



President's Report



Summer has passed swiftly and many a commercial barrister is speaking of the vacation as no more than a distant memory. On the bright side, the year has started well for the commercial bar and chambers chatter suggests that work flow is solid, no doubt influenced to some degree by many barristers being involved with the Financial Services Royal Commission. Hopefully we will continue to see strong demand for the talent and excellent service that our members provide.

CommBar's CPD and other seminars have started so keep an eye on the various offerings through the CPD program, the seminar series between CommBar and the Federal Court, and the series between CommBar and the Supreme Court. As to the latter, I acknowledge with thanks the tireless excellent work of Philip Solomon QC in his role as VicBar's representative on the Commercial Court Seminar Committee over many years. Philip has now relinquished that role and I thank Michael O'Bryan QC for not resisting being conscripted into the role.

We have seen further appointments in the commercial judicial sphere since the December newsletter and CommBar congratulates Justice

Hargrave on his appointment to the Court of Appeal, Justice Quigley on her appointment to the Supreme Court, and Judge Kirton on her appointment to the Federal Circuit Court.

A reminder that the review of the County Court Civil Rules was completed late last year with the changes coming into effect from 1 January 2018. These changes largely reflect the recent changes made to the Supreme Court Rules.

The new silks took their bows before the High Court earlier in the year and by all accounts it was a most enjoyable and well celebrated occasion. CommBar again congratulates the newly appointed members of senior counsel.

The year ahead looks like being active for CommBar and important early work for the Executive includes website integration with VicBar, transition to the National Equitable Briefing Policy, the planning of a proposed conference to be held in Hong Kong later in the year, assisting the Supreme Court with its proposed civil law conference, planning the CommBar annual function and so on.

The Hong Kong conference is proposed to be held on **Friday 21 and Saturday 22 September 2018 so *save the date now***. It is shaping up to be a most worthwhile and fun event and further information and reminders will be distributed as details are finalised. It is a significant endeavour to put together such events and CommBar and VicBar are working closely and effectively towards this end.

CommBar has successfully assisted in the transition of its equitable briefing policy participants across to the Law Council's national policy. In this context I echo the points made by VicBar's President, Dr Matt Collins QC, in In Brief regarding the importance of the national gender equitable briefing policy. I encourage CommBar members to adopt the policy by completing the straightforward form on the Law Council's website.

Finally, I invite all section heads and committees to look actively towards the year ahead and engage proactively with their section members and other stakeholders. Should they wish to raise any matters with the CommBar Executive please direct them to our convenor, Luke Merrick, in the first instance.

Matthew Connock QC | President



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Banking and Finance

The Court of Appeal on penalties – orthodoxy strikes back?

March 5, 2018 · by Jeremy Whelen

By a 2-1 majority the Court of Appeal held that a loan establishment fee of \$26,625 was a penalty, arguably bucking the trend of decisions since the High Court's judgment in Paciocco [...] [Read More](#) »

The Financial Services Royal Commission – What you need to know (Part 1)

March 5, 2018 · by Kieran Hickie and Samantha Cipriano

This article will give some practical guidance to the Financial Services Royal Commission, its powers, processes and procedures. The next article (Part 2) provides a comprehensive summary of the three Practice Guidelines that have been published by the Financial Services Royal [...] [Read More](#) »

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Building and Construction Law

Court finds Security of Payment Act can apply to one-off residential developments

March 5, 2018 · by Adam Rollnik

The Supreme Court of Victoria has found that a one-off special purpose company, incorporated for the sole purpose of carrying out a property development, was “in the business of building residences”, and therefore the Security of Payment Act applied to the dispute [...] [Read More](#) »

Security of Payments update: High Court affirms scope of review limited to jurisdictional error

March 5, 2018 · by Kylie Weston-Scheuber

The High Court has handed down its decisions in the second and third cases concerning Security of Payments legislation to come before it. In Probuild v Shade Systems and Maxcon v Vadasz, the High Court affirmed that in New South Wales and South Australia, review [...] [Read More](#) »

Competition and Consumer Law

A Cartel Case Gets Washed Away

March 5, 2018 · by Dr Richard Scheelings

Just before Christmas last year Wigney J dismissed a cartel case in which the ACCC alleged that Cussons (and the other major laundry detergent manufacturers) had colluded when they simultaneously transitioned all their detergent products from a standard formula to [...] [Read More](#) »

Panadol v Nurofen: what a headache!

March 5, 2018 · by James Davaris

The Federal Court found that the manufacturer of Nurofen had breached the Australian Consumer Law in a decision that emphasises the importance of an adequate scientific basis when engaging in comparative advertising of a scientific nature [...] [Read More](#) »

Equity

The Court of Appeal on penalties – orthodoxy strikes back?

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Bankruptcy: Unfair preferences, third party payments and the 'Quistclose' trust

March 5, 2018 · by James Strong

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Actions for recovery of land: the Court of Appeal on constructive trusts and limitation periods

February 1, 2018 · by Cameron Charnley

Where seeking to recover land on the basis of a constructive trust arising from proprietary estoppel, when does that constructive trust arise? Does it arise when a court makes a declaration to its effect, or when the relevant cause of action accrues? And when should the [...] [Read More](#) »

Insolvency

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Insurance and Professional Negligence

Brothels, bikies and pre-insurance disclosure

March 5, 2018 · by Daniel Lorbeer

The New South Wales Court of Appeal has held that a brothel owner's failure to disclose an association with a bikie gang before the grant and renewal of insurance policies for the brothel did not entitle the insurer to decline cover. [...] [Read More](#) »

IP and Trade Practices

Similarities, not differences, the key to “substantial identity”

December 14, 2017 · by Helen Rofe QC and Adam Rollnik

The Full Court of the Federal Court recently clarified the way in which the “side by side comparison” of trade marks is to be carried out in order to determine whether the two marks are substantially identical. [...] [Read More](#) »

Public Law

The limits of secrecy

March 7, 2018 · by James Forsaith

The High Court has read down a statutory secrecy provision that purported to shield information from production to a court on judicial review. In doing so, it has confirmed that s 75(v) of the Constitution protects more than simply the right to commence proceedings. [...] [Read More](#) »

Power to detain under the Migration Act involves no exercise of judicial power

March 5, 2018 · by Jonathan Barrington

In Falzon v Minister for Immigration and Border Protection, the High Court dismissed a challenge to the validity of s 501(3A) of the Migration Act. The Court held that the provision, which provided for the cancellation of a visa in certain circumstances, did not confer judicial [...] [Read More](#) »

Sports Law

Drugs in thoroughbred racing still in the limelight

March 5, 2018 · Justin Hooper

The Court of Appeal's recent decision in Racing Victoria Limited v Kavanagh addresses the state of knowledge required of a trainer to establish an administration offence under the Rules of Racing. The decision will be of interest to those following one of the biggest horse [...] [Read More](#) »



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