

President's Report

As members would have read in InBrief and elsewhere, CommBar called for expressions of interest in participating in a conference in London on 28 and 29 June 2016.

As a result of the positive responses received, at its last meeting the Executive resolved to proceed with the planning for the conference and pay deposits in order to secure the conference venues (Middle Temple and Inner Temple).

The Executive records its thanks to the Conference Organising Committee (headed by Paul Hayes) and comprising Rodney Garratt QC, Dr Josh Wilson QC, Caroline Kenny QC, Andrew Bailey, Benjamin Jellis and Caryn Van Proctor.

If you are interested in attending the London conference or would like more information, please contact Paul Hayes: pjhayes@vicbar.com.au.

Since the February 2015 newsletter, CommBar has conducted seminars that included the following:

Thursday, 23 April 2015

National Commercial Law Seminar - Securities class actions, corporate governance and liability: current issues

Monash University, Commercial Bar Association, Federal Court of Australia and the Law Institute of Australia

Speaker(s): Chair: The Hon. Justice Jonathan Beach. Presenters: Wendy Harris QC, Prof Jonathan Clough and Priscilla Bryans



Thursday, 7 May 2015

The Varanus Island explosion: supply disruption claims in contract and tort
CommBar Energy Section

Speaker(s): Chair: Sam Horgan QC, Speakers: Kevin Lyons QC and Dr Vicky Priskich

Thursday, 14 May 2015

Mortgage indefeasibility - how secure are banks and lenders?

Brian Kennedy and Andrew Kirby (Bar Association, CommBar, Banking and Finance Section)

Speaker(s): Brian Kennedy; Andrew Kirby

Wednesday, 20 May 2015

Developments in Competition Law: A Discussion of Some Recent Pt IV Cases

CommBar - Competition Law Section

Speaker(s): Chair: The Hon P Heerey, Panel: M O'Bryan QC, F Forsyth, D Clough, Dr R Scheelings

Thursday, 21 May 2015

Sports Law Ethics and Journalists

Sports Section Commercial Bar

Speaker(s): Chair: Tony Nolan QC; Speakers: Murray McInnis, Chip Le Grand

The annual CommBar cocktail function will be held on Thursday 8 November 2015 at the Federal Court. This is the night before the joint Victorian Bar/Law Institute of Victoria conference.

In addition to the CommBar seminars held with Monash University and the Federal and Supreme Courts, CommBar is also organizing seminars with Melbourne Law School (Professor Ian Ramsay). Georgie Coleman is heading up the organisation of the seminars with assistance from Carl Moller and Daniel Snyder. If anyone has any ideas for seminars, please contact Georgie, Carl or Dan.

Philip Crutchfield QC | President



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Quotes of Note

Let's make our mistakes slowly. General Dwight D. Eisenhower, to his advisors.

The important thing is not to stop questioning; curiosity has its own reason for existing. Albert Einstein

If we have no charity and no tolerance, we shall never settle our differences. Mahatma Gandhi

Cross the river by feeling the stones in front of you. Deng Xiaoping

The dogs bark but the caravan passes on. Arab saying

Publius

GEORGE ORWELL AND CLICHÉS

Publius is a great admirer of George Orwell. In his famous six rules in *Politics and the English Language* he gave the following advice, which may be of assistance to members of the Commercial Bar Association:

1. Never use a metaphor, simile or other figure of speech which you are used to seeing in print.
2. Never use a long word when a short one will do.
3. If it is possible to cut a word out, always cut it out.
4. Never use the passive when you can use the active.
5. Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.
6. Break any of these rules sooner than say anything outright barbarous.

The first rule is all about clichés. Publius was therefore startled to see the following recently in a prominent daily newspaper:

I was in a room when I saw there was an elephant in it.
So I looked out of the window, the window of opportunity.
I looked under the radar
And across the level playing field.
There was sand on the level playing field,
So I drew a line in it,
As well as moving the goalposts,
And stepped up to the plate.
Fearful that someone would shoot the messenger
I drilled down
Across a broad range of issues and
Floated a few thought bubbles

Which ticked all the boxes.
The result was ... iconic.

I am a bit apprehensive about the reaction of the ACCC (the Anti-Cliché Control Commission)
And will have to rely on ASIC (the Agency for the Spread of Irritating Clichés).

Publius

Forthcoming Events and Updates

6 AUGUST 2015 CPD SEMINAR

Her Honour Judge Kennedy and the newly appointed Judicial Registrars to the Commercial Division of the County Court of Victoria, Sharon Alexandra Burchell and My Anh Tran, will hold a CPD Seminar, hosted by CommBar, on 6 August 2015.

The session will deal with the proposed revised County Court Commercial Division Practice Notes for the General List, Expedited Cases List, Commercial List Duty Judge and Judicial Registrar and the Pilot Protocol re Judicial Registrars

Further information will be distributed to all CommBar members in the coming weeks, including an opportunity to register for the seminar.

CIVIL PROCEDURE

- *26 June 2015*

The Australian Centre for Justice Innovation will be running a full day symposium at Monash University Law Chambers on Access to Justice and the Productivity Commission Report.
<http://www.law.monash.edu.au/centres/acji/events/>

- *25 June 2015*

Gabi Crafti and Tania Sourdin are giving a talk at Monash University Law Chambers on 25 June 2015 on the *Vexatious Proceedings Act. 2014*
5.45pm arrival, lecture 6-7pm
<http://www.law.monash.edu.au/centres/acji/events/index.html>

CONSTRUCTION LAW – Commercial Bar Association CPD Seminars

1. *Nuisance and Construction Projects*

3 August 2015

Neil McPhee Room, 5:15pm

Mr. Matthew Bell (Senior Lecturer and Co-Director of Studies for Construction Law), Wayne Jocic (Senior Lecturer and Co-Director of Studies for Construction Law) and Associate Professor Katy Barnett of Melbourne University Law School.

2. *Pleading claims and defences that involve apportionment liability*

This seminar will focus on pleading claims and defences that involve proportionate liability and consider which parties may be liable for losses as a result of apportionable claims.

4 August 2015

Neil McPhee Room, 5:15pm

Mr. Ken Oliver (Secretary of Commbar Construction Law Section) & Adam Rolinik (Monitor of Commbar Construction Law Section).

3. *The resolution of construction law disputes in the 21st century – A view from the other side of the bar table*

13 August 2015

Neil McPhee Room, 5:15pm

Mr. John Sharkey.

CONSTRUCTION LAW – Conferences

1. Building Dispute Practitioners' Society

Discussion Nights

When: 24 June 2015 and 16 September 2015 at 18:30pm.

Location: RACV Club Level 2, 501 Bourke Street, Melbourne

Details: www.bdps.com.au

2. UK Society of Construction Law

Where are we now on the interpretation of contracts

When: Tuesday, June 9, 2015

Speaker(s):

Peter Rees QC, Thirty Nine Essex Chambers

Chairman: Andrew Essam

Venue: DLA Piper UK LLP, 1 St Pauls Place, Sheffield S1 2JX

The Mason and the Carpenter – a tale of concurrency...

When: Monday, June 8, 2015

Speaker(s):

Steve Briggs and Dr Franco Mastrandrea

Chairman: Vincent Moran QC

Venue: National Liberal Club, Whitehall Place, London SW1

Common issues relating to Latent Defects

When: **Tuesday, June 16, 2015**

Speaker(s):

Camille Slow, Atkin Chambers

Venue: Blake Morgan Solicitors, New Kings Court, Tollgate, Chandler's Ford, Eastleigh SO53

3LG

Organiser: Jessica Tresham

CONSTRUCTION LAW – The Society of Construction Law Delay & Disruption Protocol

The Society of Construction Law Delay & Disruption Protocol is presently being reviewed. A copy of the proposed amendments, with an explanation of those amendments can be seen at the UK SCL website (<http://www.scl.org.uk/home>).

Arbitration & ADR

[Mediation: Can a handshake settle the dispute?](#)

5 May 2015, by Glen Pauline

Handshake agreement did not waive or vary requirement in Mediation Agreement for a signed settlement agreement. A mediation agreement contained a clause which provided that no settlement of the dispute will take place unless and until a settlement agreement has been signed [...]

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[Victorian Supreme Court grants urgent enforcement of Formula 1 arbitration award](#)

24 March 2015, by James WS Peters QC and Tom Clarke

The Victorian Supreme Court and Court of Appeal granted urgent enforcement of a Swiss arbitral award obtained by a Formula 1 driver against his former team [...]

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Banking & Finance

[Reforms to summary judgment procedure in the Supreme Court and County Court of Victoria](#)

29 May 2015, by Kieran Hickie and Andrew Kirby

Reforms to the summary judgment procedure in the Supreme Court of Victoria and the County Court of Victoria now provide for one streamlined test in respect of summary judgment applications [...]

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[Guarantees and the Code of Banking Practice – compliance with the Banking Code required to enforce a guarantee](#)

29 May 2015, by Kieran Hickie and Andrew Kirby

The recent decision of the Supreme Court of Victoria in National Australia Bank Ltd v Rice [2015] VSC 10 highlights that care and attention must be taken by banks and lenders to ensure compliance with the Banking Code is taken in order for guarantors to understand their rights and liabilities under a guarantee. Non-compliance with the requirements of the Banking Code can result in guarantees not being enforceable [...]

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[Full Court of the Federal Court overturns judgment in Bank Fees case](#)

29 May 2015, by Kieran Hickie and Andrew Kirby

The Full Court of the Federal Court of Australia has overturned the decision of Gordon J that late payment fees charged by the ANZ bank on credit cards against its customers constituted penalties and were unenforceable [...]

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Building & Construction Law

[Application to restrain recourse to security](#)

28 May 2015, by David McAndrew

The Court of Appeal has found that interlocutory applications to restrain recourse to performance bonds generally fall into a special category when it comes to whether the Court should exercise its discretion to decide a question of law/construe the recourse provision. A mere assertion of reputational damage in the event of recourse will not suffice to demonstrate likelihood of irreparable harm [...]

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[The penalty doctrine and delay to practical completion caused by trivial events: Grocon Constructors \(Qld\) Pty Ltd v Juniper Developer No. 2 Pty Ltd & Anor \[2015\] QSC 102, 23 April 2015, P. Lyons J](#)

26 May 2015, by Andrew P. Downie

A modified AS4300-1995 contract defined practical completion to include an exhaustive list of both significant and trivial items of work. The builder argued that because the failure to attend to trivial items of work could trigger the liquidated damages clause, the clause was penal. The Queensland Supreme Court disagreed [...]

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[Domestic Building Contracts Act 1995 \(Vic\) applies to multi-apartment developments: Burbank Australia Pty Ltd v Owners Corporation \[2015\] VSC 160, 29 April 2015, McDonald J.](#)

26 May 2015, by Andrew P. Downie

The Supreme Court of Victoria was required to consider the application of the Domestic Building Contracts Act 1995 (Vic) to multi-apartment developments. McDonald J held that, subject to the nature of the works falling within the definition of “domestic building work”, the Act applies to multi-apartment developments and to developers of such developments [...]

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Civil Procedure

[Civil leave to appeal requirement considered](#)

26 May 2015, by Helen Tiplady

In this recent decision, the Court of Appeal grappled, for the first time, with the test for the grant of leave for an appeal under the new civil appeals regime. In November 2014, a new regime was introduced for civil appeals in the Victorian Court of Appeal [...]

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Class Actions

[The aftermath of Timbercorp](#)

28 May 2015, by Cam Truong

A short excursion into the aftermath of the Timbercorp Group collapse that included an unsuccessful grower class action and appeal, and currently hundreds of proceedings being pursued against and resisted by, individual growers. Looming test cases [...]

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[Are “institutional” sample group members necessary in a shareholder class action?](#)

28 May 2015, by Alan Nash

The Court has rejected an interlocutory application by the respondent in a shareholder class action for the appointment of “institutional” investors as sample group members on the basis that such a move was not necessary to “ensure justice is done” in the proceeding [...]

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Energy

[The Law taketh away, the Law giveth back: Political risk and exploration licences in NSW](#)

28 May 2015, by Tom Clarke

A pair of recent decisions in challenges to NSW government cancellations of coal and CSG exploration licences. To the Victorian observer, it is striking to note the prominent place of energy issues in recent NSW politics. This note addresses [...]

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Insolvency Law

[Assets purchased by a bankrupt from his or her exempt income vest automatically in the bankruptcy trustee](#)

28 May 2015, by Andrea L. Mapp

Whether inconsistency between Div 4B of Pt VI, s 58(1)(b) in Div 4 of Pt IV and s 116 of Pt VI of the Bankruptcy Act 1966 (Cth). An appeal from the decision of Di Cioccio v Official Trustee in Bankruptcy [2014] FCA 782. The appellant during his bankruptcy, used income below [...]

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International Law

[Public International Law and the Domestic Practitioner](#)

29 May 2015, by Peter Willis

School sues foreign donor government in Australian court – sovereign immunity – what is a commercial transaction? Questions of public international law do not, alas, arise regularly in the daily legal practice of most Australian lawyers [...]

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Property & Probate

[Follow the Golden Rule](#)

12 May 2015, by James D. Catlin

Finding as to the existence of testamentary capacity overturned. The last exposition on capacity by the VSCA was over 10 years ago in Kantor & Anor v Vosahlo [2004] VSCA 235 ('Kantor') [...]

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[Deficiency in will execution procedure](#)

12 May 2015, by James D. Catlin

Important decision on the requirements of setting aside a will on the grounds that the testator did not know or approve of the contents. Useful study of "suspicious circumstances" necessary to displace the presumption of knowledge and approval created by due execution of a will [...]

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Public Law

[Damages assessment where defamatory publications combined with non-defamatory](#)

28 May 2015, by Peter Heerey AM QC

A plaintiff suffers hurt, embarrassment and reputational damage as a result of the defendant's publications. Parts of those publications are clearly defamatory; other parts, although hurtful and damaging, are not. How are damages to be assessed? [...]

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[Adverse economic effect of decision gives standing under AD\(JR\) Act](#)

24 April 2015, by Alex Solomon-Bridge

In Argos Pty Ltd v Corbell [2014] HCA 50, the High Court held that an applicant whose profitability would be affected by a decision had standing under the AD(JR) Act. [...]

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[15 year legal battle ends with no mutual trust or confidence](#)

26 May 2015, by Georgia Douglas

On 17 April 2015, the New South Wales Court of Appeal handed down judgment in the 15 year legal battle of NSW v Shaw [2015] NSWCA 97 (NSW v Shaw), finding that there was no implied term of mutual trust and confidence in probationary employment contracts [...]

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[High Court: Civil forfeiture proceedings may need to await the finalisation of criminal proceedings](#)

28 May 2015, by **Simona Gory**

Civil forfeiture of asset proceedings may need to be stayed pending finalisation of the relevant criminal proceedings, at least in circumstances where the offences and circumstances relied on in the forfeiture proceeding are substantively identical to the criminal proceedings and there is no prejudice to the Commissioner arising from a delay to the forfeiture proceedings [...]

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Sports Law

[Validity of international sports arbitration awards rendered by the Court of Arbitration for Sport](#)

28 May 2015, by **Paul Czarnota**

The German case of Pechstein v ISU has thrown some doubt over the validity and enforceability of arbitral awards rendered by the Court of Arbitration for Sport, the arbitral tribunal established to determine international sporting disputes. Pechstein may provide a future avenue for challenging sports arbitral awards globally, and in Australia [...]

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