



## President's Report



Welcome to the 2016 legal year for all CommBar members.

The successful CommBar Seminar Program continues apace, with regular seminars being planned both internally and at the Melbourne and Monash Universities.

This year the Victorian Bar office has allocated times in the Bar Diary for CPDs to be run by CommBar sections. The Neil McPhee Room has been booked for CommBar seminars on the following dates, at 5.15pm:

- 6 April
- 11 May
- 20 June
- 20 July
- 22 August
- 31 October
- 29 November
- 20 December

If you would like to organise a seminar, please contact one of the relevant Section office holders.

At a meeting of the CommBar Executive late last year, the Executive resolved that the position of Section Chairs and Deputy Chairs should be reviewed every two years, and that officeholders should remain in their position for no more than six years.

Registrations for the London 2016 International Commercial Law Conference are progressing well. Places are limited and registration will close soon. If you wish to attend, please register as soon as possible through [www.london2016iclc.com](http://www.london2016iclc.com).

**Philip Crutchfield QC | President**



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## Quotes of Note

*Illness is the doctor to whom we pay most heed: to kindness, to knowledge we make promises only: pain we obey.*

Marcel Proust

*Only the heart knows how to find what is precious.*

Fyodor Dostoyevsky

*A great integrity makes us immortal.*

Ralph Waldo Emerson

*The man who leaves money to charity in his will is only giving away what no longer belongs to him.*

Voltaire

*Our life is frittered away by detail ... Simplify, simplify.*

Henry David Thoreau

## Banking and Finance

### [Court of Appeal confirms Banking Code obligation to exercise care skill and diligence](#)

**Brian Kennedy and Andrew Kirby · February 25, 2016**

The decision of the Victorian Court of Appeal confirms that the Banking Code obligation to exercise care skill and diligence in assessing credit can (and will often) be incorporated as a contractual term into guarantees. This finding is likely to affect lenders' risk assessments when [...] [Read More](#) »

## Civil Procedure

### [Waiter! There's a Chinese restaurant in my easement!](#)

**Paul T. Duggan · February 23, 2016**

Civil procedure – non-party costs order against a party's solicitor – solicitor also a director of client company – conflict of interest – LIV's Professional Conduct and Practice Rules [...] [Read More](#) »

## Construction Law

### [Assignment of warranties under construction contract – did it apply to accrued causes of action?](#)

**Kenneth Oliver · February 24, 2016**

A single judge of the Supreme Court of New South Wales has found that an assignment of contractual warranties in a contract to construct a container terminal was effective to assign causes of action that had accrued at the time of the assignment [...] [Read More](#) »

### [Excess progress payments refundable by builder where statutory warning not signed by the building owners](#)

**Kenneth Oliver · February 24, 2016**

VCAT has determined that \$654,568.00 in progress payments received by a builder was repayable as the building owners did not sign the warning in the contract that the progress payments were in excess of the statutory limits set out in section 40 of the Domestic Building [...] [Read More](#) »

## Corporations & Securities Law / Insurance & Professional Negligence

### Potent antidote to denial: at behest of liquidators, court declares insurer must indemnify directors

Michael Symons · February 25, 2016

Liquidators brought action against company directors under s 588M(2) of Corporations Act 2001 (Cth) – Liquidators sought to join third party insurer after insurer denied liability – Supreme Court had jurisdiction to grant declaratory relief on liquidators' application – Meaning [...] [Read More](#) »

## Energy

### Electricity network tariff reform: the household solar paradox

Tom Clarke · February 24, 2016

To encourage take-up of household solar, or to remove an inefficient cross-subsidy? The Federal Court dismisses SA Power's challenge to the AER's refusal of a higher network tariff for solar household customers [...] [Read More](#) »

## Insolvency Law

### Pursuing a lawyer in VCAT for non-compliance with a notice issued under s 530B of the Corporations Act

Anastasia Smietanka · February 25, 2016

A liquidator has successfully relied on legal profession disciplinary legislation to challenge a lawyer's non-compliance with a s 530B notice. The result is that the dispute was heard and determined in VCAT, as opposed to the Supreme Court of Victoria which traditionally has [...] [Read More](#) »

## Insurance and Professional Negligence

### Federal Court applies s 54 broadly (again)

Clive Madder · February 23, 2016

In *Pantaenius Australia Pty Ltd v Watkins Syndicate 0467 at Lloyds* [2016] FCA 1 Foster J considered whether one insurer ('Pantaenius') could claim contribution from another insurer ('Nautilus') regarding damage to a yacht [...] [Read More](#) »

## Insolvency / Insurance and Professional Negligence

### Insurers on the hook: High Court holds that insurers of insolvent companies can be joined to proceedings commenced by third parties against those companies

Gabi Crafti and Frank Aloe (JD Student, RMIT University) · February 22, 2016

The High Court of Australia has held unanimously[1] that a person who commences proceedings against an insolvent company or a bankrupt individual can join that defendant's insurer to the proceedings and seek a declaration that the insurer is liable to indemnify [...] [Read More](#) »

## International Law

### [The “long-arm” of Vizcaya – significance of the Privy Council decision and its impact on Australian common law and the Foreign Judgments Act 1991](#)

Simon W Lee · February 23, 2016

Privy Council advice that addresses what is required for foreign judgements. In *Vizcaya Partners Limited v Picard* and another [2016] UKPC 5, the Privy Council considered the enforcement of foreign judgments at common law, where enforcement is based on the judgment debtor having agreed to submit to the foreign court giving judgment. In particular, they dealt [...] [Read More](#) »

## International Law / Civil Procedure

### [No immunity for you: the High Court allows registration of a commercial foreign judgment against Nauru](#)

Andrew Yuile · February 2, 2016

Can foreign state immunity prevent proceedings to register in Australia a foreign judgment? Not if that judgment would fall within the commercial transaction exception to immunity, the High Court has now told us; though immunity from execution will still be a hurdle [...] [Read More](#) »

## IP and Trade Practices

### [Telstra continues to see red over YELLOW](#)

The Hon Peter C Heerey AM QC, Tom Cordiner and Alan Nash · February 17, 2016

Trade marks – inherent capacity to distinguish – whether YELLOW has any inherent capacity – deceptive similarity – use as a noun compared with use as an adjective [...] [Read More](#) »

### [Expandable garden hose patent holds water](#)

The Hon Peter C Heerey AM QC, Tom Cordiner and Alan Nash · February 17, 2016

Patents – construction – whether literal interpretation warranted – indirect infringement – innovative step – appropriateness of orders “in aid of delivery up [...] [Read More](#) »

### [Implied terms in trade mark license upsets the apple cart](#)

The Hon Peter C Heerey AM QC, Tom Cordiner and Alan Nash · February 17, 2016

Trade marks – assignment and licence back – option to take assignment – whether variations agreed by conduct – implied terms – whether implied term that licence extends to replacement versions of licensed marks – whether implied term that marks be re-assigned if licence is breached – relevance of post-contractual conduct [...] [Read More](#) »

### [Does not compute: patent for computer-implement business methods rejected](#)

The Hon Peter C Heerey AM QC, Tom Cordiner and Alan Nash · February 17, 2016

Patents – method of manufacture – business method patents – whether questionnaire and assessment method implemented using computers patentable – patent invalid [...] [Read More](#) »

## Public Law

### [High Court upholds Commonwealth participation in offshore detention regime](#)

Mark Hosking · February 22, 2016

The High Court has held that the Commonwealth's participation in the detention of asylum seekers in Nauru was authorised by the Migration Act 1958 (Cth) [...] [Read More](#) »

## Sports Law / ADR

### [CAS panel finds “strands in the cable” sufficiently strong to overturn the AFL Anti-Doping Tribunal’s decision](#)

Elizabeth Brimer · February 25, 2016

In this decision, the CAS used the ‘strands in the cable’ approach to the analysis of the circumstantial evidence before it, the majority concluding that it was comfortably satisfied that all players violated clause 11.2 of the 2010 AFL Anti-Doping Code [...] [Read More](#) »

## Uncategorised

### [What if your sham contractor overpays?](#)

James D. Catlin · January 18, 2016

The High Court has refused to resolve a conflicting authorities in the law regarding treatment of payments over award in sham employment contracts [...] [Read More](#) »



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