primarily done by arranging for barristers to speak to students at Victorian universities and secondary schools, and by providing mentoring and work experience.

The SEC plays a vital role in inspiring and encouraging students from all socio-economic backgrounds to consider the legal profession as a career path. The Committee has received a positive response from students at the event, and is in need of barristers who can provide mentoring or work experience opportunities. If you are able to assist, please contact students@vicbar.com.au.

Chief Justices join barristers at the MCG: Joint ABA and Vic Bar conference

JILLIAN WILLIAMS

The legal fraternity left its staid William Street precinct on 27 and 28 October 2016, for Melbourne's iconic sporting centre, the MCG, to attend the National Conference, a first time joint initiative of the Victorian Bar and the Australian Bar Association. The conference was a great success and provided many topics for discussion among the many barristers, solicitors, in-house counsel and other attendees.

The conference's theme, 'The National Profession in a Global Legal Market' was canvassed through an engaging two day agenda of speakers and panels from the Bar, Bench, major firms, government and corporate lawyers.

The day commenced with a welcome by David O'Callaghan QC, and a short speech by the Commonwealth Attorney-General, the Hon. George Brandis QC, on the complexities of the increasingly global practice of law at the bar.

The Honourable Chief Justice of the High Court, Hon. Robert French gave the key note address, introducing a panel comprising all of the chief justices, chaired by Chief Justice Warren. The panel opened with suggestions on what the appropriate collective noun was for a group of chief justices, a gaggle or a pride were among those suggested. Their Honours discussed new trends in Supreme Court litigation, including great case management in civil and criminal proceedings, self-represented litigants and the benefits of (and need for) judicial mediation. Chief Justice Bathurst spoke of the internationalisation of litigation that the courts were experiencing in NSW.

The morning then broke into three separate streams for panel discussions on: the role of the regulators (ACCC/ASIC) in enforcement and litigation; 'Future Directions in Patent and other IP Litigation', and 'Declaratory Relief in Tax Cases'. In the ACCC/ASIC regulators panel, the recently released Federal Court practice notes were discussed and Wendy Peters (ACCC) shared the Commission's preference for truncated or 'brief' pleadings. Michael Kingston (ASIC) discussed how the Commission perceives its role in bringing proceedings.

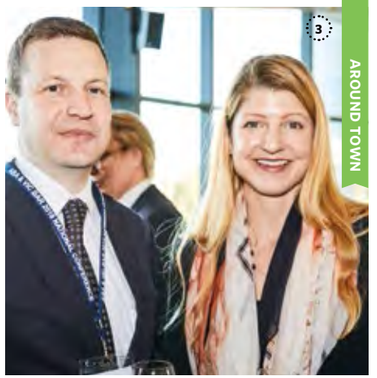
The second sessions for the morning provided choices between 'Employment Law - Boral Litigation), 'Commercial Arbitration in Asia, What is the Future?' and 'Corporate Responsibility and Risk Management and Directors Duties'.

The afternoon sessions presented panels on construction law, class actions and native title. This was followed by a panel session on 'What Corporate Clients want from the Profession'.

The final session provided a lively debate on the interrelationship between Public Relations and Litigation'. The panel participants, Shadow Attorney-General Mark Dreyfus QC, Allen Myers QC, Bret Walker QC, and Leon Zwier, Partner, Arnold Bloch Leibler, provided differing perspectives. Mr Myers discussed the potential for the creation of conflicts between a barrister's duty to the court and to the client. Panel guests, Gillon McLachlan, CEO, AFL, Kerry Wilcock, Government and Corporate Affairs Specialist, and Fiona de Jong, CEO, Australian Olympic Committee, shared their corporate in-house experiences.

That evening a cocktail party was hosted at the Glasshouse to conclude the day's festivities.

Day two of the conference opened with a panel session on High Court Appeals convened by Wendy Harris QC. The panel discussion was opened by the Hon Justice Michelle Gordon who outlined her top tricks for clear and effective written advocacy; Noel Hutley SC of the New South Wales Bar discussed his experience of oral advocacy at the court; Victoria's Solicitor-General, Richard Niall QC, spoke of statutory construction; and Simon Steward, QC, discussed Special Leave applications, and how two thirds of appeals this year have been determined on the papers.



1. Patrick O'Sullivan QC, Prime Minister Malcolm Turnbull David O'Callaghan QC Will Alstegren QC 2. Bill Gillies and Peter Cawthorn QC 3. Sam Hay and Raini Zambelli 4. Andrew Tragardh Justin Wheelahan Hamish Redd 5. Sally Peters, Leon Zwier, Jim Peters QC and Christopher Hughes QC 6. Nicole O'Hare , Michael Rivette and Sonia Stewart 7. Jane Needham SC, Fiona McLeod SC and Chris Gunston SC 8. Helen Tiplady, Rowena Orr SC and Michael Borsky

> "The conference was a tremendous success and was capped off with the closing address by the Prime Minister"

Next followed a lively debate series in the form of the National Advocacy Competition. The Competition, chaired by Mark Costello, pitted state and territory finalists against each other, each delivering a punchy five minute talk on their choice from a list of topics. The Victorian Bar was represented by the gifted Daniel Kinsey, as well as Katherine Brazenor, who was the contestant for the Northern Territory. Contestants had been given only 48 hours to prepare. Popular talks included 'Superman or Batman', and 'social media'. After some lively and highly animated performances, the judging panel, constituted by the Honourable Tom Hughes QC Chev LH and the Honourable Kenneth Hayne AC QC awarded the prize to contestants from the South Australian and Western Australian bars.

The morning was rounded off with a panel on modern litigation and the move towards a paperless office. The panel was chaired by Michael Wheelahan QC. The

1. Gavan Griffith AO QC, Helen Tiplady, Albert Monichino QC, Bronwyn Lincoln, Kanaga Dharmananda SC, Paul Hayes and Alistair Wyvill SC 2. Chief Justices Kouraki, Grant and Murrell. 3. Chief Justice Bryant AO. 4. Chief Justice French. 5. Chief Justice Allsop.

Hon. Justice Margaret Beazley, President of the NSW Court of Appeal, discussed her experience of real time transcripts in the court room and said that the use of technology in litigation hadn't necessarily made it cheaper. Rowena Orr QC and Catherine Button made observations about the increasing trend of firms to brief electronically; and Peter Butler, Partner of the Herbert Smith Freehills, and Belinda Thompson, Partner from Allens, spoke of their experiences with e-court in large litigation.

In the other morning session Christopher Hughes QC of the Queensland Bar chaired a lively discussion by the Honourable Justice James Judd (Supreme Court of Victoria), Jim Peters QC, Mark Livesey QC of the South Australian Bar, and Louise Jenkins, Partner, Allens, and Chris Fox, Partner at King & Wood Mallesons on modern trends in expert evidence.

The afternoon sessions included topics such as the future of litigation in Crime and Civil Law and Aboriginal Incarceration, convened by Matthew Howard SC, as well as a panel on Foreign Affairs and the Legal Challenges of International Terrorism and Human Rights, convened by Julian McMahon, with Chief Justice John Pascoe (Federal Circuit Court), Fiona McLeod SC (Vic Bar), Stephen Keirn SC (Queensland Bar), Arthur Moses SC (NSW Bar), and Sarah Pritchard SC (NSW Bar).

The last session, was a hilarious and entertaining Hypothetical led by Matt Collins QC, based on a suspected terrorist plot at the Melbourne Museum. Julian Burnside QC was advising his refugee protégé, an innocent bystander working at the Museum, seeking to sue the 'Herald Age' for defamation. Jeremy Ruskin QC, representing the journalists, was more than eager for Judge Sara Hinchey to hear him at length. Add to this a backdrop of a splendid Racing Carnival party hosted by Lord Mayor Robert Doyle and a threat to Phar Lap's remains, the hypothetical made for a sensational and entertaining panel.

The conference was a tremendous success and was capped off with the closing address by the Prime Minister, the Hon. Malcolm Turnbull, speaking on the important role the bar plays in Australia and the increasing global dimension of modern day litigation. Particular thanks are due to Will Alstergren QC, Bar CEO Sarah Fregon, and Sally Bodman from the Bar office, for their tremendous work organising a terrific conference.

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Important new portrait for our Bar's own gallery

SIOBHÁN RYAN

The Victorian Bar's latest commission, a portrait of the Honourable Susan Crennan AC QC, was unveiled to a small gathering at the Peter O'Callaghan QC Gallery on the 1st of September 2016. The honour went to Sue Crennan's good friend, Victoria's former Governor and a former member of our Bar, the Hon Alex Chernov AC QC.

The event was attended by members of Sue's family, her friends and colleagues as well as the artist, Lewis Miller (profiled in *Bar News* Issue 159). The chair of the Arts & Collection Committee, Peter Jopling AM QC welcomed the distinguished guests with fond reminiscences of a time when he, Crennan and Chernov were chamber-mates on the "formidable" 17th Floor of Owen Dixon Chambers West.

Alex Chernov spoke of Sue's intellectual depth and scholastic prowess; commencing with First Class Honours in British history at her convent school and then studies in Old Norse in the School of Pure English at Melbourne University where she met her husband to be, Michael (Crennan QC). Not surprisingly, teaching followed graduation, but an attraction to the Law recalled Sue to study and, once again, her academic record was studded with honours.

Crennan's achievements in the law have been written about in other editions of the VBN (Issue 158). It suffices here to recall her quick progression from being the 'in demand' junior to the even more 'in demand' silk and that following her appointment to the Federal Court, it was just 18 months before she gained her position on the High Court.

Chernov observed that Lewis Miller's portrait reflects diverse and fascinating aspects of Sue's character honed from decades in the legal profession combined with an array of appointments and leadership posts, including Deputy Chancellor of Melbourne University and President of the Victorian Bar, the demands of family life and her legendary ability for hosting long dinner parties and St Patrick's Day shindigs. Her Companion of the Order of Australia pin which honours, at least, the first of these achievements, is proudly worn in her portrait.

1. The Hon. Alex Chernov AC QC 2. Jim Peters QC, Her Hon Judge Samantha Marks and Sally Ninham 3. The Hon. S. Crennan AC QC and Peter Jopling AM QC 4. Peter O'Callaghan QC 5. The Hon. Alex Chernov AC QC 6. Wendy Harris QC and David Crennan 7. David O'Callaghan QC, The Hon. Justice Digby and The Hon. Justice David Beach 8. Paul Connor, Jim Peters QC, Paul Anastassiou QC 9. The Hon Michael Black AC QC, Jennifer Batrouney QC 10. Peter Jopling AM QC 11. Michael Crennan QC, Sarah Fregon, The Hon. Justice McMillan and Elizabeth Chernov 12. The Hon. Justice McLeish and Campbell Thompson 13. Mrs Dawson, The Hon. Daryl Dawson AC and The Hon. Hartley Hanson 14. The Hon. Susan Crennan AC QC, Lewis Millar (the artist) 15. His Hon. Frank Walsh AM QC and The Hon. Bernard Teague AM 16. Daniel Bongiorno and Adam Bushby (Curator of the PO'C QC Gallery)

International arbitration update

BY DR VICKY PRISKICH

The growing interest of Australian practitioners in international arbitration was demonstrated by the numbers attending the many events put on by CIArb Australia in 2016, including a number of new events.

Left to Right: Prof Jeffrey Waincymer, Julie Soars, the Hon Justice Middleton, the Hon Justice Davies, Neil Kaplan, Caroline Kenny QC.

International Arbitration Series, Federal Court of Australia

In March 2016, the International Arbitration Series was launched in the Federal Court of Australia in Melbourne. Running over two years the lecture series is a joint collaboration between the Federal Court of Australia and CIArb Australia. The series was initiated by CIArb Australia Vice President, Caroline Kenny QC, in conjunction with Justice Davies of the Federal Court.

The first event of the series focused on a range of cutting-edge legal issues regarding the role of the courts in international commercial arbitration. It featured a distinguished panel comprising Caroline Kenny QC, Professor Jeff Waincymer, Neil Kaplan CBE QC SBS, and Julie Soars.

The event was hosted and chaired at the Federal Court in Melbourne by Justice Middleton and was video cast across Australia via the Federal Court's video conference network, facilitating engagement with the profession across the country. Chief Justice Allsop delivered the Welcome Address from Sydney.

Three other seminars in the series were held: "Evidence in International Arbitration" featuring the Hon Jim Spigelman AC QC (Sydney), "Costs Issues in International Arbitration" featuring Professor Doug Jones AO and Professor Janet Walker (Sydney) and "Jurisdiction Issues in International Arbitration" featuring Albert Monichino QC, Bronwyn Lincoln from Corrs Chambers Westgarth and John Kelly from K&L Gates (Melbourne). Next year seminars will be held in Perth, Adelaide and Brisbane, as well as Sydney and Melbourne.

Grossi Florentino Business Lunch

In July 2016, CIArb partnered with Grossi Florentino to launch its annual business lunch. Held in the beautiful Mural Room, award-winning chef and owner, Guy Grossi, welcomed guests before CIArb Australia Vice President, Caroline Kenny QC introduced Special Guest Speaker, Justice Middleton, National Co-ordinating Judge of the International Commercial Arbitration Practice Area at the Federal Court of Australia. Justice Middleton delivered an erudite and entertaining address entitled "Some Reflections of a 'Statutory Decision-maker' on Consensual International Commercial Arbitration". Dr Vicky Priskich, Deputy Victorian State Convenor CIArb Australia, delivered the vote of thanks.

Sponsored by the Victorian Bar and CommBar, the sold out lunch attracted guests from Melbourne and interstate, including senior executives from Asialink, BHP Billiton, KordaMentha and senior partners from global firms Holman Fenwick Willan, Corrs Chambers Westgarth, Norton Rose Fullbright, Allens, MinterEllison, Herbert Smith Freehills and Baker & McKenzie. Also in attendance were current and former judges of the Supreme Court, members of the Bar and academics.

CIArb Asia Pacific Diploma Course held in Singapore

This year saw the Inaugural CIArb Asia Pacific Diploma Course in International Commercial Arbitration held in Singapore over nine-days (20 – 28 August 2016). Students came from 11 countries and included members of the Victorian Bar. The course was the result of a joint venture between the Australian, East Asia and Singapore branches of the CIArb negotiated by CIArb Australia President, Albert Monichino QC. Under the terms of the joint venture, the course will be held in Hong Kong in 2017 and in Australia in 2018.

CIArb Australia also held the Accelerated Route to Fellowship course over the weekend of 15 - 16 October 2016 in Melbourne, which was led by course director Caroline Kenny QC. The course is a fast track to CIArb Fellowship. The course attracted barristers and solicitors from Melbourne and across Australia.

On 20 May, CIArb Australia also held the enormously popular Introduction to International Arbitration course in Perth. Sponsored by King & Wood Mallesons, it attracted candidates from across Australia and the Asia Pacific. The course is designed to provide an introduction to the main principles of international arbitration and to allow candidates successfully completing the course to become Associate members of CIArb.

CIArb Asia Pacific Diploma Class 2016 with co-course directors Albert Monichino QC and Francis Xavier SC (from Singapore) and members of the faculty at Maxwell Chambers, Singapore.

International Council for Commercial Arbitration (ICCA) Congress

ICCA holds a congress every second year for the presentation and discussion of papers on different aspects of international dispute resolution, including international arbitration. It is the largest international dispute resolution seminar in the world.

The next Congress will be held in Sydney from 15 – 18 April 2018. The event is expected to attract a large number of participants from all parts of the world. The Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), one of the largest and most established arbitral institutions in China, is also the exclusive Diamond Sponsor for the ICCA Congress 2018.

On 30 August 2016, an Australian delegation led by Caroline Kenny QC presented a seminar in Beijing to promote the ICCA Congress 2018 to China. The event was partly sponsored by the Victorian Bar (whose logo was prominently displayed on the advertising program for the event) and attended by over 100 Chinese arbitrators and dispute resolution lawyers. Participants included a judge from the Supreme People's Court, representatives of the Australia and the Australian Centre for International Commercial Arbitration (ACICA), and two representatives of the Australian Government.

Early registrations for the ICCA Congress 2018 are now being accepted. For further details see the ICCA website: http://www.icca2018sydney.com.

Australian Arbitration Week

Australia's annual major arbitration event is Australian Arbitration Week. On 22 November 2016, CIArb Australia co-presented an international arbitration conference with the Business Law section of the Law Council of Australia and ACICA, which was held in Sydney at the Federal Court of Australia. This year's theme was "New Horizons in International Arbitration" and brought together eminent keynote speakers and panels from Australia and around the world. Gary Born, President of SIAC Court of Arbitration, delivered a keynote address at the conference and was the special guest speaker at the annual CIArb Australia dinner held at Sydney Tower. The conference was opened by Chief Justices Allsop and Bathhurst and panel leaders included Chief Justice Martin of the WA Supreme Court and Justice Vickery of the Victorian Supreme Court. Other international arbitrators who spoke at the conference included Dr Fuyong Chen, Deputy Secretary of the BAC/BIAC, Elliot Geissenger, President of the Swiss Arbitration Commission, as well as experts from Italy, the UK, Hong Kong, Australia, The Hague, Malaysia, and Singapore.

In 2017, Australian Arbitration week will be held in Melbourne.

Left to right: Dr Vicky Priskich, Albert Monichino QC, the Hon Justice Middleton and Caroline Kenny QC.

1. Chris Horan receives the Victoria Bar Pro Bono trophy from the Hon Tim Wilson MP 2. Will Alstergren
3. Jarrod Williams and John Desmond 4. Joh Kirby (Victoria Law Foundation), Stuart Webb (Migration Review Tribunal)
5. Haroon Hassan, Emily Porter 6. Christopher Tran receives the Daniel Pollak award from the Hon Tim Wilson MP
7. Áine Magee QC, Melanie Szydzik, Brian Walters QC, Julian Burnside AO QC

For the public good: the 2016 Pro Bono Awards

HAROON HASSAN ON BEHALF OF THE PRO BONO COMMITTEE

One of the hallmarks of the Victorian Bar has been its unstinting commitment to pro bono work over many years. Each year members of the Victorian Bar contribute thousands of hours and many millions of dollars' worth of legal services for the "public good". As Chief Justice Warren remarked at the 10th Anniversary of the awards in 2010:

> *While law firms are encouraged to perform pro bono work as an incentive or condition to winning government legal work, for barristers it is different. Were it not for the commitment to the highest ideals of the Bar displayed by those who provide pro bono work, it would not happen at all.*

The Pro Bono Committee continues to explore ways to encourage barristers to record the value of their pro bono work. By recording and recognising the efforts of our members who undertake pro bono work we are able to better quantify and analyse the enormous contribution made by our members to the administration of justice.

In 2014 the Pro Bono Awards became a biennial event. This year guests and nominees gathered in the Supreme Court Library on 16 November to pay tribute to this year's award winners. The awards were presented by the Hon. Tim Wilson MP (the Member for Goldstein and former Australian Human Rights Commissioner) on behalf of the Commonwealth Attorney General.

In selecting this years' winners, the Pro Bono Committee was faced with the unenviable task of selecting from a rich pool of nominees who have made extraordinary contributions through their pro bono work. Below is the list of the 2016 award winners. We applaud their efforts and congratulate them on their awards.

The Daniel Pollack Readers Award

Christopher Tran

Named after Daniel Pollack who joined the Bar in 2007 but who tragically passed away after just 18 months at age 29. It recognises the pro bono contributions of those who have signed the roll in the past 2 years.

This year's winner was Christopher Tran. He was recognised for his tireless pro bono work in a number of capacities. Some of the many high profile cases he has undertaken since signing the bar roll include:

» *Murphy v Electoral Commissioner* [2016] HCA 36 which challenged provisions of the *Electoral Act*, which set a cut off on enrolment and therefore disenfranchised many thousands of people.

» *Brown v Tasmania* [2016] HCA (judgment reserved), a case challenging the validity of Tasmanian anti-protest laws on the basis of inconsistency with the implied freedom of political communication.

Chris was described by his clients as "extremely attentive" and "brilliant to work with".

Min Guo and Anastasia Smietanka were both highly commended for their pro-bono contributions in this highly-contested category.

The Ron Castan AM QC Award

Angel Aleksov & Siobhan Kelly

This award is named after the late Ron Castan AM QC. It recognises the pro bono contributions of counsel between 2 – 6 years call.

The judges could not split this year's joint winners. This is fitting as they both signed the roll in 2013 and presently share a room together in chambers coincidentally named after Ron Castan.

Angel Aleksov was nominated for his "exceptional contribution to the pro bono sector, in particular [his] refugee and asylum seeker [work]". Regarded as a "talented barrister" who achieved "exceptional outcomes", he was recognised for making an enormous contribution through fearless representation of applicants in the Federal Circuit Court and the provision of training to other lawyers working in this area.

Siobhan Kelly has also undertaken significant amounts of pro bono work since signing the bar roll in 2013. She was honoured for her "fearless advocacy" on behalf of Duncan Hart (a part-time Coles worker from Brisbane) in the Fair Work Commission, both at first instance and on appeal.

On appeal Siobhan (unled) was opposed to two silks and three juniors briefed on behalf of Coles and the Shop Distributive and Allied Employees Association Alliance (the SDA), respectively. The subsequent decision of the Commission in favour of Mr Hart gained national media attention for setting aside an enterprise bargaining agreement affecting tens of thousands of lowly paid workers across Australia. Media reports estimated the scale of underpayments at between $70 - $100 million per year. As a result of this important decision a number of other agreements struck by the SDA are now being scrutinised.

"It is a case that has fundamental repercussions for many of the most vulnerable employees in Australia".

The Susan Crennan AC QC Award

Kathleen Foley & Rolf Sorensen

This award is named after former High Court Justice Susan Crennan AC QC a trailblazer and leader of our bar. It recognises the pro bono contributions of counsel between 7 – 15 years call.

Once again the Committee was unable to choose between our joint award winners.

Kathleen Foley was recognised for her work as junior counsel to Mark Moshinsky QC (now his Honour Justice Moshinsky of the Federal Court of Australia) in *North Australian Aboriginal Justice Agency v Northern Territory* [2015] HCA 411 which challenged the validity of "paperless arrest" laws in the Northern Territory, which enabled police to lock individuals up for four hours for minor offences. The case resulted in the High Court placing important limitations on the use of the laws.

Kathleen was described as the "epitome of efficiency, diligence and excellence" and was commended for being both "thorough and consultative".

Rolf Sorensen was honoured f or his tireless and ongoing work over 10 years with the AED Legal Centre, a specialist Community Legal Service representing people with disabilities. In particular, he was nominated for his advocacy in *Butterworth v Independence Australia Services* [2015] VCAT 2056, a discrimination case brought by a disabled AED client against her employer.

Rolf was praised for his "empathy" and his commitment to his clients. "His generosity with [his] time, skills and knowledge are second to none". "[Without] people like Rolf [AED] would not be able to operate".

Arushan Pillay was highly commended in this category for his work on the inquest into the death of Numan Haider (along with Megan Fitzgerald)

The recipients and distinguished guests, L-R Pat Zappia QC, Norman O'Bryan Am SC, The Hon tim Wilson MP, the Hon Chief Justice French AC, Chris Horan, Kathleen Foley, X, Christopher Tran, Angel Aleksov, Siobhan Kelly, Melanie Szydzik, Megan Fitzgerald,Ray Ternes

The Ron Merkel QC Award

Norman O'Bryan AM SC

This award is named after former Federal Court Justice Ron Merkel QC who has demonstrated an unwavering commitment to social justice and human rights throughout his time as member of the bar. It recognises the pro bono contributions of counsel between over 15 years call and those of silk.

Norman O'Bryan SC was declared the winner of this year's award. His successful nomination focussed on his crucial and multifaceted work in aid of a law reform campaign launched by eight key sector and professional bodies to fix the fundraising laws that apply to charities and other not-for-profit organisations across Australia.

"Having ready access to Mr O'Bryan's ... expertise and high-level legal thinking about the workability of law reform options, has been core to launching and gaining considerable traction with the campaign. A campaign that has the potential to bring about much needed law reforms that have been stalled for more than a decade".

The Public Interest /Justice Innovation Award

Melanie Szydzik, Megan Fitzgerald and Ray Ternes

This award acknowledges innovation in the delivery of justice or cases of significant public interest in which counsel have acted pro bono.

Latrobe Valley residents formed a community group (Voices of the Valley) in response to the Hazelwood Mine Fire in 2014, which burnt for 45 days, blanketing the community in smoke.

The fire resulted in deep Latrobe Valley concern about the short and long term impacts on community health. Through fund-raising, community activity, lobbying and advocacy, the group has managed to highlight the issue their community continues to face. Voices of the Valley continues to work to provide a voice for public concerns over direct impact and long-term health, welfare, economic and environmental effects.

Melanie, Megan and Ray (instructed by Environmental Justice Australia) appeared before the Inquiry. "[They] effectively balance[ed] advocacy for their clients with assistance to Justice Teague and the board, reviewed large amounts of evidence at short notice including complex epidemiological and medical evidence, and all in the context of very high community expectations".

The Victorian Bar Pro Bono Trophy

Christopher Horan QC

This prestigious award recognises a long standing commitment and contribution by counsel to pro bono work over many years.

This year's deserving winner was Chris Horan QC who was recognised for his "substantial and extraordinary commitment to pro bono over a significant period of time".

This included recent important Federal Court proceedings (heard concurrently) which challenged the systematic delay in the processing of citizenship applications for refugees who arrived in Australia by boat: *BMG16 v Minister for Immigration and Border Protection* and *BMF16 v Minister for Immigration and Border Protection* (judgment reserved).

Chris was also cited for his "enormous effort and skill" in arguing *M64 v Minister for Immigration and Border Protection* (2015) 327 ALR 8; (2015) 90 ALJR 197, a test case that challenged Ministerial policy under the humanitarian visa program which adversely affected family reunion visa applications sponsored by refugees who had arrived in Australia by boat.

"Chris epitomises the idea that the best social justice advocates are the best lawyers. His efforts in pursuit of fairness and access to justice are admirable and an example to the profession. Chris is a humble, quiet achiever and incredibly deserving of this award. We cannot recommend him more highly."

1. Chris Tran also appeared as junior counsel in this matter.

BACK ROW: Matthew Goldberg, Ross Gordon, Patrick O'Sullivan, Deputy President Richard Clancy, Andrew Denton, Stephen Sharpley QC, James Wilton, Keith Kendall, Barnaby Chessell;
FRONT: Rob O'Neill, James Batrouney, Carole Shanks, Judge Philip Burchardt, James Tierney, Nick Tweedie QC.

All in the family

VBN

The Victorian Bar regained the Scales of Justice Trophy in this year's match against the Law Institute of Victoria. Nobody was more pleased by the victory than Bar News editor Georgina Costello, who is married to the captain of the solicitors' hockey team (Paul Ross, Blackwood Family Lawyers). The Scales of Justice trophy had been on display in their bedroom for much of the past two years following back to back wins by the solicitors.

The future looks bright for the Bar, with rising star - Andrew Denton - winning the Rupert Balfe trophy for best on ground. Fresh talent like this should ensure that the trophy can remain in other bedrooms for years to come.

Incoming Bar President Jennifer Batrouney QC usually ropes in her two sons to play for the Bar team. James Batrouney played again this year, even though he was in swot vac for his university law exams. We look forward to having both Batrouney boys on the field next year.

The Bar – ably captained by employment and OHS barrister Rob O'Neill who ensured there was no exploitation of any player - took an early scoreboard lead. The solicitors hit back. At half time the Bar was slightly ahead. Judge Burchardt moved the ball faster than a judge leaves the bench on a Friday afternoon. Ross Gordon retired early with a "hammy" and announced it was his last game for the Bar team. Noticeably affected by the game day pressure, Ross announced that he would retire, not only from hockey, but also from Gordon and Jackson this year. Deputy President Richard Clancy played fairly and worked hard. Stephen Sharpley QC in goal never looked taxed. Carole Shanks from Green's List ran around like a busy clerk. Nick Tweedie and Barnaby Chessell's play in midfield was very well planned. Matthew Goldberg's forward thrusts were criminally effective. In the end, the Bar's players pushed through perennial back and knee pain to win 5:2.

Both teams enjoyed the beers and BBQ put on after the game by Burgess Paluch Legal Recruitment. The game was played fairly, nobody squabbled with the umpires and there were no appeals against the result.

News AND Views

Gun laws: the American predicament

LACHLAN ARMSTRONG

The past year has seen yet more mass shootings in the USA, and the predictable vitriol of the gun debate in that country exacerbated by the Presidential election campaigns.

But the year also featured the "sit-in" by the congressional Democrats after the Orlando nightclub horror, and the *cri de coeur* from President Obama, both pressing for gun reform.

We tend to wonder how things could have reached such a pass. We hear American references to their "constitutional right to bear arms", and we know that constitutions might constrain legislative action, but that constitutional provision is about *militias*, isn't it? So what's the problem? Didn't militias fade out with muskets?

But it's not so simple. Before we offer any opinions about gun control in the USA, we should acknowledge the extent to which their constitution does create an obstacle to reform. The Americans face a problem that Australian governments, in the wake of the Port Arthur massacre, never did.

This article will attempt to give some context to the US "right to bear arms", and then examine their courts' attempts to balance the constitutional right against growing concerns for public safety. The results are considerably more nuanced than media reporting might suggest.

It is important to start by acknowledging the peculiar historical circumstances in which the US and its Constitution emerged. The right to bear arms takes its colour from that context.

The Bill of Rights

In short, in the mid 1700s the Americas comprised a set of 13 British colonies. Each had a separate provincial government with fairly full power to make laws within its own territory.

But by the 1770s local resentment at British taxation had driven the colonies into revolution. They formed a loose military alliance and then, as the fighting continued, they held a series of conventions in Philadelphia to coordinate their campaigns. Those conventions led, eventually, to the Declaration of Independence in 1776.

> “All the controversy over gun control in the US depends fundamentally on the alternative meanings of that awkward clause”

At the time of the Declaration it was not clear what system of government might replace British colonial administration. What was clear, however, was that independence, if won at all, would not endure unless the territories could withstand ongoing British retaliation. That imperative for common defence was a critical factor driving the American provinces to form a union.

Initially they agreed upon some weak “Articles of Confederation and Perpetual Union” in 1781, in the later stages of the War of Independence. Those Articles proved unworkable, so in 1787 they were replaced with the original US Constitution and the federalist structure that endures today.

Thus the former colonies became States. Each retained a jurisdiction to make laws within its own territory. But sitting alongside was a new “federal” government, with power to make laws on matters across States, or between the States as a group and foreign nations. It is, of course, the basic model that Australia later copied.

But the Americans went further than their later Australian counterparts in one critical respect. The original US Constitution was criticised for being careful to delineate power between the State and Federal governments, but not clear about the rights of “we the people” as against the new government. And so, almost immediately, a set of ten amendments was added. Those amendments comprise their Bill of Rights.

The Second Amendment

At this point we need to widen the lens again. There were some peculiar features of the War of Independence, and of the society that predated it, that influenced the Bill of Rights in its treatment of “arms”. There were at least three clear factors at play.

First, America in the 1700s was still frontier country. The pioneers had ample need of guns, for hunting and self-defence.

Second, the young nation couldn’t afford and didn’t want a “standing” army of professional soldiers. Instead, there was a tradition of “militias”. In times of danger, the civilian population mobilised, served and then resumed civilian life. But when they were called up, they brought their own guns.[1]

Third, despite various checks and balances constraining federal power under the new Constitution, the Founding Fathers – deeply learned men like Thomas Jefferson and James Madison – knew from long historical precedent that the first act of any tyrannical government is often to disarm its opposition. They wanted to remove that as an option for their own new federal government.

Those three factors explain why, of all the ten amendments in the Bill of Rights, the *second* in the list, right after freedom of speech and association, is the right to bear arms.

The language of that “Second Amendment” is clumsy by modern standards. It is, at least, succinct. It reads:

> *“A well regulated Militia, being necessary to the security of a free State, the right of the People to keep and bear Arms, shall not be infringed.”*

All the controversy over gun control in the US depends fundamentally on the alternative meanings of that awkward clause. The narrow reading focuses on the opening words. It argues that the only right being protected is one to bear whatever arms might be necessary for use in a formal, State-regulated militia force.

But the broad view argues that the reference to “militia” seems to build upon an assumption of an existing, underlying right to bear arms. The opening words might explain why that right needed protection, but what really matters is the second half of the clause, which is an unqualified statement of the right.

For many decades the narrow view prevailed, even at Supreme Court level and quite unambiguously.[2] But in 2008 the Court reconsidered the issue. In *District of Columbia v. Heller* it held, by majority, that the broad view was better justified by the language, and by the constitutional and historical context.[3] The underlying right referred to in the second half of the clause was an *individual* right to keep and bear arms for any customarily-lawful purpose, including hunting but especially self-defence.

Heller was the first of two important decisions. It had limited initial impact, because it concerned a law made under federal legislative power – an ordinance of the federal District of Columbia – and there was a separate line of cases holding that the Second Amendment did not apply to *State* laws.

That limitation dissolved in 2010. In *McDonald v. Chicago*[4] the Supreme Court emphasized that in the aftermath of the US Civil War of the 1860s, the Constitution had been amended again. The Fourteenth Amendment had been adopted to ensure that the freed slaves of the defeated Confederate South not only had the same “rights and privileges” as white citizens but also had those rights protected against infringement by their resentful local legislatures.

This was not a trifling problem – the Court’s *précis* of racial violence in the aftermath of the Civil War makes harrowing reading. There were cogent reasons why the right to bear arms was explicitly mentioned in the 1860s debates, as one needing protection from *State* infringement.

Thus, the problem confronting modern American lawmakers: federal law is bound by the Second Amendment, and State law is bound by the Fourteenth Amendment, to respect what the Supreme Court has held is an essential right or privilege of American citizenship.

Laws after Heller

Now arises the most interesting question. *Heller* concerned a local ordinance restricting the storage of loaded *handguns* in private residences. The majority insisted the ruling would not undermine most existing gun laws, nor entitle private citizens to demand “dangerous and unusual weapons” like “M16s and Stinger missiles”.

> “…as lawyers we should respect the difficulties Americans confront in achieving reform.”

That last aspect seems odd given the *militia* aspect of the Second Amendment, but put that to one side. Even permission of arms for self-defence and other lawful purposes is very broad. How do they manage *any* laws constraining such a right?

The answer is best demonstrated by the course of the *Heller* litigation itself, after the Supreme Court decision.

That is, DC urgently passed new laws. Instead of outright bans, it attempted a tight system of registration of *firearms*, and periodic licensing of *owners*.

The new laws were then challenged in *Heller II*.[5] The challenge was summarily dismissed at first instance, but it is the appeal that is illuminating for present purposes.

The DC Circuit appeal decision highlights the process of enquiry the US courts make to determine whether a law impinges too far on Second Amendment rights. It is a two-step process, that:

> *“(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply the appropriate level of scrutiny.”*

In the first step, the courts look at historical records to assess whether the conduct being regulated was already constrained in the 1790s or 1860s, being the dates of the Second and Fourteenth Amendments respectively. If it was, it is unlikely to be protected now.

Thus *Heller* itself (“*Heller I*”) had indicated that longstanding restrictions on firearms for felons and the mentally ill would likely remain permissible, even on its new expanded construction of the Second Amendment.[6] And in *Heller II*, the historical record led the appeal Court to hold that the new law requiring registration of *handguns* was not novel, and so ought not be regarded as a “burden” on the right to bear arms.

But importantly, other elements of the new DC laws *were* novel – the requirements for registration of *rifles*, licensing of *owners* of any firearms, additional licensing for owners wanting “concealed carry” of their firearms in public, and a ban on “assault weapons”. The absence of any tradition for these restrictions meant they did constitute “burden”, and so for these the Court moved to the second step in the analysis – identifying “the appropriate level of scrutiny”.

“Scrutiny” here refers to the three measures of public-interest or “means-end” justification that US courts might apply to allow a law that otherwise infringes some constitutional protection. *Rational-basis review* requires only that the regulation be rationally related to a legitimate state interest. *Intermediate scrutiny* requires the government to demonstrate that there is a reasonable fit between the challenged regulation and a substantial government objective. *Strict scrutiny* requires the government to prove the restriction is narrowly tailored to achieve a compelling government interest.

Heller I had said that rational-basis review would not be appropriate in Second Amendment cases. But two things are then made clearer by *Heller II*.

First, the appropriate level of scrutiny will vary from law to law, depending on the severity of the burden (say, a ban versus mere licensing) and how close it approaches to the “core” of the Second Amendment (described as “self-defence in the home”). In short:

> *“a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.”*

NEWS AND VIEWS

Second, the DC Circuit followed other early post-Heller I decisions in holding that registration and licensing requirements were only a "modest" burden on the core Second Amendment right. As such, intermediate scrutiny was appropriate.

But recall there was another element to the DC laws – a full ban on "assault weapons". Since *Heller I* had already indicated that M16-style *fully*-automatic rifles (and anything worse) would fall outside Second Amendment protection, the phrase "assault weapons" in *Heller II* was treated as meaning anything in the range of *semi*-automatic weapons such as, most famously, the AR-15 – the civilian version of the M16.

Notwithstanding that it was a ban, the Court held it was not a "severe" burden on the right to self-defence (or, incidentally, the right to go hunting). In effect, where there were plenty of other firearm choices available, a ban on one option was only a modest constraint. Intermediate scrutiny applied.

And here is the crunch. The *Heller II* Court did not itself decide the fate of the DC laws. Having confirmed "burden" and clarified the appropriate scrutiny, it simply remanded the case to the lower courts. The parties would be able to lead further evidence as to whether the challenged laws satisfied the relevant means-end test.

Heller II is a neat demonstration of the method of analysis deployed by the US courts in Second Amendment cases drawing directly on First Amendment jurisprudence. Usefully, it also provides a virtual checklist of the main gun-control measures that US legislatures have attempted in the wake of *Heller I*.

But *Heller II* was only one decision. Almost every element of it has gone the other way in one or other of the different circuit courts.

For instance, *Heller II* treated the DC licensing requirement for "concealed carry" as a novel regulation, and therefore a burden requiring intermediate scrutiny. But in June 2016 the Ninth Circuit, sitting *en banc* as 14 judges in *Peruta v. San Diego*, found by majority that restrictions on hidden weapons were so longstanding and widespread, across the USA, that concealed carry was not conduct within Second Amendment protection at all.[7]

And *Peruta* reveals a tension in the basic two-step enquiry. The dissentients accused the majority of focusing just on "concealed carry" and ignoring the context that other provisions of the relevant Californian laws also banned "open carry", so that "public carry" overall was severely constrained. The minority's analysis is forceful; but at the same time, it gives barely a nod to the historical record. The majority did arguably favour history over text, but the minority certainly favoured text over history.

The deference paid to history is therefore one variable between judges and between circuits. A second variable arises from *Heller I*'s observation that pre-1790s attitudes toward self-defence did not extend to "dangerous or unusual" weapons.

Put to one side the consideration that almost any modern firearm would have been unusual by 1790s or 1860s standards. Even the "originalist" interpretation in *Heller I* seems to permit the Second Amendment to keep pace with technology. The issue in the second variable is whether a given court regards a particular category of firearms – usually meaning "assault weapons" like AR-15s – as being "dangerous or unusual" despite their popularity in modern America.

And that issue closely relates to a third variable – the readiness with which a given judge will regard a given regulation as sufficient "burden" to require strict scrutiny.

The second and third variables are evident in *Kolbe v. Hogan* in February 2016.[8] The Fourth Circuit there differed from the DC Circuit in *Heller II* and ruled that a ban on semi-automatic weapons like the AR-15, and related bans on large-capacity magazines, were sufficient burdens on Second Amendment rights as to require strict scrutiny.

Again, the Court simply remanded the matter for further evidence and rehearing, but its observations along the way do not augur well for the ban. That is, the majority accepted fairly readily the proposition that it was reasonable for private citizens in modern urban America to want to equip themselves for a "home defence" situation in which the sensible weapon of choice would be something capable of emptying a 30-round magazine of military-grade ammunition in under 6 seconds. It is a little startling.

But despite misgivings over examples like *Kolbe*,[9] overall one must acknowledge that the US courts in the short time since *Heller I* have developed an impressive jurisprudence. It demands evidence and subjects it to a structured analysis but is always, explicitly, deeply conscious of the need to balance the public interest in gun-control against the imperatives of the Constitution.

Heller I unleashed waves of litigation, and waves of law reform in response. The ebb and flow will continue, and interestingly the Supreme Court has declined several applications for review of lower-court rulings on post-*Heller* gun controls.[10]

It is worth noting, then, the eventual outcome of *Heller* itself. After *Heller II* the DC legislature further adjusted its regulations, but there was another round of challenges. Ultimately, in *Heller III*, the DC Circuit allowed some but disallowed other restrictions.[11] Importantly, each of them was the subject of specific evidence and careful "means-end" analysis, and where DC failed adequately to justify a particular restriction, it was ruled invalid.

The American predicament

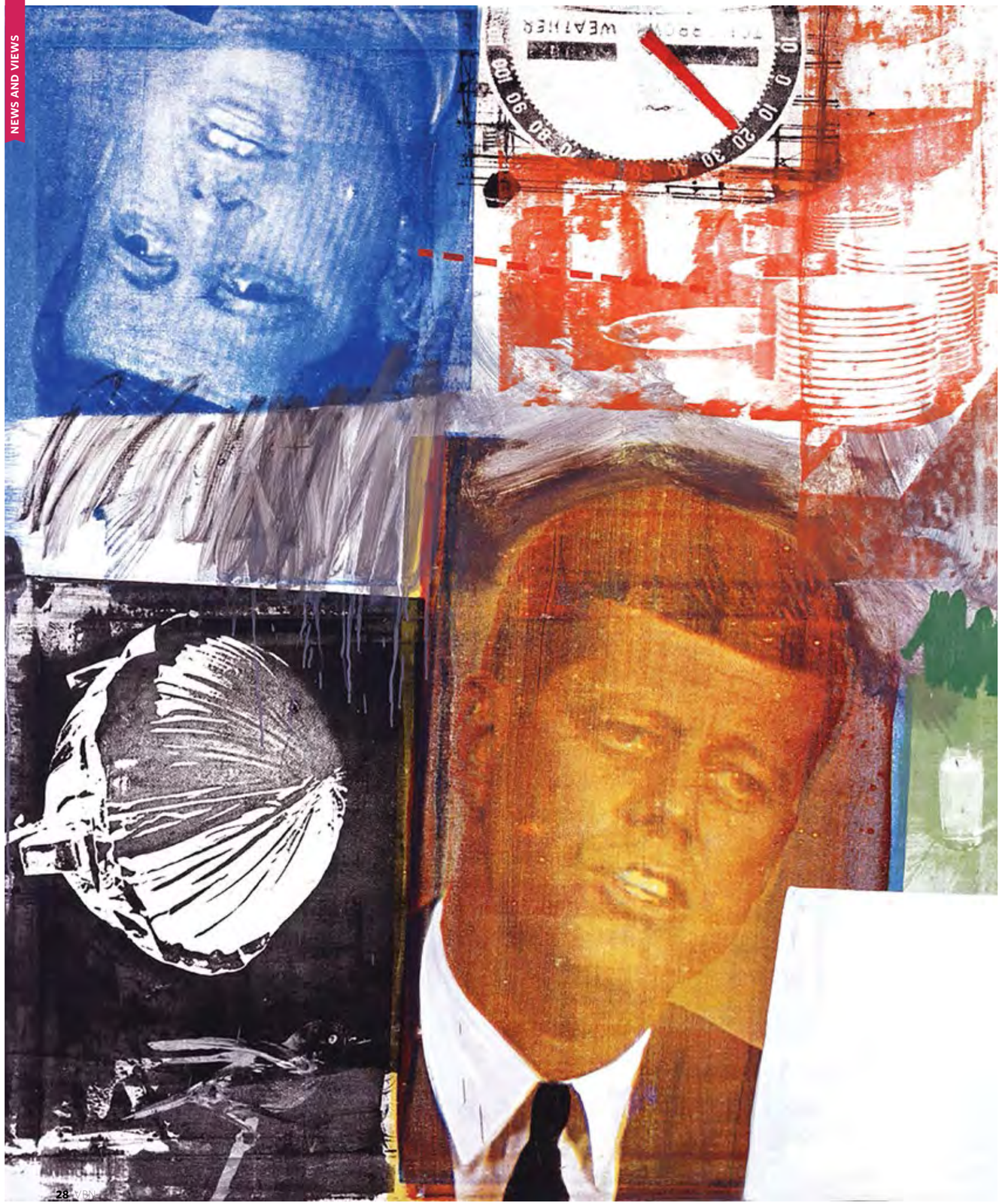
This, then, is the American predicament. Their constitution enshrines an individual's right to bear arms for self-defence. The post-*Heller* cases have affirmed some restrictions on *who* can possess guns, and *what* guns, and how *soon*. But what's left is enough to perpetuate ready access by almost anyone to weapons incomparably more lethal than the flintlock muskets of the War of Independence.

We should be horrified at the endless reports of gun violence in the USA, but as lawyers we should respect the difficulties Americans confront in achieving reform. Many legislatures have enacted sophisticated gun-control regimes, testing the limits of the Second Amendment. And their courts have transplanted into this post-*Heller* world a body of principle that in fairness does reflect a conscientious, carefully-informed attempt to balance the public benefits of gun control against the mandates of their Constitution.

Views will differ as to the desirability of the constitutional right. But that is a quite different question from whether it should be observed while it endures. And the Second Amendment itself is exceedingly unlikely to change. The mechanisms for amending the US Constitution are, if anything, even more restrictive than in the Australian Constitution.

Finally, the reality is that the US gun problem is no longer just a question of legal nicety or political will anyway. Past laws and continuing cultural expectations have seen some 350 million firearms put into circulation. There is nil prospect of effective confiscation. It is hard to dismiss the argument that new laws now would only disarm the law-abiding citizens.

1. Indeed, some of the colonial legislatures had laws requiring able-bodied freemen to keep weapons of a certain standard and in good order, ready for use at short notice in the local militia force, sometimes "at a minute's notice" – hence Paul Revere and the "Minutemen".
2. United States v. Cruickshank 92 US 542 (1876); United States v. Miller 307 US 174 (1939).
3. District of Columbia v. Heller 554 US 570 (2008).
4. 561 US 742 (2010).
5. Heller v. District of Columbia, 670 F.3d 1244, 1248 (D.C. Cir. 2011) (Heller II).
6. Nonetheless, mental-illness restrictions will also be closely scrutinised: see e.g., Tyler v. Hillsdale County Sherriff 775 F.3d 308 (2014) (US Court of Appeals, Sixth Circuit).
7. Peruta v. City of San Diego (US Court of Appeals, Ninth Circuit) (unrepd), 9 June 2016.
8. 813 F.3d 160 (2016) (US Court of Appeals, Fourth Circuit).
9. Interestingly, the Fourth Circuit held a rare en banc rehearing of the Kolbe appeal in May 2016. As at August 2016 the decision is reserved: 4th Cir. 2016 docket 14-1405.
10. E.g., in Friedman v. City of Highland Park 136 S.Ct. 447 (2015) (Scalia & Thomas JJ dissenting from denial of certiorari); Shew v. Malloy (US 15-1030, cert den 20 June 2016).
11. Heller v. District of Columbia, 801 F. 3d 264 (D.C. Cir.) (Sep 2015) (Heller III).



Observations of American Courts

CAMPBELL THOMSON

Brooklyn

Between the first and the second Presidential debates, on Thursday 6 October 2016, there was a farmers' market in the square in front of the Kings County Supreme Court in Adams Street, Brooklyn. On a wide table many varieties of heirloom tomatoes ranging from yellow golf balls to crimson baseballs sat gleaming in the sun. Nearby the statue of Christopher Columbus wondered where the new world was heading.

Inside the Courthouse, blue marker pen scribble on a white board in the Registrar's Office on the 7th floor told us which courts were sitting.

My partner and I were on holiday. We'd walked over Brooklyn Bridge. We passed by where Walt Whitman printed *Leaves of Grass*. She rolled her eyes when I quoted Whitman's poem about the death of Lincoln, that canny trial lawyer. It does not mention him by name.

I am always curious about how countries handle the rule of law. I've heard a Prosecutor at the Old Bailey cross-examine an accused about a gruesome murder. I've seen opposing counsel in wigs wave their briefs at the bench to make their points in the Jaipur Court of Appeal. I've been to Lurigancho prison outside Lima, where guards wave whips as thick as fire hoses, to advise a man charged with trafficking cocaine.

We entered a court on the 11th floor of the Kings County Courthouse. 16 men and women of various ages, races, classes and states of dress sat randomly in the body of the court. One man read the New York Times. Its pages, half as wide as those of the Herald Sun or The Age, rested on the back of the seat in front of him. Others sat bored and fidgeting, unable to use their cell phones.

The only official was an African American in a blue uniform with the badge of the State of New York on his shoulder and an automatic pistol on his hip. On one side of the empty bench was the flag of the United States, on the other was the flag of the State of New York. Above the bench were the words IN GOD WE TRUST.

Two men entered from a side door. Both were in their forties with sun tans, slicked back hair and outfits from *Suits*. One carried a board with paper on it. They sat on the bench side of the bar table. One of them looked up and asked *Ms Smith would you please raise your hand*?

Ms Smith was a red haired woman of about 35.

The questioner was counsel for a plaintiff who had fallen off a flat roof after a party. The plaintiff alleged his landlord had not provided a safe fence on the roof.

> *So Ms Smith, where do you live? - On Brooklyn Heights.*
>
> *Do you own or rent? - I rent an apartment.*
>
> *What do you do for a living?- I teach high school.*
>
> *Ever had a dispute with your landlord? - No.*
>
> *Do you have any issues that could prevent you from judging this case fairly?- It's personal.*

The questioner looked at counsel for the landlord who was taking notes. They whispered and then asked Ms Smith to join them outside the court room. They returned a few minutes later. There were no more questions for Ms Smith.

A similar process followed with other potential jurors. Each counsel asked similar sets of questions. They were unfailingly polite and obliging. After about an hour they took a break.

I introduced myself to both counsel who were chatting in the corridor and explained I was a trial lawyer from Australia where we can't ask jurors questions.

Where's the Judge? I asked.

Oh, he's out the back somewhere. We don't need him for this...

So what happens if you two have an argument? They looked at each other in amazement. It was clear they had been opponents many times before.

So the Judge has nothing to do with it? Counsel for the respondent told me:

We don't normally need him. It's different in Federal cases where the Judge asks the questions…

I later read that this was a voir dire as explained in *Implementing New York's Civil Voir Dire Law and Rules*, by Ann Pfau, Chief Administrative Judge, New York State. It states at point V.C.4:

> *Counsel should make every effort to settle disputes without court assistance. If such efforts fail, counsel shall bring the dispute to the attention of the assigned trial judge or Judicial Hearing Officer.*

These guys knew what they were doing. The Judge could have left to play golf.

De Toqueville's *Democracy in America*

In 1831 the French aristocrat Alexis de Toqueville travelled the United States for nine months to investigate its prison system at the behest of the French government. He did not only look at US gaols. He also examined its

politics. In 1835 he published the first volume of *Democracy in America*. In it he wrote:

> *The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions... it invests each citizen with a kind of magistracy, it makes them all feel the duties they are bound to discharge toward society; and the part which they take in Government... they were better informed about the rule of law, and they were more closely connected to the state. Thus, quite independently of what the jury contributed to dispute resolution, participation in the jury had salutary effects on the jurors themselves.*

In 2014 legal academics in a Cornell University study questioned jurors in seven states. They found that civil jurors were more likely to vote after jury service. They also found there was no boost in civic participation following civil jury service but that jurors after criminal trials increased their civic engagement.

NSW, WA, QLD, SA and the ACT have all passed laws to permit trials in criminal matters by Judge alone. I'm with de Toqueville. The institution of jury trials is vital for a functioning democracy.

Manhattan

On Wednesday 12 October after the second Presidential debate, we went to the Supreme Court in Manhattan on Centre Street. It's a few blocks south of Chinatown where angry Maine lobsters sell for $10 a pound and close to the original headquarters of the NYPD which is almost as grand as our Supreme Court.

The courts for criminal trials are in a building dating from 1941. It's showing its age. A wooden ramp outside allows for wheelchair access. In the foyer where security screening takes place is a pictorial monument to Court staff who died in 9/11.

I asked at the Registrar's Office why only two courts were sitting in the busiest criminal court in the country.

It's Yom Kippur, a clerk replied. We goys were abashed.

Upstairs on behalf of the People, a young female Assistant District Attorney was directing testimony from a detective. Her questions were clear and precise.

The geography of the court meant the detective sat in the stand only a few feet to the Judge's left, on the same level. The jury box was a little further to the left of the Judge at right angles to his bench. The prosecutor stood at a lectern in front of the end of the jury box furthest from the Judge.

The detective was a former infantry officer with a buzz cut. The back of his suit bulged from the pistol holstered on his belt. He told the jury about his surveillance in the Bronx. He saw the accused carrying a bag from an apartment to a parked car occupied by two men. The accused entered the car and put the bag between the two front seats. The detective saw through binoculars that the men opened the bag and looked inside it.

Other police then ran from cars nearby and arrested all three men. In the bag, under some children's clothes, were packages containing two pounds of heroin and one pound of cocaine.

No further questions.

The defence counsel walked slowly to the lectern. He was slight, bearded and about thirty. The only issue seemed to be whether the accused knew he was carrying narcotics. The detective agreed that the accused had no prior convictions. Then defence counsel asked:

> *You'd never seen the accused before had you?*

> *Only in a photograph.*

The Judge sent the jury out and said:

> *You walked into a minefield, counsellor. How do you want to handle it?*

After some discussion, the detective agreed to say that police had done number plate searches on all the cars nearby. The accused owned one of the cars. The detective had uploaded the photo from the accused's driver's license.

The detective explained this in further cross-examination when the jury came back.

Any redirect? asked the Judge.

No, said the prosecutor.

A retired senior detective then gave expert evidence about drug dealing in the Bronx. He'd been a senior member of the narcotics squad for a decade. The thrust of his evidence was that it was common for drug dealers to use cleanskins like the accused as couriers. He was the last witness the People called.

A female juror in the back row was writing furiously. She handed some papers up to the Judge. He looked at them for a moment and said:

> *Counsel to the side bar.*

Before he left his chair he pushed down on an object like a snow cone. It emitted a dull white noise.

He and the two counsel whispered together and then the Judge sat down, turned off the white noise, answered the questions that were of little moment and called a recess.

I introduced myself to the retired detective. I explained that ice was the big problem for our police.

Heroin is back on top here. Lots of ODs in Brooklyn right now, he said.

I told him I'd seen a deal that morning in the subway at West 4th Street in Greenwich Village with a wad of cash exchanged for a bulging paper bag.

We'll call you as a witness, he smiled.

It was dark and they were both black, I replied.

Back in court I asked one of the court officers about the Judge.

He only hears trials. He was a defence attorney for a long time. Not like some of them who only get here because of who they know.

The Judge wandered back into court. The jury was out. No one said anything. No one stood. The defence counsel shuffled his notes.

> "The detective was a former infantry officer with a buzz cut. The back of his suit bulged from the pistol holstered on his belt."

Well counsellor, what do you say? said the Judge, still standing behind his black leather office chair.

The defence counsel stood at the bar table with his client sitting beside him.

The People have no case. Their only witness is an accomplice. There's no corroboration.

The photographs of the bag going into the apartment corroborate the accomplice. Motion denied.

It took less than thirty seconds.

What are you going to do? asked the Judge.

I will call several witnesses, said Defence Counsel.

Well go ahead, said the Judge, and brought the jury back into court.

The defence counsel called his client's father. The court officer unclipped a velvet rope, like those in front of night clubs. It separated the body of the court from participants in the trial. He left and returned with a short, skinny, balding man with a stoop.

Mr Henriques gave evidence in Spanish through an interpreter. He was from the Dominican Republic but had lived in the Bronx for twenty years and was a US citizen. He struggled to answer questions. The Judge intervened, kindly, and discovered the man was illiterate. He washed dishes at a country club in New Jersey. So did his son. On the day his son was arrested, a friend was going to pick them up at 8am to take them to work. Then the boss rang to say the party had been cancelled and they didn't need to come to work.

The point was that the drug bust was at 10.15 am. It was only a coincidence that the accused was home when a cousin, the accomplice, came round and asked the accused to take some kids' clothes to a friend nearby.

The court adjourned for lunch. I introduced myself to the prosecutor.

What will he get if he goes down?

Ten to twenty. And I offered him probation. This is a complete waste of time.

Outside the lifts I saw the defence counsel. We exchanged cards. I asked him to let me know what happened. He didn't. I've never met a lawyer who was keen to tell me about his failures in court.

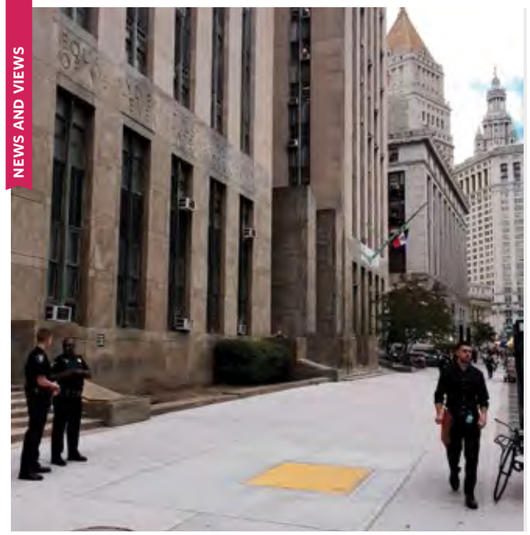
De Toqueville would have made notes on this trial. The lack of deference to authority in America impressed him.

The Judge clearly directed the drama but no-one bowed and scraped to him. He wore a simple black robe over his shirt and tie. He sat and spoke on the same level as all the other participants. The citizens of King County had elected him to a 14 year term that expires when he turns 70.

Judge Lopez Torres

On 16 January 2008, the US Supreme Court decided *New York State Board of Elections v Lopez Torres et al*. Justice Scalia delivered the opinion of the Court. He set out the history of how delegates elected to a political party convention choose the party nominee for Judge at a general election. Independent candidates required nominating petitions with the signatures of up to 4,000 voters.

In 1992, Lopez Torres was the first Latina woman elected to the Civil Court for Kings County, the level below the Supreme Court. She claimed that after her election following a Democratic Party nomination, party leaders demanded she make patronage hires. She refused. She claimed this caused the party to oppose her unsuccessful candidacy at future Supreme Court nominating conventions. In 2004 she and other candidates who had failed in similar situations sued the New York Board of Elections. They claimed that the election laws deprived voters



> “I’ve never met a lawyer who was keen to tell me about his failures in court.”

and candidates of the rights to gain access to the ballot and to associate in choosing their party’s candidates, violating their First Amendment rights.

They won in the District Court and in the Second Circuit Court of Appeals which held they possessed a right to a “realistic opportunity to participate in (a political party’s) nominating process, and to do so free from burdens that are both severe and unnecessary.”

Justice Scalia disagreed, saying there was no constitutional requirement for a “fair shot” at party nomination. The rest of the Court concurred.

Justice Stevens added that there was a distinction between constitutionality and wise policy, quoting his predecessor, Thurgood Marshall, who remarked that *the Constitution does not prohibit legislatures from enacting stupid laws*.

Justice Kennedy added: *The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.*

Justice Scalia died this year. The Senate has obstructed President Obama from putting forward his replacement. A President-elect Trump will have no such difficulty and may be able to appoint two more Justices to the Court.

In *Hurricane* Bob Dylan sings:

> *How can the life of such a man/Be in the palm of some fool’s hand?/To see him obviously framed/Couldn’t help but make me feel ashamed to live in a land/Where justice is a game.*

Plea Bargaining Power

District Attorneys are elected. They have many Assistant District Attorneys running cases under supervision. These Attorneys have the power to make plea offers that bind the court. With unrepresented or poorly represented accused, this can lead to the innocent pleading guilty to forestall the possibility of worse punishment. Only courts should determine guilt and just punishment.

Mandatory Sentencing

We took the train up the Hudson River to Beacon to see the private Dia contemporary art collection in a former Nabisco cardboard box factory. We passed the razor wired walls of Sing Sing Prison.

There are over 2.2 million people in American prisons, almost 1% of the adult population. 4.7 million are on parole.

Mandatory sentencing, especially for drug offences, has led to incarcerating huge numbers of poor Blacks and Latinos. Bill Clinton was responsible for some of these draconian laws, enacted to appease a fearful electorate.

There is no real difference between working on a chain gang as a prisoner or a slave.

In 1855 De Toqueville was *pained and astonished…that the freest people in the world is…the only one among civilized and Christian nations which yet maintains personal servitude… Slavery dishonours labour, it introduces idleness into society.*

In 1860 as a Republican, Lincoln was elected with under 40% of the popular vote but 59% of the College delegates. The slave states seceded before his inauguration. The American Civil War over slavery ended in 1865. Maybe it still continues. Remarkably, many blacks and Latinos did not recently exercise their right to vote.

Lincoln said:

> *You can fool some of the people all of the time and all of the people some of the time but you can’t fool all of the people all of the time.*

Lincoln also made a short speech on a battlefield in which he said:

> *…this nation, under God, shall have a new birth of freedom – and that government, of the people, by the people, for the people, shall not perish from the earth.*

Los Angeles

On 13 October 2016 we were in LA on our way home. My partner relaxed while I went downtown.

Frank Gehry’s Disney Hall, with its sinuous curved cladding in shiny titanium alloy, like his Bilbao Guggenheim Museum, is astonishing.

Nearby is the Supreme Court of California, Los Angeles. I took refuge there from the glaring heat.

I found a court where a trial was ending.

A Latino court officer, with a handlebar moustache and his gut spilling over the belt of his khaki uniform, marshalled the photographers and TV cameramen.

No pictures of the jury! He ordered.

The black Assistant DA entered and paced around nervously. The defence counsel went in and out a side door talking to his client, a slender Asian American woman who should have been in school. The Judge entered.

I understand we have a verdict. Bring in the jury.

The foreman handed several pieces of paper to the Judge. He read them and handed them to his clerk who read the words, difficult to believe, back to the jury. There were multiple guilty verdicts on charges from murder to armed robbery and assault.

And are those the verdicts of you all? asked the clerk, as the cameras flashed. *Yes.*

The Judge then asked defence counsel if he wanted the jurors questioned individually. He did. The responses were the same.

The Judge thanked and discharged the jury. He thanked counsel for their professionalism. He set a date for the sentencing hearing.

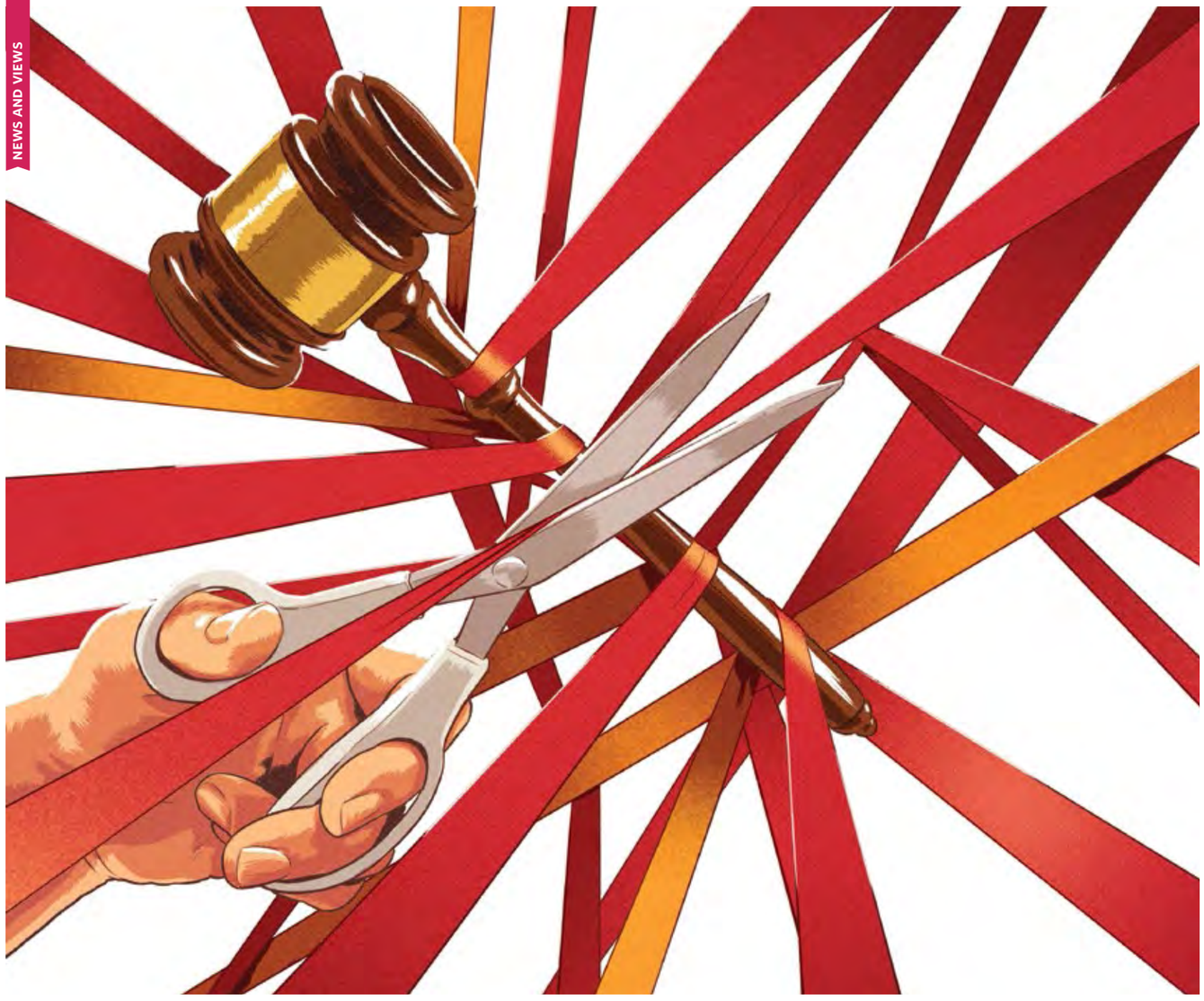
I left and Ubered back to our hotel.

My driver was a black woman with close cropped hair in a zig zag pattern. She was from Compton. She’d been to High School with gangsters but she was cheerful about the future.

I’m votin’ for Hil’ry!

What about the droughts and all the bushfires recently? Isn’t there an earthquake waiting to happen? I asked.

We’ll work it out somehow…



Open justice: The Bar, the Bench and the *Open Courts Act*

How a duty barristers' pilot scheme is helping practitioners and the Supreme Court. NATALIE HICKEY

The principle of open justice is a cornerstone of our judicial system. The public administration of justice is said to maintain confidence in the integrity and independence of the courts.[1] Abuses cannot flourish undetected when proceedings are exposed fully to scrutiny and criticism.[2] Therefore, it is the ordinary rule of the Supreme Court that proceedings should be conducted publicly and in open view.[3]

Well, that's the theory.

In 2015, a public debate erupted as to whether the *Open Courts Act 2013* (Vic) (OCA) was effective. In a story containing evocative language such as 'suppression city', *The Age* reported that Victorian courts were still issuing hundreds of suppression orders a year,[4] despite the enshrining into statute via the OCA of a presumption of open access to justice in Victoria.[5]

What *The Age* did not report was that major media outlets were no longer regularly contesting applications for suppression orders throughout Victoria.[6] The reasons were understandable. Media outlets lack the resources to do this. However, the practical result was that many, if not most, applications for suppression orders lacked a contradictor.

Chief Justice Warren was moved to respond to *The Age* report, penning an opinion piece in defence of suppression orders.[7] Warren CJ contended, "To suggest, as The Age has, that courts make orders without justification, even casually, is wrong. It undermines confidence in, and respect for, the judiciary".

Concluding her opinion piece, the Chief Justice observed:

> "To further strengthen public confidence in the process, the Supreme Court will soon utilise a generous service of the Victorian Bar, where barristers will appear – free of charge – when requested by a judge, to make submissions on public interest grounds, in the absence of any other contradictors such as the media. This is an initiative of the courts themselves together with the Victorian Bar, one of the state's most highly respected independent legal bodies."

The pro bono OCA duty barristers' scheme commenced its pilot phase on 1 May 2016. Under the stewardship of the Pro Bono Committee, and to aid the OCA duty barristers' scheme, the Victorian Bar now has the benefit of comprehensive guidelines (modestly entitled 'Background Principles') available to all barristers about how the OCA is intended to work.

"The act may be brief, but it is deceptively complex."

At the Supreme Court's initiative, the pilot duty barristers' scheme was established. In April 2015 Chief Justice Warren made a written request to the then President of the Victorian Bar (Jim Peters QC) expressing interest in devising a mechanism to deal with the many suppression order applications made under the OCA that were then unopposed.

Jim Peters referred the matter to the Chair of the Pro Bono Committee (Pat Zappia QC), who formed a sub-committee with Richard Wilson as Chairperson to explore the possibility of providing the assistance sought by the Court under the auspices of the Pro Bono Scheme.

A proposal prepared by Haroon Hassan outlining a potential pilot for a duty barristers' scheme was unanimously adopted by the Pro Bono Committee. A formal memorandum from Jim Peters QC, Pat Zappia QC and Haroon Hassan was submitted to the Chief Justice so that further work could be coordinated between the Bar and the Court to explore the feasibility of conducting the pilot and to establish a formal protocol for the scheme.

Currently the pilot scheme is limited to the Supreme Court. It will be reviewed at the end of the pilot scheme period to consider whether it should be extended to other jurisdictions. The OCA has broad-ranging application, including to the County Court, the Victorian Civil and Administrative Tribunal, the Coroner's Court and other prescribed courts, tribunals, bodies or persons.

Whilst there has been a limited take up of the scheme so far, the Chief Justice has pointed out that in those cases where it has been applied it appears to have worked well. A spokesperson for the Supreme Court told *VBN*: "The Court is indebted to the Bar for its assistance. The Chief Justice hopes that other jurisdictions will join in the scheme".

Meanwhile, the OCA itself is being reviewed. On 9 November 2016, the Victorian Government announced that Frank Vincent AO QC will review the OCA and consider whether it strikes the right balance between people's privacy, fair court proceedings and the public's right to know. Whether there should be overarching consistent principles relating to suppression and prohibition orders will be one of the matters investigated.

Asked if there was one thing that stood out for him about the OCA, Haroon Hassan responded, "The Act may be brief but it is deceptively complex. It is not well understood". In fact, navigating the statute and relevant authorities is not for the faint-hearted, particularly because some of the key concepts are buried in apparent exceptions.

The following short quiz about the provisions of the OCA is intended to exemplify some Byzantine elements (detailed answers are in end notes[8]):

> *Is there a difference between a suppression order and a closed court order? (Hint – Yes)*
>
> *Does an applicant for a suppression order need to give notice to the court that the application is to be made, so that relevant news media organisations can be notified of the application and have an opportunity to oppose it? (Hint – Yes)*
>
> *Is the notice in Q2 required if the application is for a closed court order? (Hint – No)*
>
> *Is the notice in Q2 required if the application is for a pseudonym order? (Hint – No)*
>
> *Is the notice in Q2 required if the application is to prohibit or restrict access to a court or tribunal file? (Hint – No)*

NEWS AND VIEWS

Is the inherent jurisdiction of the Supreme Court to make a suppression order retained? (Hint – Yes)

Is the OCA a 'one stop shop' statute in relation to suppression orders and closed courts? (Hint – No)

The distinction between suppression orders and pseudonym orders is vexed, because the non-specialist would expect the 'suppression' of a person's name (manifested in the use of a pseudonym) to be caught by the notice requirements in the OCA. However, pseudonym orders are a unique kind of order sharing common features with suppression orders and closed court orders, but which have developed their own jurisprudence.[9]

The decision of *Hunter v AFL & Anor* [2015] VSC 112 reflects the conundrum. This was a case where the applicant gave notice that he intended to apply for a suppression order, not appreciating that he need not have done so because, properly construed, the application was for a pseudonym order. Justice Dixon observed that this had the effect of generating substantial media publicity for the applicant's proposed proceeding overnight and that morning.[10] Such publicity need never have occurred because notice was not required. In any event, his Honour decided that a pseudonym order was not justified and the application was refused.

The first matter referred under the OCA duty barristers' scheme had some similar characteristics to the *Hunter* case. Asked about the experience, Richard and Haroon were suitably circumspect. Counsel involved in the OCA duty barristers' scheme are obliged to keep confidential and secure information they receive when accepting a referral under the scheme. Those obligations endure after counsel performs his or her role as amicus and if counsel is required to cease to act for any reason.

What they could say was that they were approached by the Court for assistance late on a Thursday afternoon and were able to prepare detailed written submissions within a short timeframe and to appear before Justice Riordan the following Monday morning to assist him in determining the application as amicus curiae.

Reflecting on the experience, Richard Wilson said that the information initially provided to counsel under the OCA duty barristers' scheme was the Form 82A (Notice of application for suppression order) which an applicant is required to file when seeking a suppression order under the OCA. This is the document circulated to media outlets.[11] Whilst not much information is provided in the Form 82A document, Richard and Haroon were able to discern that the application was in the common law division of the Court and involved a civil claim by a minor.

> "the participating barrister appears as amicus curiae and not as a contradictor."

After accepting the referral (and with the consent of the applicant), the Registry supplied Richard and Haroon with a copy of the summons setting out the orders sought by the applicant, together with a supporting affidavit from the applicant's solicitor and a copy of the proposed writ with the names of parties and persons to be suppressed. This assisted the preparation of the written outline counsel provided to the Court.

Importantly, under the duty barristers' scheme, the participating barrister appears as amicus curiae and not as a contradictor. Counsel does not stand in the shoes of an opposing party, but rather assists the Court to make the correct decision. This might involve calling the Court's attention to reported and unreported decisions which might otherwise be overlooked, acting as an adviser to the Court, making suggestions as to matters appearing on the record or in matters of practice, and making submissions on important questions of law arising in proceedings.

In the end, the Court declined to make a suppression order, but did make orders prohibiting general access to the court file.

The 'Background Principles' prepared by Richard and Haroon are a truly impressive resource for barristers confronted with the prospect of an OCA application. The document extends to 28 pages with a detailed table of contents for the time poor, and is available to all barristers on the Vicbar website.

Richard and Haroon explained that, "the Principles document was born out of the need to be able to 'skill up' members of the Bar who might not have had expertise in the area and who wanted to participate in the pilot scheme."

Richard added, "In approaching the task of drafting it there was already a lot of material in the bench-book published on the Judicial College website. In our paper we wanted to synthesise the operation of the Act in the context of the operation of the pilot scheme to (hopefully) make it easier for counsel who chose to volunteer their time".

Choice of forum issues inevitably arise. A commercial plaintiff seeking to protect confidential information in, say, a trade secrets case, faces a stark choice between issuing in the Supreme Court of Victoria or the Federal Court of Australia. To seek procedural protections around confidentiality in the Supreme Court of Victoria, the plaintiff would have to navigate the OCA and contemplate notifying the media, the absolute last thing one would normally want to do. By contrast, in the Federal Court of Australia, the plaintiff need not worry about informing the media of any application for suppression, because the *Federal Court of Australia Act 1976* contains no requirement that this be done.[12]

The content of the OCA is, of course, a matter for Parliament. In the meantime, "The Supreme Court of Victoria looks forward to the Hon. Frank Vincent's review".

For counsel, and affected courts and tribunals, the OCA must be understood and applied.

To that end, Richard and Haroon encourage counsel to sign up to the OCA duty barristers' pilot scheme on the basis that it is very rewarding and interesting work. The protocol for the scheme between the Bar and the Supreme Court is available to barristers on the Victorian Bar website.

Otherwise, for barristers generally interested in understanding how the OCA works, the 'Background Principles' document published on the Victorian Bar website is a tremendous help.

1 Gibbs J in *Russell v Russell* (1976) 134 CLR 495, 520.

2 Ibid.

3 Ibid.

4 Bachelard, M., Court suppression orders still issued in their hundreds in Victoria; The Age, 13 October 2015 edition.

5 ss.4 and 28 OCA.

6 This was conveyed to the Court by representatives of the major media outlets at a meeting of the Supreme Court's Communications Committee in 2015.

7 Warren, M, *In defence of suppression orders, by Victoria's Chief Justice; The Age,* 19 October 2015 edition.

8 Q1: Yes – A suppression order prohibits or restricts the disclosure by publication or otherwise of a report of the whole or any part of a proceeding, or any information derived from a proceeding (s.17 OCA), whereas a closed court order prohibits or restricts persons or classes of persons from being present in court (s.30 OCA); Q2: Yes – three days' notice is required (s.10 OCA, also see Order 82 Supreme Court Rules and Practice Note No. 4 of 2013); Q3: No – the notice provisions in s.10 OCA only concern suppression orders; Q4: No – the Act does not limit or otherwise affect the making of an order or decision by a court or tribunal (meaning no notice is required) that conceals the identity of a person by restricting the way the person is referred to in open court (s.7(d)(i)) OCA and see *ABC-1 and ABC-2 v Ring and Ring* [2014] VSC 5); Q5: No – s.7(d)(iii) OCA; Q6: Yes - Whilst common law power to make an order prohibiting or restricting the publication of information in connection with any proceeding is abrogated (s.5(2)), and any *implied jurisdiction* of a court or tribunal to make such an order is negated (s.5(3)), it is expressly stated in s.5(1) that "Nothing in this section limits or otherwise affected the *inherent jurisdiction* of the Supreme Court"; Q7: No – Subject specific legislation (e.g. s.121 Adoption Act 1984, s.32F or s42BQ Evidence (Miscellaneous Provisions) Act 1958, Division 1 of Part 13 Serious Sex Offenders (Detention and Supervision) Act 2009) remains unaffected (s.8 OCA).

9 Open Courts Bench Book notes at 6.5.1.

10 At [5].

11 Part 2 OCA, s.10(1) and s.11(1).

12 In the Federal Court of Australia, the making of suppression and non-publication orders is dealt with in Part VAA of the *Federal Court of Australia Act 1976.*

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Refugees and the rule of law on Nauru

ANTHONY KROHN

There is a kind of Big Bang, an explosion and coalescence of legal concepts, in the first cases heard and decided in a new jurisdiction. When the new jurisdiction is the determination of appeals by people seeking asylum in Nauru as refugees, it has great importance for the rule of law in the Pacific, and in the common law world generally. It is also a development in which Australian barristers and solicitors, including members of the Victorian Bar, are actors. Cahal Fairfield, Richard Knowles, Nick Wood, Matthew Albert, Angel Aleksov, Liam Brown and I have all been involved in appearing in the appeals, for the appellants or for the Republic.

The Supreme Court of Nauru is a superior court of record in the common law world, and the judges of the Court this year began hearing cases in a new jurisdiction, hearing appeals on a point of law from decisions of the Refugee Status Review Tribunal (the Tribunal) of the Republic of Nauru.

It is notorious that, for the last few years, people who come by boat to seek asylum in Australia are transported to Papua New Guinea or to Nauru for processing of their claims to recognition and protection as refugees. This policy is the subject of fierce debate, but, for as long as it continues, the involvement of the Supreme Court of Nauru is an important and genuinely positive aspect of the situation.

March of this year, the Supreme Court of Nauru began to hear and decide what is meant by "a point of law" such as to ground an appeal, under the *Refugees Convention Act* 2012 of Nauru, against a decision that a person is not recognised as a refugee. If an appeal succeeds, the matter is remitted to the Tribunal to be determined according to law.

The Court has grappled with questions about the law of refugee status, which all need to be determined freshly in the law of Nauru, such as what is required by natural justice and procedural fairness in determining a refugee claim, what questions and claims must be determined by the Tribunal in order to discharge its task according to law, or in what circumstances is relocation within a country reasonable and possible, such that protection in Nauru is not required. These are questions which the international *Convention Relating to the Status of Refugees* (the Convention) poses to every jurisdiction which seeks to determine the status of refugees. Other jurisdictions, including the common law jurisdictions of the United Kingdom, Canada, the United States and Australia, have for a number of years grappled with the concepts and questions posed by the Convention, and precedents in these jurisdictions are of assistance to the Court on Nauru in determining its own jurisprudence. Justice Kirby's "fine appellate tooth comb" from *Wu Shan Liang*[1] was cited in arguments and has now appeared in a judgment of the Court on Nauru,[2] as has the judgment of Merkel J. in *Paramananthan v Minister for Immigration and Multicultural Affairs*[3] and the UK authority of *Bugdacay*.[4]

In preparing and arguing refugee appeals in Nauru, Australian lawyers, including members of our own Bar, have the privilege of assisting the Supreme Court of Nauru to develop the law of Nauru while simultaneously attempting to do justice for individual applicants for asylum. In their work on these cases in Nauru, Australian lawyers contribute to the development of an international jurisprudence in the application of the Convention.

The Court on Nauru has heard a number of cases over the course of this year, and the growing body of judgements show that the court has been closely engaged with the questions raised on the appeals, and has given reasons which will add to the store of precedents of general use in international as well as local jurisprudence. Some judgements have been given (and are published on *Paclii*), while others are still reserved.

Appeals lie from the Supreme Court of Nauru, with leave, to the High Court of Australia, which of course applies the law of Nauru, not of Australia, rather as the Privy Council applies the laws of the different jurisdictions from which appeals lie to it. It remains to be seen whether there will be such appeals, either by the Republic of Nauru or by applicants for protection.

An important and positive aspect of these appeals is the very fact that they have been provided for by the Parliament of Nauru, they are occurring, and that the independence of the Court, and its decisions, are respected by the executive government of Nauru. The rule of law is therefore operating and respected on Nauru in the determination of applications for recognition as refugees.

Counsel of our Bar have been involved in the appeals, along with barristers and solicitors from other States. The experience has been a privilege, and challenging in many ways, dealing with clients with various experiences of deep distress. The judges as well as the lawyers have been concerned that appellants in situations of distress have access to justice and are heard. There has also been the great experience of a close knit and hard working community of the profession on Nauru, in equatorial heat. The Court sits long hours when needed to get through the work, including, so far, one sitting on a Saturday so that cases could be completed before counsel left the island, and some late sittings to enable counsel to travel back to Australia to prepare for cases there. The temperature is challenging – 31, or 32 or 33 degrees almost every day with a minimum of about 27 or 28 degrees by night. There is air conditioning of the fierce industrial kind, so that in court we needed our wigs and gowns and bar jackets, and our glasses fogged up when we stepped out into the fierce equatorial sun. There are also unusual hazards – a coconut fell about 30 feet onto the spot where I had just walked on my way into court one morning. I am sure that if it had connected, I would not be writing this. (As I could not bring the nut back to Australia through quarantine, I have left it in the room provided us, as a wig block for visiting barristers.)

> "The involvement of the Supreme Court of Nauru is an important and genuinely positive aspect of the situation."

Whether the processing of refugee applications continues on Nauru or not, the Court has already made a permanent and important contribution to the rule of law. Watch this space. Judgments of the Supreme Court of Nauru may come to be persuasive authorities in Australian refugee law.

1 *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* [1996] HCA 6; (1996) 186 CLR 259, 291 per Kirby J.

2 *DWN113 v. Republic of Nauru* [2016] NRSC 18, [32] per Crulci ACJ.

3 *Paramananthan v. Minister for Immigration & Multicultural Affairs; Minister for Immigration & Multicultural Affairs v Vijayakumar Sivarasa* [1998] FCA 1693 (21 December 1998), cited in *DWN072 v. Republic of Nauru* [2016] NRSC 18, [28] per Khan J.

4 *R. v Secretary of State for the Home Department, ex parte Bugdacay* [1987] AC 514, 531F per Lord Bridge of Harwich,, cited in *DWN113 v. Republic of Nauru* [2016] NRSC 18, [33] per Crulci ACJ.

This article reflect the author's views and experiences and not the position of the Government of Nauru nor the Supreme Court of Nauru.

Celebrating Justice Hayne

KATHLEEN FOLEY

This is an edited extract of a speech given by Kathleen Foley at a dinner at the Essoign Club on 25 November 2015 to mark the retirement of the Honourable Kenneth Hayne AC QC from the High Court of Australia.

Kenneth Madison Hayne is nothing less than a pillar of our nation's legal community. Most Victorian barristers know the key features of Ken's legal career. He came to the Bar in 1971, having graduated as a Rhodes scholar with a BCL from Oxford. He took silk in 1984. He was appointed a justice of the Supreme Court of Victoria in 1992, and three years later to the Court of Appeal upon its initiation. In 1997, Ken was appointed to the High Court of Australia.

Ken was a justice of the High Court for just shy of *18 years*. When one thinks of the work done by the High Court in a single year, the incredible impact of Ken's 18 years on the Court starts to dawn on you. During his time in judicial office, the man who was a formidable intellect and advocate at the Bar made his mark as a formidable judge. Indeed, for many, it is hard to imagine the High Court without Justice Hayne.

I was Ken's associate for just one year. That is the standard period of time for an associate, and it is admittedly short. Nevertheless, associates have a unique opportunity to learn about the judges for whom they work. Some of what you see is interesting but not terribly useful. The fact that Justice Gummow had a preference for very cute leather slippers instead of proper shoes, for example. Or that Justice Callinan chose to decorate his chambers in black and red velvet, evoking images of a 19th century bordello.

A year as an associate provides a greater opportunity – to observe the Judge at work, and to see what you might learn about the Judge's process, the Judge's way of getting into the cases and resolving them. What I observed of Justice Hayne was, first and foremost, that he took his job incredibly seriously. This isn't the same as taking *oneself* incredibly seriously. The High Court is full of such people – and I'm really just thinking about the associates. But Ken somehow recognised that one shouldn't mistake the importance of one's job for the importance of oneself. I am sure being married to Justice Gordon played a major role in that – I really can't imagine a better person to keep Ken's feet planted firmly on the ground. And I know that parenthood was another factor – he remarked to me once that it is hard to think too highly of yourself when your child looks at you and groans "*oh, Dad*".

The responsibility of being a justice of the High Court weighed heavily upon him. I saw it in how hard he worked, but it was much more than that. I saw it in the fact that he recognised and *felt* the importance of the work that was being done – both for the individuals involved in the litigation, but also at the broader level, the importance for the public interest of the questions invariably at issue in High Court cases.

For some in the law, there is a deep interest in questions of pure legal principle. The facts are a bit of an annoyance, really – what is of most interest is the abstract question of legal theory. For others, it is the opposite. They love a good trial, the human story behind the case and the facts. For this kind of person, the law is a bit of an annoyance.

Justice Hayne fell into neither camp. Or, rather, he is one of those rare people who fall into both. He excels in the highest levels of abstract legal thinking, and yet does not lose sight of the fact that cases involve real people, and that the course of litigation can be life-changing for those caught up in it. In my observation, this led Justice Hayne to develop an approach to the judicial task that had the following key features: First, he was concerned with legal process as well as legal principle. He understood the importance of proper process to the effective functioning of the Australian judicial system. He felt keenly the responsibility of our legal system – *to litigants* – to adhere to a just process.

Secondly, he was committed to the common law as a tradition. With this, came a love of legal history. In 2013, Justice Hayne presided over the case of *Rutledge v State of Victoria*, in which Mr Rutledge challenged the validity of the Victorian Constitution. There was a question about the form the royal assent needed to take. Counsel for the State, feeling clever and knowing of Justice Hayne's predilection for historical matters, relied upon Sir Henry Jenkyns' work, *British Rule and Jurisdiction Beyond the Seas*, published in 1902. Counsel was trumped by Justice Hayne, who in the course of oral argument asked if counsel had read what Alpheus Todd had to say on the subject, in the 1894 edition of *Parliamentary Government in the British Colonies*.

Importantly, though, his commitment to the common law did not result in a slavish adherence to tradition. He understood the differences in Australia's legal system, with its unique constitutional framework. He also understood the need for the legal system to be responsive to social change, and the delicate work involved in getting the balance right, the balance between continuity and change. The commitment to the Australian legal system is something that runs incredibly deep in Ken Hayne.

In short, it mattered to him to get to the right answer. Other justices often agreed in his analysis. According to Chief Justice French, Justice Hayne authored 412 judgments during his time on the Court, 400 of them in Full Court matters.[1] The Chief Justice noted that many of those were judgments in which other members of the Court joined.

It was Ken's deep commitment to the law, and his search for the right answer in every case, that made him so exacting of counsel appearing in cases before the Court. He would press counsel, dissect the argument being advanced and present it back: is this what you're saying? And if so, what about this? And if that is right, doesn't it mean this? Invariably this was accompanied by a sinking feeling on the part of counsel. Over time, there is no doubt that Justice Hayne developed a fearsome reputation for his grilling of counsel. It might also be said that Sydney barristers seemed particularly sensitive about it.

And yet it was clear to me that the motivation for pressing counsel in this way was because Justice Hayne was thinking deeply about the issues, and asking the fundamental question – what does justice require here? For him, that meant justice according to law, no matter the consequences. And he saw counsel as having a responsibility to be thinking as deeply about these issues as the High Court would have to. Given the nature of the High Court's work, thank God he pushed counsel to their limits in this way.

Ken's robust interactions with counsel did lead some to think that working for Ken would be an equally *challenging* experience. In fact, Justice Hayne's chambers were a *great* place to work. He has the best sense of humour. He respected his staff. As an associate, he was interested in your views about the case – expected you to debate the issues with him, to seriously engage, so as to ensure his thinking and his reasoning was tested.

> "It was Ken's deep commitment to the law, and his search for the right answer in every case, that made him so exacting of counsel."

A few years back, there was a small dinner to celebrate Ken's 15 year anniversary on the High Court. Former associates came from all over the globe to attend, a testament to the importance of those relationships and the regard each has for Ken. Not only associates though – Ken had a close and loyal relationship with his chambers staff and registry staff over many years. Such relationships speak volumes about a person.

It also speaks volumes about Ken that so many of his associates have been drawn to the Bar, both in Victoria and elsewhere. In Victoria, Ken's associates span the time period from David Bennett and Stephen Donaghue who came in 2000 and 2001 respectively, to Chris Tran and Ben Gauntlett who signed the bar roll in 2014. In a recent High Court case, there were no less than four former Hayne J associates at the Bar table, silk and junior counsel.

The number of Hayne J associates practising at the Victorian Bar is just one aspect of Ken's deep contribution to the Bar over decades. Over the years, Ken has remained closely connected to the Victorian Bar. He has given seminars in readers' courses since he was a junior barrister. As a High Court justice he found the time to speak to each and every readers' course. He was a trustee of the Bar Super Fund, and a member of the Bar's Disciplinary Tribunal.

In reflecting on Ken's contribution to the future of this profession of ours, it occurred to me how important it has been that Ken was a decade or more ahead of the game when it came to applying an equitable approach to his hiring of associates. ten years ago, when I was an associate, there were still judges at the High Court who chose associates according to the narrowest set of criteria. Justice Hayne was different. For a start, there was a formal application process, not just a tap on the shoulder. He hired from all over the country. If you were a stand-out student, it didn't matter if you came from somewhere that wasn't Sydney or Melbourne, or that your university was lesser known. And, unusually for the time, there was generally a 50/50 gender balance among his associates. As I stand here, a West Australian who came to the Victorian Bar on Ken's advice, I can tell you that years later those hiring practices make a real difference. Perhaps part of the reason Ken eschewed a parochial approach to hiring was that he was born in Gympie. Perhaps Ken was less concerned with an applicant's pedigree, because he was the first lawyer in his family. Whatever the reasons, his decision-making in that regard has been to the benefit of the Bar as a whole and will continue to be, for years to come.

It was difficult to work out how to end this speech because so much more could have been said. There are some deliberate gaps. Ken's relationship with Justice Gordon and his children are essential parts of his life, but parts best suited to a different forum and to a different kind of speech. I hope I have provided some small insights, knowing full well that no speech can truly do justice to the career of Ken Hayne. That career has been, and continues to be, marked not only by his intellect and tenacity, but his dedication and service. Service to the Victorian Bar. Service to the Australian Bar. Service to the High Court of Australia and the judiciary generally. Service to future generations of the profession through his teaching and mentoring of so many. For all of that, and so much more, the Victorian Bar is deeply grateful.

1. Transcript of French CJ's remarks to farewell Hayne J, ceremonial sitting in Canberra [2015] HCATrans 105 (13 May 2015).

Relocating David Levin QC

JOHN DIGBY

This is an edited version of a speech delivered by Justice John Digby at a dinner at the Essoign Club on 25 August 2016

It is a pleasure and an honour to say something about my friend of almost four decades, David Samuel Levin QC. David, has practised as a barrister at the Victorian Bar for some 44 years, 19 of those years as silk. Dinners such as this are seldom arranged at the Victorian Bar. That such an event is taking place tonight, and is so well attended, speaks unequivocally of the respect and affection so many at this Bar, and in Melbourne's legal profession, have for David.

It also seldom occurs that Victorian barristers issue "Press Release" like statements. Levin however, in effect, did so in respect of this event. I expect that his objective was to convey with precision the import of this dinner. In this regard, David authorised the following statement to be published:

> David has established salubrious chambers at home in Clifton Hill and intends to practice more as an arbitrator and mediator and less as a litigator so as to enable him to spend more time with his wife, Norma and family, fund raising and, of course … cycling.

Note please that there is no mention of the "R" word. David, I am told, exhibits a neurotic reaction if ever the "R" word is mentioned in relation to him.

You will have noted that the invitation for this evening described David as "the Wig on Wheels". In 2003, David convened an interest group at the Victorian Bar known as the Wigs on Wheels (formally, the Victorian Bench and Bar Bicycle Users Group). This group has, over 13 years, held a number of "Lycra Breakfasts" at the Essoign Club, ride to work days and longer rides in the Victorian countryside.

David is very much a MAMIL (a Middle Aged Man in Lycra). The everyman's Macquarie Dictionary defines a MAMIL as, particularly, a middle aged man who rides an expensive racing bicycle for leisure, wearing professional style body-hugging bicycle jerseys, bicycle shorts and other adornments.

David was born in London in 1950. He soon shed his trainer wheels and, after an adolescence so virtuous it has contributed nothing to this speech, David's application, drive and intellect ensured that he was destined for a first class tertiary education.

By 1971, David had graduated in Economics and Law from Cambridge University. David took a BA (Hons) and in due course an MA. In 1971, David met a delightful Australian girl, Norma Webb, at what the Poms called "*Kangaroo Valley*" - Earls Court.

In 1972, David took his final Bar exams and was called to the *Utter Bar* of the Middle Temple in London. The aspiring barrister's Master was FE Beezley, later a Crown Court Judge, and the cost of his pupillage in the Middle Temple was 1000 guineas. David was keen to join the peloton of competing young barristers in Cambridge.

By 1973, David had set up Cambridge's first independent chambers, at 92 Regent Street, with two fellow Cambridge undergraduates and a London University lawyer. Their beginnings were humble. On the first day the four fledgling lawyers occupied their new chambers, they were profoundly unfurnished – the young tenants literally sat on the floor and discussed their future and how on earth they were going to pay their clerk's guaranteed salary. David is no doubt proudly aware that Fenners Chambers are very much alive and are now operating at 3 Madingley Road, Cambridge, with 54 barristers.

It is well to recount a fact or two about David in his Cambridge days, because they provide something of a contrast between the David there and the David we know. First, it is said there was a time before David was besotted with bicycles, and when he was from time to time (apparently) something of a swiller.

David's colonial persona is so clean living and disciplined: most of us have been exposed to his penchant for gluten free salad wraps washed down with a chilled 2016 naturally aerated, low sodium mineral water. He is the only barrister I have known to take his own sandwiches to a Bar Dinner. Things were apparently somewhat different in the old country. At Fenners Chambers, David was heavily bearded and known to his colleagues as "Sammy". He was prominent in the Fenners Chambers sporting activities including rowing in the Chambers XIII, dubbed the "Legal Eagles". David stroked the crew.

At least one of David's propensities at that time can be inferred from the rowing top he can be seen wearing in a number of photographs taken in the 70s. David's rowing singlet reads "Cheers Charles", the explanation of which is that David's crew was sponsored by a local brewery, "Charles Wells". This came to pass because the brewery had singled David and his crew out as paragons of good custom, that is, they drank volumes of "Charles Wells" beer and, I understand, were given a case of beer every time they competed.

In 1974, David and Norma were married at Churchill College, Cambridge. 1977 marked the birth of David's first child, his beloved daughter Rachel – born at Cambridge. Daniel and Kirra were born later in Melbourne. Shortly after Rachel's birth, David and Norma decided to emigrate to Australia. There followed a memorable interview at Australia House where the first question from the interviewer, (who knew David was married to an Australian lass and therefore had a clear entitlement to live in Australia), was "*Why do you want to emigrate to Australia?*", to which David haughtily replied "*to learn the language*". The interview went downhill from there. But by August 1977 the Levins had reached these shores.

David signed the Victorian Bar Roll on 10 November 1977 – as the sole inducted member on that occasion. David read with John Larkins, later John Larkins QC. I was fortunate enough to read with John Larkins, as his next pupillage after Levin.

David's journey at the Victorian Bar was a happy one from the outset. His engaging and friendly manner immediately won him friends, and his intellect and diligence ensured that before long there were plenty of briefs.

From his earliest days in Melbourne, David and Noel Magee, now of course Noel Magee QC, formed a friendship. Noel Magee who is, as some of you may know, a skilled carpenter, renovated the kitchen in the Levin's first Melbourne home. Noel and David were responsible for instigating the Victorian Bar's Children's Christmas Party in the Botanical Gardens.

David's early practice at the Victorian Bar was diversified. He practied in the bankruptcy jurisdiction, across many commercial areas and more and more so in construction and engineering law, an area in which he has become a well-recognised leader.

David has contributed greatly to the Bar in the area of forensic use of computers. David Levin was, however, not the first to employ new forms of information transfer. David Levin was from the "get-go" at the forefront of the forensic utilisation of computers at the Bar. From about the early 80s, David's chambers sported a Compaq, which was about the size of a small washing machine.

> "David uses his skills and database organisation in a frighteningly effective manner."

David's mastery of the circuit board, computer chip, floppy disc and Internet is deployed with great effect and to his client's considerable benefit. To brief David Levin was to retain a first class barrister and get a lot more "bang for your buck" as a result of his ability to utilise the powers of these devices.

David, from the outset of his time at the Victorian Bar, was a great contributor to the Bar.

He took six readers: Dr Peter Freckleton, James Peters (now QC and former President of the Victorian Bar), Timothy Secull, Peter Sest (now QC), Sean Hardy and Michael Wise.

David was a director of Barristers' Chambers Limited for seven years. For nine years, he was a director of Bar Fund Pty Ltd, the trustee of the Bar's superannuation fund. He was a member of the Bar's Dispute Resolution Committee for nine years and chairman for two years. Between 1997 and 2008, David was a member of the Legal Profession Tribunal. He served on the Victorian Bar Supreme Court Building Cases List Users' Group. Between 2003 and 2006, David was the president of the Victorian Society for Computers and the Law, and before that, its treasurer from 1998 to 2003. David is a member of prestigious chartered institutes of arbitrators and accredited mediators.

He has acted as an expert including in relation to the Western Link of the Citylink Project – expressly nominated as an expert pursuant to the provisions of the Melbourne Citylink legislation. He has also been retained in many other expert appointments. David has often been the Court's preferred mediator in the Victorian Supreme Court and Federal Court proceedings.

He has presented and published many papers, including regularly undertaking seminars as part of the Bar readers' course.

My professional experience opposed to David always brought home to me what Victorian barristers and solicitors well knew. He is an incredibly hard working and capable barrister, who had always mastered his brief and developed that extra edge with his use of technology. In every case David had all the documents, issues, and his arguments in a spreadsheet type database readily accessible, cross-referenced, footnotable, hyperlinkable, etc. As his opponents and supporters know, David uses his skills and database organisation in a frighteningly effective manner.

David is never rude or churlish. He never gossips. He always treats his juniors with great respect and gives them opportunities to develop. David has been unfailingly adroit in all he has done as a barrister and, although a tough opponent, always generous and fair. In Court you have to put up with his ultra-efficient, heavy persona before the Court. However, as soon as you leave Court, David lets out a laugh and throws his head back with that smile that resembles the gates of Luna Park.

David also has an outstanding singing voice, which comes out of that relatively modest frame with the volume and power you would expect from Demis Roussos.

David is the paragon of a good barrister and, a great chap. We all wish him many more happy miles ahead and hope we regularly see his bicycle in the BCL cycle park.

Western Bulldogs: Premier lawyers behind the scenes

ROBERT HEATH

John Harms writes very well. After the drought-breaking grand final victory, at a club supporters' function, the coach of the Western Bulldogs, Luke Beveridge, read the following passage from John's book "Play On (a Sporting Omnibus)":[1]

> *Footy is about these things. It confirms your suspicions that there is something more. It alerts you to the existence of the soul. It invites you to be faithful and loyal. It demands you be faithful and loyal. And just when you are doubting it you see a game which makes you realise why you are so enthusiastic about it.*
>
> *You see courage, you see commitment, you see personal sacrifice, you see skill and you see beauty and you are uplifted. Footy is one of the few places in contemporary life where you experience the transcendent.*
>
> *Footy is also about suffering and suffering can be uplifting. Suffering is the natural state. It is honest. And how we respond to that suffering is elemental. Suffering can bring us together and only when we understand the suffering of others can we understand the fullness of joy.*

At approximately 4.30pm on 1 October 2016, thousands of Bulldogs supporters experienced the fullness of joy about which John Harms wrote. The members of the "Footscray Fightback" legal team – Justice Ginnane, Graham Robertson, Stephen Palmer and Alan Vassie – experienced that same fullness of joy when the final siren sounded. Shared pain had given way to mutual joy; and that joy was intensely sweet given the nature and extent of the Club's problems in early October 1989.

In 1989, Dennis Galimberti was Footscray's CEO. On 2 October 1989, at the Best & Fairest award night, a director told him that the VFL was planning to terminate Footscray's licence to participate in the competition.

Galimberti also learned that, using players from Footscray and Fitzroy, the VFL planned to create a new team called the "Fitzroy Bulldogs".

Galimberti took swift action, calling journalists at 3AW and The Sun. On 3 October 1989, The Sun published a front-page piece titled "VFL clubs to merge: Bulldogs and Lions Linked in Footy Shock".

Over the next day or so, supporters began to gather at the Western Oval headquarters of the Club. Stephen Palmer was one of these supporters. At that time, he was a keen Dogs fan and young solicitor at the City-based law firm Rogers & Gaylard. On 3 October 1989, Palmer heard a 3AW radio interview in which Fitzroy's President, Leon Wiegard, said that Footscray should accept the merger as a "done deal". Palmer was not impressed. He went down to the Western Oval, helping Peter Gordon and Denis Galimberti formulate a plan of action. The following occurred:

- Gordon accepted Palmer's suggestion to commence legal proceedings challenging the authority of the VFL to carry out the proposed merger.
- Bravely, Irene Chatfield put up her hand to act as the plaintiff. The risk of an adverse costs order makes it a big ask for anyone to take on that role. She was an invalid pensioner whose commitment to the Club was legendary. She wore a long, home-knitted scarf to which she had pinned hundreds of badges depicting Footscray players ("my boys").
- Palmer persuaded the partners of Rogers & Gaylard to act for Irene Chatfield on a *pro bono* basis.
- Gordon and Palmer put together the team of barristers – Ginnane, Robertson and Vassie, each of whom received a brief from Rogers & Gaylard to advise and appear, also on a *pro bono* basis.

Palmer was a committed Footscray fan – his family had lived in the suburb since the 1860s. He was a founding member of the "Save the Dogs" committee, which was formed to keep the team at the Western Oval. His father, Ron Palmer, is a life member of the Club – he was the team manager of the Thirds in 1954; and for many years he was the Senior team's official timekeeper. Another relative, Ambrose Palmer, was an Australian boxing legend who played 83 games for the Footscray Seniors in the 1930s and 1940s.

There would be no fees for the barristers, although the matter required considerable commitment in terms of time and effort. So, why take on the brief? Each barrister was a life-long Dogs supporter; and each one had long and deep connections with the Club and the suburb of Footscray.

- Justice Ginnane grew up in Footscray. His Honour's late father, John Ginnane, was a legendary solicitor in Footscray for more than 35 years before joining the Victorian Bar.
- Robertson's great uncle, Joe Marmo, had played in three VFA flag-winning teams. His father, Roy Robertson, played for the Footscray Seconds in the 1930s.
- Vassie had been watching the Dogs, week in, week out, for many years. Indeed, along with Robertson, he saw E.J. Whitten use his famous "flick pass" to hit Johnny Jillard's chest from 30 yards away. He felt aggrieved when the VFL outlawed this mode of disposal.
- In about 1986, Ginnane and Robertson began joining Vassie each weekend to support the Dogs. All three subjected themselves repeatedly to the ritual pain and suffering that came with being a Dogs supporter. Judge Ross Howie sometimes joined them.[2] At home games, they stood on the terrace at the Barkly Street end. They cheered on-field acts of courage and doggedness; but there were no glory-days.

Initially, for the legal team, it was not entirely clear what had happened. Galimberti had no details of the merger plan; and, not surprisingly, the League had not published any. Moreover, it was not clear who was controlling the Club. The legal team thought that an administrator had taken control of the Club's assets. The lawyers developed an argument that, under the terms of the VFL licence, the VFL was required to give the Club 30 days' notice of the merger plan.

At about 3pm on Thursday 5 October 1989, the barristers and their client went to the Supreme Court of Victoria. They went into Court 15. The lawyers wanted an injunction stopping the VFL and the VFL-appointed directors from implementing the merger plan. A small group of supporters followed the lawyers and Irene Chatfield into

Palmer and Robertson, Western Oval, Footscray, 7 October 1989

Left to right: Robertson, Palmer, Chatfield and Ginnane

court. The lawyers had to act quickly because the VFL had begun to implement the merger plan.

Justice Ken Marks was sitting in Court 15. His Honour was a wise, careful judge. He was also decisive; and his sense of right and wrong was informed by a set of diverse life experiences.[3] Ginnane argued the 30 days' notice point. Robertson was Ginnane's junior for this hearing.[4] One of the League's barristers, Tony Nolan, came into the courtroom. Justice Marks offered the parties 24 hours to present further evidence. Having received an undertaking from Nolan that the League would put the merger on hold until 4.15pm the next day, His Honour adjourned the hearing to the following morning.

By this stage, Stephen Palmer had done some investigative work. He discovered a few important things:

» After the Club's directors had resigned, the League had put forward three new directors.
» Under the Club's constitution, only members of the Club were eligible to serve as directors. Palmer believed that the new directors were not members of the Club.
» Also, two thirds of the Club's directors had to be directors of the company running the Footscray social club. Palmer didn't think that the new directors were directors of that company.
» Finally, the new directors had told the players that their playing contracts had been transferred to the Fitzroy Football Club Ltd.

On the strength of these matters, the team came up with a new argument – if the appointment of each new director was invalid, they had no power to transfer Hawkins, Libba and others to another club.

On the following day, his Honour encouraged the parties to talk, accepting that the Club should perhaps have some time to pay its debts. Eventually, the parties agreed that the hearing should be adjourned to late October. Critically, the VFL agreed not to pursue the merger until that date. Irene Chatfield had obtained a reprieve for the Club; and, in the words of Club historians, that reprieve "unleashed an extraordinary communal energy".[5] The rest is history, of course.

As to the events following the hearings, some additional matters should be recorded:

» Ginnane, Palmer and Robertson did not stop working to save the Club. On Sunday 7 October 1989, along with thousands of other Dogs fans, they attended the famous "Fight Back" rally at the Western Oval.[6] Over $400,000 was raised that day.[7]
» A week or so later, Ginnane, Palmer and Robertson attended the fundraising concert at Hamer Hall in the Arts Centre. One of the jazz bands featured a trumpeter named Jonathan Beach – a Wynton Marsalis fan, a regular at Sunday afternoon jam sessions at the Tankerville Arms, and a future Justice of the Federal Court of Australia.
» In late October 1989, after the Club had raised sufficient funds to stay in business, Gordon and Lynne Kosky met with the League bosses to regain control of the Club's VFL licence. Ginnane was on hand to provide advice, if necessary, concerning the status of that licence.[8]
» Ginnane and Robertson were present at the euphoric meeting of Club members to elect a new board. Ginnane acted as chairman of the meeting. Fortunately, amidst the celebrations, Robertson or Palmer remembered to put up the necessary resolutions to replace the VFL-appointed directors and rescind the initial merger resolution.[9]

The Club survived – thanks, in part, to the efforts of the lawyers and their client. Paradoxically, that triumph in late 1989 opened the way for further shared suffering, including Preliminary Final losses in 1997 and 2009. Robertson, Vassie, Ginnane, Palmer and Chatfield endured that suffering. They understood its significance. It brought them together, along with other Dogs supporters. Ultimately, it enabled each one to experience the fullness of joy on the sounding of the final siren of the 2016 Grand Final.

Yes, Harms is right – in football, "*You see courage, you see commitment, you see personal sacrifice, you see skill*". In the events of early October 1989 one sees like qualities in the lawyers and their client.

1 John Harms, Play On (a Sporting Omnibus), Text Publishing Co, 2003

2 For many years, Judge Howie's father sat as a Magistrate in Footscray.

3 Ken Marks, In Off the Red, Black Inc. Books, 2006 – Melbourne Grammar boy, Lancaster bomber pilot, member of the Australian Communist party (briefly), and a top QC.

4 Alan Vassie joined them at the Bar table on the following day.

5 John Lack, Chris McConville, Michael Small and Damien Wright, A History of Footscray Football Club: Unleashed, p. 258

6 After the hearing on the Friday afternoon, at an impromptu press conference, Galimberti urged Dogs fans to attend this rally. Over 10,000 people heeded this call.

7 Footscray supporters purchased stickers, one of which read "Up Yours Oakley!"

8 Kerrie Gordon and Alan Dalton, Too Tough to Die, p. 131

9 The minutes of the meeting show that Palmer proposed the resolution appointing the new directors to the board of the Club.

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The 1986 Parliamentary Commission into The conduct of Justice Lionel Keith Murphy[1]

STEPHEN CHARLES

Editors' note: The Honourable Stephen Charles was an inaugural member of the Victorian Court of Appeal from 1995 to 2006. In 1986, he was senior counsel assisting the Commonwealth Parliamentary Commission of Inquiry in relation to Justice Murphy. His obvservations in this article are based on public information and do not disclose matters of which disclosure is prohibited by the Parliamentary Commission Repeal Act 1986 *(Cth)*.

Lionel Murphy was, from the outset, a very successful lawyer, but his first degree was a Bachelor of Science with Honours in Organic Chemistry. He followed this with an Honours Degree in Law. He was admitted to the New South Wales Bar in 1947 and rapidly established himself as a labour/industrial lawyer. He took silk in 1960, and was elected to the Senate in 1961. He became Opposition Leader in the Senate in 1967.

In 1969 Gough Whitlam appointed him Shadow Attorney-General and, when Labor won the 1972 election, he was appointed Attorney-General and Minister for Customs and Excise. He was a very active but sometimes controversial Attorney-General; his principal achievement (among many) was the passage of the Family Law Act and, always a strong advocate of civil liberties and human rights, he also drew up a Human Rights Bill and set up the Law Reform Commission and the Trade Practices Act 1974, which established the Trade Practices Commission. His reputation for eccentricity and radicalism was enhanced by his raid on ASIO's Melbourne headquarters in March 1973, which attracted hostility and Murphy had to answer to an aggressive Senate Committee. Another of his significant reforms was the establishment of a systematic legal aid service for all courts.

Appointment to the High Court

Sir Douglas Menzies died on 29 November 1974, and on 10 February 1975 Lionel Murphy was appointed in his place. He was unquestionably a highly regarded lawyer, but his appointment was very controversial. Sir Garfield Barwick, then Chief Justice, told Whitlam that Murphy was "neither competent nor suitable for the position".[2] Whitlam wanted a judge better disposed to Labor than the other members of the High Court at that time, most of whom he would have regarded as very conservative. When Justice Murphy visited the chambers of his predecessor, he said of the volumes of British law reports which filled those shelves, "I want all these to go" and replaced them with reports of the United States Supreme Court.[3] His entry in the Australian Dictionary of Biography[4] says of Murphy –

> *"From 1975 to 1985 Murphy took part in 632 decisions, dissenting in 137, and writing opinions or short statements in 404 cases. His distinctive judicial method, in a relatively conservative court, was of overt legal realism. Dismissive of the rules of precedent and the more arcane, forensic techniques of appellate reasoning, he preferred the bold law-making approach of American judges, such as William O. Douglas: broad statements of underlying principles, liberal assumptions of constitutional implications, and an appeal to democratic ideals and the nature of the society that operated the Constitution. Murphy's judgments were brief and to the point and drew upon a wider spectrum of non-legal sources than judges were accustomed to use. Adventurous and innovative, he pleased those who shared his views, while others saw him as the epitome of a lawless judge. He went wigless, except on the most ceremonial occasions."*

Notwithstanding his rather hostile reception as a judge of the High Court, Justice Murphy became an important contributor to the High Court's interpretation of the Constitution, as exemplified by his approach to ss. 90 and 92 in judgments such as *Buck v Bavone*.[5] He was also a profound believer in the jury system. In Lindy Chamberlain's appeal against her conviction[6] Justice Murphy was in the minority with Deane J, and his dissenting judgment, later vindicated by events demonstrating her innocence, is highly persuasive.

The National Times allegations

On 25 November 1983 *The National Times* newspaper published a story[7] that in February 1980 police had commenced a crime intelligence operation against a Sydney solicitor reputed to be a "Mr Fixit" for organised crime in Australia. It was alleged that the solicitor's telephone had been bugged in 1980 in circumstances where the solicitor was said to have "fixed" the outcome of a court case involving an international drug trafficker. The solicitor's conversations were said to have included conversations with a New South Wales magistrate and a judge. The conversations indicated amongst other things that the solicitor and senior public officials were involved in fixing judicial proceedings.

The Age tapes

On 2 February 1984 *The Age* newspaper in Melbourne published a story[8] alleging that it had obtained access to various secret tapes containing excerpts of transcripts of telephone conversations illegally taped by the New South Wales police. Under lurid headlines such as "Secret tapes of judge, Sydney solicitor's phone was tapped" and "Phone taps reveal crime web", it was alleged that an unnamed judge was taped during telephone calls to the solicitor's office in 1979 and 1980. It was alleged that the judge had promised to ask a prominent New South Wales government figure to help secure a public service job for a man connected with the solicitor; and that the judge had rung back to say that the job had been lined up. Then, on 6 March 1984 the judge was named in the Queensland Parliament as being Justice Murphy[9], and the solicitor as Morgan Ryan. Ryan was in 1982 facing charges of forgery and conspiracy, and was alleged to be a friend of Justice Murphy, having briefed him while he was still at the bar. Justice Murphy later denied that Ryan was a close friend of his, in an unsworn statement in his second trial.

The first Senate Committee

A Senate Committee was established on 28 March 1984, its task being to discover whether *The Age* tapes were authentic and genuine and if so, whether Justice Murphy's conduct involved misbehaviour which could provide grounds for his removal from office under s.72 of the Constitution. The inquiry heard evidence from the Chief Magistrate of New South Wales, Mr Clarence (Clarrie) Briese and the New South Wales District Court Judge Flannery about what they alleged were improper attempts by the judge to influence them in respect of the criminal charges faced by Morgan Ryan. The first Senate Committee, which consisted of Labor Senators Michael Tate, Nick Bolkus and Rosemary Crowley, Liberal Senators Austin Lewis and Peter Durack and Democrat Senator Don Chipp all agreed that, in effect, nothing could be made of the conversations on the tapes

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and that the tapes and transcripts gave no basis for any possible finding of misbehaviour by Justice Murphy. This conclusion was vindicated when the tapes were referred later to the Stewart Royal Commission which, in its report made a finding that although the transcripts were "authentic" in the sense that they really did emanate from the NSW Police Force, *The Age* transcripts could not be accepted as reliable evidence of conversations. Justice Murphy did not give evidence. The Committee's deliberations ended in an equal division, the Labor members finding that even on a balance of probabilities the evidence of Mr Briese did not establish a *prima facie* case of misbehaviour by the judge, the two Liberal members holding that there was a *prima facie* case of misbehaviour, and Senator Chipp being unable to reach any finding without hearing evidence from the judge.

The evidence of Clarrie Briese[10]

Mr Briese first met Justice Murphy at a dinner at the home of Morgan Ryan on 10 May 1979, the dinner also including Murray Farquhar, then the Chief Stipendiary Magistrate of New South Wales, and Mervyn Boyd, then NSW Commissioner of Police. Mr Briese and Justice Murphy met again on several occasions at a Sydney restaurant, at the High Court and at Justice Murphy's Canberra home over a period 1980 to 1981. Early in 1982, Mr Briese received a telephone call at his home from the judge who, according to Briese, said he had a matter which he would like to discuss but not on the telephone. Briese said that in response to the call from the judge he invited the latter and his wife to dinner with him and his wife at their home in Sydney. Before dinner was served, and while Mrs Briese was preparing the meal, the judge, his wife and Briese had a discussion in the lounge room. Briese said the judge then raised the question of a social security conspiracy case, and criticised it in strong terms. According to Briese, the judge then said to him "and I will tell you about another wrong case of conspiracy too and this is against Morgan Ryan". Justice Murphy then criticised the Crown for its habit of "tossing in a conspiracy charge if a case is not very strong". Briese said he had the impression from the judge that he had heard the evidence and thought that the case was very weak. Briese did not suggest that Justice Murphy asked him to speak with the magistrate hearing the Morgan Ryan case, nevertheless Briese said he would make some inquiries about the matter to see what the situation was. Briese said that he did so because he felt that he was under pressure to take some action in relation to the case because of the possibility of some wrong happening in his court. Before the judge left Briese's house, Briese claims that Justice Murphy told him that he might be able to do something about obtaining an official government car for his use. Shortly after this visit by the judge, Mr Briese asked the magistrate hearing the case about the strength of the evidence against Morgan Ryan, and was told that there was enough for a *prima facie* case although it was not that strong. Briese did not tell the magistrate that any inquiries had been made of him about the matter and emphasised to the magistrate that the case was one entirely for his judgment. A few days later, Briese said he received another telephone call from the judge who asked him about the inquiries he had promised to make about the Ryan case. Briese asked Justice Murphy whether he would be attending the reception at the State office block that evening and told the judge he would see him there. At the reception Briese told Justice Murphy that it was his impression that the magistrate seemed to have a different view of the Ryan case from the judge and it was his guess that Ryan would probably be committed for trial. Briese said Justice Murphy responded "the little fellow will be shattered". Briese then suggested there were two possible ways that Ryan had of getting around the problem, he could either persuade the magistrate not to commit him, or he could apply for a "No Bill". Several days later Justice Murphy again rang Briese and Briese says the judge then said to him "and now what about my little mate?" He was adamant that the question was asked with such emphasis as to suggest a link between the inquiry and the preceding conversation.

Briese was cross examined by Justice Murphy's counsel, and although the judge did not give evidence to the committee, his version of these events, in which he denied a number of the assertions made by Briese, was put to him (Briese) by the judge's counsel. In particular, the judge denied that in the first call he said he had a matter he would like to discuss but not on the telephone, saying that he explained the call as being in response to several messages he had received from Briese reminding him of his standing invitation to return his hospitality. Justice Murphy denied that he said that there was another wrong case of conspiracy and that being against Morgan Ryan, claiming that Briese first mentioned the Morgan Ryan case. Justice Murphy denied that he offered to obtain a government car for Briese, and denied that he rang Briese to ask about the inquiries he had made about the Ryan case. Justice Murphy also denied that he used the expression "my little mate".

The second Senate committee

A second Senate Committee inquiry was commenced on 6 September 1984. The Senators once again were Senators Michael Tate, Nick Bolkus and Austin Lewis, and in place of Senator Chipp, Senator Janine Haines. These Senators were assisted by two former judges, John Wickham from Western Australia and Xavier Connor, from the A.C.T. and Victoria. Justice Murphy's counsel again informed the Committee that the judge would refuse to appear. After hearing all the evidence, Commissioner Wickham took the view that the Briese allegation of an attempt to pervert the course of justice was proved beyond a reasonable doubt. On the other hand Commissioner Connor said no such proof was possible and that if "misbehaviour" in s.72 of the Constitution meant criminality, Parliament could not find Justice Murphy guilty of "misbehaviour"; on the other hand, Commissioner Connor observed "in four years as a bench clerk to Victorian magistrates, in 23 years at the Victorian Bar, in 10 years on the Supreme Court of the ACT, and in six years on the Federal Court of Australia I have not encountered anything comparable (with Murphy's behaviour). It would be unfortunate if Parliament or the public were to gain the impression that it was accepted or normal judicial behaviour."[11] He said the judge was "lending the prestige of his high office to an attempt to gain on behalf of an old friend some information which neither he nor his friend should have had".[12]

Senator Bolkus held to the view he had taken in the first Senate Committee. The other three Senators however and the two Commissioners found that on the balance of probabilities, Justice Murphy could have been guilty of behaviour serious enough to warrant his removal from the High Court. As Professor Blackshield[13] put it, "four of the six participants in the second Senate Committee had found that Murphy **could not** be guilty of any criminal offence. But five of the six participants had found that he **could** be guilty of "misbehaviour" in the constitutional sense: that is that it would be **possible** for Parliament to take that view."

The first trial

The Director of Public Prosecutions, Ian Temby Q.C. then recommended on 21 November 1984 that Justice Murphy should be prosecuted on two charges of attempting to pervert the course of justice, based on the Briese and Flannery allegations. Justice Murphy was committed for trial on both charges on 26 April 1985. This was the first occasion that a justice of the High Court had ever faced criminal charges. He continued to sit during February 1985, but did not sit from the beginning of March 1985, leaving the Court to dispose of its business with only six judges. He made a written statement to the committal, which was published by the *Sydney Morning Herald*,[14] it commenced –

> *"I am completely innocent. I am angry at these false charges. I did not attempt to pervert the course of justice. To do so would be a betrayal of what I have fought for all my life."*

Justice Murphy also took legal steps seeking to overturn the decision of the magistrate to commit him to trial. The application for judicial review was heard by Toohey J in the Federal Court and dismissed on 29 May 1985.

The trial commenced on 5 June 1985 before Justice Cantor. The prosecutor was Ian Callinan Q.C. and Tom Hughes Q.C. represented Justice Murphy. The facts alleged against the judge followed generally those set out above in the paragraph headed The Briese Allegations. Justice Murphy gave evidence on oath and was cross-examined by Mr Callinan. He was later acquitted on the count relating to Judge Flannery, but convicted on 5 July 1985 on the count which alleged that between 1 December 1981 and 29 January 1982, whilst a justice of the High Court of Australia he attempted to pervert the course of justice in that he attempted "to influence Clarence Raymond Briese, chairman of the bench of stipendiary magistrates in the said State to cause Kevin Jones, a stipendiary magistrate in the said State, to act otherwise than in accordance with his duty in respect of the hearing of committal proceedings against one Morgan John Ryan of charges of conspiracy …."[15]

On 3 September 1985 Justice Murphy was sentenced to 18 months imprisonment. After referring to the evidence in glowing terms of his honesty, integrity, good character and reputation, and his public service to the community Cantor J continued – [16]

> *"After most anxious consideration I have firmly reached the conclusion that it would not be proper for me to allow these significant subjective factors to displace the need for a custodial sentence. The failure by me to impose such a sentence would amount to the countenancing by a member of the judiciary of conduct by a judge which strikes at the very foundation of our system of impartial justice. The conviction of a judge for such an offence must result in a penalty which reflects the abhorrence and disapproval of this court and of all right thinking members of the community, and, at the same time, stand as a dreadful warning to all who might similarly transgress. The commission of this crime has done a terrible injury to the administration of justice and in the minds of many has adversely affected and raised doubts as to the integrity and standing of every judge in this country."*

The hearing of the appeal

The appeal was heard by the Court of Appeal and Court of Criminal Appeal of NSW, sitting jointly (because questions of law reserved by the trial judge had been referred by the High Court to the Court of Appeal and criminal issues were involved) on six days in November, and on 28 November the Court quashed the conviction and sentence. The Court held that the trial judge had misdirected the jury on the use that could be made by them of evidence of good character and on the standard of proof with regard to motive and also in the rejection of certain evidence of conversations between Justice Murphy and his wife and Justice Murphy and his secretary. A new trial was ordered.[17]

Neville Wran's contempt

On the day that Justice Murphy's appeal was successful, Mr Wran,

> “The acquittal of Justice Murphy did not end newspaper comment about his actions...”

then the Premier of New South Wales, agreed to give an interview at the request of some reporters. A transcript[18] showed the following –

“Q. Mr Wran what comments do you have today on the re-trial of Lionel Murphy?

A. I was very satisfied with the Court of Appeal decision. I agree that there was a clear miscarriage of justice and I think the sooner the final step in what’s been a very very prolonged and sad affair is taken the better.

Q. So you’re convinced he’ll be found innocent after this re-trial?

A. I have a very deep conviction that Mr Justice Murphy is innocent of any wrongdoing.

Q. What do you base that conviction on?

A. My knowledge of Mr Justice Murphy and the facts as they emerged in that case.

After some intervening questions the interview continued.

Q. Mr Wran ... why do you think the jury found Lionel Murphy guilty?

A. Well I think the Court of Appeal has explained that. There was a clear miscarriage of justice and the judge directed the jury in relation to the offence in a way which was totally wrong and therefore the jury was asked to give a decision in relation to this whole matter which was based upon erroneous directions from the judge.

Q. So do you expect a different verdict from a new trial?

A. Oh yes.

Q. So you’re blaming the judge for the guilty verdict?

A. That’s what the five Appeal Court judges did. It’s not a question of blame, it’s a matter of being able to pinpoint the fact that there was a clear miscarriage of justice.”

When the Premier was later prosecuted for contempt, particulars of the charges alleged, in effect, that Mr Wran either intended to use or was reckless and indifferent in using words that would interfere with or prejudice the course of justice, or influence potential jurors to acquit the accused, or his conduct in so speaking was likely to have that effect.

The Premier’s words, notwithstanding that there were plenty of others asserting that Justice Murphy was innocent of the charges amounted to a clear contempt of court.[19] The NSW Court of Criminal Appeal was most unimpressed that the Premier, a Q.C. and politician of long experience of the law and politics, should have held a press conference to proclaim Justice Murphy’s innocence, immediately after the announcement of the success of his appeal and the decision to retry him, and fined him $25,000. Nationwide News Pty Ltd, the publishers of the *Sydney Daily Telegraph*, which had published the Premier’s remarks under banner headlines, was fined $200,000.

The second trial

Justice Murphy was retried before Hunt J and a jury on 14 April 1980. He was retried only on the charge alleging that he had attempted to influence Mr Briese, the charge concerning Judge Flannery having been disposed of in the first trial. The principal evidence was again given on oath by Mr Briese. Justice Murphy did not give sworn evidence, as he had during the first trial, but made an unsworn statement from the floor of the court, on which he could not be cross-examined.[20] Justice Murphy said[21] he had never suggested that Mr Briese speak to the magistrate who was hearing Morgan Ryan’s case or that he do something about the case and denied that he had said to Mr Briese “What about my little mate”. He said he had known Ryan for more than 30 years and had handled cases for Ryan’s firm when he was at the Bar, but he was never indebted to him and they were not close friends. Justice Murphy said he had approached the Chief Judge of the District Court, Judge Staunton, and asked him whether Ryan could get an early trial, and said of this that “To my mind this was perfectly proper, all it would mean was that he would be dealt with according to law as soon as possible.” The only witness called for the defence was Justice Murphy’s secretary, Ms Rhonda Shields. The Judge was acquitted on 28 April 1986.

The Decision to set up a Parliamentary Commission of Inquiry

The acquittal of Justice Murphy did not end newspaper comment about his actions, and other allegations about allegedly inappropriate behaviour on his part were raised in the press. There remained the question whether it had been appropriate for him to comment to the Chief Magistrate about the strength of the case against Ryan when the matter was being heard in the Magistrate’s Court. Professor Blackshield later accepted (as previously noted) that five of the six participants in the Senate Committee had found that he could be guilty of “misbehaviour” in the constitutional sense.

Professor Blackshield later argued that the jury verdict made it impossible for any attempt to remove Justice Murphy from the High Court to be based on an allegation of a criminal offence, but accepted that it could still be argued that although his conduct had been shown to stop short of criminality, it still amounted to “impropriety” sufficient to warrant removal.[22]

Justice Murphy was criticised for not giving evidence on oath or calling evidence of good character at the second trial. Articles were published alleging that other judges on the High Court would refuse to sit with him, but he resumed his seat on the bench. Then, however, the Federal Government decided to set up a Parliamentary Commission of Inquiry to inquire and advise the Parliament whether any conduct of Justice Murphy had been such as to amount in its opinion to proved misbehaviour within the meaning of s.72 of the Constitution.

Section 72 (ii) relevantly provides that the Justices of the High Court and of the other courts created by the Parliament shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of “misbehaviour or incapacity”. In 1986 there was little or no direct authority on the meaning of these words. The leading authority on parliamentary government at the time was Dr Alpheus Todd,[23] who wrote –

“Before entering upon an examination of the Parliamentary method of procedure for the removal of a judge under the Act of Settlement, it will be necessary to inquire into the precise legal effect of their tenure of office “during good behaviour”, and the remedy already existing, and which may be resorted to by the Crown, in the event of misbehaviour on the part of those who hold office by this tenure.”

“The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the office.” Such an estate is terminable only by the grantee’s incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other condition or estate, it may be forfeited by a breach of the condition annexed to it. That is to say, by misbehaviour. Behaviour means behaviour in the grantee’s official capacity. This behaviour includes, first, the improper exercise of judicial functions; second, wilful neglect of duty, or non-attendance; and, third, a conviction for any infamous offence, by which, although not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury.”

Todd’s statement had been in substance repeated and approved in many textbooks, (e.g. all editions of *Halsbury’s Laws of England*). The principal text on the Australian Constitution,[24] also cited and apparently approved it. At least three senior silks had given advice in the context of the allegations against Judge Murphy, one of the judge’s counsel, David Bennett Q.C. having advised in support of the narrowest view of “proved misbehaviour” to the effect that private misconduct falling short of a criminal offence could never amount to “misbehaviour” and that in addition it could not amount to “*proved* misbehaviour” in the absence of a criminal conviction in a court. The first Senate Committee had been advised by Bill Pincus Q.C. in terms which supported giving each House of Parliament freedom to decide what private misconduct constituted “misbehaviour”. The Attorney-General had obtained the opinion of the Solicitor-General, Dr Gavan Griffith Q.C., which was that proved misbehaviour was to be established to Parliament but Parliament was not at large to define it by reference to its own standards or views of suitability for office or moral or social character or conduct. An anterior conviction would suffice, but in addition Parliament could itself find by proof in an appropriate manner, in proceedings where the offender had been given proper opportunity to defend himself, that there had been misbehaviour.[25]

The Commonwealth Parliament then passed the *Parliamentary Commission of Inquiry Act* 1986, assented to on 14 May 1986, which set up the Commission. Three commissioners were appointed, all retired judges, the Hon. Sir George Lush, the Hon. Sir Richard Blackburn OBE and the Hon. Andrew Wells Q.C. The Act required the Commission to conduct its hearings in private unless special circumstances required a public hearing and to report by 30 September 1986. Mark Weinberg, Alan Robertson and I were appointed as counsel assisting the Commission, and Counsel acting for Justice Murphy were Roger Gyles Q.C., Marcus Einfeld Q.C. and Dr Annabelle Bennett.[26]

The first challenge to the Parliamentary Commission

Justice Murphy immediately applied to the High Court seeking an interlocutory injunction to prevent the Commission from sitting on the grounds that it did not authorise any investigation to be made of him and that Mr Wells was disqualified from taking part in the inquiry.[27] Shortly after “The Age tapes” had been published, the Chairman of the Australian Law Reform Commission, Justice Michael Kirby, had been reported as saying that the discussion between the solicitor and Justice Murphy about the appointment of someone to a high position in the NSW public service and his agreement to lobby the politician who would make the appointment were “the sort of thing [that] goes on all the time in judicial circles”, and that the intervention of judges in such matters was “part of the nether world of the legal arena”. Justice Wells, then a judge in the South Australian Supreme Court, was reported to have said in court the following day that the article not only imputed corruption to judges but implied that they were from time to time willing to act in flagrant defiance of constitutional principles governing the separation of powers. Counsel for Justice Murphy claimed that Mr Wells would be unable to bring an impartial and unprejudiced mind to the Inquiry. The court immediately rejected the application on this ground saying[28] –

"The remarks made by Mr Wells were made long before the Inquiry was set up and were not made in reference to the Plaintiff or his conduct but to rebut the assertions attributed by the writer of the article in the newspaper to Mr Justice Kirby. We, of course, do not know whether Mr Justice Kirby did make remarks to that effect. However, in our experience, it would not be right to say that judges commonly intervene to influence the making of public service appointments or that there is a practice inherited from England whereby judges descend into some shady nether world of dubious behaviour. The remarks of Mr Wells amount to no more than a denial that judges, to his knowledge, engage in conduct of the kind allegedly described by Mr Justice Kirby, conduct of a kind which Mr Wells regarded, understandably, as contrary to accepted standards of judicial propriety should be thought to disqualify him from acting in a judicial capacity."

In answer to the claim that the Commission Act did not authorise investigations to be made, the court said:[29]

"The mere conduct of private inquiries, in what we must assume would be a responsible manner, is not likely to cause any real damage to the plaintiff's reputation. Further no one requires special authority at law simply to make inquiries. There is no suggestion that the Commission would be considering the holding of a public hearing before this court is asked finally to determine the issues."

The 14 allegations presented to the commission

By 21 July 1986, counsel assisting the Commission had drafted 14 specific allegations of conduct by Justsice Murphy for the Commission to consider.[30] The question then arose whether the facts alleged in these documents were capable of constituting "misbehaviour" and that argument was heard on three days later in July. For the Judge, Mr Gyles and Dr Bennett argued that the word "misbehaviour" in s.72 extended to conduct falling only within either or both of two categories, namely, misconduct in office, as that expression was understood at common law, and conduct not pertaining to the holder's office amounting to an infamous crime of which the holder had been convicted. They argued that since none of the allegations asserted a conviction, they could only be supported if the facts asserted amounted to misconduct in office. Subject to further argument on the scope of the concept of misconduct in office, they argued that all or at least most of the documents would be found to fail to allege facts capable of constituting misbehaviour.

Counsel assisting argued that s.72 had presented to the Australian nation a provision that was and was intended to be a new creature; that the authorities relied upon by counsel for the Judge did not make good the proposition they were said to establish; and that even if they did, the Constitution had, by necessary implication, rejected it; and that the word "misbehaviour" should receive its natural meaning in the legislative and constitutional context in which it appeared.

Extensive reference was made by all counsel to the Convention Debates (Adelaide 1897) and Melbourne (1898) in support of their arguments. Detailed reference was also made to case law, extracts from text writers, parliamentary papers containing opinions claimed to be authoritative, and extracts from comparable legislation.

Each of the three commissioners rejected the argument pressed by Justice Murphy's counsel. The presiding commissioner, Sir George Lush[31], said –

"Section 72 must be construed against the background that it was designed to bring into existence an entirely new State. It was being written on a clean page. It was creating institutions based largely but not wholly on British antecedents, but in circumstances in which it cannot be assumed that the draughtsman intended to reproduce the British antecedents."

And later–

"[M]y opinion is that the word "misbehaviour" in s.72 is used in its ordinary meaning, and not in the restricted sense of "misconduct in office". It is not confined, either, to conduct of a criminal nature.

This interpretation can be said to leave judges open to the investigative activities of the contemporary world, and so to expose them to pressures to which, in the interests of independence, they should not be exposed.

The other side of this is that, however s.72 may be interpreted, judges are not immune from the activities to which I have referred, though it may be that there is a higher incentive for the investigator if there is a possibility that he may procure a removal. Judges and in this context Federal judges in particular, must be safe from the possibility of removal because their decisions are adverse to the wishes of the government of the day. Section 72 intends to afford this by requiring proof of misbehaviour. They cannot, however, be protected from the public interest which their office tends to attract. If their conduct even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."

And later–

"[i]t is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values. The decision will involve a concept of what, again in the light of contemporary values are the standards to be expected of the judges of the High Court and other courts created under the Constitution. The present state of Australian jurisprudence suggests that if a matter were raised in addresses against a judge which was not on any view capable of being misbehaviour calling for removal, the High Court would have power to intervene if asked to do so."

Sir Richard Blackburn said[32] –

"All the foregoing discussion relates to the question whether "proved misbehaviour" in s.72 of the Constitution must, as a matter of construction, be limited as contended for by counsel for Murphy J. In my opinion the reverse is correct. The material available for resolving this problem of construction suggests that "proved misbehaviour" means such misconduct, whether criminal or not and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question."

And later–

"In my opinion the word "proved" in the section implies that Parliament may adopt such method of proof as it sees fit, but may not address arbitrarily without adverting to the question of proof. In each case, Parliament must decide, first, whether there is proved misbehaviour, and secondly whether bearing in mind the great importance, implied in the Constitution, of the independence of the judges, it should address for the removal of the judge."

Commissioner Wells stressed that the language of s.72 must "so far as may be, allow for the preservation of judicial independence" but at the same time "The same public who must respect a High Court judge's independence is, in my view, entitled to expect from him a standard of competence and behaviour that are consonant with the national importance of his judicial function." Commissioner Wells said[33] –

"The office of judge differs markedly from that of many other public officials. The performance of his duty calls on him to display, of a high order, the qualities of stability of temperament, moral and intellectual carriage and integrity, and respect for the law. Those and other like qualities of character and fitness for office, if displayed by a judge in the exercise of his judicial function, are unlikely to be found wanting in his conduct when not acting in office. If they are said to be genuinely possessed and not feigned, they would stand uneasily with conduct in private affairs that testifies to their absence.

There are, however, other qualities which do not carry the same guarantee of stability, integrity, and respect for the law in private life. For example, a man may possess profound learning, intellectual adroitness, an accurate memory, and, by using them, adequately discharge the duties of many public offices; but, without more, he could not discharge the duties of judicial office.

In short, a man's moral worth, in general, pervades his life both in and out of office.

It is not surprising to find, therefore, that if in general affairs of life beyond his judicial functions, a judge displays aberrations of conduct so marked as to give grounds for the view that he lacks the qualities fitting him for the discharge of his office, the question is likely to arise whether he should continue in it. Such a question cannot be resolved without establishing standards of conduct by reference to which the consequences of fervent misconduct may be assessed."

And later–

"It is only to be expected that High Court judges like everyone else, will vary in character, temperament and personal philosophy. But there is, I have no doubt, a clear distinction between, say, mere eccentricity of conduct or the proven proclamation of personal views upon some matter of public concern, on the one hand, and plain impropriety, on the other."

Commissioner Wells continued–

"The issue raised by s.72 would thus appear to pose questions of fact and degree. Somewhere in the gamut of judicial misconduct or impropriety, a High Court judge's conduct, outside the exercise of his judicial function, that displays unfitness to discharge the duties of his high office can no longer be condoned, and becomes misbehaviour so clear and serious that the judge guilty of it can no longer be trusted to do his duty. What he has done then will have destroyed public confidence in his judicial character, and hence in the guarantee that that character should give that he will do the duty expected of him by the Constitution. At that point s.72 operates."

Commissioner Wells also concluded that if the Houses of Parliament pronounced to be misbehaviour that which, at least arguably, was not, that would be justiciable in the High Court.

Accordingly, the objections of Justice Murphy's counsel to the 14 specific allegations of conduct pressed by counsel assisting, all failed.

Later events

After the hearing of argument in the Parliamentary Commission, but before the Commissioners' reasons were completed and handed down on 19 August, Justice Murphy resumed sitting as a Justice of the High Court. However, his counsel informed the Commissioners of medical advice that Justice Murphy had an advanced state of cancer, in its secondary stages, and that there was no cure and no treatment. As soon as the Commissioners and counsel assisting were advised of his medical state, the hearings of the Commission were adjourned *sine die* and the Federal Government supported Justice Murphy's right to sit and moved to close down the Inquiry. The Parliament passed the *Parliamentary Commission of Inquiry (Repeal) Act* 1986, which was assented to on 25 September 1986, which repealed the Act setting up the Commission of Inquiry, and effectively terminated the Commission.

In the meantime on 5 August 1986 the Commissioners had already decided the Commission would not take any further evidence pending advice on the Justice Murphy's health and adjourned until 19 August, the date when Parliament was expected to resume.

> “Another undecided question is what role the High Court can play in all this?”

Justice Murphy resumed sitting on the High Court early in August 1986 and participated in two cases, the judgments in which were handed down on 21 October 1986. Justice Roslyn Atkinson[34], who was then the associate to Gibbs CJ, recorded the circumstances in which these judgments were handed down in the following passage[35] –

> *“The judgments in both cases were handed down on 21 October 1986. In neither were the judgments of Mr Justice Murphy decisive in terms of the result reached; but in them he made important statements of principle with regard to both criminal and constitutional law. The judgments were handed down in circumstances of extreme urgency. The court received word that Mr Justice Murphy was near death. If he died before the judgments were handed down, the reasons written by Mr Justice Murphy would have had to have been destroyed. Knowing that his judgments could not be published after his death, the Chief Justice immediately listed the matters for the judgments to be delivered without the publication of pamphlet copies which were normally produced but which would have held up the publication of the judgments for 48 hours. Justice Murphy died within an hour of the publication of the judgments. It was Sir Harry who was responsible for these last judgments of Mr Justsice Murphy being published. Without his actions the judgments would have to have been destroyed.”*

Justice Murphy in fact died on 21 October 1986. All the High Court judges attended his State Funeral in Sydney on 27 October 1986. The Chief Justice himself continued to sit in court for only a matter of weeks thereafter.

Unresolved questions

The *Parliamentary Commission of Inquiry Repeal Act 1986* appears to have been hurriedly drafted and its meaning is not entirely clear. The legislation presumably has prevented for 30 years at least access to any document containing material relating to the conduct of Murphy J. The reasons of the Commissioners were nonetheless published both in the *Australian Bar News* of 1986, and in the *Australian Law Reports*, under the title “Murphy v. Lush.” The views expressed by the Commissioners were, however, adopted by the Parliamentary Judges’ Commission of Inquiry conducted in Queensland into the behaviour of Justice Vasta and Judge Pratt, which was presided over by Sir Harry Gibbs in 1988 and 1989.[36] They were also considered, and mentioned with approval by the Hon. Peter Heerey Q.C. in his report to Parliament concerning the conduct of Vice-President Lawler of the Fair Work Commission. They also received approving comment from Odgers’ Australian Senate Practice[37], which, in a lengthy discussion of the removal of judges under s.72, states that British and American authorities accept the wider view of the meaning of “misbehaviour.”

The Parliamentary Commission was terminated before any evidence had been called. Professor Blackshield said[38] that the decision to terminate it was an act of folly, a last injustice to Justice Murphy since it gave rise to a final crop of insinuations that there must have been something to hide. It certainly prevents any examination now of the 14 allegations, since s.7 of the Repeal Act imposes severe sanctions for revealing any information about the allegations. Professor Blackshield has himself characterised the charges as containing “no surprises or fresh revelations” and the thrust of his comments is that the 14 charges would not have led to any action by the Parliament. At the same time it might be said that the High Court’s comments[39] on the application to remove Commissioner Wells for bias show that the six judges dealing with that application plainly did not share the views attributed to Justice Michael Kirby in relation to the propriety of judges descending “into some shady netherworld of dubious behaviour”.

When the Commission ceased sitting, lengthy cross-examination of some of the potential witnesses had already been forecast. The Commission had been required to conduct its inquiry as quickly as a proper consideration of the material would permit (s.7(2)) of the Act) and to report by September 30, 1986 (s.8(2)) unless the date was extended. The Commissioners would probably have fixed draconian limits to the time permitted for cross-examination, which in turn might have led to claims of unfair treatment and a denial of natural justice and to a lessening of the impact of any recommendations which might have been made to Parliament in any way adverse to Justice Murphy. As Justice Roslyn Atkinson said in her paper[40] because of the terms of the Repeal Act the 14 charges cannot be examined and, unless the Act is ever repealed or amended, they will remain unresolved in perpetuity.

At this time, so far as I am aware, the reasons of the Commissioners have not been considered by any appellate court or the High Court. After the reasons were delivered, Murphy J’s counsel made application to the High Court, seeking to challenge the charges, but the Court refused to deal with the application and referred it back immediately to the Commission without commenting on the allegations. The Hon. Peter Heerey in his report to Parliament concerning the behaviour of Vice-President Lawler also quoted[41] from the Commissioners’ reasons, describing them as “scholarly and convincing”.

The absence of later appellate court consideration leaves untested the Commissioners’ reasons relating to the meaning of the words “misbehaviour” and “proven” in s.72. Provisions such as s.72 were introduced by the Act of Settlement in 1701 as part of the Glorious Revolution, together with the Bill of Rights 1689. After the Act of Settlement, judges’ commissions became valid “*quamdiu se bene gesserint*” (during good behaviour), which meant that if they did not behave, they could be removed, but only by a vote of both Houses of Parliament. This was the result of various Stuart monarchs (particularly James II) sacking judges or influencing their decisions, and was to assure judicial independence. It is no longer a fear of royal intervention that makes such independence essential, but rather of governments, both State and Federal, whether concerned (for example) by judicial activism in the High Court, or what is thought to be too lenient sentencing in the criminal courts. The fact that Alpheus Todd’s approach to provisions such as s.72 of the Constitution had been almost universally accepted by text writers before the Commissioners reached a different view leaves it as a real possibility that the High Court might now disagree with the Commissioners’ conclusions. Even if the wider view of the meaning of misbehaviour taken by the Commissioners is accepted, a question remains at what point an allegation is “proven” and whether this stage is only reached by Parliament becoming satisfied (a) that the relevant facts have been established and (b) that in all the circumstances removal of the judge is justified.

Another undecided question is what role the High Court can play in all this? Would the High Court have jurisdiction to consider the lawfulness of a decision by parliament to remove a high court judge? Two of the parliamentary commissioners – Lush and Wells – thought so in the case of Justice Murphy. The United States Supreme Court thought that court did not have such jurisdiction in a 1993 case.[42]

There are good reasons now for Parliament to consider whether the Repeal Act should itself be repealed or amended, as Justice Atkinson has impliedly suggested. Professor Blackshield would doubtless agree.

1 There are two articles of particular assistance on this subject. Justice Roslyn Atkinson of the Queensland Supreme Court was Associate to Sir Harry Gibbs, Chief Justice of the High Court in 1986. Her excellent article, *The Chief Justice and Mr Judge Murphy: Leadership in a Time of Crisis* is published in the papers of Emmanuel College, University of Queensland, No. 5, June 2008. Secondly, Professor A. R. Blackshield’s chapter “The Murphy Affair”, is contained in the book *Lionel Murphy, A Radical Judge*, edited by Jocelynne Scutt at p. 230. It is a cogently argued polemic by a writer who is convinced the judge was entirely innocent, and needlessly hounded to his grave. The article gives a well-informed and critical perspective from the viewpoint of a strong supporter of Justice Murphy.

2 *Australian Dictionary of Biography*, “Lionel Murphy” by Brian Galligan.

3 Hocking, Jenny (1997). *Lionel Murphy, A Political Biography*, Cambridge University Press, 228.

4 Galligan, Brian, above, n.2

5 (1976) 135 CLR 110.

6 *Chamberlain v The Queen (No. 2)* (1983) 153 CLR 521.

7 Wilkinson, Marian. “Big Shots Bugged”, *National Times*, 25 November-1 December 1983, 3.

8 Murdoch, Lindsay & Wilson, David. “Secret Tapes of judge, lawyer”.

9 “How the Murphy Case unfolds”, *Sydney Morning Herald,* 29 April 1986, 4.

10 The following is based upon a Cabinet-in-Confidence Minute, Appendix 5 sent by the Attorney-General (Senator Gareth Evans) to Cabinet on 31 August 1984.

11 Quoted by Justice Atkinson, above, n.1 at p. 3.

12 See also Professor Blackshield, above, n.1 at pp. 246-7.

13 Ibid at p. 248.

14 *Sydney Morning Herald*, 27 April 1985, 9.

15 *R v Murphy* (1985) 158 CLR 596, 597.

16 Edited text of Justice Cantor’s judgment reported in *Sydney Morning Herald*, 4 September 1985, 7.

17 *R v Murphy (1985)* 4 NSWLR 42.

18 *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616 at 618-620.

19 *R v Castro Onslow’s and Whalley’s Case* (1873) 2R 9 QB 219, 226.

20 Freehill Hollingdale & Page were then the judge’s solicitors. The history of Freehills (published 2011) states at 269 that the judge was advised by Freehills’ team not to give evidence, not to call character witnesses, and not to call his wife to give evidence, and that “*if you don’t do these three things, we’ll win this case. If you do any one of them, we’ll lose*”. The judge followed their advice.

21 The judge’s unsworn statement was reported in The Australian, 22 April 1986, by Jennifer Falvey.

22 Blackshield, above n.1 at p.253.

23 *Parliamentary Government in England*, 1892, 191-3.

24 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* 1901, 731-3.

25 These opinions were each referred to in the Cabinet-in-Confidence Minute mentioned in endnote 10.

26 All counsel were later appointed to the Bench, Mark Weinberg and I to the Court of Appeal of Victoria, the others to the Federal Court of Australia.

27 The events that followed are all recorded in the High Court’s decision, *Murphy v Lush* (1986) 65 ALR 651.

28 *Murphy v Lush* (1986) 65 ALR 651 [10].

29 Ibid at [12].

30 The Act which terminated the Commission imposed strict secrecy on those involved in the Commission’s work and makes it impossible to specify the allegations or describe the preparatory work undertaken. That there were 14 such allegations is discussed in the Commissioners’ reasons for decision which are public documents.

31 Reasons for decision of Sir George Lush published on 19 August 1986, reported in (1986) Australian Bar Review 203, 208, 209-10.

32 Reasons of Sir Richard Blackburn ibid at p.221.

33 Reasons of The Hon. Andrew Wells QC ibid at pp. 228-230.

34 *King v The Queen* (1986) 161 CLR 423; *Miller v TCN Channel Nine Pty Ltd* (1986) CLR 556.

35 Above, n.1, Justice Atkinson’s paper, p. 18.

36 Queensland, First Report of the Parliamentary Judges Commission of Inquiry, for Sir Harry Gibbs, Sir George Lush, and the Hon. Michael Helsham, (1989) pp. 9-10.

37 13th ed. Ch 20.

38 Blackshield, above, n.1 at p. 256.

39 *Murphy v Lush* (1986) 65 ALR [10].

40 Footnote 1, Justice Atkinson’s paper, above n.1, at p. 17.

41 Report to Parliament delivered February 2016, at p.14 at [3.1].

42 *Nixon v United States* 506 U.S. 224 (1993).

The Library of Sir Owen Dixon[1]

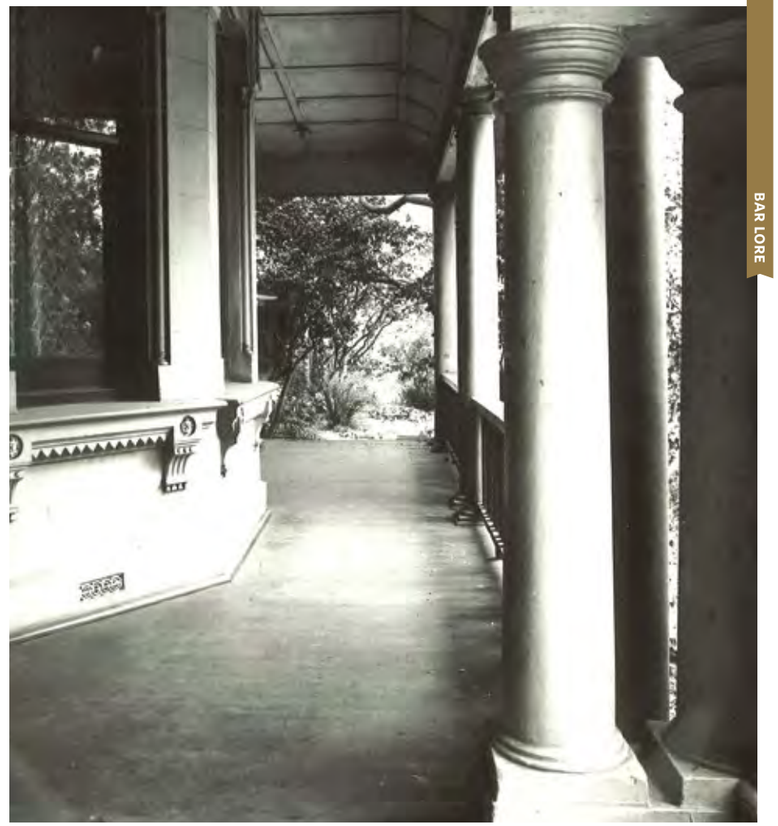
JAMES MERRALLS*

A library is both a collection of books and the place where it is housed. I shall say a little about both concerning the library of Sir Own Dixon. Throughout his judicial career he possessed three collections of books: one at his home and one in each of his chambers in Melbourne and Sydney.

The High Court was itinerant during the whole of Dixon's time in office. It had two fixed locations: Melbourne, which was the principal registry, and Sydney, where it occupied a wing of the Central Criminal Court building in Darlinghurst. In neither place was there an adequate court library. The library in Melbourne was in the centre of the building. It contained sets of the basic English and Australian reports and statutes, a set of Halsbury's Laws of England, Australian and English digests and a few recent editions of popular text books. A bare bones library. The Justices depended substantially on the Supreme Court library across the lane. The Sydney library was meagre. The library room was also occupied by typists. There were few text books and the Supreme Court library was nowhere near. The Commonwealth had acquired the libraries of some of the past Justices which were housed in Justices' chambers, but they were mainly sets of law reports.

In his chambers in both cities, Dixon had quite large collections of text books as well as the basic reports. The texts were classical works rather than recent books or editions. Of those that he regarded as the most important, he had copies in both collections as well as in his home library. He was fond of telling a mischievous story about a visit to Lord Denning's home at Whitchurch in Hampshire. Denning took him to his library and produced a prized possession: a copy of the third edition (1868) of Bullen and Leake's *Precedents of Pleadings*, the edition before the Judicature Acts (Denning had been a joint editor of the ninth (1935) edition). The volume was displayed with pride. Dixon said that he could not resist telling Denning that he owned three copies of the third edition: one in each of his chambers and another at home.

Dixon's main working library and his general library were at home where he wrote most of his judgments. Until 1937, the Dixon family lived at "Beechfield" in Trafalgar Road, Camberwell. In that year, Dixon inherited the entire contents of the library of Sir John Higgins—books and furniture. Dixon had developed a close friendship with Higgins—who was the chairman of the British Australian Wool Realisation Association—when he appeared before the High Court and the Privy Council in the post-war skin wool and wool tops cases. Higgins had no children and he had come to act as a confidant of Dixon in matters concerning his career. Dixon needed a bigger house to accommodate his own growing library as well as the inheritance. He purchased "Yallambee", a sprawling single storey house in Higham Road, East Hawthorn. The attraction of the purchase lay not so much in the house itself but in a long building at the rear. Originally stables, it had been adapted by a previous owner for amateur theatricals. A curtained stage remained at the northern end. Dixon installed high bookshelves



along the eastern and western walls and around the window at the south. In the south-west corner was a small alcove which he used as a study. It was there that most of his judgments thereafter were written. The library had no heating. In winter, Dixon worked with the warmth of only a single or double bar electric radiator.

The collection in that library comprised a multitude of legal works, including a set of the United States Supreme Court Reports, reports of appeals from India to the Privy Council from 1918 to 1950, Selden Society publications and myriad sets of books, such as the Cambridge histories of the Ancient World, the British Empire and various periods from the Middle Ages onwards. Those histories were kept in small revolving book stands scattered throughout the building.

The collection was the working library of a scholar, not that of an antiquarian. Dixon was an inveterate fossicker in bookshops new and second hand, in Melbourne, Sydney and the other cities visited by the Court and in London. His favourite bookseller was AH Spencer whose Hill of Content bookshop survives at the top end of Bourke Street. Under Mr Spencer's ownership, the shop stocked second hand as well as new books. Mr Spencer kept an eye out for books which might interest Dixon. He advertised "No library is too large and no parcel of books too small for me to purchase".

The works of classical authors were editions of scholars Dixon respected, in particular Gilbert Murray and Dixon's mentor at Melbourne University, Professor TG Tucker. Dixon said of Tucker: "You knew you were in the presence of a penetrating mind that was at once robust, clear and sensitive, and that it was accompanied by an unremitting enthusiasm for classical studies of every kind." When he visited Gilbert Murray at Boar's Hill, Dixon was delighted to find him reading an early tragedy of Aeschylus in an edition prepared by Tucker.

The range of Dixon's reading of classical texts is revealed by notes in his diaries and his journals of voyages overseas. Aeschylus and Sophocles are prominent among Greek authors, and Horace and Virgil among Roman. Dixon's biographer Philip Ayres says that there was no book closer to Dixon's soul than Aeschylus's *Agamemnon*. "It reflects his fatalism."

He read the whole of the surviving works of Aristotle. They had an important influence on his approach to Australian constitutional law. He was fond of quoting Aristotle, in classical Greek, often without the benefit of translation.

Dixon read the works of most of the well-known British poets and novelists of the nineteenth century. Apart from Kipling, twentieth century authors interested him little. His favourite novelist was Trollope, whose acute studies of provincial life in Victorian England appealed to his own temperament. He also enjoyed Dickens, Thackeray, George Eliot, especially *Middlemarch*, and Sir Walter Scott. The poets he appreciated most were Keats and, perhaps oddly, Byron. Many works of all these authors were in his library. His diaries record him regularly reading from them to his children.

The two recent legal authors whom he held in highest regard were FW Maitland and Sir William Holdsworth. He was an avid collector of Maitland's works and read each volume of Holdsworth's *History of English Law* on its publication. He enjoyed the company of Holdsworth on two of his visits to England and spoke of his scholarship with respect and praise. He also valued Sir William Harrison Moore's *Constitution of the Commonwealth of Australia*. Of Moore he said: "A gentle manner, learning infused with the true spirit of liberalism, a complete grasp of legal principle to the exclusion of all that was mere dogma and a lively interest in constitutional and legal development, these are the qualities that ensured his hold on the minds and hearts of the men he taught."

Dixon was inclined to speak of others' interest in biographies with amusement. Sir Adrian Knox, for example, was "a highly intellectual man without any intellectual interests". "He would read biographies, he would read history, he would read this, that and the other." Yet Dixon did not disdain reading biographies himself as long as that activity was relegated to its proper place.

I have a number of biographies of English and Australian lawyers which came from his library. He had a keen recollection of their contents. I was surprised to find in a work published in 1837, entitled *The Bench and the Bar*, many of the anecdotes about early nineteenth century barristers and judges he recounted verbatim. Among the books acquired from him for the High Court library were no less than 65 volumes of judicial biography.

One personal story illustrates Dixon's own intellectual interests. I visited him when he was recovering from bronchitis. I found him, propped up in bed, reading a large red-covered volume which he told me was the architect Michael Ventris's account of the deciphering of the Minoan linear B scripts. Dixon was amused that it had taken a young architect with no professional knowledge of archaeology or linguistics to solve the mystery of the scripts which had baffled scholars for more than a century.

Dixon died on 7 July 1972. The executor of his will was a trustee company. The company administered his estate with brutal efficiency. "Yallambee" was sold to Preshil School, which gutted the interior to construct classrooms. The surviving balance of the book collection was valued for probate at $1,834. With Mr AH Spencer long gone, it was dispersed in many ways. Many of the legal books had been sold to the Commonwealth during Dixon's lifetime under the supervision of Judge Woinarski, a long-standing friend of the Dixon family, who in 1965 had assembled a collection of Dixon's occasional addresses and papers for publication under the title of *Jesting Pilate*. Those books are now in the High Court library in Canberra. An inventory was compiled, comprising 26 pages. By rough calculation there are more than 1,000 items. Page 14 provides a fair sample. The sets of histories and many of the volumes of classical work were given to Monash University, then recently established and in the process of building a library. The contents of the house and the remaining contents of the library were sold at auctions conducted by Leonard Joel Pty Ltd, whose rooms were then in McKillop Street. No inventory, let alone catalogue, was made of those books or of the books given to Monash University. The sales were poorly advertised. I heard of one, I think the last, by chance. The books were sold by shelves. There was little competition—mainly from second hand booksellers—and I was able to buy three shelves, which included part of the collection of judicial biographies and various books that had been presented to Dixon when he was Australian Minister in Washington during the war. The books were not arranged by subject matter. Some sets were broken between shelves. A bidder complained of this only to be told by the auctioneer, who was draped languidly across the lectern, "You can bid for the second shelf if you like. What does it matter? They're only books."

Only books. We are here today to celebrate "only books", but without the cynicism of that auctioneer.

1 A short talk given by J D Merralls in the Library of the Supreme Court on 22 July 2016 as part of the series "Legal Luminaries and their Books".

BAR LORE

Editor's note

ANNETTE CHARAK

Editing anything written by James Merralls was a breeze and a challenge: a breeze because he wrote with punctilious care; a challenge because I had to be ready to defend any changes I made.

I had just finished editing his piece on Owen Dixon's library when I learned that, sadly, I would not have to go through the delightfully painstaking process of checking changes with him this time. I would not be exchanging emails with him where I explained that I'd made certain changes to accord with Bar News style or I wondered about a certain expression. I would not be receiving messages like the following, which I received in relation to an earlier piece:

> *"I was not aware of some of the details of Bar News style and so adopted CLR style with which I am familiar. CLR uses words to 100 and figures beyond.*
>
> *I do not like capitals but the CLR requires them in certain cases. I agree with most of your conversions. The word President in the reference to Sugerman should be retained. You have rightly capitalised Chief Justice on pp 4 and 5. The expression 'state and Commonwealth' in the second paragraph on p 4 looks odd, even though one is generic and the other specific. CEO? If vice-chancellor is to be lower case, why not ceo? The words State and Justice (of the High Court) are capitalised in the Constitution. I prefer to adopt the constitutional form.*
>
> *The expression 'on the strength' is conventional English. See Shorter Oxford English Dictionary (1993), strength: Phrases. It should be retained. I wish also to retain the last sentence of the second paragraph on p6 as there is widespread ignorance about the titles for citation of cases reported in CLR.*
>
> *I shall probably alter fn 3 when the table for 2014 is published in vol 253 next week. The word 'acquired' should be substituted for 'assumed' in the last sentence."*

I shall miss these exchanges.

A history of the Victorian Bar

CHARLES PARKINSON

One of Australia's leading historians, Dr Peter Yule, has been commissioned to write a major history of the Victorian Bar, from its earliest days in the late 1830s to the present. This significant project, which is being generously supported by Barristers' Chambers Limited (BCL), is scheduled to be completed in late 2020. As well as the publication of the history, the project will involve the preservation of materials collected while researching the history, including oral histories from past and present members of the Bar.

This history of the Victorian Bar has been long awaited. It is almost 50 years since Sir Arthur Dean, following his retirement as a justice of the Supreme Court, published *A Multitude of Counsellors: a history of the Bar of Victoria*. Since that time, the changes at the Victorian Bar have been profound: the increase in the number of barristers, the rapid expansion of BCL (which was only established in 1959), the changes in legal education, and the seismic shift in the demographic of practising barristers. Additionally, important episodes in the Bar's history, known only to those who lived through them, are being lost with the passage of time.

It is important for the Victorian Bar as an institution to have its continuing history recorded. We should take pride in and celebrate the history of the Victorian Bar, much as the Supreme Court celebrated its commemorations for the 175th anniversary of Supreme Court sittings in Melbourne earlier this year. Those commemorations included a series of events and the publication of the candid and entertaining book *Judging for the People: a social history of the Supreme Court of Victoria 1841–2016* (which was supported by the Victorian Bar and is reviewed in *Bar News* Issue 159, 34-36). The origins of the Victorian Bar can be traced back almost 180 years, and the Bar, through its members, has played an important role in the development of Victoria and the Commonwealth. We should also be looking to our past when asking how we should go forward, to see how the institution took shape.

Early last year, Peter Jopling QC, who chairs the Arts and Collection Committee of the Victorian Bar and has long advocated a new history of the Victorian Bar, established a steering committee (comprising Jopling, Wendy Harris QC, Siobhan Ryan and me) to identify the best historian to write a new and fulsome history of the Victorian Bar. After a long process, including consultation with several leading historians, the committee identified Dr Yule as the best-qualified candidate and recommended to the Bar Council that he be engaged to write the history.

> "Dr Yule is an exceptional historian. He has written brilliant biographies of the two greatest figures in Melbourne's financial history, WL Baillieu and Sir Ian Potter, as well as numerous commissioned histories including that of Monash Law School."

Dr Yule is an exceptional historian. He has written brilliant biographies of the two greatest figures in Melbourne's financial history, WL Baillieu and Sir Ian Potter, as well as numerous commissioned histories including that of Monash Law School. His histories are both enjoyable to read and scholarly and have been the subject of popular and academic acclaim. He co-authored *The War at Home,* a book on the home front in the First World War, which Professor Geoffrey Blainey described as "one of the best slices of Australian social-economic history I have ever read". Dr Yule has most recently been working on a major research project with the Australian War Memorial. Importantly for this project, Dr Yule is able to capture wonderful anecdotes and colourful characters, while maintaining a strong historical narrative.

In the latter part of 2016, BCL formally commissioned Dr Yule to write the history of the Victorian Bar. The leadership of Michael D Wyles QC, chair of BCL, and its board, in supporting this project, warrants great praise. BCL intends to gift a copy of the book to each of its tenants.

BCL has appointed a history project committee to liaise with Dr Yule: Kenneth Hayne QC, Jopling, Harris, Ryan and me, as well as Geoff Bartlett from BCL.

Work on this project is now beginning. In the initial phase, Dr Yule will be collecting materials with the help of two research assistants, Dr André Brett and Dr Gonzales Villanueva. Both Dr Brett and Dr Villanueva recently completed doctorates in history at the University of Melbourne. They already have impressive publication records, extensive research assistance experience working on major projects with some of Australia's leading historians, and have taught a wide range of undergraduate history and politics subjects.

Any members of the Bar, past or present, or others with personal or passed-down information or materials that they would like to contribute to the project are now invited to do so. During 2017 and 2018, Dr Brett and Dr Villanueva will be based in room 818, level 8, 555 Lonsdale Street, generously provided by BCL, and would be delighted to chat with anyone who calls in with reminiscences, old records, photographs or gossip. They can also be contacted by email at history@vicbar.com.au

BAR LORE

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.*

Back of the lift
Adjourned Sine Die

County Court of Victoria

His Honour Chief Judge Rozenes AO, QC

Bar Roll No 1028

In March 2016 a ceremonial farewell marked the retirement of former Chief Judge of the County Court, Michael Rozenes. The occasion, a video recording of which may be viewed on the County Court website, was a fitting celebration of his Honour's life and career as a leader of the criminal Bar, Commonwealth Director of Public Prosecutions and Chief Judge. Much was written about him by his cousin, George Hampel, in issue 158 of Victorian Bar News. This article recounts further memories and reflections of his Honour's peers and colleagues.

He was the complete barrister, bringing his quick, deft mind and considerable personal charm to the task of persuasion. Equally at home in front of a jury or appellate bench, he was able to distil the essence of an issue, be it a difficult legal matter or a complex set of facts, and convey it simply and effectively. He could be humorous and self-deprecating. He shared his friend Ray Finkelstein's ability to engage an audience with his enthusiasm for the task at hand. His irrepressible energy earned him the nickname "The Wriggler". He was always well prepared – one of his juniors speaks of the attention to detail that went into the preparation of a proof of evidence from a client. His cross-examination was precise – "razor sharp", according to another junior. He was able to develop a rapport with a witness where needed. His strategy was considered, reflecting clarity of purpose and minimal risk. There was always pragmatism and flexibility in his approach.

Having learned the value of strong and collegiate chambers through occupying for a time a room on the first floor of Owen Dixon East (which then included George Hampel, Alan Goldberg, Cliff Pannam, Ron Merkel, John Walker, John Phillips, Jack Lazarus, Philip Dunn, Jeremy Rapke, Ian Hill and Con Heliotis), his Honour became a key member of Aickin Chambers upon their establishment in 1983. On one side of the floor was a strong group of commercial barristers (Alan Goldberg, Ron Castan, Ray Finkelstein, Ron Merkel, Cliff Pannam and John Middleton), whilst on the other was an equally strong group of criminal barristers (including, at various times, John Walker, Graeme Morrish, Robert Richter, Philip Dunn, Tony Howard, Peter Faris, Julian Leckie, David Galbally, Mark Taft, Roy Punshon, Lilian Lieder, Jeanette Morrish, Paul Grant, Felicity Hampel, Stephen Shirrefs, Ian Gray, David Parsons, Reg Marron, Paul Marin, Guy Gilbert, Ed Lorkin, Campbell Thompson, Richard Pirrie, Michael O'Connell and Gerard Mullaly). His Honour's practice in commercial crime flourished in this environment, but ranged across all types of criminal matters whether legally aided or privately funded. In time he came to be head of the criminal law chambers, and was an inspirational leader and mentor, always making himself available to his colleagues for succinct and sage advice where needed. He conveyed to junior barristers his love of the life of a barrister and of the importance of the barrister's role in standing between state and citizen. He is remembered as being the life of the party at chambers functions. He loved new technology – at his instigation all the Aickin Chambers barristers acquired computers, which was at the time a real innovation.

His juniors speak of his inclusiveness; he himself had been an engaged and questioning junior and he in turn encouraged his juniors to be the same. Another aspect of his practice was that he appeared for both prosecution and defence, and was equally comfortable in each role. Those opposed to him when he prosecuted say that he was fair and always approachable, and open to settling a matter where appropriate. He understood the value of forming an effective team, perhaps most famously during his time as Commonwealth Director of Public Prosecutions with his deputy and friend, Ed Lorkin. Apparently it was said of the two: "here they come, the big bastard and the small, powerful one"!

His Honour's appointment as Chief Judge was met with universal acclaim and he was outstanding in the role. His judicial colleagues speak of his door always being open for them, and of the almost constant procession of his colleagues seeking to speak to him throughout the day. As always, he brought his energy, warmth and sense of humour to his work. He was "Michael" to colleagues and staff. He was loyal. He showed considerable political acumen, forging good relationships with government, just as he had previously as Chair of the Criminal Bar Association during a time of great change in the criminal law.

Many barristers will have encountered his Honour in the 9am mention list, in which he sat frequently. Out his Honour would stride each morning to a packed court 2.9. He was always courteous and his sense of humour was never far beneath the surface, but he would quickly move to the core issues in the matter at hand and seek clarity as to how to progress it efficiently, and would not stand for obfuscation.

When sitting in trials and pleas, his Honour was fair and efficient. He encouraged counsel to get to the point and jettison unmeritorious arguments. His rulings and reasons for sentence reflected his mastery of legal principle and were succinct and delivered without delay. His sentences reflected a keen sense of the need to balance competing considerations, and his capacity for compassion where appropriate. Appeals against his Honour's decisions were rarely successful.

His Honour suffered a serious brain aneurism in 2015. As reflected in his speech at his farewell, he has made an extraordinary recovery. Those who have seen him since speak of his continuing progress. As always, his wife Barbara has been by his side. His Honour spoke at both his welcome and farewell of her unwavering support and wise counsel over the years, and of his love of being a parent and mentor to his children Ben and Georgia. He said at his farewell he was looking forward to spending time with his grandchildren. We wish his Honour a long, happy and fulfilling retirement.

PETER MATTHEWS

His Honour Judge Anthony Howard

Bar Roll No. 1192

Johann Wolfgang von Goethe said that you can judge the character of a man by how he treats those who can do nothing for him. Anthony (Tony) Howard QC, who retired as a judge of the County Court in late 2016, was a selfless contributor to the Bar for 30 years. He was a leader of the criminal bar and went on to serve Victoria with the highest integrity as a judge of the County Court for ten years.

He was president of the Law Students' Society at Monash University, and a staff member of Lot's Wife. He was articled to Frank Galbally at Galbally & O'Bryan. He signed the Bar Roll in 1975, and read with John Walker QC. As a junior, three leaders gave him red bags –Sue Crennan QC and John H Phillips QC (as they then were), and Peter O'Callaghan QC.

He married Linda (who is now the Governor of Victoria, her Excellency the Honourable Linda Dessau AM) in 1982. He is rightly proud of their two sons, who have themselves studied law. Tony is a model example of a balanced person. Aside from his busy career, he has made the time to spend with his family, kept fit swimming long distance in the ocean and enjoyed many friendships. He tells great stories and is that person at a party who can make conversation with anyone.

As a barrister, Tony had a booming practice and was a fearsome cross examiner. He had fabulous attention to detail and prepared cases to within an inch of their life. He was constantly encouraging to junior barristers and was incredibly generous with his time, wanting to impart what he knew to those new to the Bar. When he took silk in 1992, he brought a great generosity of spirit to the relationship between leader and junior counsel.

He was great company to his barrister colleagues on level 27 Aickin Chambers, who included: Michael Rozenes, John Walker, Graeme Morrish, Robert Richter, Philip Dunn, Peter Faris, Julian Leckie, David Galbally, Mark Taft, Roy Punshon, Lilian Lieder, Jeanette Morrish, Paul Grant, Felicity Hampel, Stephen Shirrefs, Ian Gray, David Parsons, Reg Marron, Paul Marin, Guy Gilbert, Ed Lorkin, Campbell Thompson, Richard Pirrie, Anthony Thomas, Gerard Mullaly and the writers of this piece.

Silence all stand

As a judge, he stamped his authority on the Court. He was a very hard worker, who was known for his attention to detail. He demanded high quality advocacy and thorough preparation from those who appeared before him. As one colleague put it "he made you be your best self". Tony was always well-prepared and in command of the material, and conducted his cases with rigour and a firm sense of justice.

During his time at the Bar, Tony was chair of most things, including the Essoign Development Committee from 2002-2003; the List G committee; the legal assistance committee (2002-2004) and the applications review committee (2003-2004). He instigated the Bar's first silk mentoring program and was elected repeatedly to Bar Council.

He continues to offer his wisdom and leadership as a member of various community and not-for-profit organisations. He is a trustee of the Royal Melbourne Hospital Neuroscience Foundation, founding Chair of the Essendon Football Club Lawdons coterie and a Board member of the youth mentoring organisation Big Brothers, Big Sisters.

Tony was a "champion of change" for women barristers, before it was an official thing to be one. He was on the Bar's equality before the law committee, a member of the 1998 Steering Committee which produced the report "Equality of Opportunity for Women at the Victorian Bar", and part of the Law Council of Australia working group that developed the model equal opportunity briefing policy for female advocates in 2004 and 2005.

The Victorian Bar wishes Anthony Howard every best wish for a long and fulfilling retirement from the law and applauds the work he is doing for Victoria in conjunction with and by supporting his wife, the Governor. Again Tony is a leader. This time he is the model of the new cliché: "behind every great woman is a great man".

MICHAEL O'CONNELL AND
GEORGINA COSTELLO

The Supreme Court of Victoria

The Hon Justice Maree Kennedy

Bar Roll No. 2485

The Supreme Court has been a worthy recipient of an experienced hard working Judge of the County Court on the appointment of the Honourable Justice Kennedy.

With her wide commercial experience as a barrister and a judge, her Mandiesque approach to decisive decision making and administrative dexterity, her Honour brings an invaluable combination of skills to the Court.

Her Honour was educated at Loretto Nomanhurst and Genazzano FCJ Convent Kew. She was articled at Arthur Robinson & Hedderwicks with Andrew Guy (now Allens). After an associateship with Justice Keely of the Federal Court she returned to Monash to tutor full time and completed her LLM during that two year stint. She signed the bar roll in 1990 and read with the now Honourable Justice Kaye.

Given to the unvarnished comment of her early days at the Bar when commercial briefs for women were even rarer than women barristers, she says "you had to be a bit mad to do it and we were."

Her Honour was appointed silk in 2002 and soon thereafter in 2007 appointed a Judge of the County Court.

Her Honour's achievements at the Bar and then as a Judge have earned her widespread respect in particular for her talent and work ethic.

Judge Anderson recently acknowledged her contribution to the development of the County Court Commercial List commenting that her Honour helped create a "powerhouse of innovation". His Honour noted what was a pilot of 600 matters now attracts 6500 matters annually with her Honour's prodigious capacity for work and prompt decision making being but some of that contribution.

Her Honour is also a fierce advocate for junior practitioners and closely mentors her associates with many now pursuing careers at the Bar and as solicitors in commercial litigation.

Outside of the law her Honour is an avid reader, an excellent chef and enjoys getting away with her family to Apollo Bay. Her Honour also considers her two now adolescent children and the success of her marriage to Patrick Cussen her most important achievements – although she says they are matters still in the extended interlocutory stages.

FRANCES O'BRIEN

The County Court of Victoria

His Honour Judge Gregory Lyon

Bar Roll No. 2299

On 18 October 2016, the Governor in Council appointed Gregory Lyon QC as a Judge of the County Court.

His Honour's appointment comes after a 28-year career at the Bar, the last 11 as silk. Even a cursory examination of his Honour's achievements in the law reveals why his appointment was both unsurprising and welcomed broadly by the profession.

His Honour was admitted to practice in 1984. After completing articles at Hall & Wilcox he commenced his career in criminal caw, initially as a solicitor advocate with Chris Pease. He signed the Bar Roll on 24 November 1988 and read with now Director of Public Prosecutions John Champion SC.

As junior counsel his Honour was quickly identified as that rare type of criminal advocate, capable of successfully running complex and lengthy matters, especially in the "white collar crime" area. His reputation in these matters was further enhanced when he successfully completed a Doctoral Degree at Deakin University in 2003. His thesis on insider trading laws was the basis for his book *The Law of Insider Trading*, published in 2005.

His Honour combined his commercial crime practice with a strong presence in Supreme Court murder trials, often briefed by Victoria Legal Aid. He was appointed as Senior Counsel in 2005, the year he commenced in Crockett Chambers.

Those of us who have observed his Honour's work practices at close quarters over the past decade can attest to his diligence, skill and sheer discipline as he was entrusted with the carriage of weighty matters, both in their content but also often in the amount of material required to be mastered. That his Honour's appointment comes after exposed form in such high profile venues as the Bushfire Royal Commission, the OPI public hearings, High Court appeals and the "Opes Prime" prosecutions for the Commonwealth DPP shows that his efforts did not go unnoticed.

His Honour was an exceptional contributor to the Bar and profession as Criminal Bar Association Chair, Bar Council member, Ethics Committee member and Indictable Crime Certificate Committee member. He has been a committed advocacy coach through the Australian Advocacy Institute.

Of more importance than all these things is that his Honour remained over the journey a friend and great support to many of his colleagues in Crockett Chambers, and a generous and more than occasionally funny mentor to those appearing as his junior.

JUSTIN HANNEBERY

Her Honour Judge Samantha Marks

Bar Roll No. 2333

By her appointment to the County Court, Judge Samantha Marks continues her impressive service to the legal profession and the state of Victoria.

Judge Marks was born an advocate and a bibliophile. At 16, she won the Victorian Plain English Speaking competition. She originally entered an early stage of the competition with a keen eye on the initial prize: three books. She completed her schooling at Carey (which was transitioning to co-ed and where she was one of only a few girls). Notwithstanding her academic success in those years, she realised that her first two career preferences might not work. First, she wanted to be a nun. Unfortunately, she wasn't Catholic. A doctor, but she couldn't handle seeing blood. Law was the path eventually chosen, to the great benefit of the profession.

She completed articles at Blake & Riggall, with long hours and late errands. (She was once woken outside Jeff Sher QC's chambers after waiting hours for a conference to end.) It took only one performance by Alex Chernov QC and Leslie Glick, and the running of her own trial in Warrnambool, to inspire her departure from the firm. She read with Leslie and George Golvan, who describes her as having "great legal skills, tremendous energy, the gift of the gab and that indefinite quality known as wonderful charm."

When she came to the Bar, its gender profile reflected Carey's. That fact perhaps fuelled her commitment to its progress: she has been one of its most active members. She has been Honorary Treasurer of the Bar Council, convener of the Woman Barristers' Association and a member of many Bar committees. She has taught advocacy to prosecutors in Uganda. She sits on the public policy and advocacy committee of Berry Street, providing her legal talent to assist survivors of domestic abuse.

In addition to having a thriving court practice and her service to the community, her Honour spent her years at the Bar diffusing tensions as an effective mediator of complex disputes and being a supportive friend and generous mentor. Leslie likens her calming influence to a yoga master's. Her devotion to her readers (during and beyond their Reading period) and her juniors has been described as absolute and around-the-clock. One junior recalls her as unflappable before a hostile Court of Appeal, and as a silk with a genuine interest in his young family.

Her composed, inquiring and gentle nature will dispose her perfectly to service on the bench.

SAM HAY

The Magistrates' Court of Victoria

Magistrate Sarah Leighfield

Bar Roll No. 3684

The appointment of Sarah Leighfield to the magistracy of Victoria is an indisputable boon to the administration of justice in this state.

There are some who have, however, lost an asset of inestimable value: solicitors who can no longer brief Sarah; readers who can no longer be mentored by

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her; silks who can no longer lead her (albeit that Sarah led many juniors in a number of trials); and, most of all, her colleagues in Gorman Chambers who have lost a colleague whose door and disposition was always open for the purpose of providing wisdom, advice, friendship and support.

Having acknowledged that as a university student she did not know the difference between a solicitor and a barrister, it is clear that such confusion was no impediment to her being superb in each role. Her pedigree in the law was second to none. She completed her articles at Galbally and O'Bryan, where her Principal was the legendary Peter Ward. When she was called to the Bar, she read with Duncan Allen (as his Honour then was).

It was in her first year at university that Sarah learned that she was only one of two students in her faculty who had attended a government high school. This revelation had a significant effect upon her, culminating in her commitment to assist as many 'novices' as she could in preparing them for careers in the law and helping them once their careers commenced.

Sarah spent almost a decade as a teacher, advocacy coach and assessor in the Bar Readers' Course. In addition, barely a week passed without a school or university work experience student spending time in her chambers.

Even though she was a Supreme Court prize winner, Sarah did not mention this achievement on her Victorian Bar profile page, such is the extent of her humility.

Sarah's talents extend beyond the law, being an accomplished swimmer and runner at national championship level. With her usual zest for fitness and health, she convinced a number of her sedentary Gorman Chambers colleagues, who rarely took 1,000 steps in a week, to participate in the 1,000 steps per day endeavour. Sarah probably knew that a number of them 'cooked the books' in their unsupervised entries, but she questioned the bona fides of no-one.

In one of her first days as a magistrate, Sarah granted a diversion order to an accused. Unsurprisingly, the accused and his family were delighted with the outcome. Upon leaving court, the accused's parents commented to their son's lawyer how much they appreciated the respectful and positive manner in which Magistrate Leighfield had addressed both them and their son.

One of her new colleagues said to me, "Everyone says how intelligent Sarah is. We all know that, but she is every bit as kind and fundamentally good as she is smart."

Sarah was somewhat of a 'black letter lawyer' with a capacity to judge no-one, relate to all and do her best for every client for whom she appeared. No-one worked harder for their clients than Sarah. Their cases consumed her and she was indefatigable in providing them with the best representation possible.

She will be an outstanding Magistrate. We miss her already but we are so happy for her.

GEOFFREY STEWARD (ON BEHALF OF ALL HER GORMAN CHAMBERS MATES)

Magistrate Urfa Masood

Bar Roll No. 3741

I first met her Honour in February 2003, when she commenced work at the Victorian Aboriginal Legal Service in the criminal law section.

Her Honour had arrived at VALS with the uncommon background of an excellent degree with honours from ANU and time as a research assistant to an Assistant Commissioner of Taxation. At the ATO she quickly progressed to APS level 6. To PS outsiders this is the level immediately below the executive service. Not bad after less than two years in the job.

Halal food was not part of the menu on an initial VALS training road trip to a remote regional town. Fortunately, her Honour's hunger was relieved when a local Tex Mex café was found to have some vegetarian options.

After that brief introduction, her Honour was left to organise the central Gippsland area, largely on her own. It was a difficult place to work; a very low income area beset with poverty and social problems. She was an energetic solicitor and conscientious at her work.

Like so many VALS employees before her, her Honour was called to the bar in 2004, reading with Tony Lavery and joining the fourth floor of Equity Chambers, now lamentably gone.

Her Honour mainly practised in criminal law. When her time as a reader was over, she took up a room on the fourth floor where she remained for some time.

After leaving Equity Chambers, her Honour established a busy practice in the Family Division of the Children's Court.

Her Honour prosecuted cases for DHS but she also acted on behalf of families and children.

Her practice extended to the Family Court and Federal Circuit Court, with many appearances in family law matters, including a career highlight when her Honour appeared unled in an appeal to the Full Court of the Family Court.

A former colleague from the Children's Court remembers her Honour as "a wonderful advocate, much respected for her impeccable preparation for cases". And further "her Honour is a wise and compassionate person".

The Victorian Bar congratulates her Honour on her appointment and we extend our best wishes for a successful and happy life on the bench.

GRAEME DAVIS

Vale

Marc Thuraine Bevan-John

Bar Roll No 1510

Marc Bevan-John was an archetypically "old-style" barrister. As "straight-as-a-die", Marc was a fearsome, but honourable, opponent — who was always good-humoured and well-prepared. At the Bar, Marc established a general civil law and commercial practice appearing mainly in the Supreme and Federal Courts. Commercial fraud, property disputes and equity matters were the sorts of things that concerned him professionally. Marc was also an accredited mediator.

Marc was born in England and educated at Ratcliffe College in Leicestershire. He graduated BA (Jurisprudence) from Oxford University and became the third generation of his family to attend Lincoln College. He obtained a Diploma of Education from the University of London. Marc taught briefly, before becoming a Bond Street art dealer and university lecturer. Marc came to Australia at the conclusion of a round-the-world trip. Fatefully, during this time Marc met his Australian future wife, Gerri, who was to become Marc's lifetime companion. Together they raised a family of three girls whom Marc cherished.

Resuming the study of law on coming to Australia, Marc graduated LLB from the University of Melbourne and received a Diploma in Commercial Law from Monash University. More recently, Marc graduated with an MA in Military History at the Australian Defence Force Academy at the University of New South Wales.

Marc had an interesting family history. Partly he was French, which accounts for the spelling of his first given name. His mother was a hero of the résistance in WW2 who barely escaped with her life after being captured by the Nazis when trying to hide under a seat in a train. Marc's father met his mother after the war in Alsace, when he was serving in the British Army of the Rhine.

Marc was admitted to the Victorian Bar in 1979 and practised here for almost 35 years. He had eight readers, was a founding member of List A and served on the Dispute Resolution committee for 10 years. Marc's chambers were adorned with art works, custom-made furniture and an oar won at Oxford's *Eights Week* regatta. His chambers had the ambiance of a "club member" kind of man. Marc liked company. He was an excellent raconteur. His broad knowledge extended to music, history, diplomacy and great events as well as to the law.

Marc was also a source of perceptive advice for fellow-barristers over the years. Marc cared about his fellows. He was humane. As Roald Dahl once said, "Kindness — that simple word. To be kind — it covers everything . . . If you're kind, that's it."

JOHN GLOVER

The Hon Alan H Goldberg AO QC

Bar Roll No. 774

How can a few words do justice to Alan Goldberg's outstanding life, a life he left after nearly 76 years? In truth, Alan had two lives: the private life of a loved and loving husband, father, grandfather and friend; and Alan's—perhaps better known, public life—which reached its highest point in the law, but also encompassed the arts, music, civil liberties, and, most importantly, the affairs of the Jewish community.

Alan's parents had deep roots in Melbourne's Anglo-Saxon Jewish history, going back to the early 19th century. Harold Cashmore, an ancestor on Alan's mother's side, founded the Melbourne Hebrew Congregation in 1837. Alan's wife, Rachel Rynderman, came from a polar opposite background. Her Polish-Jewish family survived the Second World War in Russia before coming to Australia. Rachel and Alan married in 1967 and, despite their vastly different backgrounds, formed a symbiotic relationship that has provided much enrichment to their family and friends. Rachel was always a source of inspiration and strength to Alan and their family.

Alan's family was his greatest pride and the source of his greatest happiness. His children, Anthony and Caitlin, together with their partners, Larissa and Mitchell, and Rachel and Alan's beautiful grandchildren, Tessa, Ella, Nathan, Gideon and Guy, all provided constant love and support to Alan.

From school, Alan's future career had the stamp of an outstanding barrister written all over it. And so it was, although it might have been otherwise…

Alan was a brilliant law student. When he completed his degree, his mentor, Sir Zelman Cowen, arranged for Alan to undertake postgraduate studies at Yale University. Alan's time in the US was a critical period for his political (in Alan's word "intellectual") awakening, which he described as an "awakening to the horrors of racism and the very large number of people in the world in need of help". He was touched by Kennedy's assassination, Martin Luther King's assassination, the march on Washington and the effect on US society of the war in Vietnam. In a recorded oral history, Alan said that those events deeply affected his sense of justice and fairness.

On returning to Australia, he sought political office so that he could influence some change in the attitude of Australians. He joined the Liberal

Party and stood for pre-selection. No one can know what effect he would have had on Australia, had he been successful in his attempt to join the political system. Instead he had a profound effect on the legal system—although he never quite lost his political desire: Alan and Rachel's celebrated "Don's Party" Election Night soirées at their home were a feature of each State and Federal election.

Alan was a brilliant barrister, beginning his career reading with Sir Daryl Dawson. Alan appeared in some legendary cases. He acted for Holmes à Court in the attempted takeover of BHP, then Australia's largest company. He acted for the Liberal Party in the famous Chook Raffle election case where the electoral officer awarded the seat of Nunawading to Labor when, after a tied vote, the two candidates' names were put into a hat and the winner's name was drawn out. He acted for Dollar Sweets in its successful crushing of a union blockade; with Peter Costello as his junior. And, proudly, he acted for Mr Croon in the challenge to Tasmania's anti-homosexuality laws, a challenge which led to their repeal.

In the 1980s, Alan developed a new idea for barristers' chambers, which became the model for the rest of the Bar. In the main it involved sharing space and facilities. The chambers he organised and led became legendary. The occupants were Alan, Ron Merkel, Ron Castan, Ray Finkelstein, Cliff Pannam and John Middleton.

Alan's natural competitiveness had him leading the Bar in introducing high tech into his practice: he was the first barrister to have a fax machine and the first to own a mobile phone.

Alan's life as a barrister ended in 1997 when he was appointed to the Federal Court of Australia. When elevated to the Federal Court bench, the Bar News observed that the Bar was "… enormously gratified at the elevation of one of its universally popular and best-loved colleagues" – a rare accolade.

As a judge he was fearless and wise. He did not shrink from making a finding that a High Court judge had, as a barrister, engaged in conduct which was an abuse of process. One newspaper referred to him as "having the wisdom of Solomon" and another as having "reformed administrative law".

At his Federal Court farewell, six years ago, the Chief Justice Patrick Keane, now a High Court Judge said:

"Alan's combination of legal learning, energy, imaginative insight, sense of duty, wisdom and fundamental decency is such that I teeter on the edge of despair at the thought of the difficulty of finding a replacement. This combination of qualities is such as to make him, I fear, virtually irreplaceable."

And all the while Alan was involved in numerous other activities: deputy-chairperson of the committee that advised the Victorian Attorney-General on racial vilification; president of the Victorian Council for Civil Liberties; board member of the TarraWarra Museum of Art and of the Melbourne Symphony Orchestra; and, as his great, great grandfather had been, president of the Melbourne Hebrew Congregation, which Alan, characteristically, rescued from financial collapse. He delivered dozens of papers on a broad range of legal issues, gave classes to law students and often spoke at his grandchildren's school, Bialik College. And Alan and Rachel gave generously to many philanthropic causes .

Although Alan never sought recognition for his activities, he received many: an Order of Australia; scholarships in his name—one at his old Law School at Melbourne University and another at the Melbourne Symphony Orchestra; an Honorary Doctor of Laws from Swinburne University; and lifetime membership of the Melbourne Symphony Orchestra, an honour he proudly shared with only one other person, Sir Elton John.

Yet he remained humble throughout his career. In many speeches Alan referred to Golda Meir's observation to Moshe Dayan: "Don't be so humble, you're not that good". Those who knew him well knew that Alan was both humble and "that good".

He was also inherently likeable. During his long career in the law, and in settling numerous disputes outside the law in his various roles, he had the remarkable achievement of never offending or entering into a strained relationship with anybody—that is no easy task in a profession that is by its nature adversarial. His one great hate was split infinitives and he often corrected others.

Alan was a brave and tender man, a friend to all, and most loyal. All who knew him have been enriched by his presence in their lives.

When Alan was diagnosed with his Parkinson's disease, he didn't let it affect his life significantly and he was not fearful of it. In an interview last December, after the disease had progressed considerably, Alan was asked how he would like to be remembered. "I'm just happy to be remembered as someone who was able to help others", he replied.

During that interview, Alan said he found the loss of independence difficult to deal with but something he just had to accept. He said:

"When you've got a wonderful family around you and people who can help you, either professionally or otherwise, it makes it easier for you but harder for them. So you've got to strike a balance, and striking that balance is awesomely difficult."

Alan struck that balance until 23 July, when his fortitude, resilience and giant spirit were finally overcome. We no longer have Alan, but we have the memory of him, a legacy to treasure. We will miss you, the Honourable Dr Alan Henry Goldberg AO QC.

RON MERKEL AND RAY FINKELSTEIN

Gary Albert Glover

*B*ar roll No 2216

Gary Glover passed away on 20 April 2016. He was 65 (born 27 September 1950).

Gary graduated B Juris, LL B from Monash University and served Articles with Michael Kelly. He was admitted to practice in March 1975.

He established his own law firm, Gary Glover & Associates. He practised as a solicitor for 13 years, first in Doncaster; then in Doncaster and Box Hill; then in Warragul.

He signed the Bar Roll in May 1988 and split his Reading between Constantine Heliotis (now QC) and Noel Ackman (now QC).

He practised at the Bar for a little over four years, before returning to practice as a solicitor in his own firm, by then known as Glovers – first in Kooralbyn, Queensland; then in Wantirna South, also with offices in, variously, Queens Road and St Kilda Road, Melbourne.

He returned to the Bar in February 1996 and practised as a barrister on Holmes List in family law and related areas for a little short of 17 ½ years until his transfer to the List of Retired Counsel on 1 July 2013.

As a barrister he was well organised, capable and across the detail. Solicitors who briefed him spoke positively about his use of impressive "mind maps" in which he would map out the things that mattered in his case.

Beyond the law, Gary bred and raised horses and had a strong interest in rodeos throughout Australia.

VBN

The Hon John Joseph Hedigan QC

Bar Roll No 560

John Joseph Hedigan was born on 2 September 1931. He died on 27 March 2016. He graduated dux of De La Salle College and then proceeded to the University of Melbourne where he graduated LL B (Hons).

At that time, Professor Sir Zelman Cowan was Dean of the Melbourne Law School. Sir Zelman encouraged his best and brightest students to undertake post-graduate studies in the United States rather than the more traditional and well-travelled Oxbridge route. Jack won a Ford Foundation Fellowship to the University of Michigan from which he graduated LL M. Although not admitted in any State, he worked with law firms in New York, Kansas City and San Francisco.

Upon his return to Australia, Jack undertook Articles with Alan Corr at Corr & Corr. He was admitted to practice in March 1955.

Jack signed the Bar Roll in May 1957 and read with Olaf Moodie-Heddle (later His Honour Judge Moodie-Heddle).

Jack practised at our Bar for nearly 34 years, including 17 years as a Silk. Initially, Jack developed a large and very busy common law practice but, as his skills and experience became more appreciated, he extended his practice into commercial law. Jack appeared in many high profile cases both at trial and on appeal. His skills as a cross-examiner were legendary. Whilst he could assume an unprepossessing indeed almost humble manner in court, Jack had a mind like a steel trap and could reduce even the most recalcitrant witness to a quivering pulp.

I was his junior once acting for a senior disgraced banker in a commercial matter. The solicitor came in leaving our client outside. The solicitor explained that the client had lost his job, his marriage and most of his mind and was under the care of a senior psychiatrist. The solicitor requested that Jack "go easy" on him in conference, a proposition to which Jack readily acceded. The client was then led in and questioned by my learned leader. Half an hour later, he had to be led out, sobbing hysterically. The solicitor gently rebuked Jack telling him that he had been warned. Jack's only response was:

> *"If he can't take a bit of gentle questioning in conference, how do you think he will go in cross-examination?"*

This was Jack at his fearless best. He took no prisoners. And he went on to win that case against almost impossible odds.

Jack's generosity knew no bounds. After that particular case, Jack took me and our instructing solicitor to lunch. Although the restaurant was only a block away from chambers, Jack asked to meet me in the carpark below. This I did and Jack proceeded to open the boot and extract two or three bottles of the finest burgundy from several cases that seemed to reside in the boot of the car. A fine lunch was had by all.

His Honour was appointed to the Supreme Court on 30 January 1991. He served until his retirement on 31 August 2001. He found it difficult to give up his combative nature. Even though he was now sitting on the Bench, he continued to display his great virtuosity at cross-examination, sometimes to the utter discomfort of counsel appearing. His keenness of intellect was readily apparent not only in the court room but also in his judgments.

His Honour moved between jurisdictions with ease. He was for a time the Judge in Charge of the Commercial List and the founding Judge in Charge of the Major Torts List.

His Honour was a bluff, tough and hard man with that quintessential heart of gold. He excelled at the Bar and he excelled on the Bench. He was a very modest man who eschewed adulation or flattery. The respect that this Bar held for his Honour was demonstrated upon his Honour's last sitting day, a directions hearing in the Major Torts List. Virtually the whole of the senior defamation bar attended and sat in court. A few informal words of farewell were said. His Honour, in that gruff and characteristic manner, thanked those present who noticed what was thought to be a tear in the corner of his Honour's eye as the court rose for the last time. He will be very sorely missed.

WILL HOUGHTON

BACK OF THE LIFT

Theodorus Johan Cornelis Lusink

Bar Roll Nos 1209 and 1471

Theodorus Johan Cornelis Lusink died on the 21st day of July 2016. He was 95.

Born in the Netherlands and a graduate of Koninklijk (Royal) Militaire Acadamie Breda, Theo was taken as a prisoner of war on refusing to go to Germany when Holland was invaded at the beginning of World War II. He escaped and walked across Europe reaching England 18 months later. On arrival Queen Wilhelmina, who had set up the Dutch government in London, awarded him the Dutch Cross of Merit, House Order of Orange-Nassau.

It was intended that he should meet with the N.E.I. Army in Indonesia as a 1st Lieutenant Artillerist, but whilst on the ship, Indonesia fell, and he disembarked in Melbourne. Here he was seconded to the A.I.F. serving with the 7th Division until 1947 when he returned home to Holland and his own Army. In the mid 1950's he resigned to re-locate to Australia, joining the R.A.A.F and serving as a Wing Commander until he reached the statutory rank age of 55.

Theo undertook his bachelor or Laws at the University of Melbourne and a Master of Laws at Leiden University Holland. He signed the Bar Roll in 1975 and read with Alastair Nicholson. During his short time as a member of the Victorian Bar, Theo appreciated the friendship and assistance that he received from a number of the Reserve Officers who were members of the Bar.

After about five years as a barrister, Theo resigned to embark upon his farm dream.

Amongst other positions he held were Aide de Camp, to H.R.H Prince Bernard of the Netherlands during an Australian Royal visit, and Aide de Camp to the Commander General of the N.E.I.Army. He also had the honour of representing the Australian Armed Forces at an International Military Law Convention in Ireland.

He was the beloved and devoted husband of Peg Lusink for 51 years.

PEG LUSINK

James Donald Merralls AM QC

Bar Roll No 616

Every lawyer in Australia met J D Merralls at some time—every lawyer, that is, who since 1969 opened the *Commonwealth Law Reports*. Every member of the Victorian Bar now in practice knew Merralls by reputation and most by sight, perhaps as he made his way from Flagstaff Station to his eyrie on the 18th floor of West; or his barking laugh at lunch at his table in the back of the Essoign; or in his equally stately and ordered path south down William Street to the mysterious and anonymous edifice that is said to be the Australian Club. Every law student who passed through Trinity College at the University of Melbourne in the 1960s and 1970s learned law from Mr Merralls.

Indomitable, incomparable, humble, human, Merralls has left this mortal coil, this vale of tears, and we who remain are the wiser for his counsel, and the poorer by his passing.

Jim Merralls stood out. It's an easy thing to say of a man so tall but it was in his intellect and his social interactions that he made his mark. An only child, his father a bank manager who in the manner common to many such families (as also of school teachers, ministers of religion, military and diplomatic staff) moved from city to city, Merralls was born in Canberra in October 1936, and educated first in Sydney and for his secondary schooling, at Melbourne Grammar School, where his contemporaries included Bill Ormiston, JD Phillips and John Batt. He excelled academically in that very fine company. Matriculating at Melbourne University in 1954, he obtained his law degree with honours in 1957. His student work is preserved in *Res Judicatae* and the first volume of the *Melbourne University Law Review*, in case notes (the allotted student task) and book reviews. He was president of the MULR Association and of the Melbourne University Film Society.

The young Merralls displayed all the assurance, certainty, insight and incisiveness of the Merralls of any age. His opinions were fully formed, forthright and trenchant; but there was no malice, and genuine warmth was offered to all. No-one could accuse him of being politically correct or necessarily discreet, but there was no doubting a certain élan: "what can one expect of an institution dressed like a concert of vergers?". In *Victorian Bar News* No 156, 2014, there is a wonderful summary of the storms stirred by Merralls, as quondam theatre critic and controversialist, in the 1960s fortnightly magazine, *Nation* ("an independent journal of opinion"). Equally delightful, and indicative of the man and his sense of humour, was Merralls the anonymous Australian correspondent for the leading UK equine breeders' review, writing under the nom-de-plume, Tim Whiffler (the winner of the 1867 Melbourne Cup, but a horse with a most unprepossessing blood-line).

On graduation, Merralls took up a research scholarship in the law school as an assistant to Professor David Derham; he tutored in contract for several years; he also became resident tutor in law at Trinity College in 1958. Generations of students recalled his tutorials graced with tea and Jatz crackers. Merralls served at Trinity for 13 years, including as Dean, until he returned home to care for his aging parents at the end of 1972.

In his first year after graduation, he published a double article on constitutional law in the *Australian Law Journal* and a full length piece in the *MULR*. After articles with Peter Balmford at Whiting & Byrne and admission in 1960, Merralls came immediately to the Bar, reading with H R (Richard) Newton, paying a fee of 100 guineas. The pupillage was abridged when he became associate to Sir Owen Dixon in 1960 and 1961, neither the first nor last, nor most famous, of the associates, but one with a very special place, nonetheless, for Merralls was entrusted with Dixon's diaries and was anointed as his biographer. That was one of the few tasks that defeated him; it may be doubted that he had the distance to write the biography that he considered justice demanded. In time, the mantle fell to Philip Ayres.

Merralls took silk in 1974. His speech as junior silk, available now in the digitised archive of this journal, is one of the more creative and most amusing of that genre. As a junior, he appeared often with Keith Aickin, especially in revenue and constitutional cases. He had two readers, including Ross Robson. As leader, his practice was best known in income tax, sales tax and stamp duties, constitutional law, and trusts and equity. In published articles and in his opinions, he provided the intellectual underpinning for the adoption in Australia of the unincorporated joint venture as the preferred structure for complex mining, oil and gas, and infrastructure projects. Merralls' opinions on trusts were authoritative and departed from at one's peril—there has been more than one case where failure to heed his opinion led a litigant to later grief.

Merralls first reported for the CLRs while an associate. His first case (vol 103)—on the construction of a patent—was "utterly devoid of human interest". In 1969, while still a junior under ten years' call, he took up appointment as editor of the CLRs, initially as co-editor. Politely put, when he assumed the reins, the series was in a shambles. Publication was late by several years and reporting was distributed around the states (as the High Court itself went on circuit in time-honoured fashion). Merralls accepted the task on condition that he could appoint the reporters and, in particular, that he could engage a recent Oxford graduate, Ross Sundberg. To the delight of all, Jim served at the helm of the CLRs longer than the legendary founding editor of the Authorised Reports, Sir Frederick Pollock. The results speak for themselves—look on his works, ye mighty and rejoice: from volume 118 to volume 256, from 1969 to 2016, the authorised reports of the High Court were subjected to Merralls' selection, scrutiny, and painstaking and expert review, as he guided his team of headnoters' initial fumbling attempts to compose an accurate and succinct summary of the disposition of the case and of the facts and argument, and conform to the rules of English grammar. Merralls' approach was methodical and invariable: the judgment booklet was marked up by hand, pre-edited; key passages had a discreet line in the margin to guide the reporter; and a note with instructions and a pithy summary of the judgment's value (or defects) accompanied the typescript of reasons. Applying the principles which trainers applied to the racehorses which Merralls bred with success for many years, he schooled his reporters, bringing them by degrees from maiden handicaps, where scarcely a line of the original manuscript survived, through stages of increasing complexity, to higher standards and sterner tests.

Merralls could be a man of surprises: for many of his colleagues, never more than when he married in 1993 at the age of 56. It was a perfect match (made through the races), and with Rosemary, he raised Nora and Jamie, the apples of his eye.

Appointed Member of the Order of Australia in 1999 for services to the judiciary and to the legal profession as the editor of the CLRs, he was prevailed upon (eventually) to accept an honorary LLD by the University of Melbourne in 2013. And a visiting fellowship in his honour was inaugurated in 2014. Joseph Santamaria spoke profoundly in his eulogy at a memorial service at St Paul's Cathedral when he said that Jim Merralls "exemplified what, at a fundamental level, is meant by the 'independence of the Bar'. The opinions he expressed were only ever his own. … There was an incongruity between Jim's appearance and his personality. He was tall, and appeared aloof and detached. Jim's greatest gift was his capacity for friendship. … there were simply no barriers to entry: juniors, reporters, his colleagues in chambers; his luncheon companions; … the solicitors who briefed him; and the PAs on his floor." To this might be added, young academics, and the "fellow who had just sold him a copy of *Truth* out the front of chambers" (for the form guide, you understand—both seller and newspaper are no longer with us).

James Donald Merralls collapsed as he left chambers in August and died within the week, in sight of his 80th birthday, and—as it were—with his wig on and his wits about him. We shall not see his like again.

PETER WILLIS

Constantine Nikakis

Bar Roll Nos: 635 and 1227

Constantine George Nikakis passed away on 2 May 2016. He was 84 years old (born 1 January 1932).

Con was educated at Christ Church Grammar School, Melbourne Church of England Grammar School and, on a Commonwealth Scholarship, at the University of Melbourne.

He undertook articles with Irving Plotkin. He was admitted to practice on 6 April 1961 and came straight to the Bar, signing the Roll on 27 April. He read with D S Sonenberg.

At the end of 1964, he left the Bar and practised as a solicitor for 11 years: 18 months on his own account; then in partnership with I F H Ross for nine and a half years under the firm name Rymer Langford & Ritchie.

Con returned to the Bar in January 1976, re-signing the Roll on 12 February 1976. He taught a very popular Magistrates' Court unit in the Bar Readers Course. He had one Reader, Geoffrey Bydder. He was involved in the re-establishment of a Greek Orthodox Service to mark the annual opening of the legal year.

On 18 December 1989, he was appointed the second Judicial Registrar of the Family Court of Australia. He brought compassion, warmth and insight into human behaviour and a real sense of fair play to the Court. As a Judicial Registrar he was regarding by family law solicitors and barristers as a good decision maker and a hard worker.

He served as a Judicial Registrar until his retirement in October 2001.

He returned briefly to practice at the Bar, retiring finally in September 2003.

On the Peninsula, he enjoyed music, singing and his "potager" – his ornamental kitchen garden. When asked his occupation, he gave it as "potagier".

VBN

Kenneth John Oldis

Bar Roll No. 3257

If there be an afterlife, Ken would be both astonished and delighted to be able to learn more from Ned Kelly and many other historical figures. For their part it would not be a relaxed chat but a rigorous cross-examination by someone who knew his subject backwards – if something interested Ken, he was not a dilettante.

Ken died aged just 53 years on 30 October 2016, after seven months of stoically dealing with pancreatic cancer. He leaves a wife Catherine, and two teenage sons, Alec and Ted. The sadness of his family and friends is profound.

He practised as a criminal defence barrister for more than 17 years. His briefing solicitors described him as "a dream to work with, everything a solicitor would want in a barrister", "a consummate professional" and a courtroom "pugilist".

Coming to the Bar in 1998, Ken read with John Smallwood, now a judge of the County Court of Victoria. Before that he spent eight years at Galbally & Rolfe as a solicitor-advocate. He did his articles at Paul Markopoulos & Co.

He was educated at Melbourne High School and the University of Melbourne, graduating in Law and in Arts (majoring in history).

Professionally and personally, Ken was committed, widely knowledgeable, thorough and thoughtful. He was also well-travelled, engaging, sociable and funny.

His main personal interests were history (particularly Australian and military); cars; and renewable technologies (he was an early adopter of domestic solar energy and the Prius hybrid). There was also his tragic love for St Kilda Football Club, which gave him little reward except resilience.

Ken was an author. He wrote a carefully researched history, *The Chinawoman,* about a murder and trial in the wild gold-boom days of Melbourne in the 1850's. This won the Victorian Community History Awards for 2009. He was also working on books about a detective in racy 1930's pre-war Singapore and about Elizabeth Scott, the first woman hanged for murder in Melbourne in 1863.

His most enduring passion from schoolboy days was Ned Kelly. He was a real expert, as many can testify who accompanied him to Glenrowan and other Kelly sites. His article *The True Story of the Kelly Armour* published in the *La Trobe Journal* in 2000 established that the Kelly armour had been incorrectly assembled. Now it is displayed correctly at the State Library of Victoria.

Ken was farewelled by his family and many friends at a memorial at Como Cricket Pavilion on 11 November 2016 - coincidentally an anniversary of Kelly's hanging. There, in the inimitable style of an Irish wake (of which he would have approved) - with fond remembrances, some tears and more laughs - hundreds of people whose lives he touched raised their glasses to toast him. "Such is life", which Ken would point out Kelly probably did not say. We are grateful to have known him and he will always be missed.

GARRY FITZGERALD

Dr James Rangelov

Bar Roll No: 3869

Dr James Theodore Ivan Rangelov (Jim) passed away on 28 April 2016. He died a little short of his 57th birthday (born 19 May 1959). Jim had a number of casual occupations and was a volunteer at the Fitzroy Legal Service for some three years before going to the University of Melbourne, from which he graduated in Arts and Law.

He completed the Leo Cussen practical training course and was admitted to practice in May 1989. He later earned a Ph D at Victoria University, writing his thesis on the origins of the Victorian Magistracy.

He practised as an employee solicitor with I Glenister & Associates, then with Kiatos & Co before commencing practice on his own account as Rangelov, Barristers & Solicitors.

He was foundation Deputy Chairperson of the Law Institute Pro Bono Legal Assistance Scheme; and worked some 18 months (2001-02) as applications manager for that scheme.

He also lectured in business law, contracts, commercial law, crime and employment Law at RMIT and Victoria Universities.

He signed the Bar Roll in November 2005 and read with Graham Keil (now Magistrate Keil). He was on Green's List and practised in the area of criminal law.

He continued to teach as a Lecturer in the College of Law and Justice at Victoria University.

He is survived by his wife Michelle Rozella and his three children. His son Ivan has followed in his footsteps and is a student of law at Victoria University. A student prize in Jim's name will be endowed in his name at Victoria University College of Law.

Jim was a respected and admired member of Greens List throughout his career at the Victorian Bar. He stood for all that is good and honourable in the practice of the law.

Vale to a good and learned friend

VBN

William Ross Ray QC

Bar Roll No. 1215

I loved Ross Ray like a big brother. We lost him tragically on 22 May 2016. We lost him suddenly and much too soon.

I first became aware of Ross when I was in the Victoria police in either late 1980 or early 1981. I was at the Victoria police academy. Ross spoke to my double squad of recruits, as he regularly did, on the role of barristers in the legal system.

After resigning from the force and completing my law degree, when I decided to come to the Bar, I approached Ross. He was, to my delight, prepared to take me as his reader.

I moved into chambers on the 4th of September 1995. Ross and I got along from the beginning. He made me welcome and put me at ease. Ross was incredibly busy both in his practice and on the Bar Council, the Law Council, the readers' course, teaching in PNG and the Pacific.

He also had the responsibility of Charles, James and Andrew, their much loved mother Jan having passed away. I was never asked to leave the room by Ross for a conference or a call. His attitude was that, as an aspiring barrister, I would have to learn to hear things and not repeat them.

Ross and Mara knew each other, as the bar was a small place. Their relationship quietly blossomed and they were married in 1996.

Ross and I often met for breakfast, usually in the window of a now closed restaurant in Little Lonsdale Street called c2. We would eat breakfast (Ross – one poached egg on vegemite toast, occasionally with bacon, or a soft boiled egg with vegemite toast soldiers and black coffee). We would discuss the current case (if we were working on one together), the likely events of the day, review the news, particularly Hawthorn and Melbourne football clubs and exchange observations on the passing parade. It wasn't surprising that we were often referred to as the two old guys on the balcony in the Muppets, Statler and Waldorf.

The number of cases Ross and I did together makes it genuinely hard to select some that give an insight into his extraordinary qualities as an advocate.

I once saw Ross cross-examine a witness into completely abandoning her claim in a proceeding. Ross did this gently and compassionately, however it should never be assumed that Ross was not to be feared in court. He was.

Ross prosecuted many, many murder and other trials involving violent crime. In one prosecution involving a particularly violent criminal, at the close of the Crown case the trial judge asked the accused what he wanted to do, make a no case submission, make an unsworn statement (this was a while ago), give evidence or say nothing. The accused responded that he wanted to give evidence but all he could see was "that Ross Ray down there with a grin like a hungry dingo waiting to tear a sheep apart, so if it's all the same to you your Honour I don't think I'll bother".

While a robust and fearless advocate, Ross was also scrupulously fair. On another occasion he was prosecuting a committal proceeding in the Magistrates' Court when after lunch the defendant was brought into court by a number of prison officers. It was clear to all that there had been a significant struggle "out the back". The prisoner had a scratched and bloodied face and hands. The prison officers weren't looking too good either.

Ross refused to continue and requested the police surgeon examine the prisoner. The doctor came into court and informed Ross that in his view the injuries were superficial and he was fit to continue. Ross expressed some disbelief at this and pointed out what he had seen. The doctor replied that the prisoner had his entire genitals tattooed with a spider web and a spider and that if he could put up with that pain he was perfectly fit for the hearing. Evidence to this effect was given and the case continued.

Another experience of mine with Ross is, I think, unique. I was once interrupted by an objection from my own leader. Now I know that there are some who would suggest that he should have done that to me more often, but once was enough.

We were appearing before the then State Coroner. Ross was acting for an industry group and I was acting for one of its members. I was cross-examining a police officer. I had broken one of the commandments. I had taken my eye off the tribunal and was focused entirely on the witness. It was late on a Thursday afternoon.

Without warning Ross leapt to his feet and thundered "we object".

I was stunned – I turned to him and said, "what have I done?"

"Not you, sit down", I did immediately. Turning to the bench Ross said, "we object to your Honour!"

Ross made his point. "All afternoon your Honour has been pecking at your computer and scribbling things on bits of paper. It is plain to all of us that you are not taking notes and you are not engaged in this evidence!"

BACK OF THE LIFT

The Coroner responded testily, "well Mr Ray I'm not finding this cross-examination particularly helpful". I leant across to Ross and said, "Thanks, can you stop now?"

He didn't. His immediate response was, "There is no way your Honour can make that assessment when you haven't been listening."

After court I thanked Ross for the career boost and asked if he was planning to do that again. He grinned his famous Ross ray grin and said, "if it's as much fun as that was of course I will."

We were also regularly opposed and continued to be up until his passing.

It wasn't always work…

About eight years ago, Ross rang after the Christmas break to tell me that a great new restaurant had opened under the car park at the rear of our building. He insisted that we eat lunch there. We did and it was excellent. Ross, I, and other members of chambers have eaten there so often it came to be known as the Joan Rosanove Chambers kitchen.

We travelled to Papua New Guinea together and taught. His commitment in this regard was legendary. He had readers from PNG and Indonesia. He travelled to the Pacific regularly in pursuit of bettering access to justice and the rule of law. He was the inaugural president of the South Pacific Lawyers Association.

It was once put to me that he effectively founded the modern area of practice we call OHS or occupational health and safety. In my view he did, and was still at the forefront to the end.

The support he provided to members of the Bar at a personal level was both discreet and invaluable. In our chambers he displayed a real concern for our welfare and was truly "head of chambers". He loved Mara deeply as he did Charles (and Alison), James, Andrew, Christian (and Daniela) and Alexandra. He was besotted by his grandchildren Milla, Marco and Harry. He was immensely proud of all of them.

He was my best friend, mentor, advisor, partner in crime and battle, fearless and honourable opponent, teacher, trailblazer, raconteur and great bon vivant!

You were a giant of our Bar and I will never forget you.

ROBERT TAYLOR

Brian Scheid

Bar roll no: 2249

Brian Scheid was born on 20 March 1931, and was 85 at the time of his death, 9 June 2016.

Brian Scheid was educated at Rostrevor College, Adelaide, the South Australian Institute of Technology (Accounting Diploma) and Monash University (Bachelor of Laws).

He commenced work as a telegram delivery rider with the Post Masters General Office when he was 16, progressing to becoming an accountant with that office after obtaining his diploma in accounting in 1961 in South Australia. After this he transferred to the Official Receivers Office in Melbourne where he worked during the sixties in the bankruptcy field.

In 1967 he commenced studying law part time at Monash University for seven years whilst he both worked and helped raise a young family with four children.

Brian served articles with Evans Gus and Holt during 1974. He was admitted to practice on 2 December 1974. He then practised in the Deputy Crown Solicitor's Office as a Commonwealth prosecutor from 1975 until 1988, prosecuting offences as varied as producing liquor with an unregistered still to drug importation.

He was called to the Bar in May 1988, where he read with Peter Murley.

During his 24 years at the Bar he practised mainly in the fields of bankruptcy and company insolvency, but also maintained a regular criminal defence practice. He shared chambers with Mark Rochford QC for some 12 years.

During that time it was also my privilege to have had my father, Brian move my admission and to have also shared chambers with him from 1996 until his retirement from the Bar in 2013 at the age of 82.

During his time at the Bar, dad's favourite saying, (usually when asked in the Federal Court whilst trying to stave off a bankruptcy), who he was appearing for was: "I only act for the weak and oppressed". And he did….

He was an accomplished cyclist, having won the South Australian 1952 125 mile road Championship, and was still competing as a veteran cyclist up until the age of 74, regularly racing overseas and around Australia. He was one of the pioneers at the Bar to ride to chambers from Glen Waverley everyday, and was still occasionally doing so up until his retirement.

He was a keen trout fisherman, and in later years became an "obsessed Barramundi" fisherman, regularly visiting the Territory and the Gulf in Queensland in search of that 1 metre prize Barra which he achieved in 2010.

He is survived by three of his four children, and five Grandchildren, all of whom have become St. Kilda tragics by his influence.

Vale a great mentor, father and best mate. May he always have tail winds and smooth clear waters. His ashes will be scattered over his favourite fishing spot in the Jamieson River, forever to join his old fishing mate. Go Saints!!!

ROHAN SCHEID

Lynnette Schiftan QC

Bar Roll No: 823

Lynnette Rochelle Schiftan QC passed away on 28 August 2016. She was 74 (born 6 March 1942).

Lynne Schiftan (née Opas) was educated at Methodist Ladies College and the University of Melbourne (LL B). She split Articles between Hillard, Rice & Garde in Mildura and Ridgeway, Pearce, Freadman & Murray in Melbourne and was admitted to practice in June 1967.

She signed the Roll in October that year, reading with Austin Asche (later QC, Family Court Judge, NT Chief Justice, then Administrator of the NT). Her father Dr Phillip Opas QC was also a barrister. He represented Ronald Ryan, the last man hanged in Australia, with courage and determination. When interviewed by the Law Institute Journal in May 1987 Dr Opas said he had wanted Lynne to be a scientist rather than a lawyer, and he didn't think she would get any brief. He said he happy to be proved wrong.

She practised for more than 15 years specialising in family law. In 1982, she was appointed to the Louis Waller Committee to report to the Victorian Government on in vitro fertilisation. In 1984, she was appointed to the Commonwealth Family Law Council and, in 1986, became Convenor of its Sexual Abuse Subcommittee. She continued on the Council as a Judge.

Lynne actively supported the next generation of women at the Bar. She was the ninth woman to sign the Bar Roll; one of only three women on a practising list of some 350.

She had six women Readers before, in 1984, she became the second woman QC in Victoria. In 1985, she was appointed to the County Court, as Victoria's first woman Judge. There were, by then, some 80 women on a practising list of some 960. When appointed to the bench, she told Bar News: 'I experienced a great deal of prejudice as a female barrister, from the community generally, from solicitors and from the Bench. However, I suffered no such prejudice from other members of the Bar, who formed a protective barrier around me, which I remember with great affection.'

When Schiftan resigned from the bench in 1988, she was still the only female member of the Victorian State Judiciary. She left the Court to be General Manager Legislative Affairs at Coles Myer Limited, of which she became an Associate Director and the only woman on the Executive Committee of the Company.

VBN

Leigh Andrew Thompson

Bar Roll No: 1852

Leigh Thompson, who was a fearless defence barrister; raconteur, passionate "Slovenia-ophile", dedicated carer and proud father, passed away on in May 2016 aged 64.

Leigh was a non-conformist who disdained dogmatism in all its manifestations. He once owned Burmese and Tonkinese cats - breeds he favoured for their independence of spirit.

Before the law, he was executive officer with the Victorian Chamber of Manufacturers.

He was admitted to practice in 1978 and practised as a solicitor with Thomas J Nelson & Associates for around five years. He came to the Bar in 1983 and read with Colin Lovitt (now QC).

He had chambers in Equity Chambers retired in 2013. He appeared in many criminal trials, always appearing for defendants with uncompromising dedication and compassion. Glenn Meldrum, Leigh's clerk of 30 years, reflects that "Leigh never shirked a difficult trial, and always did far more preparation than he was ever paid for."

Leigh and his wife Katja spent time together in their house in Katja's village, Kozana, in Slovenia. It is a tiny village in the district of Brda on the present Slovenia-Italy border. They were hospitable and generous hosts to friends from the Victorian Bar who visited them and holidayed there.

Indeed, Leigh became an expert in the history of Kozana so that any English-speaking tourists that might visit would be referred directly to him for a tour- he became the unofficial, pro-bono tourist guide for the village. High in the mountains of far west Slovenia lies the spiritual home of Leigh A. Thompson.

Leigh developed a love of Slovenian culture and history and became an authority on World War II prisoners of war in Slovenia and Italy. He learned that some of the older people in Kozana had joined the Resistance and the local partisans during WW II. That sparked in him an interest in the partisans generally, and in particular one Hanna Szenes, a Special Operations Executive paratrooper, poet and martyr. After unearthing a partisan photograph, his meticulous research positively identified a previously unknown photo of Hanna Szenes, taken just before she was executed. When not researching the local history, Leigh would travel extensively around Europe, mainly Italy.

As a guest to the MCC Members Pavilion in 1972, Leigh arrived dressed in hippie garb, sporting blond locks below the shoulders. The traditional Members were aghast, but he was permitted entry as his shirt was collared.

He was a test cricket buff and deeply knowledgeable about test cricket history. He could talk for hours to fellow barrister, Terry Sullivan, about cricket players in the 19th century, the bodyline series, Bradman (of course) and types of cricket pitches, all in great detail.

As for Aussie Rules, Leigh was a fanatical Carlton supporter, and enjoyed accompanying his father to Princes Park in the 1970's.

23 years to the day before he succumbed to bone cancer, Leigh's wife, Katja gave birth to their son, Andrej. Having completed combined Science & Music degrees at ANU, Andrej returned to Kozana in late 2016, armed with two saxophones. Leigh would love that.

BENJAMIN LINDNER

BACK OF THE LIFT

David Clifford Turner

Bar Roll No 3857

Many people were surprised to learn of David's passing after his name was posted in the lift on 2 August 2016. He had been ill for a while, but it did not seem to show. He always had a great aura of vitality about him, mainly because he was so interested in everyone around him.

Despite his relatively short period of time at the Bar, David left quite an impression. One thing that ensured that he stood out was that David treated everyone as if he knew them. That was regardless of whether he did or didn't know them. Some people found that comforting. Some people found it unnerving. Some people went on-line to work out who the hell he was and whether they did know him. All of this was fine with David. It was like he was conducting his own survey of humanity and prodding a few sensitive spots along the way.

Above all else David always showed a genuine concern for his colleagues and had a sympathetic ear for those in need of one.

Beyond his usual congeniality David was a serious lawyer with a comprehensive knowledge of, and interest in, the law. He was particularly knowledgeable in the area of personal property securities law. Before coming to the Bar, David had worked as corporate counsel with Ford Credit Australia and later as Senior Solicitor with the State Bank of Victoria and then the Commonwealth Bank.

At the Bar he read with Will Alstergren QC. Even though he came to the Bar late in his career, he was open to the challenge of developing new skills to be effective as a barrister. He was constantly absorbing new ideas and strategies for life at the Bar. His main area of practice was in personal property securities law. He also taught personal property securities law as a Senior Fellow of Monash University in its Masters of Laws program.

Of course, even with the determination to master a defined area of the law, the information must come from somewhere. David had wonderful library of books to call upon in his chambers that he shared with anyone who needed it. Certainly he would be pleased to know that the library has now been assimilated back into the Bar.

David leaves behind his beloved wife Yvonne and sons Alex and Nick who were always referred to as Yvonne, Alex and Nick as if we all knew them.

JUSTIN O'BRYAN

David Willshire

Bar Roll No 762

My father, David Willshire, just missed out on reaching his 80th birthday. Given how much he enjoyed a celebration, we made sure that he was sent off in style at his memorial service at the Kew Golf Club.

Fortunately, dad enjoyed good health, living the golden life of a retiree, until around six months before he died. He had a short battle with cancer during which he was cared for lovingly by his wife, Pat. They were married for over 50 years and mum was with him as he peacefully passed away in March 2016, at Cabrini Hospital.

Dad had an adventure-filled childhood, growing up on the land in Mildura, the fourth of five children. At Mildura High School, he excelled on the sporting field as well as academically, and was a House Captain. He was awarded a scholarship to study law at Melbourne University, residing at Trinity College. As talking was his main hobby, the law seemed like a natural choice.

Admitted to practice in 1959, he practised at Slater & Gordon, then Alexander Grant Dixon & King. He signed the Bar Roll in July 1965, reading with Ken Marks (Victorian Supreme Court Judge). He served as a Director of Barristers' Chambers Limited in 1988, 1992 and 1993 and was a mentor to four readers. One of those readers, John Philbrick (now QC), fondly recalls his time sharing chambers with dad.

In all, he spent just under 30 years at the Bar, practising mostly in personal injuries, insurance and family law. His career featured a number of High Court appearances.

Mum and dad were blessed with five children and two grandsons. We love and remember dad as a brilliant conversationalist, debater, and an avid reader with a big appetite for life and a great sense of humour. Dad was also a founding member of the North Balwyn Rotary Club and received the Paul Harris medal in recognition of his service.

He made his last court appearance in the Banco Court in 2002 when he came out of retirement to don his robes and move my admission as a solicitor. Although he didn't get to see me sign the Bar Roll this year, the photo of dad in his Rumpole finery will take pride of place in my chambers.

WITH LOVE, CHRISTINE WILLSHIRE

Gonged!

Queen's Birthday Honours, Australia Day Awards etc

The Honourable Raymond Anthony Finkelstein AO, QC

The Honourable Justice Arthur Robert Emmett AO

The Honourable Ian Vitaly Gzell AM, QC

The Honourable Alan Robert Stockdale AO

Victorian Bar readers

SEPTEMBER 2016

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MIDDLE ROW: Emily Clark, Paul Lamb, Roshena Campbell, Stephanie Hooper, Sarah Zeleznikow, Emily Golshtein, Nicholas Wallwork, Shaun Clement, Mitchell Latham, Andrew Burnett, Katrina Webster, Sarah Worsfield, Christie Jones, Roshan Chaile, Katherine Rolfe, Wendy Pollock
SEATED: Rachel Chrapot, Franceska Leoncio, Amie Hancock, Katie Manning, Amanda Upton, Bridget Slocum, Natasha Mawa, Alghiffari Aqsa, Margarita Yerusalimsky, Laura Johnston, Mia Clarebrough, Jillian Williams, Emily Clark, John Maloney

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New silks Q&A

In November 2016, the Hon Chief Justice Warren AC appointed the following barristers as senior counsel in and for the State of Victoria.

Michael Cahill SC

When you were a child, what did you want to be when you grew up? A Richmond footballer.
What book will you be reading this summer? *The Hanged Man: The Life and Death of Ronald Ryan* by Mike Richards.
What was your favourite junior brief? Getting an acquittal in Victoria's only people smuggling trial.
What is your favourite song? At the moment, *Totality* by The Peep Tempel.
Name a painter that you like and tell us why. Adam Cullen, for his striking examination of crime. I'm fortunate to have one of the paintings from his Ned Kelly series in my chambers.
How do you achieve work/life balance? Not very well.
Name a restaurant you like. Circa, The Prince
What is one of your guilty pleasures? Sleep-ins on weekends.
Name one person who inspires you. Senator Pat Dodson.

Rozeta Stoikovska SC

When you were a child, what did you want to be when you grew up? An astronaut, archaeologist or lawyer – one out of three ain't bad.
What book will you be reading this summer? Whatever Santa brings. He never includes law books, but I might consider dusting off my copy of *Gowans* so I can work on this "gravitas" thing that seemed to feature in several of the lovely notes I have received.
What was your favourite junior brief? Defending a young man charged with hacking into the computer system at Swinburne Institute (as it then was) – ironic, for those who know me, as I can still barely drive a computer myself.
What is your favourite song? At the moment, *Happy* by Pharrell Williams.
Name a painter that you like and tell us why. I know little of art, but I recently saw Tintoretto's *The Washing of the Feet* at the Prado Museum. I was blown away by his ability to create perspective. The viewer has to step sideways to experience Christ and St John appear to move from the right hand side of the massive canvas to become the central focal point. Apparently, it was painted that way because it was commissioned by Monks to hang in a hallway.
How do you achieve work/life balance? Reading, gardening, Macedonian dancing, and enjoying as many camping trips as possible with my family.
Name a restaurant you like. Any any restaurant that does not push a "degustation" menu.
What is one of your guilty pleasures? Having a lie in on Sunday morning with a cup of coffee and listening to Macca's "Australia All Over" on 774.
Name one person who inspires you. Dr Hanan Ashrawi – legislator, activist, scholar, official spokesperson of the Palestinian delegation to the Middle East Peace Process. I suspect that in her part of the world the "glass ceiling" is double-glazed.

Timothy Seccull SC

When you were a child, what did you want to be when you grew up? A cricket ground curator, agricultural scientist, chef and barrister.
What book will you be reading this summer? Hopefully something travel, food or wine related.
What was your favourite junior brief? *Stingel v Clark* [2006] HCA 37.
What is your favourite song? The original theme to *The Italian Job* by Quincy Jones
Name a painter that you like and tell us why. Rover Thomas and Robert Dickerson – both powerful chroniclers of their respective times.
How do you achieve work/life balance? Family, exercise, cricket, gardening, cooking, food, wine and humour.
Name a restaurant you like. Cumulus Inc, Supernormal and Marion Wine Bar.
What is one of your guilty pleasures? Still-warm, freshly-baked "Sprout and Seed" loaf from Loafer Bread.
Name one person who inspires you. Atticus Finch.

David Hallowes SC

When you were a child, what did you want to be when you grew up? To open the bowling for Australia and play on the wing for Melbourne.
What book will you be reading this summer? *Stroke of Genius* by Gideon Haigh.
What was your favourite junior brief? The case of the brawl at Percy Jones' hotel, in which the Carlton CIU took on the late, great Raef Johanson. Raef beat them in the fight and then beat them in the trial.
What is your favourite song? *The Nosebleed Section* by Hilltop Hoods.
Name a painter that you like and tell us why. Andrew Seward, because his work improves the look of chambers - at least more than the "owl picture".
How do you achieve work/life balance? Golfzon.
Name a restaurant you like. Country Victoria.
What is one of your guilty pleasures? Kicking at the clock.
Name one person who inspires you. My mother.

John Kelly SC

When you were a child, what did you want to be when you grew up? A "bannister" like my uncle Jarleth in Dublin.
What book will you be reading this summer? *The Great Terror* by Robert Conquest.
What was your favourite junior brief? The re-trial of Bryce Jabaljarri Spencer in Alice Springs, led by the indefatigable Marie Shaw QC, in which we were promised riches beyond our imaginings if we secured an acquittal.
What is your favourite song? Changes constantly. Presently, either *Rednecks* by Randy Newman or *Our Song* by Joe Henry.
Name a painter that you like and tell us why? Again, a toss-up between Paddy Bedford and Wayne "Iggy" Eager – both masters of the second coat.
How do you achieve work/life balance? My family says I don't have any when I'm running trials, but I say I take my unpleasantness out on them and there's a balance in that.
Name a restaurant you like. Rice Paper Scissors in town.
What is one of your guilty pleasures? Bunking off early to see a film during the day.
Name one person who inspires you. Mum: she raised eight kids on her own in a foreign country with no family of her own around and there isn't an ice addict amongst us…Yet.

Julie Condon SC

When you were a child, what did you want to be when you grew up? A ballerina.
What book will you be reading this summer? *The power of the dog* by Don Winslow.
What was your favourite junior brief? *R v Clare MacDonald*, junior to James Montgomery QC (as his Honour then was).
What is your favourite song? *Gimme Shelter*, The Rolling Stones.
Name a painter that you like and tell us why. Jeffrey Smart.
How do you achieve work/life balance? Yoga, and then more yoga.
Name a restaurant you like. Bar Di Stasio.
What is one of your guilty pleasures? The odd Mars Bar.
Name one person that inspires you Bryan Stevenson, an American human rights lawyer and anti-death penalty campaigner.

Penny Neskovcin SC

When you were a child, what did you want to be when you grew up? For a fleeting moment I thought I had a vocation to be a nun. Sister Biddy, my primary school teacher, took us to the convent and I saw that each nun had her own bedroom. Coming from a family of six children, that was very appealing.
What book will you be reading this summer? *The Road to Character*, David Brooks.
What was your favourite junior brief? Appearing for Bendigo Bank in the Great Southern group proceedings. I made a lot of friends as a result of that brief.
What is your favourite song? This is a hard one. For now, I'll say *More Than This*, by Bryan Ferry
Name a painter that you like and tell us why. Gustav Klimt, for the symbolism and story behind the *Beethoven Frieze*.
How do you achieve work/life balance? By trying to get a bit of exercise every day.
Name a restaurant you like. Bacash.
What is one of your guilty pleasures? I cannot abide reality TV shows, but I make an exception for *Gogglebox*.
Name one person who inspires you. My partner, Colin.

Mandy Fox SC

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

PHOTO COURTESY OF PETER BONGIORNO

BACK OF THE LIFT

What book will you be reading this summer? *The Good People* by Hannah Kent.
What was your favourite junior brief? All three committals I did with Robert Richter QC.
What is your favourite song? *Hallelujah* – the Jeff Buckley version.
Name a painter that you like and tell us why. Leon Spilliaert. I saw an exhibition of his work and loved it, especially *The Bathing Girl*.
How do you achieve work/life balance? Exercise and spending a lot of time with non-lawyers.
Name a restaurant you like. Ciccolina.
What is one of your guilty pleasures? Online shopping while waiting for jury verdicts.
Name one person who inspires you. David Attenborough.

Dan Star SC

When you were a child, what did you want to be when you grew up? The number 1 tennis player in the world and a Wimbledon champion (in the vein of Bjorn Borg, not John McEnroe).
What book will you be reading this summer? Fiction only. I have had Steve Toltz's *A Fraction of the Whole* on the bedside table for some time so it has the inside running.
What was your favourite junior brief? A tie between:
ACCC v Safeway - a competition law case in my first year at the Bar which was effectively a year-long trial before Goldberg J, which then went on appeal to the Full Federal Court, followed by special leave applications to the High Court (junior to Jack Fajgenbaum QC, Robin Brett QC and Tim Ginnane) - a case about the price of bread; and the recent Essendon/Hird-ASADA Federal Court litigation at trial and an on appeal (junior to Tom Howe QC and Sue McNicol QC) - there is nothing quite like a footy case in Melbourne.
What is your favourite song? To give a slightly non-responsive answer, many of the tracks on the Beastie Boys's electronic instrumental from 1996, *The In Sound from Way Out!*
Name a painter that you like and tell us why. This is an easy one – Karen Salter (my wife), who currently paints 1960s Caulfield houses in an optimistic postcard way on a nice sunny day. Check out www.karensalter.com.
How do you achieve work/life balance? I look forward to someday having the answer to this important question. One can only try different things.
Name a restaurant you like. Not exactly fine dining, but I like places like Pellegrini's or a good Middle Eastern restaurant.
What is one of your guilty pleasures? In winter, eating hot chips while watching Collingwood at the footy with my sons (we cannot view a game without this ritual). Currently, watching a few different series on Netflix or Stan late in the evening with Karen while eating cake or chocolate.
Name one person who inspires you. Muhammad Ali.

Timothy McEvoy SC

When you were a child, what did you want to be when you grew up? A fireman. Until I was about 10. Don't tell Peter Marshall.
What book will you be reading this summer? *The American President*. William Leuchtenburg's magisterial study of the Presidency in the 20th Century. And I will finish *Dinner with Edward, A Story of an Unexpected Friendship*. A delightful little book.
What was your favourite junior brief? Acting, successfully, for an eminent person the subject of an Ombudsman's Inquiry.
What is your favourite song? It seems not quite right to describe it as a song, but *Zadok the Priest*. Written by Handel for the Coronation of George II. I think it is sublime.
Name a painter that you like and tell us why. Peggy Napangardi Jones. I love her birds, her bush tucker and her colour. She died in 2014. She was unique.
How do you achieve work/life balance? Not so well lately. An area for improvement.
Name a restaurant you like. Bacash, in Domain Road. Michael Bacash can cook a flounder better than anyone. His wife Fiona runs the place impeccably.
What is one of your guilty pleasures? As Dorothy Parker would have said, I like to have a martini, two at the very most …
Name one person who inspires you. Frances Perkins is pretty inspirational. She was FDR's Secretary of Labor. Perhaps as much of an architect of the New Deal as FDR himself.

Paul Connor SC

When you were a child, what did you want to be when you grew up? An opening batter for Australia.
What book will you be reading this summer? Catherine Hanley, *Louis the French Prince who invaded England*, Yale University Press, 2016.
What was your favourite junior brief? *Roads Corporation v Carter* [2010] VSC 273.
What is your favourite song? *Tattler*, Ry Cooder (from 'Paradise and Lunch', Warner Bros, 1974).
Name a painter that you like and tell us why. Wassily Kandinsky. Joy, energy, colour and spirit.
How do you achieve work/life balance? Hugging my wife and children, playing with the Lex Pistols, occasional exercise.
Name a restaurant you like. Centonove.
What is one of your guilty pleasures? Watching the Melbourne Football Club win (it is probably best that one's guilty pleasures are enjoyed infrequently).
Name one person who inspires you. My father.

Jonathan Evans SC

When you were a child, what did you want to be when you grew up? I never had a clue what I wanted to become. This continued into university, where I finished an arts degree before starting law.
What book will you be reading this summer? *The Windup Girl* by Paolo Bacigalupi.
What was your favourite junior brief? Pinnacle VRB Ltd ats Expectation Pty Ltd – working with Henry Jolson QC and Graeme Clarke QC.
What is your favourite song? Right now, *On Hold*, by The xx.
Name a painter that you like and tell us why. Tom Alberts – a good friend and a great and playful painter.
How do you achieve work/life balance? By trying to take 10 weeks' holidays each year.
Name a restaurant you like. Donnini's in Carlton.
What is one of your guilty pleasures? Owning pinball machines.
Name one person who inspires you. Barack Obama.

Hamish Austin SC

When you were a child, what did you want to be when you grew up? A soldier, preferably in the SAS.
What book will you be reading this summer? A police procedural/detective thriller.
What was your favourite junior brief? A tie between the Timbercorp class action trial in 2011, as part of a team with Jonathan Beach QC (as his Honour was) and Charles Parkinson, and the litigation flowing from the Huon corporate collapse in 2006, with Michael Sifris SC (as his Honour then was). There are quite a few others that only just miss out.
What is your favourite song? *King of Pain* by The Police.
Name a painter that you like and tell us why. Hieronymus Bosch – his vivid imagery, to which I was introduced by my mum (a teacher, including of art), fascinated me as a child.
How do you achieve work/life balance? By taking advantage of any downtime by putting the phone on divert and just staying home to be a husband and father – and always being home to read with my two sons and put them to bed, even if they end up just getting up again five minutes later …
Name a restaurant you like. Lulo, in Glennferrie Road – great tapas.
What is one of your guilty pleasures? Mint Aero bars.
Name one person who inspires you. My two-year-old daughter – when she smiles, everything seems better.

Tom Cordiner SC

When you were a child, what did you want to be when you grew up? A helicopter pilot. I was particularly taken with the idea of being in a constant state of almost falling. Make of that what you will.
What book will you be reading this summer? I'm not sure I'll have time to read a book this summer. I have about six months' worth of *New Scientist* and four years of the podcast *Stuff You Should Know* to get through. If I do have time, a friend has recommended *East West Street* by Phillipe Sands.
What was your favourite junior brief? *Seafolly v Fewstone*. The subject matter was risqué, I was opposed to my mentor for the first time, I was instructed by a team of very capable and humorous lawyers, I had to lead evidence from a series of witnesses who attended by subpoena, and all before the excellent Justice Dodds-Streeton, with the honour of appearing to collect judgment on her Honour's last day at the Federal Court.
What is your favourite song? I cannot seem to fix on one favourite song. Standouts are: *Islands In The Stream* by Dolly Parton and Kenny Rogers; *What's Love Got To Do With It* by Tina Turner; *The Frog* by Infected Mushroom; *The Final Countdown* by Europa; and *Love Yourself* by Justin Bieber (and to give that some credibility, written by Ed Sheeran).
Name a painter that you like and tell us why. I found myself completely absorbed by *The Starry Night* by van Gough in the Musee d'Orsay last year – the crowds seemed to evaporate and I have no idea how long I was standing there.
How do you achieve work/life balance? By sleeping less. That and taking many and long holidays. I don't think it is really a case of balance so much as a see-saw, but it seems to work out in the end.
Name a restaurant you like. Mr Myagi.
What is one of your guilty pleasures? Pizza Shapes (original). When they brought out the "new and improved" flavour and dumped the original, I wrote to Arnotts and complained – while the flavour was "new", it certainly was not "improved". Needless to say, Arnotts bent to the force of my written advocacy and I can once again sate my guilty pleasure.
Name one person who inspires you. Elana Cordiner.

Andrew Broadfoot SC

When you were a child, what did you want to be when you grew up? Captain of the Australian cricket team.
What book will you be reading this summer? *Prince of Penzance: The Extraordinary 2015 Melbourne Cup*, by Kristen Manning.
What was your favourite junior brief? Acting for an elderly widow in the Heidelberg Magistrates' Court. She was being sued for $400 by the stonemason who had made her late husband's headstone. The claim was successfully defended because the stonemason had misspelled the deceased's name on the grave.
What is your favourite song? Changes all the time. At the moment it's *Danger Zone* by Kenny Loggins, only because I watched *Top Gun* on DVD the other weekend.
Name a painter that you like and tell us why. Fred Williams – great Australian contemporary landscapes.
How do you achieve work/life balance? Fishing.
Name a restaurant you like. Caterina's on Queen Street.
What is one of your guilty pleasures? I can't walk into a fishing tackle shop without spending more than $100.
Name one person who inspires you. Nelson Mandela.

Theo Kassimatis SC

When you were a child, what did you want to be when you grew up? Bruce Lee.
What book will you be reading this summer? Dostoyevsky's *The Idiot*.
What was your favourite junior brief? My first appearance in the Supreme Court. It was during my

BACK OF THE LIFT

reading period and I was led by my mentor, Judge Allen, in a murder trial.
What is your favourite song? Bruce Springsteen's *Growing Up*.
Name a painter that you like and tell us why. The Impressionists – their work is out of focus for one and all, not just the vision impaired.
How do you achieve work/life balance? By spending as much time as I can spare in the company of friends or family who care little for the law.
Name a restaurant you like. Skandeia, in Paliopolis, on the island of Kythera.
What is one of your guilty pleasures? Good tobacco.
Name one person who inspires you. My father.

Daniel Crennan SC

When you were a child, what did you want to be when you grew up? A spy.
What book will you be reading this summer? *Mad as Hell: The Crisis of the 1970s and the Rise of the Populist Right* by Dominic Sanbrook.
What was your favourite junior brief? *Bell v Westpac*.
What is your favourite song? *Hard times come again no more* by Stephen Foster.
Name a painter that you like and tell us why. Lewis Miller. I have followed his career with interest since I was at university. I like the subtlety and character of my portrait of Hazel, his muse.
How do you achieve work/life balance? By spending my time with my family and away from Melbourne.
Name a restaurant you like. Rubira's @ Swallows.
What is one of your guilty pleasures? Netflix.
Name one person who inspires you. Sir Richard May.

Michael Borsky SC

When you were a child, what did you want to be when you grew up? A premiership centre half forward.
What book will you be reading this summer? *Hillbilly Elegy*.
What was your favourite junior brief? *Castles v Secretary to the Department of Justice* [2010] VSC 310 (a prisoner's rights case for the Human Rights Law Centre, junior to Debbie Mortimer QC, as her Honour then was).
What is your favourite song? *When the Saints Go Marching In* (and I don't get to hear it often enough).
Name a painter that you like and tell us why. Monet.
How do you achieve work/life balance? Long holidays.
Name a restaurant you like. Ciccolina.
What is one of your guilty pleasures? *Game of Thrones*.
Name one person who inspires you. Elie Wiesel.

Victorian Bar council

2016-2017

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CHAMPAGNE POMMERY REIMS-FRANCE

THE ART OF CHAMPAGNE SINCE 1836

Boilerplate

A BIT ABOUT WORDS

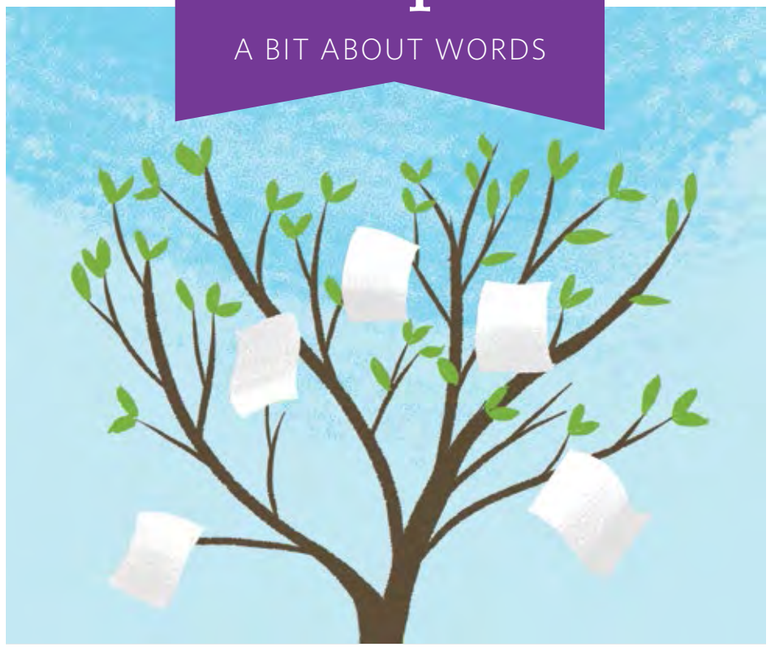


ILLUSTRATION BY GUY SHIELD

Letlings & Linglets

JULIAN BURNSIDE

Letling and *linglet* are both made-up words. They do not appear in the dictionary.

But they probably seem familiar, or at least plausible, because they both follow familiar patterns. They are the sort of words you might try in a difficult spot playing Scrabble.

English uses affixes—prefixes and suffixes—wantonly and to great effect. *-let* and *-ling* are both easily recognised suffixes.

-let as a suffix invokes a small version of the noun to which it is attached. The pattern is familiar enough:

plate .. platelet

stream .. streamlet

ring .. ringlet

Generally, the diminutive formed by the *-let* employs some kind of metaphor. *Platelet* could theoretically be used to describe a small plate (say, in a doll's house); but it is specifically a medical term these days: a reference to the tiny plate-like corpuscles in the blood.

Similarly *ringlet, armlet, bracelet* and *tablet*. The commonest meaning of *ringlet* is "curled lock or tress of hair" although it originally signified a small ring. An *armlet* is "an ornament or band worn round the arm". It only means a small arm in reference to an arm or branch of a river. To refer to a baby's *armlet* could only be understood as a weak joke. A *bracelet* is a small *bracel*: an ornamental ring or band worn on the arm or wrist, so it was once the same as a *ringlet*, although the two words could hardly be confused these days. It comes to us from Old French. *Tablet* has a number of meanings, only remotely connected to tables. The OED defines *tablet* variously as "a small, flat, and comparatively thin piece of stone ... or other hard material, artificially shaped for some purpose"; "a slab or panel, usually of wood, for a picture or inscription"; and "a small flat or compressed piece of some solid confection, drug, or the like;... a flat cake of soap".

A *tablet* as a delivery mechanism for medication is arguably its commonest sense, although iPads have reintroduced the much earlier idea of "a small smooth inflexible or stiff sheet or leaf for writing upon", which is supported by quotations from 1611 to 1885.

A *younglet* is a small, young creature—an expression used by Rolf Boldrewood to describe poddy calves in *A Colonial Reformer* in 1890. It is a pity it has fallen out of use.

Shakespeare referred to *kinglets*, at a time when kings were common enough to make it useful to distinguish the greater from the lesser. Other examples of the suffix are found in *booklet, brooklet, courtlet, crownlet, dukelet, hooklet, jokelet* and *keylet*. Of these, only *booklet* remains in use with its original, literal meaning.

In botany, a *leaflet* is a small leaf or (occasionally) a petal. Its more common use is as a small piece of paper with printed writing on it, usually (as OED points out) for free distribution. The connection between reading matter and botany is not obvious but we refer, without hesitation, to leafing through a book, and we think—perhaps more self-consciously—of each page as a *leaf* of a book. And we understand without effort that to *turn over a new leaf* signifies a new page in our history. So *leaflet* is easily understood.

It's a curious metaphor, because very few trees have leaves which are capable of being used, directly or indirectly, as writing material. Papyrus—the physical and etymological source of *paper*—is an aquatic plant of the sedge family. Its stem is used as the stock for writing material. It does not have leaves in the usual sense.

Despite the limited support we get from botany for the *leaf* metaphor, many of us use the word *folio* to refer to a sheet of paper, generally one of superior importance. It comes directly from the Latin *folium* (leaf) and indirectly from French *feuille* (leaf). Until the middle of the 19th century, a *portfolio* was readily understood as a holder containing loose leaves of paper. At the same time, it came to mean a receptacle for documents of State concerning a particular subject matter, and it was a small step from that to the metaphorical reference these days to a defined area of ministerial responsibility.

It was not until about 1930 that *portfolio* came to mean a collection of shares or other tradeable securities.

There is probably a simple reason which explains why *leaf*, *leaflet* and *folio* are so readily understood as relating to a sheet of paper, but I don't know what it is. Oddly, I was encouraged when I discovered that the OED recognises *foliole* as "one of the compound divisions of a leaf, a leaflet". But I was disappointed to find that *foliolet* is not recognised.

The *-let* suffix is often confused with the *-ling* suffix. That is a function of its mixed etymological roots.

The *-ling* suffix is seen in such words as *foundling*, *darling, yearling* and *underling*. In its primary meaning it denotes a thing which "belongs to or is concerned with" the adjective or noun to which it is attached. So, *foundling* is a noun describing a person or thing which has been found (more accurately, in 19th century London, an unwanted child who was given away into State care). *Darling* (originally *dearling*) referred to someone who was dear to the speaker. A *yearling* is an animal a year old; it is specifically concerned with animals, not children. Perhaps that is because yearlings are generally prized as good eating. An *underling* was a person who had the quality of being subordinate to another, although it quickly acquired overtones of general inferiority. A *fingerling* is a creature with the qualities of size and shape of a finger, specifically a *parr*: a young salmon before it becomes a *smolt*. A *fingerling* is also one of the fingers of a glove.

> "After that, it's no surprise that kitten, at least, fell out of favour as a reference to women."

With this meaning (*belonging to or concerned with the qualities of*) the relevant noun or adjective, *-ling* comes from the early Teutonic languages (Old English, Old High German etc) and it admitted a number of other useful, but now forgotten, words. So, a *ropeling* was a prisoner; a *hireling* was a person hired to do a particular task; an *evenling* was a person of equal quality or merit; a *fatling* was a calf, lamb, or other young animal fatted for slaughter. This honour is now bestowed on yearlings. A *wasteling* was a thing spoiled for its ordinary use, and discarded as worthless. And a *sibling* was a person with the quality of kinship. In Old English, a *sib* was anyone related by blood or descent. *Sibling* is now used in fashionable or sociological writing to refer to a brother or sister.

But the meaning of *-ling* got confused because Old Norse recognised it as a diminutive suffix, just like *-let*. So from early times we had *suckling*, *gosling*, *fishling*, and *duckling*. From these uses, its diminutive sense developed an overlay of youth.

Incidentally, by attaching the *-ling* suffix to the verb *suck* we get the noun *suckling*. But *suckling* is also used as an adjective (*suckling pig*, etc) and, because it looks like a present participle, it prompted a back-formation to create the new verb *to suckle*.

Another forgotten use of the diminutive *-ling* is *ketling* or *kitling*. From 1340, this referred to the young of any animal, but from 1530 came gradually to refer to young cats, hence *kitten*. But *kitling* continued to refer to the young of other animals. In 1603, Holland described how "sea-weasels or sea-dogs breed their young whelpes or kitlings". But the quotations in OED show that, from early in the 17th century, *kitling* referred specifically to young cats, and it had a parallel existence with *kitten* until the late 18th century. *Kitten* was used occasionally to refer to the young of other animals, such as weasels (1495), beavers (1895) and rabbits (1964). In 1972 *Watership Down* has "Clover's had her litter. All good, healthy kittens. Three bucks and three does." This shows a good, healthy mixture of terms generally reserved for other animals. *Kitten* was first used in the early 14th century and (like most kittens) seems to be here to stay.

From 1870 to 1970, *kitten* was, as OED puts it, "applied to a young girl, with implication of playfulness or skittishness". The first quotation in support of this use is DJ Kirwan *Palace & Hovel*: "The 'Kitten' is a blonde, with black eyes, a pretty, babyish face, a profusion of golden hair." Perhaps not surprisingly, the last quotation in support of this usage comes from *The Female Eunuch* by Germaine Greer. At page 281 of *The Female Eunuch*, this lacerating sentence appears: "There are the cute animal terms [to describe women] like *chick*, *bird, kitten* and *lamb*, only a shade of meaning away from *cow, bitch, hen, shrew, goose, filly, bat, crow, heifer,* and *vixen* ...". After that, it's no surprise that *kitten*, at least, fell out of favour as a reference to women. The OED has no later quotations supporting the usage, and its entry for *bitch* (with its last supporting quotation from 1956) says "Applied opprobriously to a woman; strictly, a lewd or sensual woman. Not now in decent use; but formerly common in literature. In mod. use, esp. a malicious or treacherous woman; of things: something outstandingly difficult or unpleasant."

Germaine Greer was right.

MUSIC

Skidmore v Led Zeppelin – Who owns the Stairway to Heaven?

ILLUSTRATION BY GUY SHIELD

ED HEEREY

I had never heard of the 1960s Californian psychedelic rock band Spirit until I came across this case.

Spirit formed in 1967 and revolved around the teenage guitar prodigy Randy Wolfe.

So the story goes, when Wolfe was 15 years old, he was discovered playing guitar in a music shop by Jimi Hendrix and they played together in the band Jimmy James and the Blue Flames. Hendrix invited Wolfe to travel to London to join the newly formed Jimi Hendrix Experience, but Wolfe declined because his family wanted him to finish school.

Sprit released its debut album *Spirit* in January 1968, which broke the Billboard Top 40 chart and included a 2 minute 37 second instrumental titled *Taurus*, written by Wolfe when he was 15 and featuring an ethereal plucked guitar line and melody.

Meanwhile a new band was forming in London, out of the remnants of the Yardbirds, and performed its first show under the name Led Zeppelin on 25 October 1968. Shortly after that, Led Zeppelin embarked on its first tour of the United States, ahead of the release of its self-titled debut album in January 1969.

Led Zeppelin proceeded to become one of the world's most successful and influential rock bands, with a string of chart-topping studio albums full of crunchy, bluesy, riff-driven rock. Lead singer Robert Plant was all scream and swagger, Jimmy Page defined the concept of a guitar hero, and John Paul Jones and John Bonham (RIP) locked down a prodigious groove on bass and drums. What could epitomise 1970s rock'n'roll indulgence better than Bonham's endless drum solo on *Moby Dick*? Their sell-out world tours became notorious as the ultimate in rock-star extravagance and debauchery. Kooyong Tennis Stadium survived the Led Zeppelin onslaught on 20 February 1972.

But this glory was still a dream of the future when Led Zeppelin played their first US show on Boxing Day 1968 in Denver, opening for Spirit and another band called Vanilla Fudge. Led Zeppelin and Spirit played at the same place on the same day at least twice more, at festivals in Atlanta and Seattle in July 1969.

Led Zeppelin's biggest hit ever, *Stairway to Heaven*, was recorded in London in December–January 1970-1, and was released on their fourth album in November 1971.

Many fans and critics noticed the similarity between *Taurus* and *Stairway to Heaven*, focusing on the plucked guitar arpeggios in the opening of each song.

In an interview in April 1991, Wolfe was asked about the possibility that Led Zeppelin had copied the opening of *Taurus*, and responded that Led Zeppelin members "used to come up and sit in the front row of all [Spirit's] shows and became friends and if they wanted to use [*Taurus*], that's fine." Later in that interview, he reiterated, "I'll let [Led Zeppelin] have the beginning of *Taurus* for their song without a lawsuit."

Wolfe never took legal action against Led Zeppelin. He died tragically in 1997, drowning while rescuing his 12 year old son from a rip current in Hawaii. His copyright went to a trust overseen by his mother until her death in 2009, and since then by Michael Skidmore, a London-born music writer who had helped compile new Spirit albums from Wolfe's old recordings.

Two factors precipitated the launch of the current litigation in 2014, 43 years after the alleged copying.

The first precipitating factor was the entry of a young lawyer from Philadelphia named Francis Alexander Malofiy.

Operating out of a cramped suburban office in a building shared with a few doctors, Malofiy's own story is a sub-plot in itself. In August 2008, a year after finishing his law degree, he smashed a beer glass across the face of a fellow patron at a Philadelphia pub. He was prosecuted for assault, with apparently damning videotaped evidence, but managed to convince the jury that he acted in defence of himself and his girlfriend from an aggressive mob.

Before the *Taurus/Stairway* case, Malofiy brought another copyright claim against various musicians relating to the song *Bad Girl* by the R'n'B star Usher. Malofiy was prosecuted for professional misconduct for soliciting an affidavit from one of the unrepresented defendants and obtaining summary

judgment against him, while leading him to believe that he was only a witness rather than a defendant facing financial liability. Malofiy was ultimately barred from practising for three months. The judge in the Usher case said, "I reluctantly accept that Malofiy's conduct was, at least in part, a function of the grotesquely exaggerated zeal common to less experienced lawyers."

Skidmore met Malofiy while Malofiy was representing Spirit's founding bass-player, Mark Andes, in a battle with the Rock'n'Roll Hall of Fame over the use of his image in tributes to the band Heart—Andes played with Heart for over a decade but was not inducted with the band into the Hall of Fame. Andes wanted to pursue a case against Led Zeppelin, but had no legal standing because he did not own any copyright in *Taurus*. Malofiy met Skidmore in a Boston pub and persuaded him to bring the infringement suit.

The second precipitating factor was the decision handed down on 16 May 2014 by the US Supreme Court in *Petrella v Metro-Goldwyn Mayer,* a case about the classic Robert de Niro/Martin Scorsese film *Raging Bull*. The Supreme Court ruled that the applicable statute of limitations would not bar a copyright claim made many years after the relevant copying, but would merely limit the damages claim to the last three years.

Shortly after that, on 31 May 2014, Malofiy filed his complaint on behalf of Skidmore and the Randy Wolfe trust. The headings of his complaint used the distinctive type font used in Led Zeppelin's cover art, and claimed not only copyright infringement but also "falsification of Rock'n'Roll history."

The court moved the case from Philadelphia to Los Angeles, rejecting Malofiy's argument that his hometown was the appropriate venue by reason of a 1985 Led Zeppelin reunion in Philadelphia for Bob Geldoff's *Live Aid* fundraising concert for Africa.

In pre-trial rulings, Federal District Judge Gary Klausner held that the jury could not hear evidence of other alleged plagiarism by Led Zeppelin, the personal wealth of Page and Plant or their use of drugs and alcohol (which Malofiy sought to use to throw doubts on Page's recollection that he had never heard *Taurus*).

The trial began before Judge Klausner in Los Angeles on 14 June 2016. Plant and Page sat in the court room while eight jurors were chosen—seven of the first 14 potential jurors were dismissed, including one who declared that his "love for these two guys [Plant and Page] is very strong."

A key issue in the trial was whether Led Zeppelin had knowledge of and access to *Taurus*. On this point, the case was very different to the *Blurred Lines* case, where Pharrell Williams and Robin Thicke conceded that they well knew Marvin Gaye's prior hit *Got to Give it Up*.

BOILERPLATE

The surviving members of Led Zeppelin and Spirit gave different recollections of the interaction between them. Page and Plant testified that they never toured with, shared a stage with or listened to any of Spirit's music. Former Spirit bassist Larry "Fuzzy" Knight testified that he met Page once at a party after a Spirit show in 1973, and that they exchanged musician-to-musician banter for a minute or so in which Page said something along the lines of "great show". (It is unclear why Malofiy wished to adduce such evidence of interaction between the bands two years after *Stairway to Heaven* was recorded.) Randy Wolfe's sister and Andes testified but were unable to say whether they saw members of Led Zeppelin at any Spirit concert where *Taurus* was performed. Andes said that he met Plant and played snooker with him after a Spirit show in the Birmingham club Mother's. Plant admitted that he went to Mother's 40 to 50 times but said, "I don't have a recollection of mostly anybody I've hung out with", and said also that he and his wife were in a car crash that night leaving Mother's and they were both hospitalised with head injuries.

In his oral evidence, Page gave an intriguing insight into the process of creating *Stairway to Heaven.* He described it as an "ambitious piece" and said there were various parts which were not well received by other band-members and were jettisoned. (The mind boggles as to what other parts Page had in mind, given that the final work already exceeds eight minutes.) He testified that he resorted to teaching parts to bass-player Jones so as to have an ally before pitching them to Plant and Bonham.

Page admitted to finding Spirit's first album amongst his collection of 4,329 albums and 5,882 CDs, but there was no evidence that he had the album before 1971.

Malofiy launched into an aggressive cross-examination of

"If someone took the intro to Stairway to Heaven, would you sue?"

Page, attempting to show that Page lied about or misremembered where he initially wrote the song. (An "official" story had developed that Page wrote the song by the fireside in a remote Welsh cottage called Bron-Yr-Aur. Page admitted this was false.) The judge upheld more than half a dozen objections against Malofiy in about as many minutes. His final question, also struck out by the judge, was "If someone took the intro to *Stairway to Heaven*, would you sue?" Over the six-day trial, more than a hundred sustained objections were racked up against Malofiy.

The other key issue in the case was, if Led Zeppelin did have access to *Taurus*, is there still a sufficient extrinsic similarity between the songs? Each side called expert evidence from musicologists in support of their respective arguments that the songs are or are not sufficiently similar. Led Zeppelin's experts also testified as to the unoriginal nature of any common elements.

After less than a day deliberating, the jury delivered its verdict on 23 June 2016, holding that Skidmore owned copyright in *Taurus* and that Led Zeppelin members indeed heard the song, but that there was no substantial similarity in the extrinsic elements of *Taurus* and *Stairway to Heaven*. The decision came after the jury took one last listen of both songs. Within a half hour of doing so, the jury had made up its mind.

I hear you ask: how would this case play out in Australia? The two key questions would be largely the same in Australia: did Led Zeppelin have access to *Taurus* and is there sufficient objective similarity between the two songs such that *Stairway to Heaven* reproduces a substantial part of *Taurus*? Unlike the United States, in Australia all these questions would be determined by a judge, not a jury (it remains theoretically possible to request a jury for a copyright case, even in the Federal Court, but to the best of my knowledge it has never happened.) A small part of a copyright work, such as a song's opening, can be a "substantial part" of the work so long as it has qualitative importance. If an Australian judge found that Led Zeppelin in fact had access to *Taurus*, a finding of infringement would be wide open; there is certainly a degree of similarity between the respective openings, but also some differences. You be the judge: get onto YouTube and search for "Taurus—Spirit / Stairway to Heaven".

On 26 July 2016, Malofiy filed an appeal, which remains pending. Stay tuned. In the meantime, we can only suppose that Malofiy is sure all that glitters is gold, and he's buying a stairway to heaven.

Ten tips for weight control

MATTHEW TOWNSEND AND SIMONE BAILEY

Much dietary advice for barristers is advanced by those trying to sell a product or service. The net effect of the following tips for barristers will be a financial saving and an improvement in health and wellbeing:

1 Eliminate sugar from your diet. Arguably, the most important means of controlling your weight is avoiding sugar, whether added to tea or coffee or as a component of confectionary, fruit juice or dessert. If you need a sugar hit, eat unprocessed fruit. Diet-drinks should also be avoided because they can interfere with your body's capacity to recognise and respond to real sugar.

2 Avoid energy dense carbohydrates such as bread, rice, pasta and potatoes. Choose nutrient-rich carbohydrates such as green leafy vegetables and smaller amounts of fruit. After eliminating sugar from your diet, this is probably the most effective thing you can do to control your weight.

3 Eat protein with every meal. This need not be a 400g rib eye steak. A small tub of plain yoghurt or a 100g can of tuna will suffice, but without adequate protein in your meal, your body will look for it in other foods, often resulting in an over-consumption of carbohydrates. Boiling a few eggs in the morning is a convenient means of stocking up on your protein supply for the day. Protein powder can also be handy, but is a second-rate substitute for real food.

4 Eat smaller meals, more often. Once you convert to nutrient-rich food over calorie-dense food, you may find yourself eating five or six times a day. Aim to eat a smaller meal every two to three hours, including one as soon as you wake and before you go to bed. Planning ahead can be a logistical challenge, particularly for days when you are appearing in court, but eating well should mean never feeling really hungry.

5 Bring food to work from home. As much as we love the Essoign, the healthy food options there are limited. Bring a lunch-box with food to graze on: carrots, celery, nuts, yoghurt and fruit. Perhaps bring leftovers from dinner the night before. GNC sell compartmentalised lunch boxes that allow you to store several meals for the day, chilled.

6 Drink two to three litres of water a day. If we are dehydrated, our bodies will look for water in food, possibly resulting in over-consumption. Drinking this much water isn't as hard as it sounds: buy a water jug for chambers. If you have a full glass of water handy on your desk, the chances are you'll consume several glasses throughout the day. If you eat lunch at a restaurant, drink a glass of water with your meal.

7 Avoid alcohol. Alcohol slows your metabolism, may contain large numbers of calories, reduces your will power to eat healthily, and makes you less inclined to exercise. In an energy-balanced diet, alcohol can also displace nutrient-rich food.

8 Get enough sleep. If you are tired, you may find yourself eating to find more energy when your body is really after more sleep. Try to avoid using an alarm clock. If you need to get up early, get to bed earlier.

9 Pay less attention to the scales. Despite the title of this article, body weight is not necessarily the best marker of good health, particularly if you're getting stronger through exercise. A better indication of weight control is your waist measurement, but even then, measure this infrequently. You'll feel better from eating well, long before that reveals itself on the scales.

10 Exercise every day. That's right, every day. And there's a reason this is the last in the list: it's true that you cannot out-exercise a bad diet. Lift weights two to three days a week, do step aerobics, practise yoga, ride a bike, or go for a walk. Mix it up and do what works for you. You'll sleep better, enjoy a greater capacity to concentrate, maintain better joint and muscular mobility, and delay the reduction in health that's generally associated with aging.

Matthew Townsend (townsend@vicbar.com.au) is a level 1 CrossFit Coach and masters CrossFit athlete. Simone Bailey (bailey@vicbar.com.au) is a national level boxer and Victorian weightlifting champion for her age category.

ILLUSTRATION BY GUY SHIELD

OFF THE WALL...

Portrait of Sir Leo Cussen by Sir John Longstaff

SIOBHÁN RYAN, ART & COLLECTIONS COMMITTEE

The smallest, but one of the most valuable portraits in the Victorian Bar's collection, is an unsigned oil of Sir Leo Cussen, attributed to Sir John Longstaff. We are reasonably confident of that attribution because of its likeness to two much larger portraits of Sir Leo painted in 1929 and 1930, signed by the artist, John Longstaff. The later portrait hangs just across the road in the Supreme Court library, the earlier one is in the National Gallery of Victoria's collection. In each of these paintings Sir Leo wears a dark three-piece suit and sits crossed legged in an armchair looking dignified but kindly. In the NGV's portrait he is flanked by books.

In his recent lecture, 'Creating a Collection: Portrait Painting and the Peter O'Callaghan QC Gallery,' the gallery's honorary curator, Adam Bushby commented on the Bar's portrait, observing that:

> *"The small scale of the portrait and the efficient application of paint on an apparently unprepared surface of wood suggest it is a study, being concerned with general composition and tonal relationships, rather than achieving a likeness as such."*

A relationship with the Supreme Court's portrait becomes obvious when they are compared side by side. The posture is similar, particularly the relaxed grip of the sitter's right hand.

The Bar's work also closely resembles the NGV portrait. However, the arresting eye contact with the viewer, which is remarkable in the study, is not repeated in either of the finished portraits. This makes the study stand out. The Bar's painting is in need of cleaning and restoration. This will be a priority project for the Art & Collections Committee in 2017.


The Supreme Court's painting


The NGV Painting

> "Cussen soon became one of the most sought after and highly paid barristers, renowned for thorough preparation, clarity of argument and sound knowledge of legal principles"


The Bar's painting

Leo Cusssen (1859 – 1933) was born at Portland Victoria, the son of an Irish immigrant grocer. He was educated at Hamilton College on a scholarship. After initially training as a civil engineer, he returned to university at the age of 25 and graduated with an LLB and a Master of Arts. He was called to the Victorian Bar in 1889, read with (Sir) John Madden and got a room in 35 Selbourne Chambers. He served on the Bar Council in 1901 – 2.

The Australian Dictionary of Biography records that, *"working long hours, Cussen soon became one of the most sought after and highly paid barristers, renowned for thorough preparation, clarity of argument and sound knowledge of legal principles"*. His reputation as a barrister was such, that it was said that "*if a solicitor had a difficult case and did not consult Cussen, he was guilty of negligence*." However, Cussen never took silk. He was appointed to the Supreme Court of Victoria in 1906 and worked until 2 days before his sudden death in 1933.

Apart from his contribution to the Bar and the Bench, Leo Cussen was responsible for consolidating the Victorian Statutes, *gratis* and almost single-handedly. In 1922 he received a Knighthood for invaluable service to his country.

While a barrister he played for the Bar Cricket XI and from 1907 until his death he was the President of the Melbourne Cricket Club. He died in 1933.

John Longstaff (1861-1941) was born in Clunes, Victoria, the son of a store keeper. In 1882, he began art studies at the National Gallery School in Melbourne. He was the winner of the National Gallery's first travelling scholarship in 1887, which facilitated studies in Paris, London and Spain. Back in Australia in 1895, he established a portraiture practice in Melbourne, but returned to England in 1901. In 1918-1919, Longstaff served with the Australian Imperial Force as an official war artist. He returned to live in Melbourne permanently in 1920, successfully resuming his portraiture practice. He won the Archibald Prize five times during the 1920s and 1930s for portraits of Maruice Moscovitch (1925), Dr Alexander Leeper (1928), William Holman (1929), Sir John Sulman (1931) and Banjo Paterson (1935).

BOOK REVIEWS

Tom Hughes QC: A Cab On The Rank

PETER HEEREY

The sub-title of this compellingly readable biography of Thomas Eyre Forrest Hughes AO QC requires no explanation to the readers of *Victorian Bar News*.

Through a career at the Sydney Bar from 1949 to 2012, Tom Hughes plied his trade as a barrister for clients famous and infamous, in cases celebrated and routine, but always with superb advocacy, backed by meticulous preparation.

If it were no more than a catalogue of cases, however famous, such an account might lack insight into the character of the advocate whose story is being told. But the author, a distinguished historian, has had the advantage of frank interviews with many of Hughes' contemporaries. Also there are some valuable documentary sources. Ordinarily, barristers do not keep much in the way of records. Indeed, one of the attractions of the profession is that once the case is over the papers can be handed back. But Hughes was a diligent diarist and keeper of personal papers.

It is a very Sydney story. Hughes' father Geoffrey Hughes was a prominent solicitor. His grandfather, Sir Thomas Hughes, was a Lord Mayor of Sydney. (His daughter Lucy was later to achieve that honour.) His great great grandfather, Thomas Hughes, migrated to Sydney from County Leitrim in 1840. Hughes was educated by the Jesuits at St Ignatius' College, Riverview. He later graduated from Sydney University.

During the Second World War, Hughes flew Sunderland flying boats out of England with the RAAF 10 Squadron. The Squadron lost 151 men and 19 aircraft and sank six U-boats. He had, as he modestly puts it, "a relatively lucky and safe war."

In 1963, Hughes entered politics, winning the seat of Parkes from the sitting Labor member, Les Haylen. While on the back bench, although a conscientious attender at the House, he was able to continue his practice at the Bar. In 1964, he achieved a notable victory for the writer Hal Porter who sued the Hobart *Mercury* in the Supreme Court of Tasmania over a review of *The Watcher on the Cast Iron Balcony*, which, as the Court accepted, carried the imputation that Porter had inserted "Anglo-Saxon words", not out of literary necessity, but to gain publicity by attracting the attention of the censor. Justice Neasey found the preview "gravely defamatory" and awarded damages of £1000. Hughes' fee was the then not inconsiderable £435-15-0 plus expenses. (Another valuable resource for the author has been Hughes' fee books which are cited from time to time to demonstrate how his practice became increasingly lucrative.)

After the 1969 election, Hughes was promoted by Prime Minister Gorton to Cabinet as Attorney-General. This was a time of great controversy over Australia's participation in the Vietnam War. A famous incident occurred when a group of protesters, led by one Ian Macdonald, attempted to invade the Hughes' home. (Macdonald was to become a New South Wales Labor Minister and still later the subject of adverse findings by ICAC over his dealings with the Obeid family.) Hughes repulsed the would-be trespassers with dextrous use of his son's cricket bat. One of the many comments was that of journalist and Test cricketer of the 1930s, Jack Fingleton:

> *Footwork magnificent – cannot be faulted. Grip with bat just a little suspect. Perhaps hands should have been closer together although gap is permissible if stroke is improvised.*

When McMahon replace Gorton as Prime Minister, Hughes was sacked as Attorney-General, much to the disappointment of many Liberals. By all accounts, Hughes had successfully balanced the political obligations of a Minister with the objectivity required of the Attorney-General as first Law Officer. Clarrie Harders, who had been Secretary of the Department under eight Attorneys, described him as "the best Attorney-General under whom I served."

One feature of Hughes' attitude to life and career, which the author notes in the particular context of a loss in a difficult case, was that "just as he was capable of a strong emotional commitment, he was equally adept at moving on." After a distinguished war record, he nevertheless did not become involved in ex-service activities. After leaving the political scene he did not become an *éminence grise* in Liberal circles, but confined himself to donations, handing out how-to-vote cards, and writing references for pre-selection candidates. He moved towards the moderate wing of the Liberal party, aligning himself with the Australian Republican Movement, led by son-in-law Malcolm Turnbull, and supporting company director Kevin McCann for pre-selection for the seat of Warringah. (His candidate was defeated by Tony Abbott.)

Hughes' advocacy style has been described as declamatory and theatrical. A characteristic pose was, with "menacing pirouette", to address the side or even the rear of the courtroom. Occasionally there would be penetrating wit, as when he said of a trade union hearing which had expelled his client that to describe it as a kangaroo court "would be an understatement and an insult to a great Australian marsupial."

One celebrated case was Hughes' appearance on behalf of rugby league player Andrew Ettingshausen, who sued for defamation when a newspaper published a grainy black and white photo showing the plaintiff in the shower with other players after a game. The contention, which the jury ultimately accepted, was that the plaintiff was defamed because readers would think he had consented to the publication of this revealing photograph. Just what the photo revealed was a central issue.

Hughes' cross-examination of the New Zealand-born editor went as follows:

> *Hughes: It is a penis is it not ...?*
> *Witness: Well, I assume if it's in that part of the body, maybe it could be and maybe it might not be.*
> *Hughes: What else could it be?*
> *Witness: I guess it could be a shadow...*
> *Hughes:(appropriating the witnesses' New Zealand accent) Is it a duck?*
> *Witness: I don't think it would be a duck.*

Not surprisingly, as the author notes, the growing enthusiasm for mediation in recent years had no appeal for Hughes.

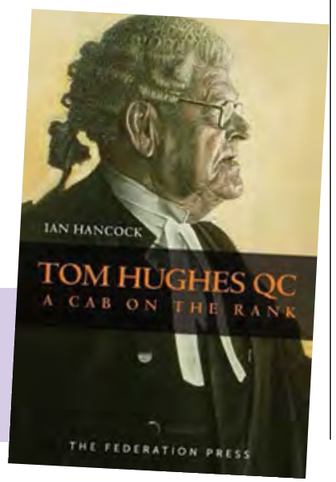
However, behind the style lay substance, based on painstaking preparation. He was renowned for regularly catching the 5.30 am bus to his Chambers.

The story is not confined to the courtroom. The reader learns of the failure of Hughes' first marriage, some relationships, and a long and happy second marriage as well as his abandonment of, and return to, the Catholic faith.

As well, there is some intriguing gossip about the personalities and internal politics of the Sydney Bar. The actress Kate Fitzpatrick was said to have called Murray Gleeson the sexiest man she had ever met, prompting the comment from Michael McHugh: "Poor Kate. She must have led a sheltered life."

Hughes emerges from the book as a warm, generous and thoughtful man, notwithstanding an initial somewhat austere impression. He had the same secretary for over four decades and the same farm manager for three—a good indication of his human side.

A version of this review was first published in the August 2016 issue of the Australian Book Review and is republished with the kind permission of the Review.



Tom Hughes QC: A Cab On The Rank

Ian Hancock, Federation Press, 2016, pp xii, 402

Annotated Insurance Contracts Act

PENNY HARRIS

This year marks the 30th anniversary of the commencement of the *Insurance Contracts Act 1984,* which governs most insurance contracts in Australia. This year also sees the final stages in the staggered commencement of the comprehensive legislative amendments introduced by the *Insurance Contracts Amendment Act 2013*. As such, this seventh edition of *Mann's Annotated Insurance Contracts Act* is timely, for both historical and practical reasons.

The *Insurance Contracts Act* seeks to strike a balance between the interests of insurers, the insured, and members of the public, and the Act includes provisions relating to the duty of the utmost good faith, disclosures and misrepresentations, the form of the contract, expiration, renewal and cancellation, and subrogation.

As the author states in his preface, the 2013 amending Act introduced significant changes to the Act in several areas, including the areas of utmost good faith, electronic communication, the powers of ASIC, disclosure and misrepresentations, remedies under contracts of life insurance, the rights of third party beneficiaries, and subrogation. This edition offers an annotated guide to the new sections, while helpfully providing the pre-Amendment Act sections for comparative purposes, including the commencement date for each new section. It also offers updated case commentaries since the last edition, which was published in 2014. The text also includes a guide to the *Insurance Contract Regulations*, as well as reproducing the General Insurance Code of Practice and the Insurance Brokers Code of Practice.

The commentary throughout is well structured and the analysis is comprehensive. In particular, the commentary and analysis sections in relation to the duty of the utmost good faith, the insured's duty of disclosure, remedies for non-disclosure, and the general provisions of insurance contracts are detailed and helpful.

This is a very useful text for all general commercial practitioners, offering a comprehensive guide to the Act now that the 2013 amendments are fully commenced, as well as a survey of the case law relating to this important and often-used Act.

Mann's Annotated Insurance Contracts Act, 7th Edition

Thompson Reuters

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Migration Law

MEREDITH SCHILLING

Over the past decade, migration law has provided fertile ground for the development of important principles of administrative law concerning the relationship between the judicial and administrative branches of government. *The Migration Act* 1958 (Cth), described on its enactment as "in many respects……the finest immigration charter that the world has yet seen",1 has seen countless amendments, with each successive government seeking to achieve its distinct policy objectives through the amendment of its provisions. Those amendments have, in turn, spawned a vast and increasingly complex body of case law.

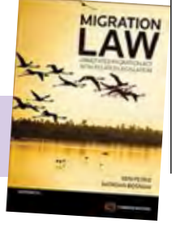
The daunting task of mastering this field of legal practice has been made easier with the recent publication of Thomson Reuter's *Migration Law: Annotated Migration Act with Related Legislation*. Authored by Ben Petrie, who signed the Victorian Bar roll in October 2016, and Natasha Bosnjak, Senior Associate at Clayton Utz, this book brings together in one single, hard copy volume the full text of the Migration Act, Migration Regulations 1994 and other related legislation as at 19 April 2016.

Each significant provision of the Migration Act is accompanied by commentary covering the scope of its application, critical concepts, key cases and, where applicable, useful practice points. Petrie and Bosnjak's extensive expertise in the practice of migration law is evident in their admirably concise distillation of the legislation and its history, and their careful identification of relevant legal issues and seminal cases.

The publication of Migration Law follows the 2015 launch of Thomson Reuter's online service, Migration Act Annotated, which is also authored by Petrie and Bosnjak. The hard copy Migration Law complements the online service, providing a quick and portable reference tool for both experienced practitioners and newcomers to the field of migration law.

This book—which the publisher and authors believe to be the first annotated commentary on the Migration Act since its enactment—is an important new resource in this rapidly-changing area of legal practice. As his Honour Judge Riethmuller states in his forward to the book, "No other civil law litigant has had so many cases in the High Court in the last 20 years [as the Minister for Immigration]. … This overwhelming volume of materials has called out for a work such as this for some time."

1. The Hon A R Downer, MP, Minister for Immigration. Source: *Australian Dictionary of Biography* cited in *Migration Law Annotated Migration Act with related Legislation,* p ix.



Migration Law
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Assessor Typologies

ANONYMOUS

In *R v Miller*[1] Justice King lamented:

> *The case of* Verdins *now arises in almost every plea before the courts, certainly in the Supreme Court. It has made the task of sentencing judges more difficult, forcing them to consider reports from psychiatrists, but more usually psychologists, who have often had only very brief interaction with an offender, who have accepted as reliable and truthful the word of that offender as to their state of mind, thought processes or abilities, and relied upon the statements by the offenders, as though it was sworn evidence, to then ascribe to the offender, at least one of the six limbs of* Verdins. *I have found over time that I am less and less satisfied with reports prepared by forensic psychologists who have often spent an hour or less, with the offender before producing a lengthy report that purports to address quite particularly, and directly, the various limbs of* Verdins, *usually relating to either the moral culpability or the sentence weighing more heavily upon the offender.*

VBN recently received the following anonymous letter:

> *Dear editors*
> *A colleague has prepared a tongue-in-cheek typology of forensic psychologists—I thought this was the appropriate venue, but s/he (perhaps rightfully) refused to have their name attached lest this result in loss of friends. Or worse! One for the next edition?*
> *Best wishes.*

Assessor Typologies appears to be a sort of DSM-V for the cohort of forensic psychologists described above. Of course where a diagnostic label from the Assessor Typologies is applied to a psychologist, this should be treated as the beginning, not the end, of the enquiry.

The Storyteller

The Storyteller obtained his graduate diploma in psychology in 1982 after a lengthy career in an unrelated field. After assessing two or even three clients in the morning, he dictates his reports during the car ride back to the office. The Storyteller refers to his protagonist as a "young man" or "delinquent", usually because he can't remember their name. His report is a mere summary of the defendant's personal history, the details of which are repeated in no less detail in a section curiously titled "opinion". If you listen carefully when you read his report, you might hear a crackling fire in the background. The Storyteller has numerous friends in the legal fraternity and is just at home in the court room as he is at a twilight soirée attended by his lawyer pals. More recently, the Storyteller has accepted his learned friends' advice to provide a risk assessment, which he undertakes by drawing upon his wisdom and experience, as opposed to any validated risk tools.

The Mono-Diagnoser

The Mono-Diagnoser went to university with the Storyteller, and subsequently attended a two-day workshop in a mental disorder that became her raison d'être. Strangely, everyone who attends this psychologist's office is burdened with this same affliction, which, incidentally, was removed from the Diagnostic and Statistical Manual in 1994 but can still be cured with the same homeopathic remedy. Given that the Mono-Diagnoser's mental condition of choice can account for an individual's entire offence history, she is a popular choice when addressing Verdins. Thus, the Mono-Diagnoser's resumé boasts the completion of over 10,000 court reports, which can be achieved by using the 'find and replace' function with an offender's name and resisting the need to undertake any professional development activities. Nevertheless, she is available to give talks on any of her unpublished manuscripts.

The Advocate

Each defendant assessed by the Advocate is innocent. His lengthy reports, which identify the victim as the true perpetrator of the crime, dutifully outline the defendant's life history—a tale of woe and tragedy. The advocate takes it upon themselves to speak not only for the client, but to act as their character witness. While knowing how to undertake a risk assessment, the Advocate routinely uses the clinical over-ride function in an attempt to prevent the inevitable miscarriage of justice.

The Genius

The Genius has more degrees than a thermometer. Like the Advocate, the Genius writes extremely long reports which are made even longer by appendices which summarise an article disputing any incremental validity that dynamic variables afford to static factors alone and the fundamental problems inherent in tests of statistical significance. The Genius is a popular witness by virtue of her ability to confuse opposing counsel, but truth be told, not even other psychologists know what the Genius is talking about.

After deep psychodynamic textual analysis, VBN have concluded that the anonymous contributor probably has a complex dual diagnosis exhibiting traits of the Storyteller's proclivity for fraternising with lawyers and the Genuis's penchant for accumulating post-graduate qualifications. VBN only hopes the anonymous author will come forward to contribute a judicial typology for our next issue.

1. [2015] VSC 180.

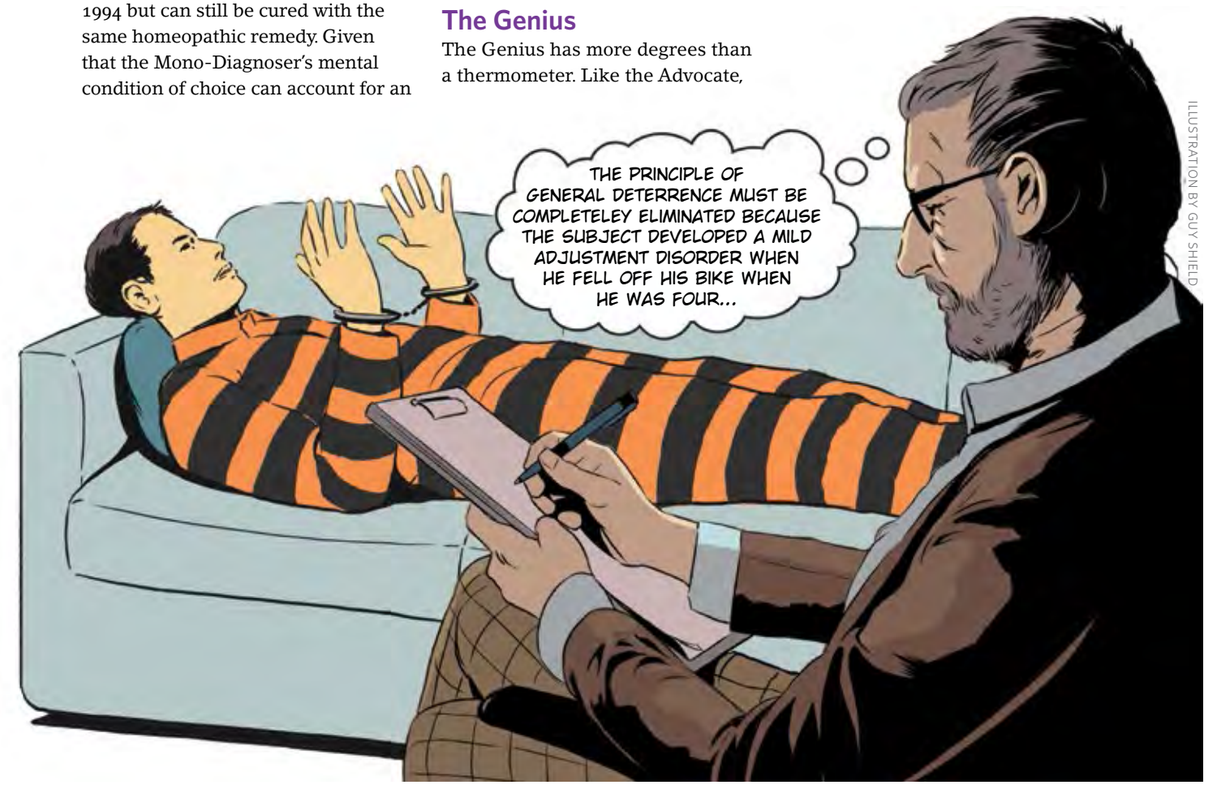


ILLUSTRATION BY GUY SHIELD

BOILERPLATE

THEATRE

2016: Thespian Year in Review

THETA GAMMA

Melbourne Theatre Company

The 2016 MTC season debuted with ***Ladies in Black***. Although sceptical about an Australian musical based on the novel by Madeleine St John, I suggested the book to my book club ahead of the play. I counted four times that I fell asleep while reading the book and I found the play to be equally soporific. The audience seemed to love it though (as did the other book club members the book), which confirmed that, in truth, I am just a sadist who harbours unreasonable expectations.

MTC's 'Dr Jekyll and Mr Hyde' approach to its season saw us shift to a sad and deeply moving ***Lungs*** with Kate Atkinson and Bert LaBonte—a story about the tribulations of love. It even throws in a miscarriage. Très triste indeed and stellar performances from Kate and Bert (whose couple name must be Kabe or is it Berka? Burqa?). The play was written to be performed on a bare set. MTC decided that its audience would be disappointed with this and so came the introduction of the Ikea kitchen installation on a wheel. It rotated throughout the play with crockery, appliances, bins, books flying everywhere. Not recommended for ~~children~~ the obsessive compulsive.

I won't say much about ***The Distance*** which came next. Suffice it to say that it was a play about women and how they are to be blamed for all the bad decisions that are made in life. The men in the play of course saved the day with their wise counsel. Two hours of my life I will never get back but Katrina Milosevic was hilarious. Silver lining?

Kip Williams did an excellent job in his direction of ***Miss Julie***, with a set design that was simply remarkable. Another sad story about an intelligent and beautiful woman who seemingly has it all but who cannot cope with the expectations that her aristocracy imposes upon her. Robin McLeavy did an excellent job in her portrayal of the role and ultimately is helped by those around her to realise that suicide is not the answer. Poignantly relevant.

Then came the tale of three brothers—***Straight White Men***, a play about privilege. Lots of parallels for us to draw here indeed. Happily, the overall message from the play was that we ought to embrace and exploit our privilege. Otherwise we might end up like Jake, the youngest of the three: depressed and a dire drain on the economy (though the audience is left wondering whether he is a closeted homosexual which might otherwise have helped him in eroding a lot of that privilege he feels so guilty for having).

The second half of the MTC season gave us crime-novel-turned-theatre-spectacular ***Double Indemnity*** which kept us on the edge of our seats as an almost magical, rotating set transported us from one scene to the next. Four and a half stars.

This was followed by ***Skylight***. Toby Wallace was excellent in his non-lead role. The play otherwise almost brought me to tears with boredom. At interval, I discussed the play with other theatregoers only to later find out that Cameron Woodhead and I agreed that the most realistic thing about the first act was the smell of fried onions, as Kyra made dinner. ***Jasper Jones*** was next. Another novel-cum-play. Not the most compelling storyline but a rotating set once again kept you interested. Also: #australiana.

Disgraced was another play underpinned by the theme of race and it was jarring in its message that after 9/11, Muslims are doomed; be they connected with their faith and retaining a sense of patriotism for their motherland or self-loathing and extremely successful MnA lawyers gunning for partnership at a top-tier firm. Spoiler: covert or otherwise, discrimination is here to stay.

The MTC season is being rounded up with Francis Greenslade and Shaun Micallef in ***The Odd Couple***. I won't say much other than that it is showing until 21 December and comes highly recommended. Do yourself a favour and embrace this opportunity to laugh away the doom and gloom that has pervaded the air since November 8.

Malthouse Theatre

Of note from this year's Malthouse season was its production of ***The Glass Menagerie*** in May which was a brilliantly performed and moving piece of theatre. The women, in particular, shone and Rosie Riley who played *Laura Wingfield* was captivating and unwaveringly method in her performance. Her character was also relatable because, like most of us, she probably suffers from mild Asperger's.

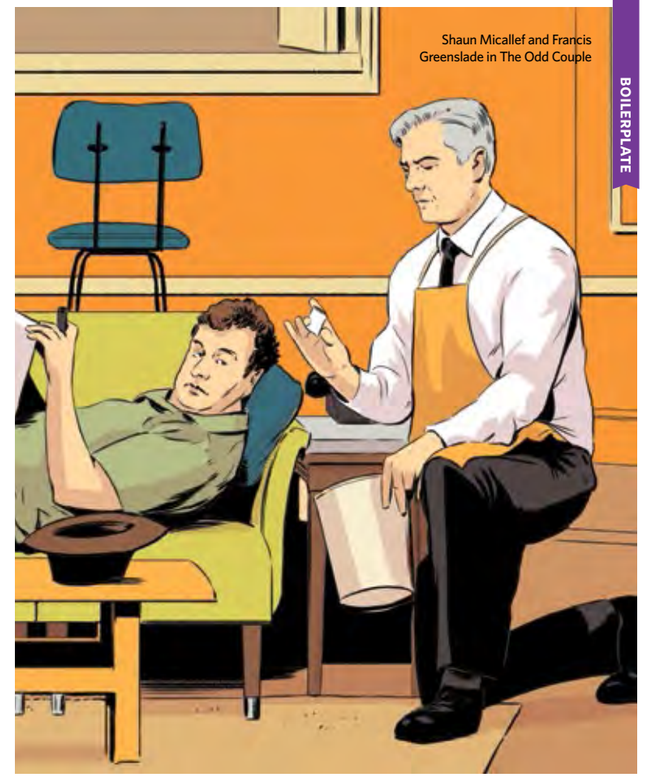
Musical Theatre

We were also presented with an array of musical theatre in 2016. ***Matilda*** dazzled the Melbourne bourgeois with our very own and hilarious Tim Minchin providing us with an optical illusion in which children perpetually appear to be militarily disciplined (read: how do I get my child to do exactly as directed and without objection six nights a week for nine whole months?).

That said, the Tony for 'best musical' has to go to ***The Colour Purple***, brought to us by StageArt and performed at Chapel Off Chapel throughout October and early November. It was, simply put, sublime. It deservedly received a standing ovation after every single performance which, in Australian circles, is unheard of.

There we have our 2016 theatre year in review. 2017 is shaping up to be exciting and I will be reporting back in the next issue on the first half of the season. Look out for:

- MTC's ***Born Yesterday*** for some quasi-musical entertainment
- the Malthouse Theatre's technologically super-charged ***The Encounter***, a play experienced for the most part through individual headphones that each audience member is provided with
- ***The Book of Mormon*** playing at the Princes Theatre from January (which I highly recommend you go see) and ***Aladdin*** coming to Her Majesty's Theatre in April (which I recommend to your youngens)
- in a less professional capacity: the one, the only, ***Les Miserables*** being put on by CLOC Musical Theatre in May



Shaun Micallef and Francis Greenslade in The Odd Couple

BOILERPLATE

ILLUSTRATION BY GUY SHIELD

FOOD AND DRINK

French Saloon

A review by SCHWEINHAXE, the Bar's resident undercover foodie

French Saloon
First Floor, 380-384 Little Bourke Street (entry via Hardware Lane)
Telephone: 9600 2142
Trading Hours: Monday-Friday, lunch, dinner and supper
The taste: French Bar and Bistro, including small plates to share
The bite: you see the occasional lawyer!
Things to chew: oysters, cured meats, dry-aged steaks and cheese
Things to sip: boutique wines, grappa and French beers

The scene was set: a traditional celebratory lunch with instructors, 1pm on a Thursday. A friend had suggested French Saloon. It sits above Kirk's Wine Bar on the corner of Hardware Lane and Little Bourke Street. We entered via a small entry on Hardware Lane and went up a narrow wooden staircase. I tripped on the top stair and made a grand entrance by flying at speed into the restaurant. We had a table by the window, overlooking Little Bourke Street.

The table and chairs are wooden in the French bistro style. The surrounds are painted white, with a large wooden bar (with a zinc bench top) being the dining room's HQ. We were served by two French waitresses, which added to the French vibe of the place.

To get the party started, we ordered some beers, including a Gavroche Sur Lie Red Ale 8.5% ($14) and a Bridge Road Chestnut Pilsner 5% ($11). I had the pilsner and it was very crisp with a slight nutty flavour. We ordered a dozen Sydney rock oysters ($4.50 each) and then started to look over the rest of the menu.

We first decided to share a number of small plates. We had kingfish with confit yolk and a gravlax dressing ($18.5), anchovy toast with guanciale (Italian cured pork cheek) and espelette (a kind of pepper plant) (4 @ $7 each), and steak tartare ($24). I very much enjoyed the kingfish as the gravlax dressing brought all of its flavours into sharp focus. We washed all this down with a bottle of 2015 François Cotat Caillottes from the Loire Valley ($130), a beautiful crisp sauvignon blanc and the perfect complement to all our small plates.

By this time, we had left the legal world well behind us. We were not hungry but ordered like we were in a dining room in Game of Thrones! We decided to share the lamb shoulder from Flinders Island ($84) with sides of hand cut chips ($11) and broccolini with capers, raisins and goat curd ($11). The lamb was served in a large pot and we used our cutlery to hack into it. We had a bottle of 2014 S.C. Pannell Grenache ($104) from McLaren Vale, incorrectly noted in the wine list as being from the Adelaide Hills. This is a medium-bodied wine that tastes like a pinot, only with more perfume and red fruits, and less dirty grit. A great match for the lamb.

We were full, but were having too much fun. Cheese anyone? *Oui, merci*! So out it came, a selection of three cheeses (75g @ $25), including a persille de chevre. To cut into the heaviness of the cheese we went for something even heavier: a bottle of 2014 Great Western Bin o Shiraz ($136). Do yourself a favour and buy a dozen bottles of this wine, cellar them until you have forgotten you bought them and then drink them!

The next part gets lost in translation. Espresso coffee and a glass of Capovilla Bassano Grappa ($16). And I don't even like Grappa! However, it was the perfect finish to a lunch of clean and complex flavours. Yes, we were the last to leave the restaurant (3.22pm, not too bad). As we left we spied some barristers sitting on a balcony just off the entrance, enjoying a glass of wine in the sun.

The bill was $800.10 for a very lovely lunch. An indulgence, but worth every *centime*.

LUDLOWS
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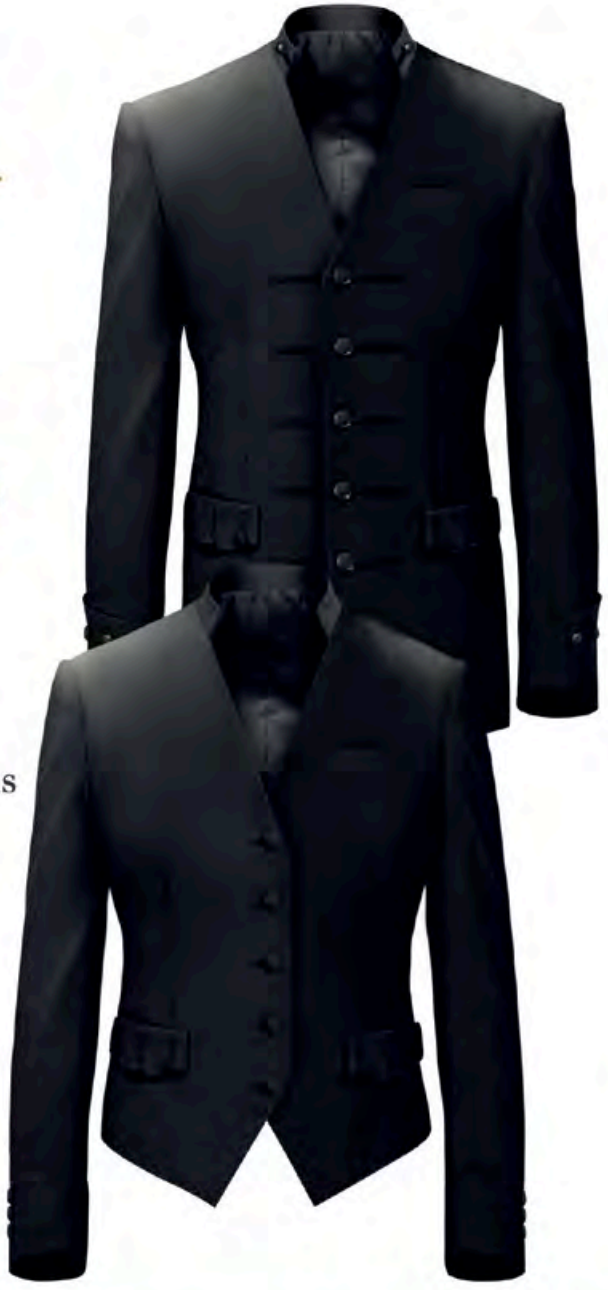
SUMMER BAR JACKETS



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