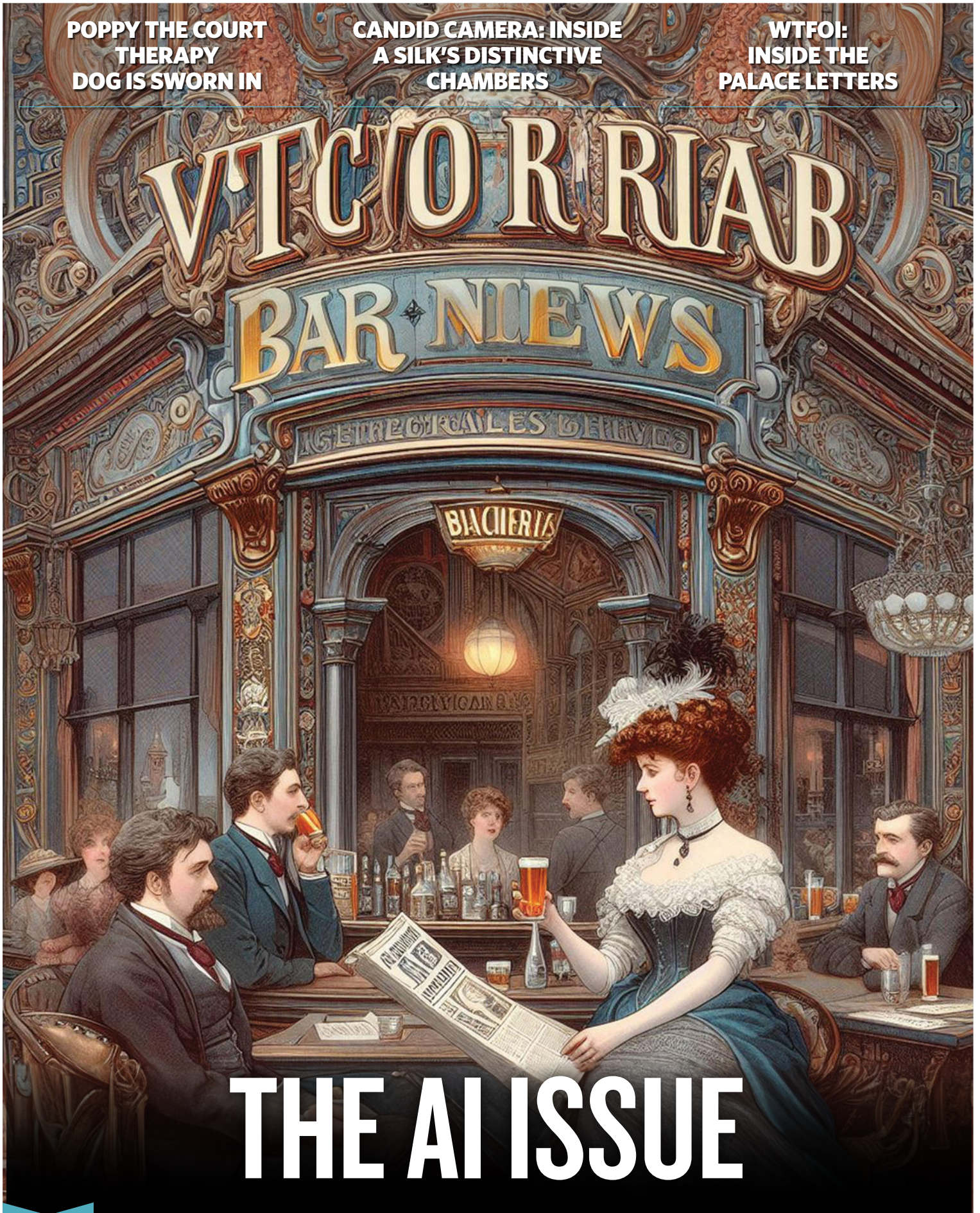
POPPY THE COURT THERAPY DOG IS SWORN IN

CANDID CAMERA: INSIDE A SILK'S DISTINCTIVE CHAMBERS

WTFOI: INSIDE THE PALACE LETTERS



THE AI ISSUE

What is AI, how does it work and does it matter?

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ISSUE 174 SUMMER 2023/24
VICTORIAN BAR NEWS

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Editorial

AI walks into the Bar

EDITORS

Most of us in the editorial team were in high school when the internet was becoming 'a thing'. At least one of us thought 'this will never take off'. Another editor took a similarly dim view of email.

Australia joined the global internet on June 23, 1989. It was the University of Melbourne which established our first connection to the world wide web—a link which, back then, provided just 56 kilobits of connectivity for the whole nation. That isn't enough to play a single piece of music from a streaming service (encoded at 128kbs), and it would take a week to download a movie.

In time, of course, the internet provided the foundation for email, online news, and innumerable opportunities to buy things we don't need or even really want. Most of us will agree that the internet is able to deliver unarguably desirable things: education for people in circumstances and places that make higher learning difficult or—in some cases—impossible, easier connections with family and friends around the globe, and the ability to read what 1,358 previous travellers have to say about that concerningly cheap hotel in Berlin that your friend's trying to convince you to stay in.

But there are plainly some less desirable aspects to the web: the proliferation (and acceptance) of fake news, cyber-bullying, and viral TikTok dance routines.

Whatever your view, it is hard to argue against the simple fact that the internet is—like science—of itself neither good nor bad. It is ultimately an extension, or expression, of the humans that create and use it. Or at least that has been the case. Now, artificial intelligence is challenging the notion that computers simply do as they're told; AI is (by one description) the simulation of human intelligence. And that has and will create room for debate and concern as to the proper limits for this new technology.

VBN Committtee: BACK: Joel Silver, Jesse Rudd, Emma Poole, Stephen Warne, Michael Wyles FRONT: Alexander Di Stefano, Lara O'Rorke

This edition of *Victorian Bar News* is 'the AI Issue'. Whether you know a little or a lot about AI, you will (even if unwittingly) already have been exposed to it in some way or another. Instagram is full of beautiful rooms which exist only in the mind of the computer program which dreamt them up. Websites with articles about celebrities written by entities with no heart, brain, or hands are mushrooming. And, the picture on the front cover of this edition of *VBN* was created entirely by AI; Alexander Di Stefano of the VBN Committee simply typed the words "Victorian Bar News Magazine Front Cover" into an AI image generator and out came the rather fascinating image (which we have reproduced without amendment).

And here's the rub: you'll see from the image that things aren't quite right. Words are misspelt. Some 'words' aren't actually words. The human hands are wonky. And that's leaving aside the fact that AI has evidently assumed we were talking about a public bar in the Victorian era rather than a college of barristers in Victoria who happen to be seen occasionally in public bars.

The point is that what AI has produced on this occasion, whilst rather charming, isn't really correct. And that resonates with a point made by the authors of one of the main pieces in this edition: AI can be good at delivering text which *looks* or *sounds* right but isn't necessarily accurate. And we needn't explain the implications of that for lawyers seeking to use AI as part of their work.

We hope that readers find the articles about AI in these pages as interesting as we have. A number of lawyers from HWL Ebsworth have crafted a piece giving a digestible summary of the technology behind AI and the potential ramifications for barristers. Sincere thanks to each of those HWLE lawyers for their careful work and considered views. The other articles about AI provide equally eybrow-raising insights into the way AI works (or does not work). One of these pieces asks AI to answer the sorts of questions you might expect to appear on the readers' course entrance exam to see whether AI deserves a spot on the Bar Roll.

The entrance exam is also of itself topical, with some debate presently spilling out from the Bar's lift wells and kitchenettes as to whether it is (at least in its current form) still serving the purpose/s for which it was introduced. So much so that a subcommittee has been appointed to review the exam. As our beloved readers know, we always welcome contributions on this or any other issue with some tangential or tenuous connection with the Bar. Drop us a line at vbneditors@vicbar.com.au. Thanks as ever to the VBN Committee for their work in bringing this edition to fruition, and to Guy Shield and Peter Barrett for their specialist input. We also want to single out, again, Sharni Doherty of the Bar Office for her constant enthusiasm and consistently first-rate assistance to us editors in producing these pages.

PRESIDENT'S MESSAGE

The year that was

GEORGINA SCHOFF

I have been President for barely a month, so the report that follows concerns the work of the Bar Council that Sam Hay KC led. The year was not without its challenges, and it was a privilege to be a member of a Bar Council that worked collaboratively to deal with them.

One of those challenges has been dealing with the chambers repricing implemented by Barristers' Chambers Limited which had the effect of significantly increasing the rent of some tenants. The rental increases were necessitated by increasing costs on the back of two years of COVID and government legislation that prohibited rent increases during that time. The increases were particularly steep for tenants of Castan and Aickin Chambers because the pricing model in place for those chambers historically failed to account for the cost of the common areas. The result was that for many years tenants in BCL-owned buildings have been subsidising the cost of leased buildings. The Bar Council has worked closely with BCL to develop pricing principles that we consider to be equitable between all tenants of BCL across all buildings. I can assure members that the decisions have not been taken lightly and that Bar councillors have carefully interrogated BCL's reasoning. I understand that the price increases may prove to be the catalyst for some to abandon BCL, particularly given the current state of the Melbourne office rental market. However, members should not underestimate the value of the BCL model. It enables our members to be housed together, with generous facilities for our clerks, our Bar Office, the readers' course, and the Essoign Club. In time we hope to also offer childcare facilities. Importantly, the BCL model means that members can join the Bar without stumping up a significant investment in chambers. We have the flexibility to move from one chamber to another, without the need to make good or fit out, and when we leave, we simply give 30 days' notice. Tenants are also able to take advantage of the secure technology platform that BCL provides, a great benefit when cyber security is a serious issue for us all. Many of our learned friends in other states take out a mortgage to buy into chambers before they can afford to buy a home. An article in the *Financial Review* recently lauded a group of Sydney barristers who have established chambers along similar lines to BCL in the hope of encouraging women and barristers from diverse backgrounds to join the New South Wales Bar. The barristers said that the cost of buying into chambers was a significant financial barrier to entry that had entrenched the New South Wales Bar as a place of privilege.

There are many challenges ahead for BCL and thus for the Bar. COVID has caused us all to rethink our accommodation needs. Many more barristers are sharing chambers and working from home. Much of our work is now done online. For this reason, many may be wondering whether they need such large chambers. The beauty of the BCL model is, of course, the flexibility that it allows us when our needs change. I thank the Hon John Digby KC for his careful stewardship of BCL through this difficult year. It has not been an easy task and has required hours of his time. I also thank Paul Clark the CEO of BCL who has valiantly borne the brunt of much tenant dissatisfaction. They have both worked very hard to ensure that the BCL model is sustained into the future.

The Bar Council this year has had a keen focus on promoting the Bar and increasing the fees paid to barristers. This work will continue throughout next year. A working group was established to make a submission to the Commonwealth Parliament Joint Committee on Corporations and Financial Services in response to its inquiry "Ethics and Professional Accountability: Structural Challenges in the Audit Assurance and Consultancy Industry", arising out of the PWC scandal. The gist of our submission was that governments can avoid many of the risks associated with multi-disciplinary firms if they turn to the independent Bars for legal advice. I thank Allan Myers KC, James Barber KC, Joseph Carney, Lachlan Molesworth, Daniel Kinsey and Sarah Zeleznikow for their work on the submission. The Committee has invited the Victorian Bar to attend a hearing next year and I am grateful to Allan Myers KC, James Barber KC and Joseph Carney who have agreed to attend on our behalf.

The submission also observed that the Commonwealth Legal Services Direction, which regulates the procurement of legal services by the Commonwealth, does not specifically deal with the briefing of counsel. It was submitted that the lack of any protocol for briefing counsel hinders the Commonwealth's ability to draw upon a valuable resource. A smaller working group comprising Lachlan Molesworth, Joseph Carney and David Blumenthal has been established to advise the Bar Council about how change might be effected and that work is well underway.

The Bar Council has also established a working group to look at the pay and conditions of our members who accept publicly funded briefs in criminal prosecutions, legally aided matters, and child protection across all jurisdictions. These briefs are chronically underfunded to such an extent that it is increasingly becoming a risk to the administration of justice. One issue that particularly concerns the working group is that in some cases counsel at the Bar table are all publicly funded, but at different rates that depend, not on the skill of the barrister, but on the briefing entity. This can lead to an 'inequality in arms'. The working group is currently gathering as much information as it can about the briefing practices of various government entities. The next step will be to use this information to demonstrate the need for change. I thank the members of the working group who have a very difficult task ahead: Craig Dowling SC, Colin Mandy SC, Oren Bigos KC, Ruth Shann SC, Eleanor Mallett KC, Catherine Boston SC, Rishi Nathwani SC, Christine Clough, Natalie Sheridan Smith, Adrian Kennedy, Jordana Cohen, Sophie Mariole, Jessie Taylor and Ffyona Livingstone Clark.

> "The Bar has for many years actively worked to encourage those from diverse backgrounds to join the Bar."

The Bar has for many years actively worked to encourage those from diverse backgrounds to join the Bar. Gender was the initial focus. Happily, today women make up about half of those who join our Bar each year. But the work continues. One of the Victorian Bar's most successful initiatives is the Indigenous Justice Committee's Indigenous clerkship program which provides an opportunity for indigenous law students to obtain paid work experience with the Supreme, Federal and County Courts in the hope of encouraging them to consider a career at the Bar. The Diversity Internship Program, launched in November this year, has a similar goal. Law students from diverse backgrounds spend two weeks working with judges from the Supreme, Federal and County Courts and a week with a barrister.

These initiatives make a real difference to the students who participate in them, strengthen our relationship with the courts and enrich our college. The work involved in administering these programs is undertaken by the members of our Indigenous Justice and Equality and Diversity Committees. I am inspired by their achievements and look forward to supporting them in any way that I can.

Our work responding to the findings of Coroner McGregor into the tragic death in custody of indigenous woman Veronica Nelson continues. Coroner McGregor recommended that the Victorian Legal Services Board and Commissioner and the Victorian Bar consider including First Nations cultural awareness training as a mandatory requirement of continuing professional development. In response to that recommendation the VLSB+C has invited the Victorian Bar to collaborate with it to develop training that will be mandated for barristers under three years' call, pursuant the Rule 11 of the Barristers' CPD Rules. We understand that there are many calls on the time of young barristers and that as self-employed professionals time spent training is not remunerated. The working group is doing all that it can to ensure that the training will be of real value to those who undertake it. I thank the members of the working group, many of whom were also on the working group established to respond to the recommendations of Coroner McGregor, and who have given so much of their time to represent the Bar in its dealings with the VLSB+C: Richard Dalton KC, Georgina Coghlan KC, Rachel Walsh, Julie Buxton, Timothy Goodwin, and Felicity Fox. From the Bar Office: Amanda Utt, Michelle James and Jodie Hill.

The Bar Office is currently managing the IT project which encompasses a complete overhaul of the Bar's website, its membership database, and the many portals through which it serves its members and the public. I am told that this is the largest project the Bar has undertaken since the construction of the physical building that we occupy on William Street. The work, commenced by previous Bar Councils, is now well underway. Progress has been steady and measured and remains on course for completion in the first half of next year. I wish to thank particularly our Executive Director, Amanda Utt, who has been managing this huge task (on top of all her other duties) and Michael Shand KC who has overseen it on behalf of Bar Council.

This year the Victorian Bar's view has been sought on many issues

concerning the administration of justice and the law. Much of this is driven by the energetic and ambitious agenda of the Commonwealth attorney-general. There have also been many requests for input from the Victorian Government. I thank all our diligent committee members for their work preparing submissions, often with very tight deadlines.

Next year it will fall to Bar Council to develop a new Strategic Plan for 2024-2028 (the current four-year plan expires in June 2024). This year 600 members participated in the 2023 State of the Bar survey. The results are currently being compiled into a report that will be published in the new year. We hope that they will provide us with a solid understanding of the demographics, wellbeing, and practices of our membership and its needs that will inform the Strategic Plan.

I thank those members of the 2022–23 Bar Council whose term has come to an end: Suzanne McNicol KC, Alistair Pound SC, Catherine Boston SC, Dr Michelle Sharpe, Ashlee Cannon and Nawaar Hassan, and pay tribute to Sam Hay KC. He has been a collaborative leader who has always been available. I would also like to thank Mark Robins KC who, whilst serving again on Bar Council, has decided to stand down as Honorary Treasurer, a role that he has performed diligently for two terms.

> “600 members participated in the 2023 State of the Bar survey. The results are currently being compiled into a report that will be published in the new year.”

Finally, I thank the hard-working members of our Bar Office, led so capably and efficiently by our Executive Director, Amanda Utt. It is a lean operation, and many have had to take on additional duties and roles from time to time. Miranda Tulloch, our Corporate Services Manager, was called upon this year to support the Preliminary Evaluation Committee which meets weekly for up to two hours in the evening over about three months. Kai Li Zhu, our in-house legal counsel, has a very heavy workload. It is thanks to her (and Amanda) that we have such a good working relationship with the VLSB+C. Our education team, led by Michelle James, has managed two readers’ courses, three prescribed sexual harassment trainings seminars and many other seminars and events without a hitch, and Mark Bryant has kept a close eye on the books. We have also been extremely fortunate to recruit Sharni Doherty to the team. She has been of invaluable assistance to me.

Verbatim

VBN

Supreme Court of Victoria

Shao v One Funds Management Ltd, 5 and 6 April 2023 (during Holy Week)

Day 1: Redemption

MR MOLLER: It’s appropriate that at Easter we are talking about redemptions and we are to be redeemed. Your Honour was waiting for that joke.

Day 2: The myth of the uroboros and Pontius Pilate

MR EVANS: Now, your Honour, I need to take your Honour back to the ING decision, because Mr Moller made submissions in which he suggested that we were dealing with an uroboros, a snake that eats itself, by reference to the way in which we sought to say that redemption could only occur by payment in cash and only the payment in cash could make redemption occur.
DERHAM ASJ: Yes. How do you spell uroboros, Mr Evans?
MR EVANS: U-r-o-b-o-r-o-s.
HIS HONOUR: Thank you.
MR EVANS: I’ll owe a debt to Mr Stuckey of counsel for suggesting that word to me in a different context. It made me laugh at the time.
HIS HONOUR: And me now.
[Later in the day]
HIS HONOUR: Bear in mind that Justice Garde really has the conduct of this proceeding, in the ultimate sense. I’m simply doing what he’s not in a position to do. That is, to determine the preliminary questions that are being framed, and ordered to be determined. And the final important matter is, I’m on a three-month limited term.
MR MOLLER: Yes.
HIS HONOUR: I end at the end of May.
MR MOLLER: I think it was Pilate who sent the matter back to the Sanhedrin, didn’t he, your Honour?
HIS HONOUR: Your knowledge of the Bible is much better than mine, Mr Moller.
MR MOLLER: Sorry, your Honour. I’m obviously in a more religious mood—notwithstanding my friend, Mr Evans’ reference to Egypt and Greek magical scepticism with snakes eating themselves.
HIS HONOUR: I think you started that snake to run.
MR MOLLER: I had to look that up.
HIS HONOUR: That’s why I asked him to spell it.

Federal Court of Australia

StarTrack Express Pty Ltd v TMA Australia Pty Ltd [2023] FCA 1271, 20 October 2023
MR WALLIS: And can I just confirm we do not take the point that the Commonwealth Government will not be able to meet an undertaking as to damages.
SNADEN J: No.
MR WALLIS: If it was the Victorian State Government we might have had to think a bit harder.

September 2023 Readers

FRONT ROW (L-R): James Mitchell, Allen Clayton-Greene, Georgia Suhren, Thomas Diaz, Nicolas Muniz Saavedra, Ran Zaydan, David Blumenthal, Courtney Hart, Amy Armstrong, Caitlin O'Neil
SECOND ROW (L-R): Hayley Daniel, Dylan Ioannou-Booth, Joshua Cunningham, Chadwick Wong, Camilla Middleton, Elizabeth Main, Hetty Champion de Crespigny, Taylah Stretton, Bryony Seignior, Candice Jackson, Tapas Kametan, Marlynn Koim, Isabelle Murphy, Bianca Sacco, Ben Kerlin
THIRD ROW (L-R): Evan Ritli, Jasmine Still, Aaron Lane, Bree Ridgeway, Scott Smith, Luke Chircop, Angela Kittikhoun, Kelly Butler, Leigh Crosbie
BACK ROW: (L-R): Jamie O'Regan, Ben Holding, Angus Mackenzie, Robert Marsh, Tim Noonan, David Rofe, Andrew Theodore, Oliver Lloyd, Adrian Dean

Readers' Digest

September 2023

Each edition, we reach out to the latest cohort of readers to get to know them better

David Rofe

Favourite fictional lawyer? Horace Rumpole.
If you could argue any historical case, what would it be? The OJ Simpson trial, for the defence.
Best piece of advice you learnt in the readers' course? Beware the knife in the napkin.
Who are you reading with? Anthony Lewis.
What is your guilty pleasure? Old Gold dark chocolate.

James Mitchell

Favourite fictional lawyer? Cleaver Green (*Rake*). A great criminal barrister and a great Australian ratbag.
Historical case you'd argue? *Chamberlain v R*. An astonishing example of why we do what we do.
Best readers' course advice? Remember your case theory!
Reading with? Richard Edney.
Guilty pleasure? A cheeky pasta at Tipo.

Amy Armstrong

Favourite fictional lawyer? Ling Woo from *Ally McBeal*. Fierce AND stylish—potent combination.
Historical case you'd argue? The Gwyneth Paltrow ski collision trial. Is early 2023 historical?
Best readers' course advice? Book a decent holiday in your calendar, long in advance and stick to it!
Reading with? Kylie Evans SC.

Scott A Smith

Favourite fictional lawyer? She-Hulk.
Historical case you'd argue? *Depp v Heard*.
Best readers' course advice? Book a holiday.
Reading with? Dugald McWilliams.
Guilty pleasure? Watching reaction videos on YouTube of rappers listening to heavy metal songs for the first time.
Guilty pleasure? Very bad Netflix Christmas movies. Especially when there are even worse sequels.

Ran Zaydan

Favourite fictional lawyer? Erin Brockovich.
Historical case you'd argue? *Chamberlain v R* because there were great legal points to argue.
Best readers' course advice? You've made the best decision to come to the Bar.
Reading with? Moya O'Brien.
Guilty pleasure? Chablis.

Candice Jackson

Favourite fictional lawyer? Atticus Finch.
Historical case you'd argue? The Mabo case. It would have been an honour to be part of something so significant and meaningful.
Best readers' course advice? You will learn to tolerate the anxiety. LOL.
Reading with? Sam Tovey.
Guilty pleasure? Having a bubble bath with a true crime podcast.

Bryony Seignior

Favourite fictional lawyer? Lionel Hutz, for making us laugh with his unbridled incompetence.
Historical case you'd argue? I have a keen interest in the dynamics of family violence and would have loved to have been involved in the Royal Commission into Family Violence.
Best readers' course advice? Be careful, there's a knife in that napkin.
Reading with? Diana Price.
Guilty pleasure? Coffee in bed—most mornings.

Thomas Diaz

Favourite fictional lawyer? Lionel Hutz, for his impeccable ethics, undoubted competence, and timeless humour.
Historical case you'd argue? *Codelfa v State Rail Authority of NSW*, to put a halt to the noise and vibrations!
Best readers' course advice? Don't forget to bring your business shoes into chambers.
Reading with? Kane Loxley.
Guilty pleasure? Basketball … Three nights a week!

Bree Ridgeway

Favourite fictional lawyer? Cleaver Greene—to watch, not to emulate.
Historical case you'd argue? *Estate of Henrietta Lacks v Thermo Fisher Scientific Inc*. The HeLa cell line gave us the polio vaccine and so much of what we know of modern medicine but it was commercialised on the back of a great injustice. Trying to find a way through that legal and ethical problem would have been fascinating.
Best readers' course advice? Whinging is not good advocacy.
Reading with? David Sanders.
Guilty pleasure? Super dulce de leche gelato from Gelato Messina. Regular dulce de leche was pretty good to start with but they went one step further and it is heaven.

Angela Kittikhoun

Favourite fictional lawyer? Sydney Carton (*A Tale of Two Cities*) for his quiet brilliance.
Historical case you'd argue? *FHR European Ventures LLP v Mankarious* because it concerned such an interesting issue—namely, whether a principal has a proprietary claim to a bribe or secret commission received by an agent.
Best readers' course advice? Be courageous and measured.
Reading with? Tamieka Spencer-Bruce SC.
Guilty pleasure? Eating chocolate-covered liquorice bullets.

Jasmine Still

Favourite fictional lawyer? Lawrence Hammill QC (*The Castle*), for teaching me constitutional law.
Historical case you'd argue? The Scopes Monkey Trial, because you can make a monkey out of me.
Best readers' course advice? Take holidays! (Or at least that's the advice I heard them say).
Reading with? Liam Brown SC.
Guilty pleasure? Playing the bagpipes. … I'm concerned my neighbours are plotting a class action.

Oliver Lloyd

Favourite fictional lawyer? Hard to go past the eloquent, warm and principled Atticus Finch.
Historical case you'd argue? Mabo or the Communist Party Case—they each concerned a fundamental principle of our country.
Best readers' course advice? Keep propositions as simple as possible—for clients, instructors and judges!
Reading with? David Morgan.
Guilty pleasure? A summer's Monday morning watching live NFL (go Eagles!).

Liz Main

Favourite fictional lawyer? Helen Fisk. I love her honesty, her individuality, and her fabulous brown suit.
Historical case you'd argue? Oscar Wilde's libel trial, so I could warn him he was doomed to fail.
Best readers' course advice? Be reliable.
Reading with? Sandip Mukerjea.
Guilty pleasure? Reading bad restaurant reviews.

Evan Ritli

Favourite fictional lawyer? *Seinfeld's* Jackie Chiles.
Historical case you'd argue? The Nuremberg Trials.
Best readers' course advice? Take holidays.
Reading with? Gideon Boas.
Guilty pleasure? Extra dirty martinis.

Allen Clayton-Greene

Favourite fictional lawyer? Atticus Finch, because "you never really understand a person until you consider things from their point of view".
Historical case you'd argue? *Yanner v Eaton* because native title, usufructuary rights, Kevin Gray… what an amazing case!
Best readers' course advice? If you get a bad reaction from the judge, be curious not crushed.
Reading with? Tom Clarke.
Guilty pleasure? Watching Tom Baker-era *Dr Who* and eating Whittaker's 72 per cent Dark Ghana. Enough said.

Camilla Middleton

Favourite fictional lawyer? Elle Woods. She's the reason that, at eight years old, I decided to become a lawyer.
Historical case you'd argue? *A v Hayden*—a contracts case arising from a wild set of circumstances. As Mason J said: "There is an air of unreality about this stated case. It has the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart".
Best readers' course advice? Book a holiday.
Reading with? Matthew Hooper.
Guilty pleasure? Buying things I don't need because they're on sale.

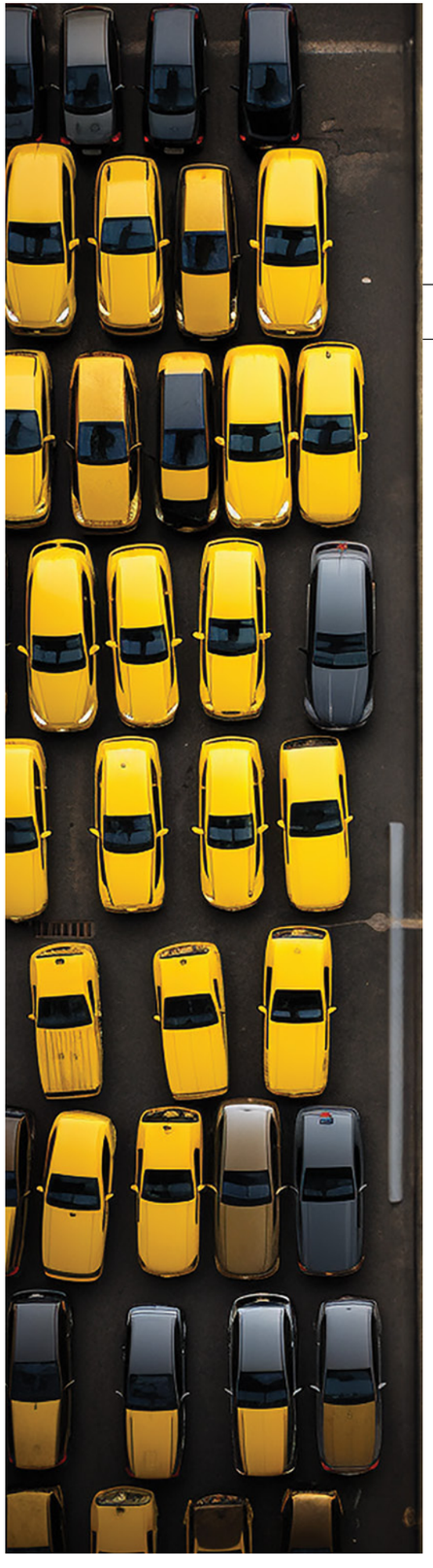
Andrew Theodore

Favourite fictional lawyer? Saul Goodman. Hardworking and creative.
Historical case you'd argue? The 1947 trial of Andy Dufresne. He didn't do it.
Best readers' course advice? Be polite, not hostile; respond, don't react; charm, rather than challenge.
Reading with? Adam Hill.
Guilty pleasure? Gelato.

Aaron Lane

Favourite fictional lawyer (and why)? Oliver Babish of West Wing fame—fearless and no-nonsense.

Historical case you'd argue? *Pape v Commissioner of Taxation*—even if you lose, you can still win.
Best readers' course advice? Avoid taking the court on a "Nervous Parade of Knowledge".
Reading with? Thomas Warner.
Guilty pleasure? A long lunch.



The Cab Rank Rule

Ingrid Braun

On weary shoulders lie
Her case, (a silent sigh)
The barrister's no fool
Hark to the cab rank rule

My client, like so few
Her truthful ways outflew
Her case, a factual stew
Looks like it is all true!

But then, I doth lament
A new clean document.
Produced, out of the blue
Is on my close review…
One that can surely skew

The case was ere so strong
Now falls well into wrong
She speaks with fading valour
And quickly growing pallor
The client, at her disgrace,
Told porkies with straight face!

T'wards justice we do race.

Her case is now a mess
For she must now confess
Her former alibi
Is shot into the sky!

The court, at post eruption
Came to the great deduction
The judge, with a clear sigh,
Says "documents don't lie!"
(My client's day is nigh…
She sees my hands held high
My face says "Why? Why? Why?
We really coulda won it
If you had just not done it!")

The judge was not for us
But counsel brooks no fuss.
How foolish does she feel?
But then regains her steel.

The case came like all others
She couldn't have her druthers
So thanks, O Cab Rank Rule…
That counsel's not the fool!

AROUND Town

Remarks of the Hon Justice O'Meara

VICTORIAN BAR READERS' DINNER, 18 MAY 2023

Good evening ladies and gentlemen and thank you for the very warm welcome.

I acknowledge all distinguished guests as well as any Aboriginal or Torres Strait Islander peoples present.

Justin Graham KC sent me this letter asking me to give this speech. It says, in terms, you can talk about 'whatever you want'. Think about that for a moment. It's not that long ago that a Supreme Court judge wanted to speak at the Bar Dinner about his own grandfather's experiences during World War I. Nor is it really that long since a County Court judge addressed a dinner about the detail involved in certain changes made to the Civil Procedure Rules. For that matter, a judge once delivered an extremely lengthy speech concerning his own love of cricket.

Mindful of these and other such examples, I thought that I would adopt a relatively conventional course and, at least for a while, simply talk about myself.

You've already heard about some aspects of my career at the Bar. Let me summarise that for you: I came to the Bar in 1998. I proceeded to lose a great number of cases. I was so good at that, apparently, that it qualified me to become a silk in 2011. I then proceeded to lose an even greater number of cases. Ten years later that qualified me to become a judge. I then faded into relative obscurity for exactly two years to the day until addressing this dinner tonight.

In my time at the Bar, however, I was lucky enough to work and become friends with some truly great barristers.

One was the late, great, RJ Stanley QC. Dick was a natural. Handsome, debonair and with an easy charm akin to that of Robert Redford: if any of you know who that is.

I did a few cases with Dick early on, and several years later we became colleagues in chambers. I was proud to call him my friend. He was also my hero; insightful, kind, hard-working and humorous. One day I was led by him. Dick did everything; I did practically nothing. Dick opened the case to the jury. He was so charming, magnetic and persuasive that it was not unknown for jury members to clamour for his attention. In this case, his opening was so powerful and intoxicating that even the normally flint eyed defendant got the wobbles. A good figure was offered and the case was settled at the Bar table.

We retired to Dick's chambers, victorious. The client sobbed with gratitude and relief. She said, "I can never really thank you enough". When she said "you", she really should have said "Dick". At one point, overwhelmed by emotion, she extended her arms widely and came rushing across the room. Dick removed his wig and placed it on the desk bracing himself for the inevitable impact. The client sailed straight past him, and, completely inexplicably, threw her arms around me. I feigned protest; but nowhere near hard enough. To be perfectly honest, Dick was a bit miffed, and rightly so; but realistically he probably had only another day to wait until his next triumph.

James Athorn, Carly Burgess, Wendy Burgess, Wayne Burgess

Another great was, and still is, Jeremy Ruskin KC. I also worked with him from early on, and we also later became neighbours in chambers.

One uncommon day we were due to go to the High Court in Canberra. We discussed the argument, which I said was about the law of negligence. The Full Court had also said something about the law of bailment, whatever that is. Jeremy asked me about that part of the case, and I waved dismissively and said, "Don't worry about it".

That was a rookie mistake. If they don't teach the following rule in the readers' course then they should: don't ignore the parts of the argument that you don't like or understand. But I'd just broken that rule, and in so doing coaxed my leader into ignoring something that the Full Court had thought was important in deciding the case against us. And the following day we were facing the kind of people who don't usually miss these kind of things.

The next morning we were sitting in Court 2 in Canberra opposed to a true great of the Sydney Bar, BW Walker SC. Legend has it that Bret travels to Canberra with a custom-made attaché case with internal moulding crafted to cradle a chosen volume of the CLRs or other suitable tome. The idea is that the book can be extracted at the critical moment and deployed to vanquish the argument of the opponent. It's the barristerial equivalent of the sniper who can open his case, assemble his rifle and shoot a bullet through the head of his target; all within 3.9 seconds.

Jeremy and I were sitting at the Bar table, fretting. Bret was also sitting at the Bar table, initially with his back to us. By contrast to us, he looked completely at ease. At one point he swung around, and open in his right hand was a book, presumably extracted from the attaché case. Bret started telling us rather airily about how he'd been in Court 1 for five days in a case involving Constitutional claims over water. He then said that our case raised what he described as "an interesting question". He might have said some other things too, if either of us could hear them. We were transfixed by the title of his book: *Palmer on Bailment*.

Time stopped as Jeremy and I turned and looked at each other in utter horror. It was rather like in the cartoons where the characters are looking in every direction and no direction all at the same time. Except that we were sitting at the Bar table in the High Court of Australia in Canberra and each of us had realised


D'Arcy Hope, Dr Andrew Apel, Dr Robyn Apel


Sam Hay KC


Beth Shingles, Odette Richwol, Diana Price

that we were very likely cast in the role of the Coyote to Bret Walker's Road Runner; imminently to be crushed by a giant anvil bearing the words *Palmer on Bailment*.

Jeremy eventually managed a strangled whisper: "You told me not to worry". To which I searched for my most useful and articulate response and said: "Um". The Chief Justice of Australia then said, "Yes, Mr Ruskin". Jeremy started talking about the law of negligence. I started contemplating life beyond the Bar. Then a miracle happened: Bret was waving his copy of *Palmer on Bailment*, but either no one on the court could see it, or no-one was interested, and we emerged unscathed.

Later we got the result: appeal allowed. The solicitor said that he was grateful to both of us. Jeremy was appropriately gracious. If I was gracious at all, I was nowhere near gracious enough.

None of this was really that long ago. However, few of the people involved were not male or white. Happily, your world is a little different. I now have the occasional privilege of sitting on admission ceremonies and getting to see the modern and diverse profession. That diversity is also evident in tonight's group of readers.

I'm reliably informed that more than 50 per cent of tonight's group are female; and that there are readers hailing from Kenya, the Philippines, the United States, the United Kingdom, Canada; as well as Australia. It's absolutely fantastic, and in some ways affirming, to see significant change for the good take place over such a short period of time.

Now, for me, the days that I've spoken of were good days. There are many days in which the barrister is the undeserving beneficiary of the miracles of the universe. You'll all have your share of miracles too. Enjoy those days. Because there's others.

In personal injuries litigation, it's common—even customary—for the plaintiff to give evidence of experiencing "good days and bad days". However, I've never heard any barrister speak of good days and bad days at the Bar. Yet they're all around us; even for BW Walker.

Sometimes the bad days are just a bit annoying. But other times it can be quite confounding, and even distressing. An example of the latter might be when one manages to lose the unloseable—a topic on which I might be regarded as having "specialised knowledge" within the meaning of s 79 of the *Evidence Act*. But there are actually lots of ways in which a barrister can have a bad day.

For me, one of those came when I was a young silk. There were lots of barristers in that case. Some were my friends. The judge had been a friend of mine too when he'd been at the Bar. The case went for a long time. From the start, things went wrong. For me. The judge got into me. Once he started, so did my opponents. It's a contest, after all; and their client's interests could be advanced. I don't mean to suggest that the judge or anyone else did anything improper or wrong. It might have been professional dereliction for my opponents to have done differently. But it wasn't happening to anyone else in the case, and it came to feel personal. Very personal. It felt that way; day after day.

I sought to project calm and control; and to cover the hurt with a thin and bitter humour. But this time the randomness of the universe was against me. Some colleagues who weren't in the case got wind of it, and tried to jolly me along by joking about it all in a well-meaning sort of way. Some of that involved passing on commentary concerning my performance in the case. For me, there was no escaping the torment.

Many months later, in epic written submissions, my opponents named and criticised me personally, and in great detail. By that point, the hurt and anger within me was so great that I could feel nothing. At that point, a miracle finally occurred, and the case settled. But my appreciation of miracles was gone. I felt irretrievably angry, hurt, and alone.

I blamed myself. It doesn't much matter whether I was right or wrong to do that. But the consequence was that in the years that followed I worked even harder. Fuelled by anger and hurt, I thought that I would redeem myself—and that my wounds would heal—if I worked and fought cases like a devil.

But the situation became worse; much worse. I lost my joy. I took my joylessness home. I saw it etched on the faces of my wife and then little and beautiful children. I was on a path to losing them, and myself.

And what of my colleagues and friends? I didn't tell any of them what I'd felt, or was feeling. How could I ever tell them about something that I didn't understand and was pretending wasn't happening? I could do no more than laugh with an intractable bitterness; sometimes meanly, and at the misfortune of others.

Dick Stanley died in his sleep in 2020. He'd been sick for some time; but for me, the final nature of his death was sudden and a little unexpected. I was in no position to feel any normal form of grief. Dick passed without me ever being able to tell him what he meant to me. I regret that very deeply.

Ironically, in the midst of all of this, I became more and more successful


Shanon Finegan, Iman Osman, Shivani Pillai

AROUND TOWN

> "I've never heard any barrister speak of good days and bad days at the Bar. Yet they're all around us."

professionally. The most ironical moment came when I was confirmed as senior counsel assisting the Royal Commission into Victoria's Mental Health System. What did they know about any of this? Nothing. Ever.

One morning I was sitting alone at the kitchen bench. The day before I'd been in an appeal. Like the client in Dick's chambers many years before, I started sobbing uncontrollably. But unlike her, I couldn't stop. And I now had a dark feeling deep within me. I couldn't retrieve myself, not even with work. As the days went on, I didn't know what to do.

Fortunately, I searched something that hadn't existed when I started at the Bar: namely, the VicBar website. And I found something on it that I didn't know existed at all: namely, the VicBar crisis service. That service saved me, and my family. I would not be here today without it.

There would be people—maybe even people in this room—who would think that I shouldn't tell this story. What? A barrister who lost it? And now he's a judge. What if he loses it again? How can he sit dispassionately and hear cases? Particularly cases involving psychiatric injury? He should stick to funny stories about the good times. That's what people want to hear, particularly readers.

I understand all of that. But for me, that kind of thinking led me to the abyss. Critical, suspicious, unforgiving and cruel. And I would like to think that my suffering has made me more just; not less. It's something that is still in me, and probably always will be: although I've accepted it and have sought to make peace with it. But this is the first time that I've spoken of it in this way.

So, what has any of this got to do with you, the readers' group of September 2022? In 2023, you are the future. You are the inheritors of the system. And it is a good system that on the best days delivers real justice. None of you came into the system because you wanted to destroy it, or anyone else, or yourself.

But all of you will experience bad days, and more than one of you will experience something similar to what happened to me. And when that happens, you shouldn't feel alone. We shouldn't be pretending that everything's fine; and you shouldn't be left blaming yourself and pretending that it's ok.

In a profession which is competitive, and intrinsically involves winning and losing, and in which the people that you're competing

Tristan Joseph, Robert O'Neill, Duncan Chisholm, Matt Garozzo

Ashleigh Best, Laura Schuijers, Rob Ireland

Natasha Giles, Alistair Hackett, Kepler Ryan

Sharan Nambiar, Shakti Nambiar, Preethi Saldanha

against also double as your peers and friends, it's probably no more realistic to tell you to seek support from your friends than it ever was for me. After all, how could I turn to anyone when I didn't even know what was happening? The real point, I think, is to recognise that it can happen to you and to recognise it in yourself when it's happening. When it happens, seek professional help as early as you can.

So, enough. You are all barristers now. Undoubtedly you will already have felt some of the ups and downs. And they are actually what makes it the greatest job of all. As Ross Gillies KC says, "God loves a barrister". However, it is so much more than a job; it's a calling. Even the best solicitors are still in the stands when the action really starts in court.

Each one of you has been called onto that field of play to represent real litigants in real cases. And those cases are meaningful: which is why the client was sobbing that day in Dick Stanley's chambers. No-one rational wants to be a litigant. It's stressful, unpleasant and uncertain. But you—the barrister—are the shepherd in your client's hour of need. You are also their advisor and their avatar. It's a calling of true nobility within a system that exists for the just determination of conflict and issues of real importance.

Within that system—if you look—you will see every part of life: the elegant, the ugly, the just, the unjust; and the hilariously funny. In one moment, you see the sobbing and grateful client, the next Bret Walker's attaché case; yet another is your own tears and moment of reckoning. And all of that happens because what you're doing really matters. There's really nothing like it.

To each of you I say:

» when you've won the unwinnable and lost the unloseable;
» when you've sat with a lump in your throat awaiting the verdict of a jury;
» when you've felt the bitter and real sting of loss;
» when you've prepared so assiduously that your argument transcends the mere notes that you prepared to guide it; and
» when you've seen the gratitude in the eyes of your client and the admiration in the eyes of your opponents…

…then in those and other such moments you'll really know that you're alive. And you'll also know—and really feel—an appreciation for life and the human condition. And in the end, the feeling of life is not only better than the alternative; it, like every single one of you, is beautiful.

Red Bag Blue Bag

In a twist on the conventional Red Bag Blue Bag concept, VBN *invited a mentor (now silk) and reader who each attended the May 2023 readers' dinner to share their reflections on the speech that Justice O'Meara delivered that evening (reproduced on the preceding pages). Here are their responses.*

Red Bag—Christian Juebner KC

Over the years, I have listened to many speeches. Some good. Some excellent. The speech delivered by the Hon Justice O'Meara in May 2023, at the Readers' and Mentors' Dinner was, by a solid margin, the best address I have had the privilege of listening to.

Whilst, like many great speeches, it was infused with much wit and humility, it was brilliant because it was honest. Brené Brown wrote, "Vulnerability is our most accurate measurement of courage". In speaking openly and candidly about the struggle with his own mental health as a barrister, his Honour displayed enormous courage. That is especially so given his Honour addressed a profession where vulnerability may well be regarded as a liability. Of course, in truth, we are all vulnerable. But we are not all courageous by openly displaying it.

Most of us have either experienced, or witnessed others suffer from poor mental health. My family is no exception. About 20 years ago, my uncle took his own life. That has left deep scars in my family. As barristers, we are often harsh judges of our own performance. We are also too often harsh judges of the performance of others. Gossip travels fast and far at the Bar. That provides fertile ground for disappointment and worse.

There is only one small bit of advice that I would offer. After losing a case early on in my time at the Bar (and I am by no means suggesting that that was an isolated incident), a very wise and weathered silk said to me that if I was going worry about winning or losing cases, I was probably in the wrong game. It took me a little while to understand what he meant. I think he was trying to tell me that we should not get attached to, or measure our worth by, the results of our cases. We will win some and lose some. We are not all dealt cards of equal value. We have a limited amount of control over the ultimate outcome. As barristers, we need to try our best in the running of the case and leave the rest to the judge. Whilst it is good to reflect on our performance to seek continuous improvement, we should also not be too hard on ourselves in the process. Most of us have at times thought of our best points only after leaving the courtroom. Finally, if you are struggling, speak up. My door is always open.

Blue Bag—Haley Aprile

I will (sheepishly) admit that prior to the evening of the dinner to mark the official end of the reading period for the September 2022 readers cohort, I did not know very much about Justice O'Meara. When he walked up to the lectern and started his speech it was immediately witty. His Honour mused about his mentors and painted himself as the somewhat hapless junior (endearing himself to hapless readers), although I am sure that was not in fact the case.

And then his Honour began speaking about barristers having good days and bad days, and about his own dark time as a young silk. His Honour spoke not just about having a few bad days, but about being so bereft that he almost lost his family. The change in tone and topic made everyone in the room visibly sit up and pay greater attention. His Honour spoke so candidly about the mental ill health from which he had suffered and made himself so vulnerable in doing so, that it was easy to imagine how a barrister might fall into the "abyss", as his Honour put it. It was also incredibly humbling, as a 'baby barrister' to hear that such an esteemed member of our new profession is, just like us, fallible.

What I took away from his Honour's speech that night is that it's ok to not be ok, and it's ok to admit that you're not ok. That even those we put on a pedestal and admire can feel that way. While that might seem like an obvious or trite lesson, in a profession where we are trained to appear polished, calm and in control, and to prepare to such an extent that we know our argument and case backwards, it seems to me to be equally important to impress upon new barristers that we won't always be able to perform in that way or to that level.

I have found my first year as a barrister to be fun, challenging and stimulating, but also exhausting, mentally-draining and stressful. Which is why I feel so fortunate to have witnessed his Honour's speech first-hand—the message is something which gives me great comfort and I know it is something to which I will often return.

As his Honour finished his speech to a standing ovation and barely a dry eye, it was obvious to all of us there that we had just been given an exceptional gift.

Victorian Bar mediation referral schemes in action

The referral schemes are positioning the Victorian Bar as a leading provider of high-quality mediation services. GLEN PAULINE

Creation

Born of the pandemic to provide the County Court with experienced barrister mediators to resolve cases as quickly as possible, the referral schemes are achieving objectives including access to justice through facilitating fair, proportionate and timely resolution of disputes by available mediators with case appropriate experience, at fixed fee rates.

The *Commercial Division Referral Scheme* was signed by Judge Woodward[1] and launched on Zoom on 20 October 2020. The *Family Property List Referral Scheme* was finalised by Judge Tran, signed by Judge Tsalamandris[2] and launched on Zoom on 2 December 2021.

The schemes stand as a legacy of the pandemic to the benefit of the Court, parties to proceedings and nationally accredited barrister mediators. They are excellent examples of dispute resolution systems designed with the needs of the publicly resourced courts, parties to particular types of litigation, and mediators in mind.

Purposes

The schemes expressly recognise the value of mediation and its "critical importance" in facilitating the "fair, proportionate and timely resolution of disputes", which "serves the public interest in the due administration of justice…[and] improves access to justice". The Court utilises its power to refer proceedings to mediation under s 66 of the *Civil Procedure Act 2010* (Vic).

The schemes expressly aim to provide "visibility and clarity to members of the Bar, judges, judicial registrars, court staff, practitioners and parties about how mediation services can be requested from the Bar by the Court", and recognise it is in the interests of the administration of justice that referrals be directed to barristers with "appropriate experience" and "fairly shared amongst available barristers".

Process

The Bar Office's in-house lawyers manage the schemes under the guidance of the Alternative Dispute Resolution Committee. Details of a referral are circulated by the Bar Office to appropriately experienced barristers seeking EOIs from available non-conflicted nationally accredited barrister mediators. EOIs are considered in accordance with the formal nomination process approved by the Bar Council in 2022 to give transparency to the nomination process and ensure the principles of the schemes are achieved. The Bar Office advises the names of the barristers to be nominated by the President. The President will nominate at least three (if possible) and not more than five available mediators.

Commercial Division

Judicial Registrar Muller's feedback is that the Commercial Division Referral Scheme is working well and is a valuable option for the court in managing cases. It is estimated that between two and five days of court time is saved per case resolved at mediation. The 2021/22 County Court Annual Report[3] says:

> The Division continues to promote appropriate dispute resolution (ADR)… A focus during the reporting period was on identifying, as early as possible, matters which might benefit from ADR significantly earlier than the time a proceeding is referred to mediation under the standard orders and then proposing possible ADR procedures… [including] an earlier JRC or private mediation…[which] has enabled the Court to propose ADR before significant costs have been incurred by the parties. This often greatly assists the parties in resolving matters more expeditiously…

Family Property List

Judge Tran and Judge Fraatz are very pleased with the Family Property List Referral Scheme's operation. The number of judicial mediations conducted by the Court has fallen from 75 in 2020–21 and 23 in 2021–22 to just six in 2022–23 as a result of the standard timetabling orders in each matter, which include orders relating to mediation and referral to the scheme. The 2021/22 County Court Annual Report[4] says, "The new procedures for alternative dispute resolution have proven effective—of the 211 proceedings which were finalised… only three proceedings were finalised by trial".

Benefits

The schemes promote barrister mediators to solicitors practising in their practice areas, and also Victorian Bar nationally accredited mediators generally. The nomination process followed by the Victorian Bar has generally resulted in senior and experienced barrister mediators being nominated and appointed at a capped fee. The parties are getting good value for money in their mediator and the mediator furthers their practice. The schemes have provided an opportunity to mediate a dispute to more than 28 nationally accredited barrister mediators matched to the case. Less experienced accredited mediators have the opportunity to participate in the schemes, be promoted, and have on some occasions been appointed, furthering their experience.

Glen Pauline is chair of the Alternative Dispute Resolution Committee.

1 Now Justice Woodward of the Supreme Court and President of VCAT.

2 Now Justice Tsalamandris of the Supreme Court.

3 Page 57.

4 Page 48.

All grown up, 25 years on

DAN STAR

The March 1998 Bar readers celebrated our 25th anniversary of signing the Bar Roll with a dinner at the Essoign Club earlier this year. Shane Lethlean, our group's spiritual leader and social organiser, made it happen. The event was attended by 21 members of the cohort, along with Bar President, Sam Hay KC. The night was an opportunity for colleagues and friends to catch-up and reminisce about our shared "origin story". There were 56 of us readers back in the day, including three Papua New Guinean colleagues. A quarter of a century later 26 are still in active practice in Victoria.

Our group produced four superior court judges, a VCAT deputy-president (Richard Wilson), a magistrate (Mary-Anne MacCallum), a judicial registrar at the Federal Court (Phillip Allaway), a judicial registrar at the Children's Court (Judy Benson), 14 silks, and even a Bar legend (Julian McMahon SC).

Court of Appeal Justice Leslie Taylor gave a short and sweet after dinner speech. As the night's self-appointed MC, I noted that the other superior court judges of our group, Justices Moore and O'Meara of the Supreme Court and Justice Johns of the Family Court, need not feel left out as we will have more reunions in the future.

Remarkably, as the photos evidence, we have not aged in the last quarter of a century!

BACK ROW: Andrew Clements KC, Michael Sanger, Deputy President (VCAT) Richard Wilson, Susan Brennan SC, Dan Star KC, Nick Tweedie SC, Matthew Fisher, Justice Steven Moore, Shane Lethlean, David Langmead, Paul Hannan, William Stark, Justice Stephen O'Meara, Sam Hay KC
FRONT ROW: Justice Sharon Moore, Judicial Registrar Judith Benson, Jamie Singh, Michael Bearman, Justice Lesley Taylor, Roisin Annesley KC, Suresh Senathirajah KC, Robyn Wheeler
LEFT: the 1998 Bar readers.

Katrina Rathi, AAT President Justice Emilios Kyrou, Kishwar Chowdhury, Molina Anasthana, the Hon Michael O'Brien MLA, the Hon Justice Kristen Walker

Astrid Haban-Beer, Judge Sharon Burchell, the Hon Dr Samantha Ratnam MLC (Leader, Victorian Greens), Shivani Pillai, Radhika Kanhai

Jordain Wongtrakun

Asian Australian Lawyers Association 10th Anniversary Gala

DANIEL NGUYEN

On 1 September 2023, the Asian Australian Lawyers Association (AALA) held its 10-year anniversary gala celebration at the Arts Centre Pavilion Room, of which the Victorian Bar was a proud gold sponsor.

AALA's primary objective is to promote greater cultural diversity in the senior ranks of the legal profession.

Molina Asthana, AALA's national president, opened the evening with a welcome speech, followed by an inspiring keynote address from Kishwar Chowdhury. Ms Chowdhury achieved prominence thanks to her starring role in the popular Australian television show, *MasterChef*, where she introduced Australian audiences to authentic and modern Bengali food.

There was an insightful fireside chat with former AALA presidents Reynah Tang, Tuanh Nguyen, Kingsley Liu and current National President Molina Asthana, moderated by Jane Lee, a presenter and reporter for *The Guardian* newspaper who also excelled as the evening's master of ceremonies.

The panel reflected on the encouraging increase in cultural diversity in the legal profession, while also noting there was room for improvement. The panellists also shared their experiences of unconscious bias and discrimination early in their legal careers and the lack of senior lawyers or barristers of Asian background. Later in the evening, AAT President Justice Kyrou (who spoke at AALA's launch 10 years ago), William Lye KC (AALA's co-founder and former vice-president) and other attendees added their reflections on AALA's journey.

Kelvin Ng, AALA's Victorian president, made the closing address.

Throughout the evening, we were also treated to talented performances by lawyers Joanne Kim (concert pianist), Melanie Kiremiticiyan (classical Persian dancer), Jourdain Wongtrakun (Mandarin singer) and Johanna Nonato (Filipino singer).

The wonderful celebration was well attended with over 250 attendees, including members of the judiciary, state government, interstate guests and members of AALA branches in NSW, QLD, WA, ACT, NT and Tasmania.

Lily Sarkar, Jenny Si, Jane Lee, Kerry Truong, Daniel Nguyen, Kelvin Ng

Melanie Kiremitciyan

AALA past and present office bearers and committee members

A seat at the table

GEORGIE COLEMAN

As part of the Victorian Bar Foundation Student Achievement Awards, 32 legal studies students from the City of Hume participated in a work experience day on 21 September 2023. Jasmine Roeschmann, Victorian Bar Foundation Student Achievement Award Winner from Roxburgh College, wrote the following article about the day for *VBN*. Jasmine wants to study law at university, and her career goal is to become a barrister practising in civil law.

Picture yourself with a seat at the table: reflections on the Victorian Bar Foundation work experience day

JASMINE ROESCHMANN

A group of Hume's highest performing VCE Legal Studies students were given the opportunity for a work experience day at the Bar in the Melbourne CBD on Thursday the 21st of September. The day consisted of a session with the Hon Justice Gordon, a tour of Melbourne's Supreme Court with the Hon Justice Incerti and her former associate Elif Bardon (now Senior Associate, Lander and Rodgers), and ended with break-out groups with junior barristers from the Bar (Rishi Nathwani SC, Georgie Coleman, Tim Jeffrie, Elizabeth Brumby and Bernice Chen).

The Work Experience Day entailed many anecdotes, advice, and networking opportunities, but more importantly it created a real and authentic space to air the truths often untold by accomplished individuals. These breaths of fresh air came to us in the form of wise words from many notable legal professionals. While I can put them in a list for you to read, for you to develop an interpretation unique to mine, there was one quote that deeply resonated with me:

> "Picture yourself with a seat at the table."
> —Elif Bardon, Senior Associate, Lander and Rogers

As a young person whose mind has convinced her that her seat seems out of reach, an experience common for many of us, hearing these words re-affirmed that the only barrier between me and that table is myself. If you believe and put in the hard work, you can not only have a seat but be the head of that table.

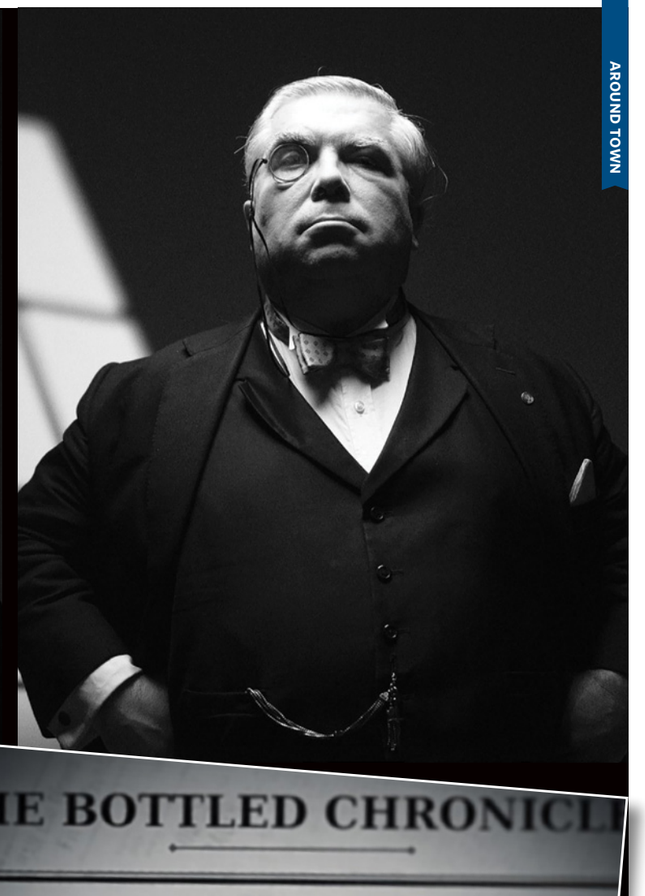
Justice Incerti also inspired me by reminding us all that, "Your culture is a badge of honour" and, "Don't ask, 'why help?'. Ask them, 'What can I do?' and put this in the front of your mind when approaching not only work but life."

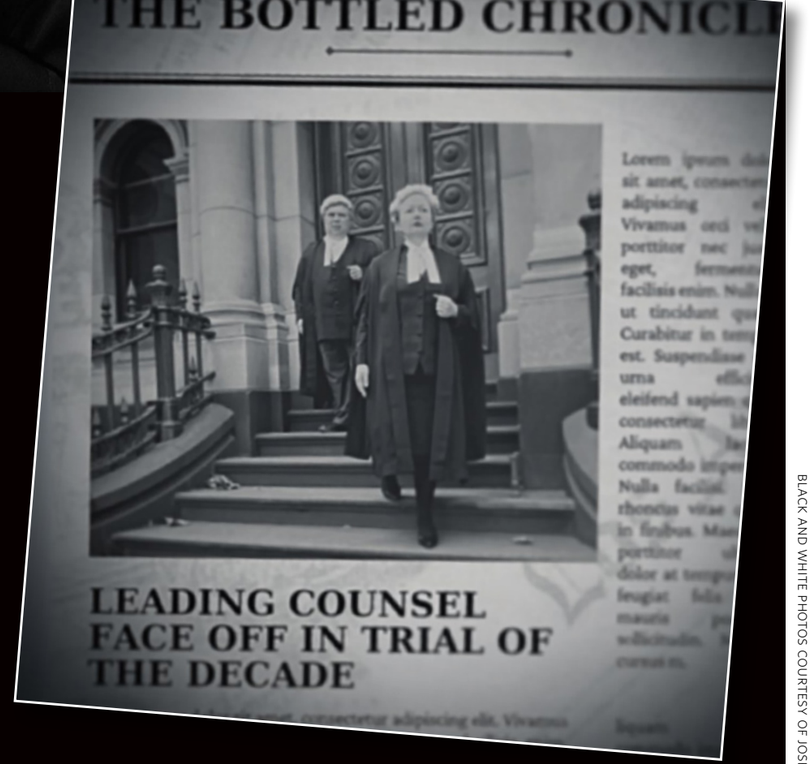
Justice Gordon had similar advice for us, reminding us of the importance of giving and listening. Justice Gordon also provided us with invaluable advice in relation to dealing with nerves and lack of self-confidence, and making the most of the opportunities the work experience day provided us.

While the experience was unlike any other, it was a true reminder that success stems from your ability to be determined, disciplined and passionate. As Georgie Coleman reminds us, "You might be in a room with people smarter than you but if you care and work hard you can achieve".

FRONT ROW (L-R): Mudit Dhami, Matthew Albert, me, Mark Robins KC, Ali Samaei, Marie Constantine, Rachel Cox
MIDDLE ROW (L-R): Jessica Symonds, Ashleigh Kemp, Prani West, Catherine Dorian, Yvonne Kushnir, Sanela Osmanovic, Laura Bentley
Back row (L-R): James Plunkett, Lily McCaffrey, Judge Michael Strong, Thomas Ponissi

GROUP PHOTO COURTESY OF NICKY NEVILLE-JONES





BLACK AND WHITE PHOTOS COURTESY OF JOSHUA YU

Witness for the Prosecution

EMILY PORTER

Barristers are all actors in a way, and courtrooms are our stage. I don't know about you but, by February 2023, two years of lockdowns and three years of virtual hearings had sucked the joy out of my job.

So, devoid of my stage, I auditioned for Agatha Christie's play *Witness for the Prosecution*. Produced by BottledSnail Productions and sponsored by the Victorian Bar, the production was to be staged in the Old Melbourne Gaol during Victorian Law Week. When I got the part of Mrs Myers QC (originally written as a male character) and realising I would be required to appear in four performances over three days from 18 to 20 May, I had to deliver the most unusual excuse to my instructors for returning a brief that week. (Happily, they ended up coming to the show.)

I was delighted to discover that, together with some absolutely fabulous people in our legal community from law students to retired Judge Michael Strong, I would be joined by the utterly lovely Mark Robins KC and Matthew Albert of our Bar, as members of the cast. Mark played my nemesis, Sir Wilfred Robarts QC, and Matthew played his instructor, John Mayhew. I hadn't done any acting since Year 12, but I had the benefit of Mark's experience in literally hundreds of amateur theatre productions, and our wonderful director Nicky Neville-Jones, to guide me.

We rehearsed every Sunday and multiple weeknights for two months in Owen Dixon Chambers. When emotions ran high, Mark produced a bottle of Shiraz from his chambers cellar. Between rehearsals, I would walk the dogs while muttering my lines like a madwoman, prompted by the app LineLearner.

After hours of work and a COVID scare, we performed on opening night (and in every performance) to a packed theatre. In fact, the season sold out in no time, leading to another three shows being added on 21, 26 and 27 May. The venue of a heritage court really brought the play to life, and Mark and I sparred at the Bar table with increasing enthusiasm each night. I cannot give an impartial review, but can simply report that the production was fabulous, particularly owing to the talents of our lead actors Ali Samaei as Leonard Vole and Marie Constantine as Romaine Vole.

Even if you haven't acted since high school (or ever), don't let that put you off releasing your inner thespian and trying out for future BottledSnail Productions projects. Acting in a supportive environment is more fun than I can say. ■


Bridget Slocum SC, Neale Paterson


James Waters, Richard Harris SC


Tomo Boston KC, Premala Thiagarajan, Meg O'Sullivan KC

Matt Collins KC, Sam Hay KC, Peter Dunning KC, Kate Eastman SC (NSW Bar), The Hon Justice Sarah Derrington AM, Prof. Jeannie Paterson, Sebastian Hartford Davis


Martin Scott KC, Raini Zambelli and Nik Dragojlovic


The Hon Justice Claire Harris, Meg O'Sullivan KC, Jesse Rudd, Tim Goodwin, Premala Thiagarajan, Kieran Hickie, Richard Harris SC, Tom Smyth, Gabi Crafti SC, Chris McDermott

Sun, surf and the law: the 2023 ABA Conference goes Gold Coast

JAMES WATERS

It was a Thursday. 21 September 2023. A warm breeze was blowing across the sparkling beachside pool where kiddos frolicked. Dignitaries hobnobbed over afternoon coffees, congratulating one another on their good fortune at being there and offering snappy sneak previews of their talks. Meanwhile I stood, water still warm from my dip in the gentle breakers dripping from my boardshorts, sucked in my paunch and thought: my god, that's the Honourable Justice Susan Kiefel AC!

The Gold Coast glittered as rockstars of the legal world assembled at the Langham Hotel for the Australian Bar Association's annual conference, "Cornerstone: The Rule of Law". Hosted by ABA President, Peter Dunning KC, the conference was opened by a trio of keynote speakers, including Geoffrey Robertson KC and Chief Justice William Alstergren.

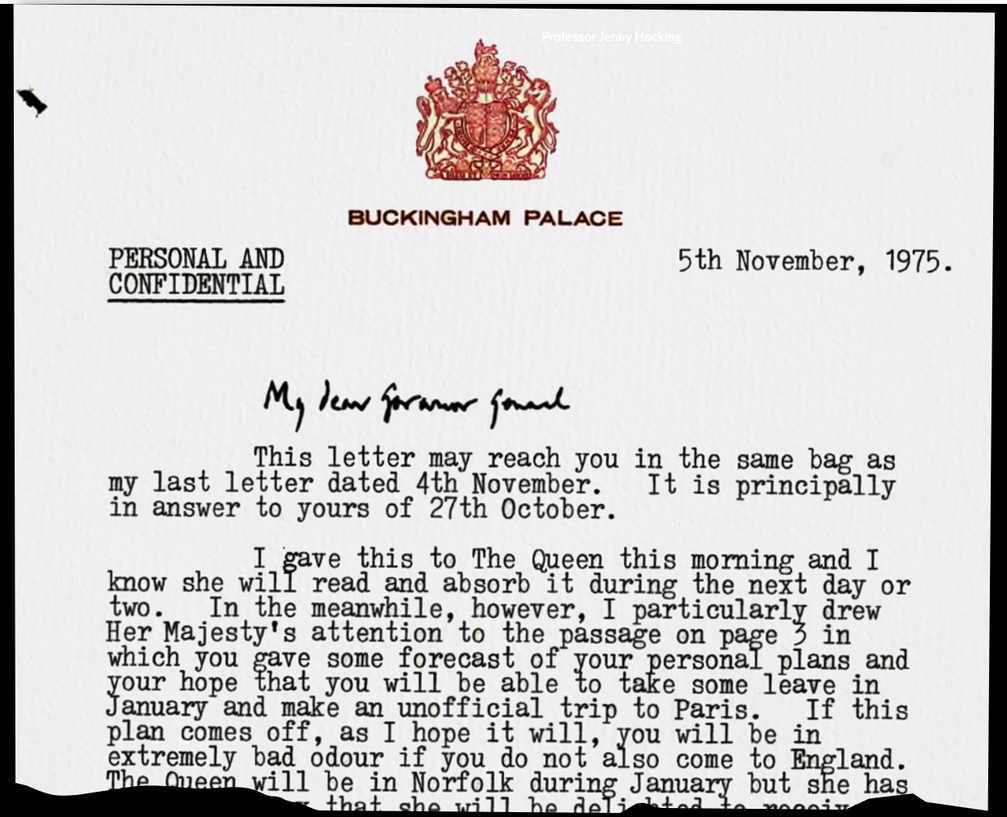
The conference theme was embraced throughout, with rousing panel discussions from ABA Vice President, Róisín Annesley KC, Bret Walker SC and Justice Michelle Gordon covering the vexing topics of youth detention, the interplay of anti-terror laws and securing individual autonomy through the rule of law. The program was tailored for all areas of practice, covering useful topics such as ex parte orders with Claire Harris KC (as her Honour then was) and Chief Justice Andrew Bell of the New South Wales Supreme Court, legal-tech, risk management war stories, whether the Bar has a duty to innovate, and the intersection of AI and the law. There were riveting sessions on tax, crime (and tax and crime), a brilliant session on diversity and the judiciary—Chris McDermott delivered the statistics superlatively—as well as sanctions on multinationals and compensation in native title cases.

With a panel including leading academics, Professor Jeannie Paterson and Professor Bryan Horrigan, Martin Scott KC and I delivered a paper on the potency of sections 18 and 21 of the *Australian Consumer Law* (and why it is inapposite for sophisticated parties). Throughout all sessions there was an incredible amount of interaction, impassioned argument and rigorous discussion between presenters, attendees, superior court judges and leaders of the academy. The only shame attending the sessions was that there was not more time for questions, with discussions continuing long after sessions finished (some debates continue to rage north and south of the Murray).

The conference was a brilliant opportunity for barristers and their families to enjoy a break in salubrious hotel surrounds and make the most of what the Gold Coast has to offer. The conference program was peppered with social functions, culminating in the Gala Dinner, where attendees were treated to the superb repartee of Justice Glenn Martin, Senior Judge Administrator of the Supreme Court of Queensland.

The conference presented a unique opportunity to converse with judges and fellow barristers from all states and territories. Friendships were forged and professional alliances strengthened. The conference reflected that the Bars of Australia are strong, engaged and at the forefront of societal issues and pressures.

I encourage all members of the Victorian Bar to lock in the next ABA Conference in August 2024 in Queenstown, New Zealand. And a tip: don't take dress-code tips from the conference location—formal attire is probably best when meeting High Court judiciary.



BUCKINGHAM PALACE

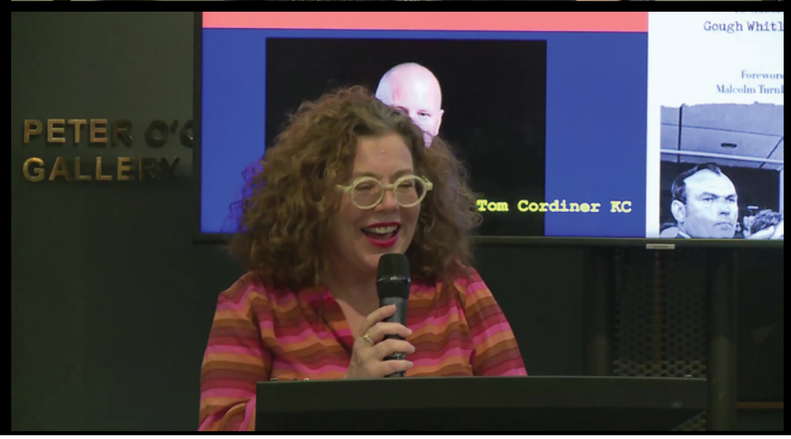
PERSONAL AND
CONFIDENTIAL

5th November, 1975.

My dear Governor General

This letter may reach you in the same bag as my last letter dated 4th November. It is principally in answer to yours of 27th October.

I gave this to The Queen this morning and I know she will read and absorb it during the next day or two. In the meanwhile, however, I particularly drew Her Majesty's attention to the passage on page 3 in which you gave some forecast of your personal plans and your hope that you will be able to take some leave in January and make an unofficial trip to Paris. If this plan comes off, as I hope it will, you will be in extremely bad odour if you do not also come to England. The Queen will be in Norfolk during January but she has



Queen Elizabeth II with then Governor-General Sir John Kerr in 1977

Royal secrecy and the dismissal of the Whitlam Government:

The Palace Letters case in history

A lecture by Emeritus Professor Jenny Hocking for Victorian Law Week 2023

SIOBHÁN RYAN & PROF JENNY HOCKING

Continuing a tradition of offering stimulating talks in Law Week, it was the Art and Collections Committee's pleasure to host a lecture by Emeritus Professor Jenny Hocking on 17 May 2023. Professor Hocking's protracted battle with the National Archives to gain access to correspondence between the Governor-General Sir John Kerr and Buckingham Palace in 1975 culminated in the High Court's decision in her favour in *Hocking v Director-General of National Archives of Australia* [2020] HCA 19. In this edited extract from her lecture, Jenny explains the surprising volume of letters uncovered, their significance, and what it was like to work with the exceptional legal team which took on the case pro bono. As I noted at the time, there was a palpable frisson of envy in the audience; not everyone gets to take a case to the High Court (and win). Tom Cordiner KC deftly moderated a lively Q & A session after the lecture, which demonstrated the enduring interest and passion that the dismissal stirs almost 50 years on.

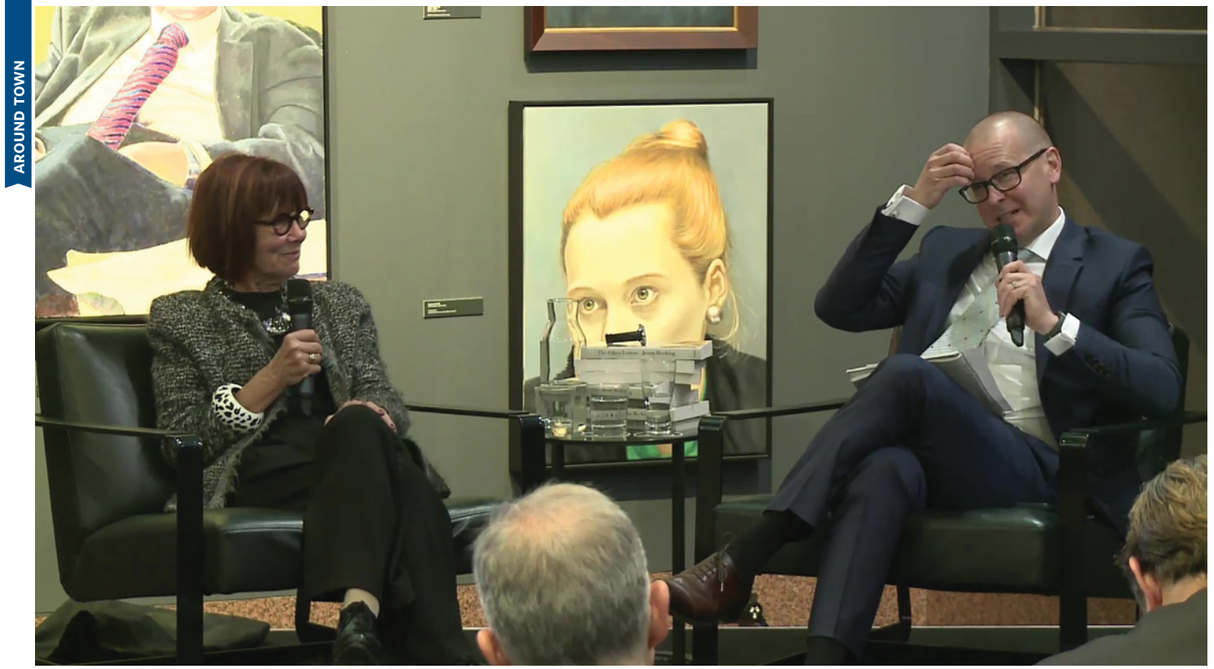
The well-known proclivity of our new King Charles III to involve himself in political matters has earnt him the moniker of "the meddling Prince". Charles' political interventions have put renewed focus on the central requirement of a constitutional monarchy of political neutrality.

This central requirement for studied disinterest in domestic political matters was profoundly challenged by the Governor-General Sir John Kerr's 1975 vice-regal dismissal of the Whitlam Government, and it is central to any discussion of the "Palace Letters". These are letters between the Queen, through her private secretary Sir Martin Charteris, and the Governor-General, regarding Kerr's controversial dismissal on 11 November 1975 of Prime Minister Gough Whitlam and his government. The letters were lodged in the National Archives in Canberra by the official secretary, David Smith, in 1978 and had been closed to the Australian public for 45 years, until I took a legal action to secure their release. This was the Palace Letters case.

Thanks to the High Court's landmark 6:1 decision in my favour in May 2020, we now know that there are 212 letters between Kerr and the Queen, more than 1,200 pages in total and, moreover, we can all read them. This is an extraordinary number of vice-regal letters which are usually sent every six months or, at most, quarterly. Kerr's letters comprise as many pages in three-and-a-half years, as the letters of four other Governors-General put together.

The great significance of the Palace Letters is that they cover matters relating to Kerr's dismissal of the Whitlam Government. From September 1975, when Kerr first raises the prospect of dismissal with the Queen, the letters canvass issues which were central to his decision to dismiss the government, without warning, just as Whitlam was set to call a half-Senate election which was due at that time. Gough Whitlam later described this to me as, "the greatest shock I had ever experienced".

The dismissal of an elected government which retained the confidence of the House of Representatives was an unprecedented and contentious use of the "reserve powers", debate about which continues today. In place of Whitlam, Kerr appointed as Prime Minister Malcolm Fraser, leader of the Liberal Party which had lost the previous two elections and who did not have the confidence of the House of Representatives. Fraser lost a confidence motion in the House an hour later by 10 votes, and the House also called on the Governor-General to recommission a government led by Whitlam. The Speaker was despatched to deliver the no confidence motion to Kerr, who refused either to receive him or to acknowledge the motion, dissolving both Houses one hour later with



Fraser still in office.

As the dismissal passed into history, the dominant view was that that this was a solo act, that Kerr acted alone before reaching a "lonely and agonising decision". Central to this apparently settled history was the insistent claim that the Palace was not involved; that Kerr "protected the Queen" by maintaining her ignorance of his thinking. As Charteris wrote in a letter to the Speaker days later, "the Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution."

The release of the Palace Letters has changed this view irrevocably, having now revealed, as Professor Frank Bongiorno writes, that "the Queen was indeed a player".

Given the undoubted significance of the Palace Letters to our history, why did it take a High Court action by a self-funded litigant historian for the Archives to release them? The reason was a single word—"personal", a label used throughout the Commonwealth to ensure the secrecy of royal records. As "personal" records the letters were bound by the conditions set by Kerr, later modified by the Queen, giving her a permanent veto over their release. The only way to challenge this was through a Federal Court action.

After a decade of archival research in Kerr's papers and the UK Archives, I already knew a great deal about the letters and it was abundantly clear that they were in no way "personal". In 2016, I lodged a case against the National Archives seeking their release. I could never have done so without an exceptional legal team willing to work on a pro bono basis: Antony Whitlam KC at trial and Bret Walker SC at the Federal Court Appeal and the High Court, with Tom Brennan SC throughout, instructed by Corrs Chambers Westgarth.

For me, the case was always about history. I believe that all history should be public history and that Australians have a right to know their own history. We cannot know our history if we can't access the documents that would tell it to us. I saw this case as a unique opportunity for transparency and for history. And I took it.

The release of the Palace Letters has finally confirmed what was always denied: that the Queen, Charteris and Prince Charles were involved in extensive discussions with Kerr directly relevant to his decision to dismiss the government. The Queen knew that Kerr was considering dismissing the government from September 1975, two months before he did so. She knew that this would be against the advice of Kerr's responsible minister, the Prime Minister, who was about to call a half-Senate election, and against the advice of the Australian Solicitor-General and Attorney-General.

Which is why, as former Prime Minister Malcolm Turnbull writes, the Palace letters "can be read as encouraging Kerr" to dismiss Whitlam.[1] It is impossible to read these letters—with their lengthy consideration of the use of the reserve powers to dismiss the government and appoint the leader of the opposition in his place, secret from the Prime Minister and against the advice of Australia's chief law officers—and conclude otherwise.

1 M Turnbull, 'Foreword' in Hocking, J. *The Palace Letters: The Queen, the governor-general and the plot to dismiss Gough Whitlam*. Scribe Publications Pty Ltd, 2020.

Dr Russell Harrison, The Hon Chief Justice Alstergren AO, The Hon Judge Amanda Mansini, The Hon John Digby KC

Paws for thought: a heart-warming welcome

JUSTIN HOOPER

On 4 October 2023, I attended the swearing-in and welcoming of the most unique kind at the Melbourne Registry of the Federal Circuit Court and Family Court of Australia.

Welcoming remarks were made by Chief Justice Alstergren KC, Judge Amanda Mansini on behalf of the court, Philip Crutchfield KC on behalf of the Victorian Bar Foundation (which provided funds to enable the purchase of Poppy the Family Court Therapy Dog), and Dr Russell Harrison on behalf of Guide Dogs Victoria.

The Associate to Chief Justice Alstergren conducted the swearing-in as follows:

> Pursuant to section 56 of the *Canine Therapy Act 2023* (Cth), and on the basis of her bone-a fide skills and aptitude as a "very good girl" acquired through training at Guide Dogs Victoria, and having been pawsitively endorsed by the Victorian Bar Foundation, the court hereby appoints Poppy to the position as Court Therapy Dog commencing on 4 October 2023 until her Furriness reaches an appropriate retirement age.

And so it was, in this heart-warming manner, Poppy, a beautiful black Labrador, trained by Guide Dogs Victoria, was sworn in by Chief Justice Alstergren, who applied Poppy's paw print to her oath and certificate of office.

At the end of July, Poppy was placed with the court for the benefit of the court's most vulnerable litigants and their children. As Chief Justice Alstegren said in his welcoming remarks:

> The level of family violence in our society remains a national disgrace.
>
> It is not just the one woman killed every week, one child every two weeks or one man every month, it is the thousands of children and vulnerable people who suffer from experiencing family violence, many who may never recover.
>
> The court's aim is to make the court process as trauma-informed as possible, and also to facilitate litigants being able to fully participate in court hearings and children in interviews, where relevant. Anything that helps to mitigate that trauma, and assist parties and children to engage, speak freely and tell their story or give their evidence, is a worthy initiative in our eyes.

The Victorian Bar Foundation's Chairman, the Hon John Digby KC, made the following remarks in relation to the foundation's support for, and funding of, the court's inaugural Court Therapy Dog:

> The Victorian Bar Foundation is confident that Poppy will be a supportive and calming presence within the court for those Victorian families facing the difficult and stressful experience of a family law dispute.

Apparently, there was healthy competition amongst the judges to become Poppy's Court Dog Guardian, with her Honour Judge Symons being the successful candidate.

We all wish Poppy a long and tail-waggingly happy tenure.

Federal Circuit and Family Court of Australia (Division 1) and Federal Circuit and Family Court of Australia (Division 2)

Commission of Appointment and Oath of Office

Pursuant to section 56 of the Canine Therapy Act 2022 (Cth), AND on the basis of her bone-a fide skills and aptitude as a 'very good girl' acquired through training at Guide Dogs Victoria, AND having been pawsitively endorsed by the Victorian Bar Foundation, I hereby appoint

Poppy

to the position of Court Therapy Dog at the Melbourne Registry, commencing on 4 October 2023, until her Furriness reaches an appropriate retirement age.

"I do swear that I will well and truly serve in the office of Court Therapy Dog, and that I will comfort and support all people, without fear or favour, but with lots of affection and good will."

The Hon Chief Justice William Alstergren AO

Court Dog Poppy

Junior Bar Conference 2023

ANNETTE GABER

The 2023 Junior Bar Conference was held in the Neil McPhee room on 23 June 2023.

The annual conference provides an invaluable opportunity for members of the junior Bar simultaneously to learn ways to develop their practices, earn CPD points and network with their peers and silks.

Rebecca McCarthy welcomed members to the event and introduced Victorian Bar president, Sam Hay KC, who gave the opening address.

Attendees were treated to a powerful, yet humorous, keynote speech from the Hon Jaclyn Symes MP, Attorney-General for the State of Victoria. In her concluding remarks, the Attorney-General quipped that, if junior Bar members were nice to her laws, she would in turn appoint nice judges.

The first session was a panel discussion, chaired by Zoe Maud SC, on the briefing practices of regulators and government agencies. The panel comprised in-house counsel and representatives from the ACCC, AGS, ASIC, OPP, TAC, VGSO and VLA. This session covered briefing practices of the agencies, including how they make briefing decisions and how junior barristers can put themselves forward for work. The session provided a rare opportunity to hear directly from the agencies about how they decide who to brief.

Event sponsors also delivered a number of informative sessions. Mark Higgins of LegalSuper spoke about the importance of establishing and maintaining a healthy superannuation balance. Cullen Haynes of Legal Home Loans, Australia's only mortgage broking service dedicated to barristers, provided an overview of services offered.

Later in the afternoon, Dr Oren Bigos KC chaired a panel comprised of Robert O'Neill, Tamieka Spencer Bruce SC, Katherine Brazenor, Daniel Briggs and Georgie Coleman. Panel members shared their own practice development experiences and gave tips on how to expand into new areas, how to get on the radar of law firms and the effective use of clerks.

Last, but not least, was the silks Q&A session chaired by Raini Zambelli. Panellists Peter Chadwick KC, David Batt KC, Hamish Austin KC, Penny Neskovcin KC, Christopher Carr SC and Elizabeth Bennett SC, demonstrated their humility and sense of humour as they each answered anonymous questions submitted online in advance of the conference.

The conference was closed by Shane Lethlean, chair of the New Barristers' Committee.

After the conference, attendees, presenters and silks enjoyed networking drinks in the Essoign Club.

With such an impressive line-up of speakers and informative sessions, it is hoped that attendees left the conference better equipped for their journey ahead.

I extend my thanks to all those who presented at or chaired sessions on the day and to those who worked behind the scenes to pull the event together: the Victorian Bar office (Michelle James, Matthew Reddin, Vicky Kourtis, Stephen Porter and Amanda Utt) and my colleagues in the Junior Bar Conference Working Group (Dr Oren Bigos KC, Zoe Maud SC, Shane Lethlean, Deborah Siemensma, Amit Malik and Rebecca McCarthy).


Rebecca McCarthy

Sam Hay KC

L-R: Zoe Maud SC, Verity Quinn, Katrina Close, Nathalie Pietsch, Alex Murphy, Lauren McKirdy, Timothy Crapp, Neill Hutton, Jarrod Van Arkadie


Tony Dodd

L-R: Raini Zambelli, Penny Neskovcin KC, Chris Carr SC, David Batt KC, Elizabeth Bennett SC, Peter Chadwick KC, Hamish Austin KC

The Henry Jolson Prize

TASMAN ASH FLEMING & TEMPLE SAVILLE, ADR COMMITTEE

The Henry Jolson Prize is awarded each year by the Victorian Bar to the winning team in the Asia Pacific Commercial Mediation Competition. This year's recipient, a team from OP Jindal Global University in India, will have the opportunity to compete in the International Chamber of Commerce Mediation Competition in Paris in 2024.

This article has been adapted from a speech given at the 2023 Asia Pacific Mediation Competition, which was held online between 26–28 August 2023.

Henry Jolson QC was called to the Bar in 1973 and took silk in 1991. He was a pioneer of mediation in the Victorian legal profession, acting as mediator in clearing the backlog of cases in the County Court Building Cases List in 1985. He was also involved in the Spring and Autumn "offensives" during the 1990s, which saw members of the Victorian Bar assist via court-referred mediations—a practice which continues today under the various protocols such as the List of External Mediators (LEM) of the Magistrates' Court of Victoria and the County Court (Family Property List) and (Commercial List) Mediator Referral Schemes. Initiatives such as these have seen mediation become an essential part of the Victorian justice system and a compulsory step in some instances.

Henry received an OAM in the 2012 Queen's Birthday Honours List for service to the law, particularly in the area of ADR, to professional associations, and to the community.

In 2012 Foley's List recorded an interview with Henry, from which the following extract is taken:

> The mediation usually starts with the parties and their lawyers not willing to give anything away, with fixed positions, and aggressive attitudes. Gradually, as the day unfolds, they open up, and you get to a meaningful discussion. I never give up because I am no longer surprised by a sudden change in mood or direction by just one sentence or comment that can open the door to a resolution. I found that human behaviour quite stimulating.
>
> Negotiating is an important skill in various aspects of life, from personal relationships to professional settings. Negotiation is a process of reaching agreements, resolving conflicts, and finding acceptable solutions.
>
> Mediation goes beyond negotiation, it is a philosophy that encapsulates the values of empathy, respect, and open communication. It invites us to listen actively, to comprehend different perspectives, and to seek solutions that are mutually beneficial. It is through this process that we discover that even the most entrenched conflicts can be unravelled, paving the way for resolution and growth.

Julian William Kennedy Burnside AO KC

SAM HAY

The following is an edited extract of a speech delivered by Bar President, Sam Hay KC, at a function held on 4 October 2023 to mark Julian Burnside KC's contribution to the Bar and to the legal profession and his most generous donation of books to the Bar's library collection.

Julian Burnside KC is regarded as a legal giant by many, a hero of the underprivileged by others, as an outstanding advocate for asylum seekers and refugees, and as a figure by which many of us in the legal profession measure ourselves. Nationally and internationally renowned for his staunch opposition to the mandatory detention of asylum seekers, Julian was made an Officer in the Order of Australia in 2009, "for service as a human rights advocate, particularly for refugees and asylum seekers, to the arts as a patron and fundraiser, and to the law".

That is a broad spectrum indeed, but beyond that Julian is a friend, mentor, confidante and provider of wise counsel to many.

Julian was born in Melbourne and educated at Melbourne Grammar, where he took an early interest in music that has continued to this day.

Over the years Julian has been a principal, sponsor, chair and supporter of the Flinders Quartet, at one time purchasing an ancient and extremely well-regarded violin for a six-figure sum for use by one of the Quartet's violinists.

Julian has given generously to many artists and art disciplines over the years, even establishing an arts venue known as fortyfivedownstairs with Marylou Jelbart.

At school and university Julian also played rugby, including with a broken hand described by his surgeon father as merely swollen.

When not playing rugby with a broken hand Julian studied law and economics at Monash University, with aspirations to eventually work as a management consultant.

However, he showed immense talent for the law and was selected to represent Monash at an international mooting competition in New Zealand. Julian was named best speaker and won the much-coveted Blackstone Cup for presentation and elocution, thereupon deciding to pursue a career as a barrister.

In 1976, Julian read with his Honour Judge Peter Rendit, formerly of the County Court, and primarily focused on commercial law.

Importantly, Julian threw himself into Victorian Bar life, being appointed to numerous committees, including the Legal Education Advisory Committee, the Computer Committee, the Library Committee and a project designed to computerise the Bar's operations, and ultimately the Chief Justice's Supreme Court Computer Committee.

However, Julian's first and most cherished appointment was to the editorial board of the *Victorian Bar News* back in 1977.

His coverage of the exploits of fellow barristers—social, sporting and professional—made compulsive, and at times, nervous reading.

I was going to describe these as Julian's "halcyon years", but I am reminded of one of his many articles in the *Victorian Bar News* where he reviewed and dissected with much glee words or terms that were in common *mis*usage—especially by colleagues at the Bar.

In 1993, Julian highlighted that Halcyon was in fact the daughter of King Neptune and the term referred to the calm between storms. So the word is perhaps not appropriate here.

During his early career, Julian appeared in many significant commercial cases and represented some of Australia's wealthiest people, including Alan Bond and Rose Porteous; "acting for the big end of town", as he put it.

But then in 1998, Julian turned that perception on its head when he acted for the MUA in its battle with Patrick Corporation during the 1998 waterfront dispute—one of Australia's most severe and longest running industrial relations controversies.

The matter went to the High Court which eventually found in favour of the Union, albeit with certain conditions.

Julian described this case as one of his most memorable, and as convincing him that the survival of reasonable and responsible union representation is crucial if there is to be justice in the workplace.

Julian's 'official' readers include Mark Settle, Peter Pascoe, Anthony Rodbard-Bean, the Hon Justice Ian Waller and Federal Attorney-General the Hon Mark Dreyfus KC MP, but he mentored countless others.

His first reader, former Federal Treasurer, the Hon Peter Costello, said it was fitting that he be honoured by the Victorian Bar for a very wide-ranging and successful career. Peter says that as a pupil of Julian's, he learned a little about the law, nothing about politics, but a great deal about wine.

From the late 1990s onwards, Julian began to undertake more and more pro bono work on a range of human rights issues.

Notably, he acted for Victoria's chief civil liberties organisation in an action against the Australian Government over the *Tampa Affair* and vehemently criticised the Howard Government for its mandatory detention of asylum seekers arriving in Australia.

With his wife, artist Kate Durham, Julian set up Spare Rooms for Refugees and Spare Lawyers for Refugees—programs that provide free accommodation and free legal representation for refugees in Australia.

Julian acted in several major cases on behalf of Indigenous Australians, most notably for Bruce Trevorrow, a member of the Indigenous stolen generations.

Bruce sued the South Australian Government for having removed him from his parents and, for the first time in Australian legal history, an Australian government was found liable for such conduct. The court awarded $500,000 in damages.

It is regarded by many as Julian's greatest human rights victory.

In 2004, Julian was awarded the Human Rights Law Award by the Human Rights and Equal Opportunity Commission and recognised by the Law Council of Australia for his pro bono legal work for asylum seekers and for establishing Spare Lawyers for Refugees.

In that same year, he was elected an Australian Living Treasure. Julian also received the Australian Peace Prize in 2007 and the Sydney Peace Prize in 2014.

And how could we forget politics? Julian joined The Greens and stood against Treasurer Josh Frydenberg in Kooyong. He lost, but at the next election Mr Frydenberg was defeated by Dr Monique Ryan representing the Teals. Julian said at the time: "Right result, just wrong colour!"

Julian and Kate have given great love and care to their foster son, Moosa, whom they have raised from the age of nine. That hospitality and generosity of spirit has been extended to Julian's family and friends for decades.

Finally, I will allow Ron Merkel KC the last word about Julian:

> Julian Burnside's journey through life and the law has been an extraordinary one. The common and recurring theme in that journey, whether in the areas of human rights, litigation at all levels, music, writing or political discourse has been Julian's insight, creativity and excellence … a rare combination. Few can match that journey but so many of us are privileged to have been able to share a part of it with Julian.

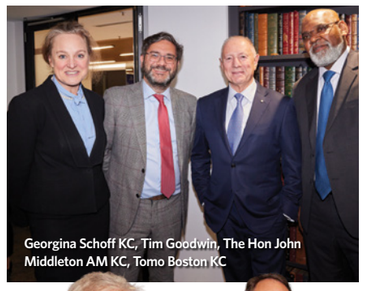
Julian—thank you for the books; thank you for all that you have done for the Victorian Bar; and congratulations on a magnificent, storied career. We wish you and Kate all the very best for your retirement.

Sam Hay KC

James Hird, Tania Hird, Jessie Taylor, Michael Stanton

Matthew Albert, Alistair Pound SC

Julian Burnside AO KC, Kate Durham



Georgina Schoff KC, Tim Goodwin, The Hon John Middleton AM KC, Tomo Boston KC

The Hon Geoffrey Nettle AC KC, Fiona McCleod AO SC

The Hon Justice Ian Waller, Julian Burnside AO KC, Sam Hay KC

Ron Merkel KC, Andrew Maryniak KC, Dr Ian Hardingham KC, Robert Richter KC, The Hon John Middleton AM KC

AROUND TOWN

VicBar L-R Daniel Nguyen, Patrick Santamaria, Gorjan Nikolovski (heading the ball)


NSW Bar team


First goal, VicBar L-R Jamie O'Regan, Daniel Nguyen


L-R James Fitzpatrick, Phil Cadman, Sam Hay KC, Chris Dibbs (referee)


QLD Bar team


First row L-R: Adrian Bates, James Fitzpatrick, Nicholas Philpott, LeRae Sandy, John Gurr SC, Daniel Nguyen, Nico Muniz, Simon Tan, Christopher Archibald KC
Back L-R: Phil Cadman, Patrick Santamaria, Gorjan Nickolovski, Jamie O'Regan, James Penny, Christopher Beach, Alex Solomon-Bridge, James Eley, Anthony Klotz,

The Sports Report

VICBAR FC

Annual Sports Law Conference

We held the annual Sports Law Conference and Tri-State Football Tournament on 16 September 2023 at Green Gully Soccer Club with thanks to Anthony Klotz, president of the club.

Sport anti-corruption, the life of a coroner, concussion and CTE, and the jurisdiction of sports were interesting speeches presented respectively by Justice Jack Forrest, Coroner Simon McGregor, Daniel Nguyen and Ivan Griscti, with Justice Melanie Sloss as chair. The morning conference was well attended by about 45 people.

Tri-State Football Tournament

Victoria, NSW and Queensland teams then took to the field. It was a beautiful day with perfect conditions on the lush grass field of Green Gully Reserve.

First game: QLD v NSW

Queensland gave it their all, but NSW won the match 4–0 convincingly. Player of the match was awarded to Johnny Selfridge for Queensland and Vahan Bedrossian SC for NSW.

Next game: Victoria v QLD

Managed by Anthony ("special one") Klotz and captained by James ("Kaka") Fitzpatrick, the mind games began when our players walked onto the field adorned in sparkling fresh new navy Kappa strips.

Daniel Nguyen opened the scoring with a chip over the goalkeeper, followed by goals from super-sub Nicholas Philpott; Alex Solomon-Bridge, who celebrated in iconic style with his shirt over his head and running downfield; and Chris Archibald KC, from his bend-it-like-Beckham corner kick.

Our defensive line of James Fitzpatrick, James Eley, John Gurr and Nico Muniz held up an impenetrable wall, leaving LeRae Sandy, our goalkeeper, with not much to do though she was almost caught out by an audacious wind-assisted long range shot by Queensland which narrowly missed our goal. Victoria won 4–0.

Player of the match was awarded to Caitlin Pincott for Queensland (who was playing her first game, though clearly had speed as a Commonwealth Games gold medallist in the 4x400m relay) and Chris Archibald KC for Victoria.

The final match: Victoria v NSW, the reigning champions

It was a cagey match with neither side making any breakthroughs in the first half and several names being scribbled into the referee's yellow card notebook (each resulting in a $50 fine for charity).

In the second half, Nico Muniz, upon asking the gaffer for a chance in the attack, changed the game with his turn and snap shot, beating the NSW goalkeeper. Celebrations from the Victorian bench erupted—think finally opening a champagne bottle after a long day in court.

Later, Patrick Santamaria, after yet another overlapping run, shot from outside the penalty box, causing the NSW goalkeeper to spill and be nutmegged by the ball. The referee issued Patrick a yellow card for unsporting behaviour—quite fair.

Player of the Match was awarded to Vahan Bedrossian SC again (a stellar effort) for NSW and Phil Cadman for Victoria, whose silky touch and work rate in our midfield made the difference.

Victoria won 2–0, taking home two trophies: the Tri-State Cup and the NSW v Victoria Cup, both now kept securely and proudly on display in the Richard Griffith Library.

VicBar FC thanks its squad for an incredible and historic effort: Anthony Klotz (manager), James Fitzpatrick (captain), Adrian Bates, Alexander Solomon-Bridge, Christopher Archibald KC, Christopher Beach, Daniel Nguyen, Gorjan Nikolovski, James Eley, Jamie O'Regan, John Gurr, Michael Kats, Nicholas Phillpott, Nico Muniz, Patrick Santamaria, Philip Cadman, Simon Tan, LeRae Sandy (goalkeeper) and James Penny (goalkeeper).

Special thanks to our president, Sam Hay KC and Peter Agardy for their support and presentation of the trophies and awards, and Gemma Kenna for her excellent assistance in organising the event.

We also thank the Queensland and NSW squads, led by Andrew Skoien and Anthony Lo Surdo, for making the conference and tournament a success.

VicBar FC is always looking for players of all level of skills, ages and backgrounds, so if you're interested in playing and having fun at our next tournament, feel free to reach out to James Fitzpatrick, Anthony Klotz or Daniel Nguyen.

Victorian Bar and RMYS Squadron Sailing Day

WIGS AND GOWNS COMMITTEE

On 12 February 2023, the Victorian Bar Wigs and Gowns Squadron got together with the Royal Melbourne Yacht Squadron (RMYS) Red Pants Funday participants at RMYS St Kilda for a Sunday of sailing, lunch, frivolity, and camaraderie.

Expecting a flat sea, warm breeze and benign conditions, 130 or so participants were confronted with a 25-to-30-knot (stiff!!) breeze, lumpy conditions, drizzle and generally very unpleasant weather. Not the usual balmy February weather we had anticipated.

As the skippers and crew were marshalling in the clubhouse to make their way to the floating marina, our reliable race officers, Peter Rattray KC and Amanda Wakeham, together with your correspondents, huddled together to discuss the wisdom of pushing on with the sailing component of the day, for trophies were at stake (the Neil McPhee QC Trophy and the Thorsen Perpetual Trophy).

The weather did not abate, and the decision was that it was not fun and not safe to venture forth. Accordingly, the trophies will note that 2023 was a "blowout". However, undeterred, some hardy experienced souls chose to challenge the storm and headed out to test their mettle.

In the meantime, the bulk of participants decided to enjoy the club premises' hospitality, and urgent talks were convened by your correspondents to see if it was feasible to put in place a mock trial. The trial turned out to be a great success.

A hypothetical forensic nautical event was concocted involving a collision between two yachts and the ensuing death of an unknown stowaway. Participants were:

» Richard McGarvie KC with Julie Davis of counsel as Crown Prosecutor;
» John Hall of counsel for the defendant;
» Peter Golombek, retired counsel, in a convincing appearance as a very unreliable Water Police officer; and
» RMYS members David Taylor (as the hapless skipper accused of negligence) and Patrick Milwright (as the blameless skipper on starboard tack).

As luck would have it, now retired Justice John Digby (formerly Judge in Admiralty) was on hand to ensure a fair trial was held, and to supervise the jury (the room full of participants, a number of whom were experienced lawyers including Robert Galbally, keen to have their say).

Ultimately, after a good deal of contested evidence, a number of ex tempore rulings, and highly technical submissions, the good men and women of the jury determined that the defendant was indeed guilty of negligence; no criminal charges were sustained.

The trial was followed by a fabulous lunch, thanks to four wonderful RMYS volunteer members (Cath Mahony, Julie Cutler, Pam Joseph and Alexis Delaforce). An amazing BBQ including steak, gourmet sausages and chicken was cooked courtesy of RMYS general manager Richard Matterson, accompanied by incredible salads, delicious homemade desserts, too much cheese and of course wine and beer available for purchase to wash it all down. As a result, the participation fee of $35 per person enabled RMYS to donate $2000 to the Making Waves Foundation (sailors with disabilities). An incredible result.

Thank you to all those who joined in this really fun day. Special thanks to past RMYS committee member and Rear Commodore Julie Davis of the Victorian Bar whom all recognised was the principal driving force behind the event and its success. *Diary date—we will do it again on Sunday 11 February 2024!*


Tour of Government House

Queer as a Clockwork Barrister

CHRIS McDERMOTT

It has been 10 years since the High Court concluded that it was well within the scope of the Commonwealth's "marriage" power (under s 51(xxi) of the *Constitution*) to legislate to provide for marriage between persons of the same sex. When doing so, the court observed that "[the] status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable."[1]

It might also be said that the character and composition of the Victorian Bar is not, and never has been, immutable. This may explain the greater presence and—more importantly—visibility of members of the LGBTIQ community at the Victorian Bar in recent times.

It has been five years since the Victorian Bar supported the creation of an LGBTIQ Working Group, a voluntary (and non-funded) sub-committee of the Bar's Equality & Diversity Committee. It has the simple purpose of identifying the needs and priorities of members of our Bar who are also members of the LGBTIQ community, with a view to promoting initiatives that foster equality, inclusion and freedom from discrimination and harassment.

It has been three years since a volunteer group, enthusiastically led by John Heard and Beth Warnock, came together to create an informal and fun social network for LGBTIQ barristers and allies at our Bar. Both groups have been a terrific success, if not complementary lightning rods, in ensuring members of the community realise that being out and Queer at the Bar is, and ought to be, straightforward. The groups have built on the legacy of many people in earlier years[2] at our Bar who identify as LGBTIQ who had a much more difficult, even hostile, path to tread in being themselves.

In recent years, the Bar's LGBTIQ community has been more active in making its collective, but non-homogenous, presence felt. In particular:

» Many barristers have kindly volunteered their time to present a range of quality CPD sessions to assist members of the Bar to better understand issues that impact members of the LGBTIQ community and to provide basic training on how to be a good and supportive ally.

» The LGBTIQ Working Group has engaged effectively and collaboratively with community legal centres, including by forging ties with the newly launched Victorian LGBTIQ Legal Service, to meet specific legal needs affecting the community in Victoria. Barristers have assisted in legal clinics, contributed to legal education, and undertaken appearance work in important strategic litigation, frequently on a pro bono basis.

» One of the highlights at the end of each year is the presentation of the symbolic Rainbow Wig to a member of our Bar who has gone above and beyond the call of duty to champion LGBTIQ issues at the Bar. The Rainbow Wig, generously donated by Ludlows Regalia, was first awarded to Dr Matt Collins KC by Sophia Loren's fabulous stunt-double, barrister and sometimes real housewife, Gina Liano. Fortunately, it was possible to negotiate a mutual separation from the Rainbow Wig and Matt to award it to the next recipient, rather than having to prise the Wig from his cold, dead hands (as he originally declared we would have to do).

» Consistent with its policy commitment to equality and diversity, the Bar will hold the Equality and Diversity Moot in 2023, a competition designed to assess university students on their knowledge of legal issues faced by LGBTIQ people in Victoria.

» Springing up from the oubliette of COVID-19 restrictions, the Rainbow and Inclusive Social Network has regularly held online and in-person networking events, where LGBTIQ barristers and allies regularly catch up to socialise, exchange tips and tricks for navigating practice as a barrister and, in the finest traditions of the Bar, gossip. The regular exchange of warmth, wit and quality skincare tips has been a highlight for the junior and senior ranks of our Bar, particularly those who wish to avoid tired-looking skin.

» The Rainbow Social Network has also been responsible for some of the funnest and most anticipated annual events, including the Annual Queermas Party. Last year's White Lotus / Resort Person theme was an eye-catching, tropical inspired party with a friendly, welcoming atmosphere, basically transforming The Essoign into Kaui. The Essoign also happily displayed an inflatable Flamingo from that party for a while after the sun had set! There is also now an annual Rainbow and Inclusive Dinner, where community members and allies come together in the depths of winter to share laughs over fine dining.

» On 18 May 2023, which was International Day Against Homophobia, Biphobia, Intersex discrimination and Transphobia, Chief Justice Ferguson launched the Victorian Chapter of Pride in Law in the Library of the Supreme Court. In acknowledging the contribution of LGBTIQ lawyers in the Victorian legal profession, including several members of our Bar, her Honour gave a clear and direct message to the large crowd of solicitors, barristers and members of the judiciary: "[From] the highest court in Victoria: all are welcome here".

» Recently, the former Governor of Victoria, Her Excellency, the Hon Linda Dessau and Mr Anthony Howard AM KC very graciously hosted a private tour of Government House for LGBTIQ and allied members of our Bar, with the Hon Howard Nathan KC, a former judge of the Supreme Court. It was an excellent opportunity for the group to meet "Hurricane Howard", to hear about his personal and challenging experiences of staring down and overcoming homophobia, anti-Semitism and stigma during his time on the Bench.

Some might query why, in 2023, there is any need to talk about issues of sexual orientation or gender identity at the Bar. One reason might be that members of the LGBTIQ community continue to experience higher rates of discrimination and adverse mental health issues than the community more generally, which is attributable in part to feelings of isolation, exclusion, stigma and harassment. Ensuring that the environment in which members of the LGBTIQ community work as professionals is welcoming and supportive, rather than hostile, is a basic step to addressing this issue. It is also the right thing to do to foster a college in which you can bring your whole, true sense of self to work.


The Hon Howard Nathan AM KC and Chris McDermott


Ally Natalie Campbell spots a rainbow fire engine in Sydney at the World Pride Games.

LGBTIQ members of the Bar look forward to a day when talk of their lives, loves, hobbies and interests is as commonplace as other topics of conversation—the horror of paying private school fees, whether Carlton will ever win a premiership again, or whether Sorrento is better to holiday in than Lorne. Until then, it may be that you'll take notice of the minor, untelevised Rainbow revolution happening at our Bar.

Chris McDermott (he/him) is a member of the Victorian Bar, former co-chair of the LGBTIQ Working Group and former secretary of the Equality & Diversity Committee.

1 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [16] (French CJ, Hayne, Crennan, Kiefel, Bell & Keane JJ).

2 For example, next year, it will be the 40th Anniversary of the legendary Brian Shaw QC's attendance with his partner, Keith Beard, at the Victorian Bar's Centenary Dinner: Peter Yule, *A History of the Victorian Bar* (2021), p 289.

News & Views

NEWS AND VIEWS

Artificial intelligence & large language models

A practical insight for today's barrister

DANIEL KILEY (PARTNER), ALEXANDRA DOUVARTZIDIS (SENIOR ASSOCIATE) & AKASH JACOB MATHEW (LAW GRADUATE) FROM HWL EBSWORTH LAWYERS

The 101 on Artificial Intelligence & Large Language Models

Underpinning the development and operation of most generative Artificial Intelligence (AI) tools is a concept known as machine learning. Machine learning is a field of AI in which a computer program learns on its own and evolves in the process.

Much like how humans learn through experience, a piece of software can be created to learn from a set of examples. This process is governed by neural networks—pieces of software that attempt to crudely mimic the human brain through a set of algorithms. When training data is inputted, the machine generates an output based on its existing model and then tweaks its model to conform more closely to the input it received. This automated process continues until the model develops high accuracy in generating a predicted output. In more advanced versions of these systems that use techniques known as 'deep learning', a machine can learn to map any given input to a predicted output through multiple layers of neural networks and millions of examples and training data.

These techniques have been used to create classification systems within applications from relatively trivial tasks like searching images in your phone's photo library for images that contain beaches, dogs, or sandwiches, to much more significant ones, like assessing medical data.

Generative AI systems take this machine learning approach and move beyond mere classification or assessment of data, into the creation of new data. Having been exposed to vast libraries of images and associated keywords, AI tools like DALL-E use what they have learned from that training process to generate images matching a user's prompt.

For wordsmiths like lawyers, the drawcard is a generative AI system that can create text, with large language models (LLMs) like ChatGPT capturing significant attention over the past year.

An LLM is trained on huge swathes of written documentation, in an intensive machine learning process. The resulting LLM system can then 'write' passages of text by effectively leaning on its training processes to predict the next word in the relevant sequence. This can produce

uncannily good results, although critics might suggest that LLMs are good at delivering text that *sounds* right, rather than being accurate.

Can AI & LLMs conquer the legal landscape?

The capability of LLMs is generally broad and limited only by the data it has been trained upon (which is known as *corpus* data). Currently, LLMs have been implemented by companies for the purpose of achieving simplicity and consistency in processes. In a legal environment, the main attraction is the ability of LLMs to understand inputs and generate outputs in a self-supervised environment. The generative capabilities of LLMs will be influenced by the quality of the input text, therefore, if the input is more directed and narrower in scope, then the output will likely be of increased relevance and detail.

LLMs also possess the capability for summarising passages of text into a more concise form, with an uncanny knack to seemingly understand the context and meaning of the input text, whilst ensuring that coherence of the text is maintained. This could be particularly useful if there is an article or passage of text that a barrister wants to review quickly without having to read the full text.

Moreover, it is well known that lawyers spend a substantial amount of time proofing their work, which in turn could limit the time available to attend to other matters. LLMs can assist insofar as they possess the capacity to analyse text for grammatical, stylistic, and spelling errors. This is achieved by cross-referencing each word and sentence against text in its training data. LLMs can also provide suggestions on how to address any identified errors which the lawyer can review accordingly.

It is important to note that as LLMs become more advanced and are trained on wider *corpus* data, the abovementioned capabilities will only expand, and potentially become more reliable and accurate. Furthermore, the adaptability of LLMs will exponentially grow in the coming years, particularly for paid or subscribed models allowing for lawyers to better transition this technology into their practices. Given the labour-saving potential, there is a significant cost-benefit that could be obtained in the utilisation of LLMs in the future.

Beware: like everything, it isn't perfect

Whilst LLMs bring a plethora of abilities, there are certain limitations that a lawyer must be aware of when utilising AI in practice. As discussed, LLMs try to emulate human speech and linguistic capabilities, and much of the time they do so with impressive accuracy. However, emulation or imitation does not always mean that the output is accurate, truthful, or legitimate. When LLMs create nonsensical or erroneous outputs, this is referred to as "hallucination". There is no identifiable pattern as to when an LLM may hallucinate nor is it reserved for highly technical or complex inputs. Accordingly, it is vital to apply forensic judgment and scrutiny to outputs generated by LLMs, as inaccuracies can have broader implications, particularly in relation to a barrister's ethical duties, which are explored below.

Another potential limitation is bias evident in outputs produced by LLMs. Bias in LLMs is not indifferent to the original meaning of the word, insofar as there is repeated or systematic favouritism and/or prejudice towards certain groups, backgrounds, and viewpoints. Fundamentally, there are five types of biases that would be evident in LLMs, namely relating to gender, religion, culture, politics, and stereotypes. The bias sprouts from the *corpus* data upon which the LLMs are trained having an underlying bias. This is understandable as much of the said data is published material on the internet, the majority of which is not fact-checked. Whilst LLMs have embedded safeguards in their coding, barristers should be wary of potential bias in any outputs. For example, if utilising LLMs to provide a summary of case law, it is crucial to ensure that the AI is not inadvertently including/excluding relevant cases due to bias.

ChatGPT and similar tools are described as *machine learning* systems, which can tend to imply that they are continually learning and evolving. However, most of the current systems are not in a continual state of evolution in practice. Instead, a 'model' is developed through an initial intense training process, and then is effectively fixed in place. This means that LLMs are trained on *corpus* data that is 'frozen' at a certain point in time. It should be noted that it is not generally currently economically viable for an LLM to be continually trained as new information arises, as it will be both expensive and inefficient. Therefore, LLMs generally will not be able to access or draw upon any recent developments in case law or legislation for example. This could be detrimental, particularly in relation to legislation that is consistently being amended such as the *Corporations Act 2001* (Cth), wherein the LLM could provide an updated response. A further pertinent example could be recent the changes in the *Australian Consumer Law* in relation to unfair contract terms. An LLM such as ChatGPT 3.5 which has been trained on *corpus* data as at September 2021 will not be able to comprehend any recent changes to the ACL. Thus, barristers utilising LLMs must cross-check any outputs against recent developments to ensure that any output is relevant and accurate.

As the name suggests, the strength of many LLMs is in their size, having absorbed huge amounts of information in their training. Consequently, advanced LLM systems like ChatGPT would be impossible to run on standard work computers and networks alone. They rely on complex servers and cloud-based systems to operate. Using one of these systems accordingly involves sending prompt inputs to a third party operating the relevant product. In a legal setting, careful consideration needs to be given before providing client information to a third party. It is to be noted that the fine print of most LLMs will contain clauses that allow the provider to track or log inputs entered.

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> "Critics might suggest that LLMs are good at delivering text that *sounds* right, rather than being accurate."

Using AI in practice—a barrister's ethical obligations

Rule 4 of *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Vic) (the Rules) sets out core principles of a barrister, which requires, amongst other things, a barrister to act honestly, be competent and diligent, and be able to exercise forensic judgment and provide independent advice for the proper administration of justice.

When considering the limitations of systems such as ChatGPT (as outlined in this article), barristers wanting to rely on such systems as part of their everyday practice will need to give careful consideration as to whether such use may result in a breach of their obligations under the Rules (for example, see Rules 4, 11, 13, 23–24, 35 and 37).

The adherence to the duty of independence and being able to provide forensic judgment to work performed cannot be overstated. It is an expectation that work produced by a barrister reflects their own research, skill, and judgement. Therefore, a barrister wanting to use LLMs in practice will need to satisfy themselves that the work produced is accurate and reliable. They should also ensure the work is consistent with their own legal knowledge and research before relying on it.

Another crucial obligation of a barrister is the requirement to promote and protect fearlessly and by all proper and lawful means the client's best interests (to the best of the barrister's skill and diligence) (Rule 35). Therefore, it goes without saying that inputting client-specific or sensitive data into LLMs could greatly put a client's best interests at risk, and risks breaching contractual and ethical obligations to protect confidential and privileged information (eg, Rule 114).

There is an increased risk of this occurring in circumstances where a person uses an LLM system that retains user input, and uses that information to further train its own models. The risk then becomes that information could become 'public' and accessible to others. Further, given the lack of information available regarding the storage and use of data being input into the systems, barristers will also need to turn their minds to data and privacy issues. It worth noting that ChatGPT has already had one data breach, which led to over 100,000 ChatGPT accounts being compromised.

Notwithstanding these risks, there are strong arguments that the use

> “In years to come, it is likely that a failure to incorporate AI into practice may breach the Rules”

of AI may improve the quality and efficiency of a practitioner’s work. Proper use of AI in practice may save significant time and reduce the costs for the client. In years to come, it is likely that a failure to incorporate AI into practice may breach the Rules. The duty to provide access to justice may also be improved through the use of AI in practice. For example, using AI systems to help draft legal documents (or at least streamline the process) can help those who cannot usually afford legal services. Where possible, thought should be given to whether AI can be effectively used as part of everyday practice.

When using AI in practice, and to avoid the risks of breaching the Rules, practitioners should:

- avoid inputting any information or asking any question that may include confidential, personal or privileged information pertaining to a brief;
- consider whether it is necessary to obtain the consent of the client to use LLM systems;
- familiarise themselves with the risks and limitations of LLMs. Barristers who are aware of these risks are more likely to identify where answers or information provided by an AI system may be subject to a potential bias, hallucination, or other limitations; and
- when using LLM systems as part of practice, make sure that they are satisfied that the information has been verified by their own independent research.

AI and intellectual property: best friends?

The development process of a generative AI system involves supplying the training algorithm with huge volumes of example data—typically, the more the better. Developers of LLMs accordingly tend to gather up huge collections of publicly available materials to feed to their systems, potentially including text that is the subject of copyright. Whether or not that training process is permissible under copyright law is a bigger question than this article proposes to address, but users of these systems may still need to have regard to IP concerns.

It appears relatively well accepted that the output of an AI system is unlikely to attract copyright protection in Australia, with the well-accepted judicial position being that only a work created by a human author can meet the requirements of the *Copyright Act 1968 (Cth)*.

Given that generative AI systems also involve creating ‘new’ works based on a set of training data, there is potential for that output to incorporate parts of that training data, and possibly infringe copyright in the original materials on which it was trained.

Legally, the production of a generative AI output would be infringing if it reproduces a substantial part of any of the original works. A substantial part does not necessarily need to be a large volume of the original work but could instead be a smaller part that is significant or memorable.

Generative AI systems are not intended to merely reproduce their training data verbatim. Ideally, these systems operate like a human author, familiar with a shared cultural context and, in turn, producing its own work inspired by that context, but not appropriating any specific details from works that have come before. In practice, this might not always be the case.

Academics have been able to identify instances where generative AI models appear to ‘memorise’ inputs and regenerate them nearly verbatim. Some vendors have moved to try to address these concerns. Adobe has an image generation product that is trained only on stock imagery owned or licensed by the company and is offering its users of the tool an indemnity against associated infringement claims.

Current and future opportunities for AI in practice

It is evident that AI may become increasingly prevalent in legal practice in the future. Thus, it would be fitting to briefly explore how different types of AI are currently being utilised. Unsurprisingly, firms utilise AI for large discovery tasks wherein lawyers can review a smaller number of documents and the AI will actively learn from this data set and conduct an automated review and predicted coding of further documents. In essence, it is an extrapolation exercise, however, it can significantly reduce the number of documents that need to be reviewed manually.

Another example of AI being utilised in practice is to achieve practice management automation, including tasks such as time entry, with AI being able to log the work conducted by a lawyer on each matter autonomously and provide a summary for review. Furthermore, AI is being utilised by some lawyers and firms to assist with legal research, which is a task that traditionally utilises extensive resources and at times cannot be charged to the client. Firms are implementing additional software packages from known and trusted providers such as LexisNexis which employ AI to assist in searching their platform. One such software is Lexis+AI which allows for conversational searches and provides answers in a similar form to other LLMs. The competitive advantage of Lexis+AI is that its *corpus* data is generally based upon the LexisNexis database and therefore should be more reliable and to the point. Whilst novel, this type of technology has the potential to significantly reduce costs and improve efficiency in legal practice.

Finally, there are numerous LLMs in development with a specific focus on the legal industry. One such example is Harvey AI which has all the benefits of a standard LLM but also has specific *corpus* data including case law and legislation, with the ability to be adapted and customised to subscribing law firms, including adoption of precedents. Whilst this raises issues relating to IP and other privacy issues, as discussed above, it could in time become a very useful tool for lawyers and barristers.

AI and LLMs are not designed to replace the role of a lawyer or a barrister, however, as they continually develop, they will inevitably become more and more a part of everyday legal practice. Therefore, it is crucial for all legal practitioners to understand the benefits and limitations of AI and LLMs. Barristers should be prepared to utilise the technology to transform their practices to become more efficient, in turn allowing for more time to focus on providing advice and added value to clients.

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AI Resource Guide

VBN

In June and August 2023, the Bar’s Innovation and Technology Committee ran a two-part CPD series on the use of AI in practice as a barrister. Part 1 covered AI technology, risk and ethics, while Part 2 focused on AI legal tools. Both seminars can be viewed via the members’ section of the Vic Bar website.

The following internet resources are also available:

- “Limitations and Risks of Using AI in Legal Practice”, Legal Practitioners’ Liability Committee
- “Generative AI and Lawyers” and “Tips for Developing Legal Self-Help Tools”, Victorian Legal Services Board + Commissioner
- “Issues arising from the use of ChatGPT and other AI Language Models in Legal Practice”, New South Wales Bar Association
- “Artificial Intelligence: Do you have a usage policy?”, David Bowles, Proctor, April 2023

Finally, practitioners interested in exploring the use of AI in practice should note that a number of major providers, including LexisNexis, have (or are developing) products specifically designed for legal users. Watch this space.

It was the best of times, it was the worst of times:

Adventures in the ChatGPT universe

MICHAEL WISE

I've been playing with ChatGPT to try to understand how it might usefully assist in my practice. It's been a mixed story. It does some things well. Others—not so much. I'll give two examples below and explain why I think it worked with one and not with the other. This may provide a bit of a roadmap for future reference.

Example A

I asked it to provide a summary of a constitutional case I ran a couple of years ago—*QSuper Board v Australian Financial Complaints Authority Limited* [2020] FCAFC 55.

Part of its response was as follows:

> This case concerned a dispute between *QSuper Limited, a superannuation fund*, and the Australian Financial Complaints Authority (AFCA), a body that resolves complaints between financial firms and their clients. The dispute centered on the *calculation of a member's benefit entitlements and whether the AFCA had jurisdiction to determine the correct amount owed to the member.*
>
> ...
>
> AFCA determined the correct amount owed to the member and ordered QSuper to pay that amount. *QSuper challenged the AFCA's determination in the Federal Court, arguing that the AFCA had exceeded its jurisdiction by making a determination about the calculation of the member's benefits. The Federal Court agreed with QSuper and set aside the AFCA's determination. The AFCA then appealed to the Full Federal Court. The Full Court overturned the Federal Court's decision,* finding that the AFCA did have jurisdiction to determine the correct amount of the member's benefit entitlements. *The Full Court held that the AFCA had the power to make a determination about the amount owed to the member because this was a dispute about the member's rights under the superannuation fund's rules, and therefore fell within the AFCA's jurisdiction.*
>
> ...

The italicised parts of its response were largely wrong. For example, there was no single judge decision of the Federal Court under appeal. In this case, the first instance decision had been referred for consideration by a Full Court.

The response also failed to recognise that the case largely concerned the constitutional question of whether AFCA's decision making was judicial in character and thus offended against Chapter III of the *Constitution*.

Now the circumstances of this case—referral to a Full Court at first instance—are unusual. And ChatGPT is nothing more than a predictive tool that has been trained to expect that A follows B, follows C. So, when it sees a Full Court decision, it predicts that this is an appeal from a single judge decision at first instance. It assumes that to be the case. It then proceeded to surmise what that first instance decision might have been (in other words it made it up) based on what it knows of the Full Court decision.

Lesson: in their current form Large Language Models (LLMs) such as ChatGPT can be blunt predictive instruments—they cannot be relied on to get things right. They can be time savers, particularly when they do get things right—but you must check everything they produce for accuracy.

Example B

A colleague constructed the cross-examination of a forensic accountant based on prompts they gave to Chat GPT. I have emulated those prompts and part of the results appear below.

> Prompt: please explain the capitalisation of maintainable earnings method of valuing an enterprise
>
> ChatGPT Output: The Maintainable Earnings Method is a valuation approach used to determine the intrinsic value of an enterprise or business. It is commonly employed in the field of corporate finance and business valuation. This method focuses on estimating the sustainable or maintainable earnings of a company and then capitalizing them to arrive at a valuation.

> "In their current form Large Language Models such as ChatGPT can be blunt predictive instruments—they cannot be relied on to get things right."

ChatGPT then proceeded to provide six steps in applying the methodology and explained each step:

> 1. Determine Maintainable Earnings ...
> 2. Select a Capitalization Rate ...
> 3. Calculate Business Value ...
> 4. Consider Other Factors ...
> 5. Sensitivity Analysis ...
> 6. Final Valuation ...

As far as I can ascertain, its explanation was correct and a good start to understanding the methodology.

In order to cross-examine an expert who had valued an enterprise using the methodology, ChatGPT might be of assistance.

So I gave it this prompt:

> Please provide five circumstances that would make this method of valuing an enterprise inappropriate.

The output was this:

> While the Capitalization of Maintainable Earnings Method is a valuable tool for valuing enterprises in many situations, there are circumstances where it may not be appropriate or may provide a misleading valuation. Here are five such situations.

It then outlined those circumstances and gave an explanation of each. I have only set out the heading of each rather than including included the explanations as well.

> 1. High Growth or Rapidly Changing Businesses ...
> 2. Cyclical or Seasonal Businesses ...
> 3. Early-Stage Startups ...
> 4. Asset-Intensive Businesses ...
> 5. Significant Changes in Business Conditions ...

> It's essential to recognise that no single valuation method is universally applicable, and the choice of valuation method should align with the specific characteristics and circumstances of the business being valued. In practice, business valuation often involves using multiple methods and considering qualitative factors to arrive at a well-informed estimate of a company's worth.

This was a pretty useful exercise—however, it still required me to exercise my judgment and consider the circumstances of the enterprise that was under consideration and whether any of those countervailing indicia might have made the methodology inappropriate.

Just in case none of those indicia applied to the enterprise I was (hypothetically) cross-examining about, I asked ChatGPT for five more—and it provided them.

From that output, I could have constructed a useful, rigorous and successful cross-examination of the expert. This would be a substantial time saver.

Why did this work well? I think it's because the valuation methodology is well known, has been extensively written about, and has had multiple structured analyses already uploaded to the web from which ChatGPT could draw in providing its output.

Of course, to make this useful I had to know what prompts to provide and how to apply the output. The latter of those is a matter of human judgement and reasoning.

Conclusion

ChatGPT can do some things well and not others. You can use it to save time in your practice—but you must check all of its outputs and never assume that it is correct.

POP QUIZ:

Are you smarter than AI?

Can you spot the errors in these ChatGPT responses?

Turn to page 98 to find out more. CHATGPT, CHRISTOPHER LUM & GREG BUCHHORN

Q1. What does section 47 of the *Civil Procedure Act 2010* (Vic) deal with?

ChatGPT: As of my last knowledge update in January 2022, Section 47 of the Civil Procedure Act 2010 (Vic) relates to offers of compromise in legal proceedings. The section provides a framework for making offers of compromise and outlines the potential cost consequences associated with such offers.

In summary, Section 47 establishes that if a party makes a reasonable offer of compromise and the other party rejects the offer but fails to achieve a better result at trial, the court may take this into account when awarding costs. The idea is to encourage parties to consider reasonable settlement offers and to potentially penalise a party that rejects such an offer if the final result at trial is less favourable than the rejected offer.

For the most current and specific information, it's advisable to refer directly to the text of the Civil Procedure Act 2010 (Vic) or consult legal resources for any updates or amendments to the law since my last update.

Q2. What section of the *Supreme Court Act* (Vic) applies to an application for a declaration?

ChatGPT: In Victoria, applications for declarations in the Supreme Court are generally governed by Section 35 of the Supreme Court Act 1986. Section 35 provides the court with the power to make declarations in certain circumstances. It states:

> **Section 35 — Declaratory Relief**
>
> The Court has power, in all matters whatsoever, to make binding declarations of right, whether any consequential relief is or could be claimed or not, and whether any such declaration is or could be made on or in relation to an application for any other relief or not.
>
> This section grants the Supreme Court the authority to issue declarations of right in a wide range of matters. Declarations are legal statements by the court that clarify the rights or legal status of parties involved in a case. The court can make a declaration even if no other relief is sought or granted in connection with the matter.

For the most up-to-date and accurate information, it is advisable to consult the latest version of the Supreme Court Act 1986 or seek legal advice from a qualified professional familiar with Victorian legislation.

Q3. Can an accused person in Victoria be compelled to give evidence for the prosecution?

Chat GPT: In Victoria, Australia, the right against self-incrimination is a fundamental legal principle. Section 13 of the Charter of Human Rights and Responsibilities Act 2006 (Victoria) provides that a person has the right not to be compelled to confess guilt or incriminate themselves. This means that an accused person cannot be compelled to give evidence for the prosecution.

Additionally, the Evidence Act 2008 (Victoria) contains provisions related to the examination of an accused person as a witness. Section 9 of the *Evidence Act* provides that a witness has a privilege against self-incrimination. This privilege extends to accused persons, and they cannot be compelled to answer questions that may tend to incriminate them.

However, it's essential to note that there are exceptions and complexities in the law. For example, an accused person may choose to give evidence voluntarily. If an accused person decides to give evidence, they are subject to cross-examination by the prosecution.

As legal situations can be complex and subject to change, it is always advisable to consult with a legal professional or refer to the latest legal resources for the most current information on the rights of accused persons in Victoria.

NEWS AND VIEWS

Barristers and cybersecurity—you need to protect yourself

MICHAEL WISE, GARRY BIGMORE, MATTHEW MENG, SARAH WEINBERG & DANIEL CALLEJA

The legal profession is an attractive target for cyber-attacks. You may have read of the devastating attack on HWL Ebsworth. Lawyers, in which certain client data was accessed and posted on the dark web and the firm faced a ransom demand. This article provides an important reminder of your current obligations, how they intersect with cybersecurity, and a refresher on how to protect your client's information (and yourself).

What are your obligations?

Bar Rules and the general law

Although the Bar Rules do not prescribe specific obligations regarding cybersecurity and risk management procedures, you are under the related obligation to maintain your client's confidentiality pursuant to r 114 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. That rule requires that a barrister "must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice". This rule reflects a barrister's obligation under the general law to exercise reasonable care in protecting clients' confidential information. There is presently no guidance in the general law about what steps a barrister, or a lawyer more generally, ought to take to protect a client's confidential information against cybersecurity threats.

Legal Practitioners' Liability Committee (LPLC) Contract of Insurance

The LPLC's *Contract of Professional Indemnity Insurance for Barristers (2023/2024)* (LPLC Insurance Contract) provides insurance against "claims arising from any cyber act and/or data breach" (cl. 7(c)). "Cyber acts" are relevantly defined as "an unauthorised, malicious or criminal act or the threat … of such act, involving the access to, use …, operation of, processing by or interference with a computer system." "Data breach" is relevantly defined as "any unauthorised acquisition, use, or disclosure… of confidential or personal information involving … a computer system."

While insurance coverage is provided for the above claims, the LPLC Insurance Contract imposes a deterrent excess in respect of claims relating to unauthorised access to your email account where access did not require at least two different factors of authentication (cl. 5.5). BCL email accounts already comply with this requirement.

Template Costs Disclosure Agreement

The template Costs Disclosure Agreement (available on the VicBar website) includes a provision entitled "Document security" (cl. 10). The template clause provides that you store documents you receive or create in a matter on the Microsoft OneDrive cloud file storage service. All cloud storage services use servers in particular locations and usually that location determines the jurisdiction governing issues with the data. BCL has an agreement with Microsoft that all data will be stored on servers located in Australia. BCL has a similar onshore storage arrangement with its DropBox Enterprise storage service. You will need to decide whether you wish to include such a clause in your costs agreement and how it should be adapted to fit the cloud services you use and your practice.

Lessons from (one of) the first cybersecurity cases

As noted above, in Australia there are no express statutory obligations on legal professionals to have adequate cybersecurity risk management systems in place. There are also no decided cases involving legal professionals who have been the victim of cybersecurity breaches.

Some useful lessons might be learned from the financial services industry. Express risk management obligations are imposed on financial services licensees pursuant to s 912A(1)(a) and (h) of the *Corporations Act 2001 (Cth)*. Those provisions were considered in the recent case of *ASIC v RI Advice Group Pty Ltd* [2022] FCA 496 (*RI Advice Group*).

In that case, the respondent (RI Advice), a financial services licensee, was held to have breached its licence obligations by failing to have adequate risk management systems in place to manage cybersecurity risks. There were nine cybersecurity incidents at the practices of RI Advice's authorised representatives (AR Practices) between June 2014 and May 2020. These included:

- an AR's email account was hacked and five clients received a fraudulent email urging the transfer of funds. One client made transfers totalling some $50,000;
- an unknown malicious agent gained unauthorised access to an AR Practice's service for a period of several months between December 2017 and April 2018. This compromised the personal information of several thousand clients, a number of whom reported the unauthorised use of their personal information; and
- in August 2019 an unauthorised person used an AR Practice's employee's email address to send phishing emails to over 150 clients.

Following these incidents, the inquiries and reports made on behalf of RI Advice revealed several issues with the management of cybersecurity risk, including: lack of up-to-date antivirus computer software; no backup systems in place/backups not being performed; and poor password practices (sharing passwords between employees; using default passwords; passwords being known by third parties and not being stored securely). Rofe J held that the standard of cyber risk management will not be assessed by reference to public expectation. Rather, it is an area of technical expertise where expert evidence will be required. RI Advice was ordered to pay $750,000 towards ASIC's costs and to engage a cybersecurity expert to identify what further documentation and controls were necessary for RI Advice to adequately manage these risks across its AR network.

The cybersecurity breaches in *RI Advice Group* could happen to any barrister. The case serves as a reminder to revisit your cybersecurity risk management systems and to seek expert advice if you need it.

Practical cybersecurity tips

No one wants to ring in the New Year with a cyber-attack. Below are some general tips to help you protect yourself:

- use strong passwords (and do not use the same one for your personal and professional accounts);
- change your password regularly;
- keep your software up to date;
- back up your information (to enable you to recover it if it is damaged, lost or stolen);
- reset your devices before disposing of them; and
- keep your devices locked and physically secure.

Further information regarding cybersecurity measures are available from the business websites of the Commonwealth and Victorian Governments—https://business.gov.au/online/cyber-security/protect-your-customers-information and https://business.vic.gov.au/business-information/protect-your-business/manage-cyber-security-in-your-business

Wishing you all a safe (and cyber-secure) holiday break!

This article provides general information only and is not legal advice.

Friends in need:

Why courts should consider seeking the assistance of an amicus curiae in proceedings involving self-represented litigants

MATTHEW HARVEY AND ANNA O'CALLAGHAN

When courts are asked to determine complex legal or factual matters—sometimes of great importance to the broader development of the law—but do not have the benefit of assistance from legally trained representatives for all parties, the support of counsel acting as amicus curiae (or a "friend of the court") can be invaluable.

When barristers accept briefs from the court as amicus curiae in proceedings involving self-represented litigants, they are given the opportunity to assist the court, without accepting the usual additional pressures and obligations that come with accepting direct access pro bono briefs. For barristers with busy schedules who are keen to expand their pro bono practice, this is an attractive option.

In this article, we suggest that courts should more readily take advantage of barristers' desire to provide pro bono assistance, by considering whether a proceeding would benefit from the appointment of an amicus curiae.

When discussing the role of the amicus curiae in the modern legal context, Justice Einfeld noted that:

> The variegated complexity of modern life and technology, increasing materialism and the possible risks to the public of otherwise lauded scientific advances, have brought consequent significant legal challenges. These have been amplified not minimally by the burgeoning of statutory law expressing vague general principles and requiring the exercise of broad undefined judicial discretions. For the just resolution of these issues, the resultant mix beckons, if not requires, whatever assistance and expertise the courts can reasonably muster. Consistent with the need for maximum possible conservation of the costs and duration of all litigation, it seems to me desirable that we adopt and adapt the English or American amicus curiae procedure as appropriate to each case.[1]

To that end, we set out some questions and answers as to the role and appointment of amicus curiae, in the hope it will encourage greater use, and acceptance of, court-requested amicus curiae briefs.

Q: What can an amicus curiae do, once invited to assist the court?

A: The role of an amicus curiae is to provide assistance to the court on a matter of law or fact which the court would not otherwise receive.[2]

There is no set category of work which barristers would be required to do once they accept a brief as amicus curiae. Their role will be determined by what the court asks of them.

Usually, an amicus curiae will assist the court by making submissions on law or fact. In exceptional circumstances, an amicus curiae has been permitted to adduce evidence and raise new issues or special defences.[3]

Courts have also sought the assistance of an amicus curiae for discrete tasks, such as cross-examination of particular witnesses on behalf of self-represented litigants.[4]

Examples of work undertaken by an amicus curiae appointed by a court through a pro bono scheme include:

- In *Sullivan v Greyfriars Pty Ltd*,[5] counsel was appointed amicus curiae to draft submissions on possible defects in a judgment, in the course of an application for summary dismissal of an application for leave to appeal.
- In *Double v The Salvation Army (Victoria) Property Trust*,[6] counsel was appointed amicus curiae for the discrete purpose of cross-examining a witness on behalf of a self-represented plaintiff in proceedings concerning institutional liability for sexual abuse.
- In *Commonwealth Bank of Australia v Doggett*,[7] following the completion of trial, a counsel team was appointed amicus curiae to file written submissions on issues that were novel and of potential general significance to the banking industry.[8]
- In *Maddaferi v R (No.2)*,[9] a counsel team was appointed amicus curiae when, due to the sensitivity of material which was the subject of a public interest immunity claim, the court was required to hear the claim in the absence of the defence.
- In *Fidelity Capital (Australia) Pty Ltd v Declic*,[10] during the course of an appeal of a review of decisions made by trustees in bankruptcy, amicus curiae was appointed to provide written submissions on the court's jurisdiction to make consent orders which had been proposed in the proceeding.[11]
- In *SZHYH v Minister for Immigration & Border Protection (No 2)*,[12] the court appointed a counsel team as amicus curiae, for the purpose of providing written and oral submissions on credibility findings made during a protection visa application.[13]

Q: Does an amicus curiae have to be independent?

A: An amicus curiae is usually expected to be independent of the parties and neutral about the outcome of the proceeding.[14]

Q: When can a court appoint an amicus curiae?

A: An amicus curiae may only participate in a proceeding with leave of the court.

Courts have a broad discretionary power to grant leave to persons to appear as amicus curiae, including on an own motion basis. Typical considerations will be:[15]

a. whether the intervention is apt to assist the court in deciding the case (for example, by offering assistance that the parties' legal representatives could not otherwise provide);
b. whether it was in the parties' interest to allow the intervention;
c. whether the intervention would occupy time unnecessarily;
d. whether the intervention would add inappropriately to the costs of the proceeding.

Q: How can counsel volunteer for pro bono amicus curiae briefs?

A: Briefs to assist the courts as amicus curiae are advertised through the Victorian Bar Pro Bono Platform. If you would like to receive alerts when these briefs are available, make sure your profile settings are set to include "Amicus Curiae briefs"(under "Assistance Type Preferences").

By appointing an amicus curiae from the Bar, courts can avail themselves more readily of the assistance of counsel not only for the furtherance of justice in the application of the rule of law, but also to assist in the resolution of novel or complicated questions of fact or law.

Matthew Harvey KC is chair of the Victorian Bar Pro Bono Committee and Anna O'Callaghan is a committee member.

1 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 201–2.

2 *Priest v West* (2011) 35 VR 225, 232 [29] citing *Levy v Victoria* (1997) 189 CLR 579, 604.

3 *Re Medical Assessment Panel; Ex parte Symons* (2003) 27 WAR 242, 250, [20].

4 See for example, *Double v The Salvation Army (Victoria) Property Trust* [2023] VSC 452.

5 [2015] VSC 422.

6 [2023] VSC 452.

7 [2014] VSC 423.

8 [2014] VSC 423, [107].

9 [2021] VSCA 4.

10 [2022] FCA 41.

11 [2022] FCA 41, [17]–[25].

12 [2018] FCA 1417.

13 *SZHYH v Minister for Immigration & Border Protection (No.3)* [2019] FCA 589.

14 *Priest v West* (2011) 35 VR 225, 232 [29], citing *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381-2.

15 *Priest v West* (2011) 35 VR 225, 233 [34].

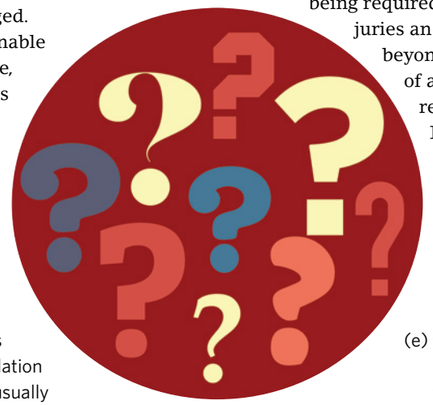
NEWS AND VIEWS

Can an "unrealistic possibility" constitute a "reasonable doubt"?

MICHAEL STANTON AND PAUL SMALLWOOD

In our accusatorial system, there is arguably nothing more fundamental than the criminal standard of proof, whereby the prosecution bears the onus of proving the guilt of an accused person beyond reasonable doubt.[1] Ordinarily, that requires the prosecution to prove beyond reasonable doubt each of the elements of the offence charged. The belief that "proof beyond reasonable doubt" was a well understood phrase, along with the concern that attempts at elaboration had confused or misled juries, resulted in the High Court taking a firm stand against elaboration. Over a century ago, in *Brown v The King*, Sir Edmund Barton said:[2]

> I fully recognise that one embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary and common use with relation to this subject matter, and which is usually stated to a jury without embellishment as a well understood expression...



In *Thomas v The Queen,* Sir Frank Kitto explained the potential danger of such embellishment:[3]

> Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what "reasonable" means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable.

Sir Owen Dixon, in *Dawson v The Queen,* said that it was "a mistake to depart from the time-honoured formula", and "wise and proper" to avoid attempts to substitute other expressions.[4] Similar warnings are found in *Green v The Queen*[5] and *La Fontaine v The Queen*.[6]

A challenge to that traditional view emerged in *Darkan v The Queen*, where a majority of the High Court described the historical resistance to elaboration as "an extreme and exceptional stand" that had not been shared in other common law countries, including the United Kingdom, Canada and New Zealand.[7]

In *R v Dookheea*, the High Court queried whether "proof beyond reasonable doubt" was a well understood expression, although the court maintained that:[8]

> ...it is generally speaking unwise for a trial judge to attempt an explication of the concept of reasonable doubt beyond observing that the expression means what it says and it is for the jury to decide whether they are left with a reasonable doubt.

Contrary to these warnings, in Victoria legislative reforms in 2015 and 2022 have resulted in criminal trial judges being required—in all criminal trials—to give juries an explanation of the phrase "proof beyond reasonable doubt" at the outset of a trial unless there are good reasons for not doing so.[9]

Pursuant to s 64(1)(e) of the *Jury Directions Act 2015* (Vic) (the Act):

> (1) In explaining the phrase "proof beyond reasonable doubt" under section 63, the trial judge may— ...
>
> (e) *indicate that a reasonable doubt is not* an imaginary or fanciful doubt or *an unrealistic possibility*.[10]

Does a direction that a reasonable doubt is not an unrealistic possibility have the potential to diminish the criminal standard of proof? We suggest that it could. It arguably provides no greater clarity and simply transposes the question: instead of asking "what is a reasonable doubt", the question becomes "what is an unrealistic possibility?"[11]

In *Green*, the High Court said:[12]

> If during the course of a trial, particularly in his address to the jury, counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the minds of the jury that *possibilities which are in truth fantastic or completely unreal* ought by them to be regarded as affording a reason for doubt, it would be proper and indeed necessary for the presiding judge to restore, but to do no more than restore, the balance. In such a case the judge can properly instruct the jury that fantastic and unreal possibilities ought not to be regarded by them as the source of reasonable doubt.

However, it is one thing for a trial judge to remedy an extravagant submission made by defence counsel in closing address, it is quite another for a direction to have to be given at the outset of every criminal trial in Victoria. Further, there is an important qualitative difference between a "fantastic" or "completely unreal" possibility and an "unrealistic possibility". They are not one and the same. Something may be "unrealistic" (in the sense of improbable) but still give rise to a reasonable doubt.

The *Jury Directions: A Jury-Centric Approach* report published by the Criminal Law Review section of the Department of Justice & Regulation in March 2015 observed as follows in relation to the proposal for a direction that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility:[13]

> The expression "a reasonable doubt is not an imaginary or frivolous doubt" is used in the Lifchus direction. The wording of the expression has been amended to better reflect modern Australian language. For example, the reference to "frivolous doubt" has been removed as it is not a commonly used phrase.

The "Lifchus direction"—developed by the Supreme Court of Canada in *R v Lifchus*[14]—said in part:

> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

There is again an important qualitative difference between a frivolous doubt and an unrealistic possibility.

As was said in *Dookheea*:[15]

> ... a reasonable doubt is a doubt which the jury as a reasonable jury considers to be reasonable (albeit, of course, that different jurors might have different reasons for their own reasonable doubt).

> "There is a question as to why such a direction should ever be given in circumstances where the defence will not be advancing an "unrealistic" positive case"

The direction in s 64(1)(e) of the Act is not a mandatory direction. It has the real potential to confuse a jury. There is a question as to why such a direction should ever be given in circumstances where the defence will not be advancing an "unrealistic" positive case that could be argued to meet the definition (and where the direction would then have work to do). Of course, the difficulty with giving the direction in such circumstances is that it may adversely impact upon a legitimate defence. In short, the provision is fraught.

Counsel appearing in criminal trials may wish to consider whether to make a submission, when "proof beyond reasonable doubt" is to be explained, that the explanation should not include a direction that a reasonable doubt is not an unrealistic possibility.[16] We must be vigilant to ensure that the criminal standard of proof—perhaps the most foundational protection in our accusatorial system—is not diminished.

1 *RPS v The Queen* (2000) 199 CLR 620, 630 (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

2 (1913) 17 CLR 570, 584.

3 (1960) 102 CLR 584, 595.

4 (1961) 106 CLR 1, 18.

5 (1971) 126 CLR 28.

6 (1976) 136 CLR 62.

7 (2006) 227 CLR 373, 395-6 (Gleeson CJ, Gummow, Heydon and Crennan JJ).

8 2017) 262 CLR 402, 426 [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ).

9 See s 63 of the *Jury Directions Act 2015* (Vic), as amended by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), which commenced on 1 January 2023. Despite the recommendation by the Victorian Law Reform Commission (VLRC) in its 2021 report *Improving the Justice System Response to Sexual Offences* (Recommendation 82) that the direction be given in sexual offence trials, the reform applies to all criminal trials.

10 Emphasis added.

11 The VLRC report, at [20.94]:

> ...some studies have found that, when asked to explain what this standard means in numbers, jurors range widely in their understanding of what is needed. One study found that jurors thought the standard varied from needing to be 50 per cent sure to 99 per cent sure, with an average of 90 per cent. Their understanding of the standard of proof may also depend on how much they understand jury directions and the type of offence and sentence, as well as their language and communication skills (citations omitted).

Traditionally, the courts have strongly resisted ascribing a percentage to the meaning of "beyond reasonable doubt". However, given the motivation for these reforms, and the above research, it is interesting to consider what a juror would consider to be an "unrealistic possibility" in percentage terms. It is strongly arguable that this concept provides no greater clarity.

12 (1971) 126 CLR 28, 33 (Barwick CJ, McTiernan and Owen JJ). Emphasis added.

13 At [15.2.7]. The report is accessible at https://www.justice.vic.gov.au/jury-directions-reports.

14 [1997] 3 SCR 320.

15 (2017) 262 CLR 402, 423.

16 There is also a question, which cannot be addressed here, as to whether the direction is a matter of procedure under s79(1) of the *Judiciary Act 1903* (Cth) and valid when a Victorian court is exercising Federal jurisdiction, especially given the protections afforded by Ch III of the *Constitution*. There is also an issue about how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) may affect the interpretation of the relevant provision, and the direct application of the *Charter* to the courts pursuant to s 6(2)(b).

In conversation with James Allsop AC

LUKE MERRICK & ALEXANDER DI STEFANO

"The energy of the law comes from its human engagement."

The Hon James Allsop AC SC retired from his position as the Chief Justice of the Federal Court of Australia in April 2023. *Victorian Bar News* recently sat down with him to discuss his long career as a lawyer and a judge.

When we did so, the judge was ensconced in his study in the Southern Highlands of NSW, surrounded by books. Talking with the judge in this environment, away from the pressure and formality of the law, his passion for the law and the work of a judge was obvious. So too was his delight in the language of the law. What underpins this for the judge? As we learnt, it is the human values which drive legal decision-making, and the pathway between abstract legal ideas and the resolution of legal conflict, which motivate and fascinate him.

The highlights of the judge's career would be well-known to many readers of VBN. In 1980, he won the University Medal in law at the University of Sydney. He practised as a barrister between 1981 and 2001, taking silk in New South Wales in 1994. He was appointed as a judge of the Federal Court in 2001. He continued in that role until 2008, when he was appointed as the President of the New South Wales Court of Appeal. In 2013 he returned to the Federal Court, this time as its Chief Justice. He retired from that role in April 2023 and is now practising as an arbitrator and mediator.

By any measure, the judge has had a stellar career in the law. However, the law was not where his professional life began. Having abandoned law school, the judge's first career was as a teacher of English and history. He speaks fondly of what he learnt in the classroom:

> I enjoyed teaching very much. It's very good training to be an advocate. Actually, getting things through the heads of 15-year-olds on a summer afternoon when the windows are closed and they are not really interested—it was a huge challenge to capture and maintain their attention. It taught me a lot about reading eyes in a room and how to work out what's sinking in and what isn't. I also learnt a lot about planning how you are going to explain something. It's partly intuitive and partly logical, but you get pretty good practice dealing with precocious 15-year-olds.

Soon enough, the judge was lured back to the law. Having resumed and completed his law degree, articles at Freehill Hollingdale & Page (now Herbert Smith Freehills) awaited.

As with so many young lawyers, this early phase of the judge's career had a long-lasting impact. At Freehills, he was mentored by Kim Santow (later a judge of the Supreme Court of New South Wales) and David Gonski, among others. He describes them as wonderful mentors and extraordinary lawyers. However, in the midst of his articles, the judge was taken on as an associate by Sir Nigel Bowen, the first Chief Justice of the Federal Court. Sir Nigel became a valued mentor for the judge:

> He was a lovely man. He was a very gentle man, but very, very firm. Watching him work was a real revelation—how a judge should work and how a head of jurisdiction could run a court. I never saw him lose his temper. He wanted to create a court of the highest quality possible in which it would be a pleasure but an intellectual challenge to appear.
>
> He encouraged me to go the Bar and gave me two pieces of advice. He told me that you should have at least two specialties, preferably diverse, so that you have a couple of areas of work where you were completely familiar with the subject matter and could work in those areas while you develop your general practice. He also reminded me not to tout.

Having finished his associateship, the judge returned briefly to Freehills to complete his articles, before going to the Bar. He speaks with frankness, and even a flicker of vulnerability, about his early years at the Bar:

> The Bar, I found the Bar very hard. For the first eight years, at the end of every year, I used to say to myself, "Should I take up Kim Santow's offer and go back to Freehills?". One year I wanted to be a merchant banker. Really! At times, I was really down in the dumps. It wasn't until about eight years in when I was doing a very large case, a demanding case, that I thought to myself, "No, no, I can do this".

Despite his early doubts, the judge came to revel in life at the Bar:

> The first time I stood up on my hind legs in the High Court and argued something on my own in front of the likes of Mason, Deane and Brennan—with those judges actually listening to you—it was really quite something. There's no turning back after that kind of excitement—I know it sounds a bit nerdy. But that kind of adrenaline and that kind of respect from that court just keeps you going for another few years.

The judge has spent much of his professional life at the Federal Court, whether as an associate, an advocate or a judge. He is, in many ways, uniquely placed to comment on its evolution as a court:

> One of the most important things that happened was the amendment of the *Judiciary Act* to give the court plenary civil jurisdiction in all matters arising under laws made by the Parliament. That change occurred in anticipation of the coming disaster of *Wakim*, which everyone could see was on the cards. This led to a huge growth in the work of the court and the number of judges across its registries.
>
> When I left in 2008, it was quite a large court—nearly 40 judges … The difficulty was that it was really a number of federal courts organising themselves. The local judges had a degree of autonomy in how they ran the registries. This led to a sort of incoherence. The profession was complaining that practices differed from Brisbane to Sydney to Melbourne and so forth. This was no real surprise. It's a huge continent. The challenge was to somehow knit these different circuits together. The big change which allowed that to occur was the development of the electronic court file. This was underway before I came back to the court in 2013. It took me a while before I realised that that was not just some over-the-counter change. It was significant change within the court. There used to be loyal staff who carried paper from floor to floor and you saw them every day. That was how information moved around the court. Digital files were transformational because they can be accessed from all over the country, which enabled us to organise the place nationally.

The idea of "specialist" judges within the Federal Court has in the past attracted strong and divergent views. The judge was characteristically pragmatic about this:

> I always took the view that it was not really serving the public to send a judge out in a patent case, when the parties have likely spent millions of dollars preparing a very important commercial dispute, for the judge then to say, "Well, good morning, this is my first patent case."
>
> That doesn't mean that you quarantine these things tightly. The court has to live and grow. And so you have to recruit in those specialist areas but also train judges up in those specialist areas.
>
> The idea was to try to have a kind of a court within a court … there's a commercial court, a native title court, a public law court, an intellectual

property court, a tax court etc. The judges who would be hearing those cases might not all be paid up members of the tax club or IP club, but they would have a knowledge of it or an interest in it. This was the idea that was adopted unanimously by the judges and it was facilitated by the electronic court file. And that's not to say that you don't give the opportunity for judges as they live on the court to develop their expertise and interests and move into areas that they've not done before.

The appellate structure of the Federal Court, with judges sitting as both trial judge and then in regular appeal sittings, ties in with this topic. Again, the judge is very well-placed to comment on the pros and cons of this structure, given his experience as President of the NSW Court of Appeal. He is emphatic in his support of the current approach:

> Given the continental nature of the court and the variety of its jurisdiction, a separate appeal court would be less than optimal for a number of reasons. This is not a court of swathes of work—appeals from the District Court, appeals from State tribunals, appeals from the common law division etc. It's admin, it's commercial, it's tax, it's IP, it's labour law, it's native title. How do you do all those specialities across a country that's five hours from east to west and with 40 or 50 judges or so? The flexibility of a properly run Full Court system is much greater than a small cohort of 10 or 11 appellate judges.

When the judge retired from the Federal Court, one of the consistent features of the farewell speeches was his focus on the human values that must be brought to bear in the law. The judge has been reflecting on this as he looks back across his career:

> I think about this and go back to why I dropped out of law. The way administrative law was taught drove me out of the law. It was taught in a very abstracted way, breaking everything up into its constituent parts and taxonomies. It was just a kind of series of rules that you had to recall—it was disconnected from society, it was disconnected from human engagement. I just thought it was a dry, almost meaningless occupation.
>
> Abstraction is important. Abstraction is the appropriate focal distance to look at something, to understand its parts and its structure. But it must then always be fitted back into experience and reality to make sense of it.
>
> Judicial power is a protective power for the declaration of rights and obligations and the enforcement of them. It is a power for the protection of the individual, of groups and of society from the abuse of private or State power.
>
> The idea that the law is an abstracted science, that it is static, is misconceived, I think. This was the great problem with unremitting logical positivism—life just doesn't work that way.

Continuing on this topic, the judge reflected on the extra-curial writing of Justice Cardozo:

> He talks about the antinomies or antitheses of the law and how law, like life, is the reconciliation of irreconcilables. You can't reconcile irreconcilables by logic and binary reasoning. Life is not binary, and those things are reconciled and mediated in a human setting. Very often this might be through a sense of mercy or it might be through a sense of appropriate legal emotion or intuition.
>
> The humanity of the law allows the reconciliation and the growth of the law through the reconciliation of antinomies and antitheses. The energy of the law comes from its human engagement. And not only the energy of the law, but the consent to it comes from the human engagement with it. Otherwise, people don't consent to it.
>
> It's a very subtle thing and the idea that you can talk about this in terms of rules and abstractions and without engaging with the humanity of what you're doing is fundamentally flawed.

We asked the judge for his advice for barristers in the early stages of their career:

> When I first went to the Bar, without much experience, some people said, "just get up on your feet as often as you can". I'm not sure that's right. My advice is to do everything as well as you possibly can. Build slowly and don't worry too much about money if you can. It depends on your circumstances, of course.
>
> You really make your reputation from the quality of what you do, not from how many times you do different things and how many times you're heard to squawk on your hind legs.
>
> Of course, it's important to get advocacy experience. But you'll get that experience when people are confident you will do their work to the best of your ability.

"You really make your reputation from the quality of what you do, not from how many times you do different things and how many times you're heard to squawk on your hind legs."

As we left our discussion with the judge, we were reminded of many of the finest things about practising law: the role and importance of mentors, the pleasure of using language as a tool of our trade and the powerful impact that the law has across society. Above all, we left our discussion with this in mind: it is well to have an abstract understanding of the law, but it is vital to apply with human values in mind.

We wish the judge every success and happiness in his future endeavours, and in retirement, should that ever beckon.

Tracking the history of the rules of the Supreme Court

EMMA POOLE

Have you ever wondered when and how a particular rule of court came into existence? Possibly this is a mark of how much of a nerd I am, but I did.

I had submissions to write on a particular rule of the Supreme Court and I looked for the circumstances of its introduction. That information turned out to be very difficult to find. So, in a couple of quiet months (those months when most senior barristers seem to vanish to the beach or Europe) I created a list.

The list is now publicly available via the Law Library of Victoria's website (and the Digital Bar Library)—search for the "Rules of the Supreme Court of Victoria to October 2023". It is a hyperlinked PDF which you can use as a digital resource or print as you prefer.

At the moment the list is intended to be a record of every iteration of the Rules of the Supreme Court. The document also includes a brief summary of the history of the authorising legislation and the arrival of the English common law in Victoria. The list itself is quite simple. Each entry consists of the number and the title of the particular document with a record of where it appeared in the Victorian Government Gazette. The accompanying hyperlink is to the best available digital resource for that particular document. As you will see there has been a change in the way in which the rules were published over time.

The list will not be complete: it is entirely my work and there will inevitably be errors and omissions. It is the best I could do as a starting point. My hope is that it will enable future scholarship and work, possibly beginning with the larger task of tracking the content of changes over time.

I hope that in years to come, when I am asked how a document would have been subpoenaed on 14 February 1915, I will be able to find the answer quickly and simply. To all of you who might like that too, I hope you enjoy the start of this journey.

A short history of BCL

DANIEL BONGIORNO

Based on contemporaneous sources, the opening of Owen Dixon Chambers on 16 October 1961 was a grand event. First, there was the venue. Held on the ninth floor of what we now call Owen Dixon Chambers East, the *Law Institute Journal* described the setting as the "special green-carpeted common room… whose broad windows give rare views of the bay to the south of the river docks and Williamstown to the west…".[1] Sadly, no such view exists now.

Secondly, there were the attendees. On one account, the entirety of the Bar attended along with various eminent guests including Prime Minister Sir Robert Menzies QC with Dame Patti Menzies, Chief Justice Sir Owen Dixon with Lady Alice Dixon, Chief Justice Sir Edmund Herring and Dame Mary Herring, Premier Sir Henry Bolte, federal and state attorneys-general and solicitors-general, almost every judge of the High Court, Supreme Court, Commonwealth Industrial Court, Arbitration Commission, County Court, General Sessions and various other federal and state jurisdictions, representatives of the Bars of other states, the president and members of the council of the Victorian Law Institute, professors of law and, surprisingly, representatives of the British Medical Association.

Thirdly, there were the speakers. There were at least six. Menzies formally opened the building and unveiled AD Colquhoun's portrait of Dixon CJ (now hanging in the Peter O'Callaghan Gallery in Owen Dixon Chambers). Following Menzies was Dixon CJ, Bar Chairman Sir Reginald Smithers QC, Herring CJ, BCL's first Chairman Sir James Tait QC and Premier Sir Henry Bolte.

In what was perhaps a dig at the green carpet, Dixon CJ let rip with the following:

> This building is a magnificent building and one which, I think, in 1901 no one would have ever looked for. It would have been regarded as impossible—an impossible dream. I remember my grandfather telling me that the late Mr George Higginbotham, afterwards Chief Justice of this State, took him into counsels' chambers at a date which I would estimate to be about the late 1870s and, as he opened the door to see the counsel, he looked at the floor and he said to the counsel, "Goodness me, what are you doing with a carpet on your floor? You are a barrister, not a company promoter."

Cue early 1960s chuckling at the expense of the company promoter—a group that always got a raw deal.[2]

At least two separate sources indicate that the speeches took some time. Sir Henry Bolte rounded things up as follows: "Thank you very much for your—I nearly said hospitality—but if I go on talking there won't be any time for any hospitality…"[3]. Cue early 1960s chuckling again.

With that, according to the *Law Institute Journal*, the night progressed accordingly:

> It was then that the splendid organisation of the function was seen at its best. A team of well-briefed young men had all the chairs out of the way and food circulating from an excellent buffet. Within minutes the loveliest party was in full swing.

The opening of Owen Dixon Chambers may appear a tad self-important. If this is the case, we might forgive the Bar for being self-congratulatory. The construction of Owen Dixon Chambers by a newly formed company, Barristers' Chambers Limited, was a unique and significant undertaking.

According to Bar records, by some point in the 1950s, the widely held position was that accommodation for barristers, including newcomers, was not only an individual barrister's responsibility—but was the concern of the Bar as a whole. This was coupled with a strong sentiment that the Bar's members should be housed in one building. At least one source describes this position as a "Bar policy" adopted during the "beneficial chairmanship" of Maurice Ashkanasy QC between 1953 and 1956. A Melbourne Jewish community leader and distinguished veteran,[4] Ashkanasy QC reformed several aspects of the Bar.

"By some point in the 1950s, the widely held position was that accommodation for barristers, including newcomers, was not only an individual barrister's responsibility—but was the concern of the Bar as a whole"

The Bar's assumption of this responsibility arose from certain circumstances. In the early 1950s, Selborne Chambers at 505 Bourke Street, where the Bar was predominantly housed until Owen Dixon Chambers was built, had burst at the seams. As Peter Yule's *A History of the Victorian Bar* explains,[5] many barristers returning from World War II were left to loiter around Selborne Chambers without formally occupying chambers. With no place to go, they conducted their practice, including conferring with clients, in its poky dim hallways.

Against this background, on 1 October 1959, the Bar Council resolved that "Barristers' Chambers Ltd" be formed to secure an option to purchase a factory site in William Street. The site had been occupied by Guests Biscuits (which, around that time, became part of Arnott's). The same council meeting authorised Chairman, Sir Oliver Gillard KC, to commission Dixon CJ's portrait (later to be unveiled by Menzies QC on that swinging evening in October 1961).

Incorporated on 4 November 1959, BCL was for many years run predominantly by its first Chairman Sir James Tait QC, along with his assistant Dorothy Brennan, from chambers on the fifth floor of Owen Dixon Chambers. Others, including Gillard KC and Sir Richard Eggleston QC, were also instrumental during BCL's formative years. The company had no employees to rely upon.

Today, BCL is a wholly owned subsidiary of the Victorian Bar holding $321 million worth of total assets.[6] All would agree those assets should be deployed to the benefit of Bar members as usefully and efficiently as possible. But how that is done is a matter on which reasonable minds will differ. BCL has, from its inception, been caught between two often competing objectives: on the one hand, providing suitable chambers on reasonable terms and, on the other hand, remaining commercially viable so it may continue to exist. So long as chambers can be secured on a month-by-month basis on reasonable terms, barriers to enter the profession are lowered.

The norm at the NSW Bar—where "buying a room" involves a significant upfront capital outlay ("key money") and the purchase of shares—is very different.[7] The family home is commonly used to finance that purchase or, if that is not possible, a commercial loan. Under the "Selborne and Wentworth models," which require key money and ongoing maintenance fees but no rental payments, a standard sized single room ranges from $100,000 to $500,000. Under other arrangements, where a barrister essentially buys a right to occupy part of commercially leased premises, shares for entry level rooms can cost between $10,000 and $100,000 in addition to an ongoing rental obligation. A bank guarantee or rental bond of three to six months' rent is also required. As the barrister wants to upsize, they will sell one share and buy another, refinancing as they go.

All these points have been made before. What is less known is how BCL's assets have been accumulated over its 60-year existence. It is a matter of which Bar members, especially those called after the early 2000s, are largely unaware. That blithe ignorance is a luxury for which those members, including

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myself, should be grateful. History demonstrates that things have not always been as simple as current day arrangements.

During Owen Dixon Chambers' construction between 1959 and 1961, BCL was partly funded through the issue of shares, debentures and unsecured notes to Bar members. The Bar's superannuation fund was also a major contributor. That is, those barristers prudent enough to invest in super had the joy of investing in their own landlord via multiple routes.

Soon after opening, Owen Dixon Chambers was full. By 1965, three more floors had been added.

> "Bar records in this period refer to a minority of barristers occupying chambers on a "licensee basis" as an exception—in contrast to those occupying as BCL shareholders and debenture holders. Of course, a "licensee basis" is now the only way to occupy BCL chambers."

Anticipating that these rooms would be fully occupied by the end of 1966, BCL's board imposed shareholding and debenture requirements as a prerequisite to taking chambers.

Accommodating the Bar's expansion throughout the 1960s and 1970s posed a significant financial strain. Throughout the 1960s, the number of BCL chambers almost doubled (329) compared to that previously offered in Selborne and its satellites (168). By 1979, this number had nearly doubled again (646) with chambers spread across seven buildings including the Hooker Building, Tait Chambers, Equity Chambers, Hume House and Four Courts Chambers.

In this period, the Bar's responsibility for chambers might well have been abandoned. The Bar's 1970–71 Annual Report laments:

> Serious financial problems will have to be faced if the Bar as a whole is to continue to make itself responsible for providing chambers for a greatly enlarged Bar in the future. It may be that students and others who contemplate coming to the Bar after 1972 should be informed that they cannot rely upon accommodation being provided for them.[8]

The upfront capital requirements were unsurprisingly problematic:

> The Bar as a whole undoubtedly has a large potential for producing investable funds. The committee[9] realises that the requirement that tenants subscribe or agree to subscribe a certain amount to Bar funds is unpopular. *The principal cause for complaint seems to be the unattractiveness of the investment and the circumstance that it is in the early years of his career when liquid funds are at a minimum that counsel is asked to provide these funds.*[10]

The rates of interest on old debentures also became uncommercial—a problem for which there was no easy answer. Could new debentures be issued at a higher rate? That would be unfair to the original debenture holders. Could old debentures be reissued? Any increase in the debentures' interest rate would mean a commensurate increase in rent.

Interestingly, Bar records in this period refer to a minority of barristers occupying chambers on a "licensee basis" as an exception—in contrast to those occupying as BCL shareholders and debenture holders. Of course, a "licensee basis" is now the only way to occupy BCL chambers. As barristers' direct investment in BCL has abated, the exception has become the norm.

In November 1979, BCL purchased 525–539 Lonsdale Street—what was to become Owen Dixon Chambers West (but at the time was referred to as the "ABC Building" because it housed Radio National)—for the sum of $1.85 million.

Proposals for the construction of chambers took time, as did arranging appropriate finance. Other than building on the ABC site, options included selling Owen Dixon Chambers or demolishing it altogether to house the Bar in one building spanning two sites. Another option was to sell both sites so the Bar might be housed together at 550 Bourke Street.

BCL paid a deposit on the purchase and borrowed the remainder. Interest on those borrowings far exceeded the ABC's rent. Something had to be done and the answer did not come harmoniously. On 16 March 1981, a general meeting of the Bar was called to consider whether Bar Council should, if necessary, require all members to take up a debenture in BCL for $2,000[11] (approximately $9,500 today). The resolution passed by a narrow margin. So narrow that another meeting was called to consider a rescission of the original motion and referral of the issue to a postal ballot. On 11 May 1981, a further general meeting did exactly that—rescinding the motion and referring the issue to a postal ballot. On 19 June 1981, that referendum was successful, essentially reinstating the initial resolution by 210 votes to 157. At that time, Peter O'Callaghan QC pleaded in these pages that, although the matter had "generated considerable heat and recriminations,"[12] no other feasible option had been proposed.

The matter did not end there. At a general meeting on 26 April 1982, and by subsequent poll on 10 May 1982, the Bar approved the "development of the ABC site… by such combination of mortgage finance, debenture finance, strata titling and sale and lease-back as the Bar Council shall approve." In doing so, it left open the option of selling Owen Dixon Chambers "as an integral part of the development of the ABC site with the capacity to house all of Melbourne's barristers in a single location."

Meanwhile, demand for chambers was increasing. Among other efforts, the Bar had taken floors in 200 Queen Street to accommodate 107 barristers. This would, in 1983, become Aickin Chambers.

On 7 September 1984, BCL contracted with Leighton for the development of the ABC site. Schroders, the Australian arm of a British merchant bank, was financier. Leighton was to deliver a building capable of housing 550 barristers, which the Bar was required to occupy for 40 years. These arrangements would later prove significant.

On 1 May 1987, the Chief Justice Sir Anthony Mason formally opened Owen Dixon Chambers West. As part of its financing for the building, BCL had leased the building to Schroders for a peppercorn rent and, in return, took a sub-lease back at market rent. Under these arrangements, rents could be ratcheted up. They could not, however, be ratcheted down. And so, by the mid-1990s when commercial rents across Australia were plummeting due to a recession, rents in Owen Dixon Chambers West were not. Its tenants were unhappy and several were refusing to pay.

To the bemusement of BCL's then Chairman, Allan Myers QC, Schroders was unwilling to renegotiate. In May 1995, he invited Schroders to Melbourne to address BCL's board. The Schroders representatives, who sat on one side of the table with BCL's board on the other, reaffirmed their position that rent would not be negotiated. Myers QC thanked them and, in their presence, immediately asked the meeting to consider the next item of business—the appointment of a receiver (a Lindsay Maxsted of KPMG). In what he later described as a "bit of theatre,"[13] Myers QC invited Maxsted into the room to address the board on BCL's parlous position and the (very personal) dangers of trading while insolvent. All of a sudden, what was once non-negotiable became negotiable: Schroders capitulated, agreeing to a 40 per cent rent reduction.

Of course, Shroders' compromise did not come for free, requiring transfer of BCL's underlying ownership in the building. This position was rectified in 2009, when BCL purchased Owen Dixon Chambers West for approximately $60 million.

One significant matter played out in the background. In April 1995, the Victorian attorney-general announced that the Government planned to legislate for the abolition of the Bar rule requiring barristers to rent chambers from BCL as a condition of membership. As David Habersberger QC suggested in the Bar's Annual Report of that year, this assisted BCL's board in the renegotiation. To Schroders' knowledge, absent some deal being struck, West's tenants would be free to leave.

That rule likely played a significant role in the period between BCL's inception and the rule's abolition in 1994. Although barristers may have occupied chambers with minimal attendant obligations, they were unable to flee the system. To some degree, this guaranteed BCL an income stream attractive to financiers. Of course, that guarantee is now gone.

Myers QC's canny efforts may have assisted with rent in Owen Dixon Chambers West, but the company was still afflicted with a hotchpot of historical secured notes, shareholdings and debentures. The position was convoluted and, by at least 1997 if not before, uncommercial to maintain. A proposed BCL float early in 1997 was unsuccessful. In response, BCL—in particular Ross Robson QC—saw to BCL's debt reduction and rationalisation. By 2000, BCL had repaid all its debentures and unsecured notes. Throughout the 2000s the Bar itself contributed several annual injections of $500,000, ensuring the company was appropriately buoyed. The net result was that BCL sat as a wholly owned subsidiary of the Victorian Bar Incorporated (itself only incorporated in 1996).

Against this (very) potted history, BCL's current position and the licensing arrangements under which we now occupy chambers, appear relatively straightforward. The present situation has undoubtedly been hard fought. The short point is that we should not take it for granted.

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1 *Law Institute Journal*, 1 November 1961, p 394.

2 See eg. *Tracy v Mandalay Proprietary Limited* (1953) 88 CLR 215 (Dixon CJ, Williams and Taylor JJ); for a full historical account of this issue, see *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193, 228–234 (Gummow J).

3 *Law Institute Journal*, 1 November 1961, p 395.

4 Ashkanasy QC served in the Australian Imperial Force at the fall of Singapore on 15 February 1942. He and others escaped on a lifeboat. Via the Dutch East Indies, they fled to the safety of Fremantle (a journey of 2218 nautical miles or over 4,000 kilometres). His portrait now hangs in the O'Callaghan Gallery and his bust is on display in the National Portrait Gallery in Canberra.

5 Australian Scholarly Publishing, 2022, pp 188–192.

6 Barristers' Chambers Limited, Annual Report 2022–23, p 11.

7 J Coutinho, B Tronson and C Winnett, "Buying in to Chambers for the first time—what do I need to know?" [2023] (Autumn) *Bar News*, p 15.

8 Annual Report of the Victorian Bar, 1970–71, p 12.

9 A sub committee of Bar Council appointed to deal with the whole of the new and future accommodation for the Bar, including the practical work of finding and negotiating for such accommodation.

10 Annual Report of the Victorian Bar, 1972–73, p 15 (emphasis added).

11 At an interest rate of 8.5 per cent for three years and thereafter at 10.5 per cent.

12 *Victorian Bar News* [1981] Winter, p 27.

13 A fuller account apears at p 259 of Yule; see also GT Pagone, "AJ Myers QC", 108 *VBN* March 1999, p 34.

Candid camera: Rob Heath KC's unusual undertaking

VBN EDITORS

Dolly Parton famously observed the following of her experience as a salaried employee:

> Workin' nine to five
> For service and devotion
> You would think that I
> Would deserve a fat promotion
>
> Want to move ahead
> But the boss won't seem to let me
> I swear sometimes that man is
> Out to get me, hmmm
>
> They let you dream just to watch 'em shatter
> You're just a step on the boss man's ladder
> But you got dreams he'll never take away

Whilst Ms Parton's undisclosed dreams may well be similar to those of many barristers, her working hours and ability to govern her working conditions were quite different. A barrister's work—and working hours—are almost by definition erratic and "fat promotions" are reserved for the chosen few. On the upside however, a barrister has no "boss man" other than instructors and clients (and perhaps the trier of fact).

A further, rarely advertised, advantage of being at the Bar is the ability to determine your physical work surroundings—something that many have come to appreciate more than ever following the enforced working from home arrangements of the pandemic. For some barristers, the look and feel of chambers is of very little, if any, interest to them; chambers are merely a place where the work gets done. For others, having a room which is not only functional but beautiful—or at least interesting—is elemental. For these types, making chambers a place of aesthetic value is often about creating a space which enables the barrister to feel calm and, thus, to focus properly on the brief at hand. And the creation of aesthetic value can be undertaken simply—with a piece of art and a bunch of flowers—or by a more "ground-up" approach.

VBN will, over coming editions, look at the chambers of a number of barristers in order to illuminate the diversity of approaches to the workspaces of the Victorian Bar.

The first of these chambers is that of Rob Heath KC. Rob has been on level 16 of Castan Chambers since 2019. He engaged FMD Architects to design his room and gave them largely free rein, wanting them to create "something completely different". The extent of Rob's instructions was simply to include some "pops of colour"—a brief many barristers would kill for.

The result is one that is striking and, more importantly, pleasing to Rob. He likes that his chambers don't feel like a normal office space, due at least in part to the unorthodox colour scheme.

Tasmanian Oak joinery—which provides a contrast to the green carpet and dark walls—hides almost all evidence that these are a barrister's chambers. Briefs and textbooks are kept out of sight. A conference table sits slightly askew to Rob's desk in the centre of the room, and a standing desk on the far wall allows him to work away from the main desk.

Along an otherwise unadorned dark wall is "Plate Glass 2", an expression of an urban train scene by Melbourne artist Sam Shmith. A light fixture by Christopher Boots provides soft overhead light.

Once FMD had finished the space (and taken the main photographs accompanying this piece), Rob introduced his own touches, adding objects gathered over the years both in Australia and abroad. One recurring theme consists of the melamine trays he's amassed which are occasionally useful but are mainly whimsical confirmations of places he's been or football teams he's loved. Tea and coffee vessels also feature heavily, and they aren't mere artefacts: these are in constant use. A brass teapot from Jaipur was a gift from Rob's father-in-law from their time travelling together in India, and a cup and saucer set from Wan Chai in Hong Kong were—when we visited Rob in chambers mid-trial for this article—speckled with tea leaves. Scattered amongst these pieces is evidence of his upbringing in Warracknabeal, including architectural prints from nearby towns. And amongst the paraphernalia is a model of a human heart which he bought from local store Wunderkammer after a trial about Vioxx. The outcome is a space which is refined and professional, but not impersonal.

FMD describes the finished product as follows:

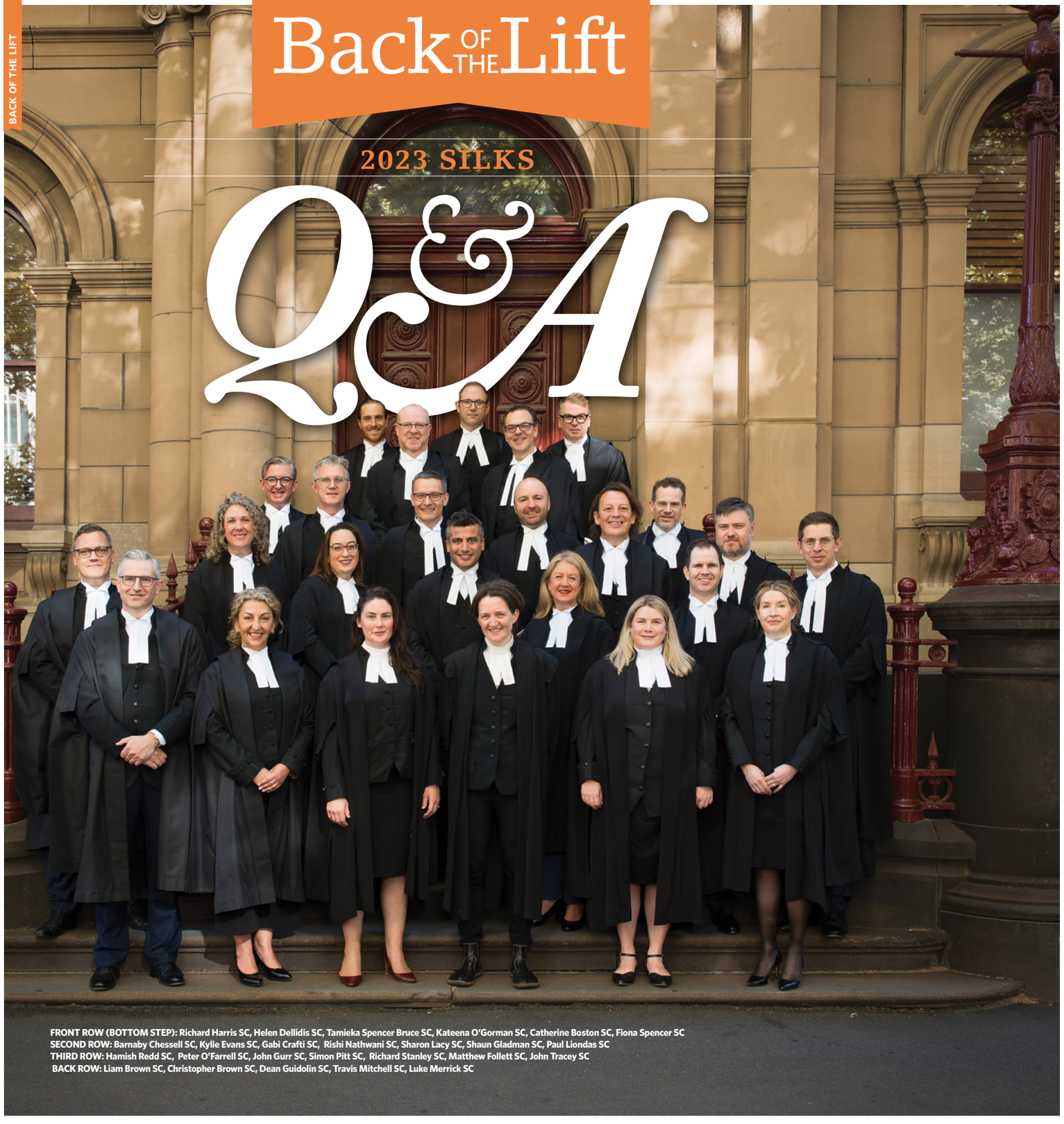
> Nestled within the busy urban landscape, [Rob's] chambers operates as a quiet space of contemplation for a KC within the Melbourne CBD. Functioning as a workplace and meeting place, it is also a space to contemplate, a moment of respite from the daily happenings of the court—an opportunity to recharge and think ahead of the next case.

And, if you look closely, you'll see pops of colour that would make Dolly Parton proud.

With thanks to Fiona Dunin, Director at FMD Architects, and photographer Tatjana Plitt, for their kind permission to reproduce the main photos of Rob's chambers.

Back of the Lift

2023 SILKS Q&A



FRONT ROW (BOTTOM STEP): Richard Harris SC, Helen Dellidis SC, Tamieka Spencer Bruce SC, Kateena O'Gorman SC, Catherine Boston SC, Fiona Spencer SC
SECOND ROW: Barnaby Chessell SC, Kylie Evans SC, Gabi Crafti SC, Rishi Nathwani SC, Sharon Lacy SC, Shaun Gladman SC, Paul Liondas SC
THIRD ROW: Hamish Redd SC, Peter O'Farrell SC, John Gurr SC, Simon Pitt SC, Richard Stanley SC, Matthew Follett SC, John Tracey SC
BACK ROW: Liam Brown SC, Christopher Brown SC, Dean Guidolin SC, Travis Mitchell SC, Luke Merrick SC

Matthew Follett SC

How did you celebrate the news of your appointment? Outgoing calls to family; incoming calls from friends and colleagues; consumption of many calories and much alcohol.
Who has been a legal idol or mentor of influence to you? No idols, but many notable mentors, counsel and solicitors alike. Of counsel, Stuart Wood KC, Frank Parry KC and Richard Dalton KC.
Who would play you in a movie, and why? I've been told (by others) that the answer to this is Matt Damon. I don't profess to see the same level of resemblance as some others do.
What do you like most about the Bar? The freedom of working for oneself, including when, where and how to work. Also, its collegiality.
Advice to new barristers? Work hard and foster and maintain relationships.
Who did you read with? Stuart Wood KC.
Who read with you? Matt Garozzo.

Travis Mitchell SC

How did you celebrate the news of your appointment? Lunch with my floor colleagues, then home to celebrate my wife and kids.
Who has been a legal idol or mentor of influence to you? There have been many, but none more profound than Chief Justice Debbie Mortimer, who I was lucky enough to share a floor with for many years, and who persuaded me to appear unled when she had to drop out of our special leave application.
Who would play you in a movie, and why? Emma Watson. I just did the *Buzzfeed* quiz and apparently, she's the one. I pity the makeup crew having to make that work.
What do you like most about the Bar? The people that I share this profession with. The congratulatory notes I've received have reminded me what a diverse and wonderful group of people I've encountered in my time at the Bar and have left me smiling for days.
Advice to new barristers? When you get to your feet for the first time, leave the water glass in the upright position (bless you Geelong Magistrates' Court bench clerk who silently mopped up with paper towel to let me begin fumbling through my submission).
Who did you read with? Judge Samantha Marks.
Who read with you? Reiko Okazaki and Melanie Albarella.

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.*

Gabi Crafti SC

How did you celebrate the news of your appointment? With rivers of champagne.
Who has been a legal idol to you? Grace Van Owen from McKenzie, Brackman, Chaney, and Kuzak (10 points for those who remember who she was, two points for those who have to google her).
Who would play you in a movie, and why? Mayim Bialik, obvs.
What do you like most about the Bar? It's rarely boring.
Advice to new barristers? Two mantras have sustained me over the years (and, weirdly, they're both athletic): *run your own race* and *it's a marathon, not a sprint*.
Who did you read with? The most excellent David Batt KC.
Who read with you? Sahrah Hogan, Lisette Stevens, Nussen Ainsworth, Joshua Bridgett, Ashleigh Best and David Blumenthal. (How lucky am I?!?!)

Kateena O'Gorman SC

How did you celebrate the news of your appointment? With my husband, Zim, who was working next to me at the time. Then I phoned my parents and asked if they could fly to Melbourne to celebrate (which they did). Our new chambers will go out to lunch soon.
Who has been a legal idol or mentor of influence to you? My grand dad and my parents were/are barristers. They plied their craft and inspired me, in different ways. I have tried to follow in each of their footsteps (but never tried to fill their shoes). Phil Solomon KC and Penny Neskovcin KC are two other mentors who I try to emulate: as barristers and as mentors.
Who would play you in a movie, and why? Claire Danes. I have had moments with the kids when I have had to rush to court as hectically as Claire rushes around in *Homeland*.
What do you like most about the Bar? The chance to attempt to right the scales of fairness for a client: even if just in some small way. And the chance to help preserve our fairness institutions.
Advice to new barristers? 1. Oscar Wilde's advice: "Be yourself; everyone else is already taken." 2. Go gentle on yourself (sometimes). 3. Find some fellow barristers to journey with.
Who did you read with? No-one. I started practice in Queensland. Phil Solomon KC and Penny Neskovcin KC generously played mentoring roles though.
Who read with you? Andrew Healer, Julia Wang, Jess Moir, Dean Merriman, Kalia Laycock-Walsh, Josh Forrest and Kelly Butler.

Rishi Nathwani SC

How did you celebrate the news of your appointment? There have been a few celebrations!! My partner Luci Thies is working in Brisbane. I called her first once I heard the good news. There have been many glasses of champagne since with friends - including in Chambers due to three of us taking Silk at Gorman and more Luci returned. I was however reminded of my place by my daughter who sarcastically slow clapped me whilst saying "well done Daddy".
Who has been a legal idol or mentor of influence to you? There have been many. In England, Kieran Vaughan, KC, Susan Rodham and James Martin were very influential on my career. Fortunately became Kieran's junior of choice, and I would do well to be half the barrister he is. Here in Victoria there have been many but,Pat Doyle, SC has been so supportive and influential. Many members of Chambers and the Judiciary have also been incredibly supportive and influential. There are too many to name!
Who would play you in a movie, and why? Given I am short, have a cheesy smile and a healthy ego, I would like to think Tom Cruise. However, I am sure the truth would be very different!
What do you like most about the Bar? For me, this is the ultimate job. We get to spend our days in Court, meeting different people on a daily basis. The collegiality of the Bar is something that makes our profession what it is and is something I love.
Advice to new barristers? The quality of the Junior Bar is so high. So my advice is simple. Believe in yourself and enjoy this job - you have made it this far based on your ability. However, at the same time, listen to all of the advice and direction available within the Victorian Bar, and don't get ahead of yourself. There is so much to enjoy. And if I can take Silk - then you definitely can.
Who did you read with? I read with Pat Doyle SC. He was just a brilliant mentor - he helped me immensely with the transfer between jurisdictions and gave me a lot of exposure with solicitors. The best example is perhaps this - Pat was asked about representing Lawyer X at the Royal Commission by Minters, but he was conflicted. He then suggested me and rest is history. The only fault Pat has is that he is a mad Dees fan!
Who read with you? I was not initially permitted readers by the previous Bar Council Readers committee but eventually was given exemption for my prior years of experience in the UK. My readers have been Jennifer Ball, Daniel Dober, Greer Boe, Holly Baxter and currently, Dylan Ioannou-Booth.

Richard J Harris SC

How did you celebrate the news of your appointment? A celebratory coffee mid-bike ride; an impromptu lunch with generous friends; and a weekend afternoon tea with family, the highlight of which was my three-year-old niece dressed up as my junior in Harry Potter robes, makeshift jabot and wig.
Who has been a legal idol or mentor of influence to you? A long time ago when I was an associate, the Hon Sir Gerard Brennan QC suggested that I might consider going to the Bar one day. His outstanding intellect, qualities as a person, work ethic and generosity to a very green lawyer have always stayed with me.
Who would play you in a movie, and why? Sean Micallef—he's got the grey hair, a law degree and is far funnier than me (but I try).
What do you like most about the Bar? We are fortunate in our colleagues—mentors, readers, those we share chambers with and on our lists, as well as our opponents.
Advice to new barristers? Embrace every opportunity to appear to hone your advocacy skills. And don't buy a wig.
Who did you read with? Simon Marks KC.
Who read with you? Haroon Hassan, Angel Aleksov, Dr Adrian Hoel, Roshan Chaile and Huw Watkins.

John Gurr SC

How did you celebrate the news of your appointment? Quietly, with family and a new puppy.
Who has been a legal idol or mentor of influence to you? Every leader I have had over the years has been a fantastic mentor. The best have led by their fine example whilst giving me room to make my own mistakes, and to learn from them.
Who would play you in a movie, and why? George Clooney—because he wants to!
What do you like most about the Bar? The collegiality, the commitment to the law and the privilege to act on behalf of clients in the courts. Knowing that colleagues are always available for help and advice—because someone, somewhere, has been there before you—creates a wonderful sense of camaraderie.
Advice to new barristers? Take a deep breath and dive right in—you know more than you think.
Who did you read with? Stephen O'Bryan KC.
Who read with you? Justin Tevelein.

Hamish Redd SC

How did you celebrate the news of your appointment? With champagne and my chambers colleagues plus a few additional guests; and then some more champagne later, in the Botanic Gardens.
Who has been a legal idol or mentor of influence to you? The Hon Justice Ian Waller (with whom I read).
What is the soundtrack to your time as a junior? I'd like to say "Movin on Up" by M People, but, in reality, as my readers all know, it's usually sacred choral music in my chambers.
What do you like most about the Bar? The immediacy of the results (for better or worse) and the flexibility that being self-employed offers.
Advice to new barristers? Never lose sight of the fact that the most important things in life are your relationships with people you love.
Who did you read with? Ian Waller KC (as his Honour then was).
Who read with you? Kate Burgess, Lachlan Carter, Evelyn Tadros, Brett Harding, Nic Chow, Justin Lipinski, Ella Zauner.

Liam Brown SC

How did you celebrate the news of your appointment? In a maelstrom of drinks and dinners with friends and family. An early task was to instruct my children on the respect that I now deserve after they met the news of my appointment with customary eye roles and implanting of earbuds.
Who has been a legal idol or mentor of influence to you? Rachel Doyle SC and Rowena Orr KC. I would be astonished if I need to provide reasons.
Who would play you in a movie, and why? Richard Roxborough—he has had necessary experience playing Rake. Oh, and the red, unkempt hair.
What do you like most about the Bar? The engaging work, the brilliant, fun, and inspiring colleagues, the work-life balance, and the appropriate placement of sarcasm. I think the third point has less importance for life at the Bar because some of the balance is maintained through engaging work and the camaraderie. Nonetheless, at least for me, I feel it is necessary to have plenty of time away from the Bar focusing on family and hobbies. We have a lot to do and such little time.
Advice to new barristers? It will get better. There will be many periods of sheer terror, despair, and the feeling that you are an imposter. But packed within these periods are the most alluring highs and fulfilling friendships. And the highs and beautiful friends increase in number and intensity as time passes. I also found comforting something that Peter Hanks KC said to me at an early low point—there is a fair bit of dumb luck that contributes to success at the Bar. Don't beat yourself up and if it isn't working, it's been a great experience that you can take to so many places. Leaving the Bar can be a giant step towards happiness and fulfilment for some people and should never be foreclosed as an option.
Who did you read with? The Hon Justice Peter Gray.
Who read with you? Ben Bromberg, Chris Fitzgerald, Jasmine Still.

Paul Liondas SC

How did you celebrate the news of your appointment? Calls with family and friends; a conference with instructors to discuss accounting adjustments (the least exciting part of the day); lunch with colleagues on L14, Castan Chambers; followed by a few quiet drinks after work.
Who has been a legal idol or mentor of influence to you? My mentor, Hon Justice Ted Woodward—a great leader by example.
Who would play you in a movie, and why? I had trouble thinking of this

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one—so I did an online quiz and it told me George Clooney; not at all sure how that works …
What do you like most about the Bar? The interesting work, and the colleagues that you get to share it with.
Advice to new barristers? You get lots of advice—work out early whose advice is worth following!
Who did you read with? The Hon Justice Ted Woodward
Who read with you? Alexia Staker, Karan Raghavan, Chong Tsang, Laila Hamzi and Jacob Waller.

Helen Dellidis SC

How did you celebrate the news of your appointment? In hospital for tests for a suspected heart attack the night before. Seriously!
Who has been a legal idol or mentor of influence to you? Minal Vohra SC, inspiring calm confidence in those all around her.
What is the soundtrack to your time as a junior? "Friday I'm In Love," by The Cure.
What do you like most about the Bar? Freedom, independence, adrenaline.
Advice to new barristers? Work hard to earn the trust of your colleagues at the Bar, and the judges before whom you appear, and good outcomes for your clients and professional life will follow.
Who did you read with? The Hon Kirsty MacMillan KC. My senior mentor was the late great Noel Ackman QC.
Who read with you? Ms Alex Finemore on Foley's List.

John (Jack) Tracey SC

How did you celebrate the news of your appointment? Eating mud crab and drinking cocktails with friends and family in Port Douglas.
Who has been a legal idol or mentor of influence to you? Many great people, but I will single out my late father.
What is the soundtrack to your time as a junior? Theme from "The Good, the Bad and the Ugly".
What do you like most about the Bar? Discovery applications.
Advice to new barristers? Every matter is a matter.
Who did you read with? Justice Stephen O'Meara.
Who read with you? Emma Harold, Patrick Tiernan, Niko Kordos and Ben Holding.

Shaun Gladman SC

How did you celebrate the news of your appointment? I called my wife and went to lunch with friends.
Who has been a legal idol or mentor of influence to you? I can't name just one—Justice David Beach, Justice Michael Wheelahan, Justice James Gorton, Justice Stephen O'Meara, Justice Emilios Kyrou AO, and Jeremy Ruskin KC.
What is the soundtrack to your time as a Junior? When deadlines loomed, as they often did, the main theme from *Jaws*. I was not the shark.
What do you like most about the Bar? The work.
Advice to new barristers? Written advocacy is critically important. Listen to John Roberts, the Chief Justice of the United States, who said: "The only good way to learn about writing is to read good writing."
Who did you read with? Justice Stephen O'Meara.
Who read with you? Joshua Forrest.

Tamieka Spencer Bruce SC

How did you celebrate the news of your appointment? Champagne! Lunch! Drinks! Opening night of my son's high school musical…
Who has been a legal idol or mentor of influence to you? Elle Woods.
Who would play you in a movie, and why? Julia Sawalha (see *Press Gang* and *Absolutely Fabulous*). Or, Jennifer Connelly, because as a kid I was always being told I looked like the girl in *Labyrinth*.
What do you like most about the Bar? Being self-employed.
Advice to new barristers? You'll never regret saying no to a brief.
Who did you read with? David Batt KC.
Who read with you? Ahmed Terzic, Yanni Goutzamanis, Bernice Chen, Angela Kittikhoun.

Peter O'Farrell SC

How did you celebrate the news of your appointment? Around the kitchen table with my wife Sally followed by an evening on a Richmond rooftop with family, friends and colleagues.
Who has been a legal idol or mentor of influence to you? My father Laurie O'Farrell who is now retired from practice after founding a firm in Bendigo and practising primarily in crime and family law whilst contributing strongly to a broad range of community organisations.
What is the soundtrack to your time as a junior? "Thank God I'm a Country Boy".
What do you like most about the Bar? Its independence and collegiality and the honour of being asked to represent the best interests of people who seek our assistance.
Advice to new barristers? Be contactable, do the work, participate in a range of community activities.
Who did you read with? Christopher Townshend KC.
Who read with you? Anthony Roden-Paru.

Chris Brown SC

How did you celebrate the news of your appointment? Lunch with friends from the Bar, including from my readers intake, and dinner with extended family.
Who has been a legal idol or mentor of influence to you? The many silks I have been lucky to have been led by whilst at the Bar. You know who you are (I hope). Each of them has taught me something. If I had to single out one, it would be my mentor at the Bar, Philip Crutchfield KC.
Who would play you in a movie, and why? Richard Roxburgh. He could bring a touch of Cleaver Greene to an otherwise typically uneventful commercial/insolvency practice … and bring a touch of the ginger.
What do you like most about the Bar? The collegiality, especially when one takes into account the breadth of personalities, backgrounds and practices of members (which are also all great attributes of the Bar).
Advice to new barristers? Don't try to do it all on your own. Ask for help. Fully utilise the resources available to you. And find good chambers (as in good people, not a large room with a good view). Life at the Bar is so much better in good chambers with fun and engaging colleagues.
Who did you read with? Philip Crutchfield KC.
Who read with you? Katherine Wangmann, Rhiannon Malone.

Dean Guidolin SC

How did you celebrate the news of your appointment? My children insisted on using their pocket money to take my wife and I out to dinner at our local Grill'd. As it was a "special occasion", they also sprung for a large chips and Kombucha! It was perfect.
Who has been a legal idol or mentor of influence to you? I have been fortunate that there are several and they know who they are. They have all reached out to me once this year's appointments were announced, and I let each of them know of their influence on me and how grateful I am for it.
Who would play you in a movie, and why? You know that actor who is in all those movies and you always recognise him, but you never quite remember his name and you never quite remember the movies in which you've seen him, but he is always there … that guy!
What do you like most about the Bar? The freedom to bring independent thought and analysis to a problem.
Advice to new barristers? I would pass down the following advice that was given to me as a new barrister by two of my mentors: (1) "Being a barrister is like being a wood-turner. You get better at it the more you do it." And (2) "Just look straight ahead. Don't worry about what others are doing. Run your own race—it's a long one!"
Who did you read with? Justice Macaulay and, after his Honour was appointed silk, Anthony Kelly KC.
Who read with you? Daniel Briggs, Naomi Lenga and Angus Mackenzie.

Luke Merrick SC

How did you celebrate the news of your appointment? A phone call to my parents (who sounded a little too surprised for my liking) and a succession of lunches and dinners with family, friends and colleagues.
Who has been a legal idol or mentor of influence to you? There are many who spring to mind (Philip Crutchfield KC, Tony Bannon SC, David Catterns KC to name a few), but I think the answer is the Hon John Middleton KC: a model of calm, intelligence, clarity and good humour.
Who would play you in a movie, and why? Joaquin Phoenix, obviously.
What do you like most about the Bar? The wonderful friends you collect along the way, the joy of using language for a job and the freedom to build the career you want to have.
Advice to new barristers? Three things—quality not quantity, be on time with your work and take as many holidays as you can.
Who did you read with? Philip Crutchfield KC.
Who read with you? No one took such a risk with their career.

Simon Pitt SC

How did you celebrate the news of your appointment? I was immediately informed (rather than being asked) that we were going out for lunch, which then rolled into floor drinks, which then rolled into a family celebration dinner and… well, you get the picture. The common theme was good champagne. Truth be told, I am still celebrating, and I have no intention of stopping any time soon.
Who has been a legal idol or mentor of influence to you? Without meaning to be evasive, there are too many to mention, so I won't. I probably would not have had the courage to apply for law, apply for articles, apply for the readers course, get to my feet for my first case or apply for silk without the belief and support of some really wonderful people. They know who they are.
What is the soundtrack to your time as a junior? I was a junior for almost 20 years, so there have been many vinyl records, mix-tapes, CDs, iPod playlists, Spotify compilations (get the picture?) that have helped get me through. Seeing Coldplay live was one of the best music experiences that I can remember. *Les Misérables* (the stage production not the movie) inspires me and gives me goose bumps every time I see it.
What do you like most about the Bar? So many things. Competition with, yet dependence upon, one's colleagues. Mutual respect. People giving back to the system that has given to them. More recently, running matters with very talented juniors and observing a case come together by the exchange of ideas that is not possible when running a case on my own.
Advice to new barristers? In no particular order: get involved in every aspect of life at the Bar; the more you put into this place, the more you will get out of it. Get out of your comfort zone. Say yes to things. Trust your gut. Lean on your colleagues and let them lean on you. Be courteous with colleagues and the Bench at all times. Don't be afraid of going in hard on points you believe in. Jump and the net will appear!
Who did you read with? Rod Randall, who then became the Hon Associate Justice Randall (now retired).

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Who read with you? Stephanie Scully, James Waters, Bridget Slocum and Simone Kipen.

Richard Stanley SC

How did you celebrate the news of your appointment? A swim in the freezing waters of Port Fairy's East Beach (being on circuit in Warrnambool at the time).
Who has been a legal idol or mentor of influence to you? My father.
What is the soundtrack to your time as a junior? "I Fought The Law And The Law Won" by the Bobby Fuller Four.
What do you like most about the Bar? My colleagues.
Advice to new barristers? Take a regular holiday.
Who did you read with? Iain Jones KC.
Who read with you? Daniel Kinsey; Oliver Lesage; Ruby Heffernan.

Catherine Boston SC

How did you celebrate the news of your appointment? By riding on the coattails of Dermot Dann KC one last time as he closed to the jury in our criminal trial.
Who has been a legal idol or mentor of influence to you? The Hon Mark Weinberg KC. Without fail, I always learned something when I appeared in his court.
Who would play you in a movie, and why? Reese Witherspoon, because she isn't afraid to advance the interests of women in a room full of men. (Plus, she feels comfortable using legal jargon in everyday life.)
What do you like most about the Bar? The autonomy, the flexibility, and the unrivalled "high" one experiences when one (a) does a good job; and (b) obtains a good result for a client.
Advice to new barristers? First, follow your passion, even if it's not the type of work you think you "should" be doing, and even if it doesn't pay well (or at all). Secondly, don't stress about getting on the "right" floor immediately after your reading period. I spent about five years on a general floor in ODCW and really value that time—it was such a great opportunity to get to know people from other practice areas.
Who did you read with? I was supposed to read with Nick Papas, but he took silk shortly before my readers' course commenced. Luckily, Nick told me about some bloke called Michael Croucher. Not only did I get to learn from the genius that was Michael, I spent a bit over a year in Crockett Chambers surrounded by the greats of the Criminal Bar—Richter, van de Wiel, Dunn, Hill, Heliotis etc. Crockett was also the centre of the criminal appellate Bar, with people like Chris Boyce and the late, great, Lachie Carter. I treasure that time.
Who read with you? Hannah Canham and Danny Zajd.

Kylie Evans SC

How did you celebrate the news of your appointment? The day the news broke was a very exciting day in chambers, as there were three appointments on my floor. At lunch, Richard Harris SC, Liam Brown SC and I had a champagne toast given by the Hon Justice Gray in chambers. Arriving home to my family, I was greeted with two giant "KC" balloons in the kitchen which were very exciting to see! It seems as it there has been a steady flow of celebrations since, with colleagues, family and friends. I've enjoyed every minute.
Who has been a legal idol or mentor of influence to you? There are really too many to name. My earliest mentors were two judges—the late Hon David Hunt QC who I worked for at the International Criminal Tribunal for the former Yugoslavia, and then the late Professor James Crawford who later became a judge of the International Court of Justice in The Hague. Both inspired me to become a barrister as well as pursue an academic interest in the law. You can't be what you can't see.
What is the soundtrack to your time as a junior? "6 Inch" by Beyonce (featuring The Weekend) because it's about a woman who works hard to achieve her goals and is not afraid to make her own way.
What do you like most about the Bar? The Bar offers a great opportunity to do interesting work and make a difference. I enjoy working with so many talented colleagues and juniors on great cases.
Advice to new barristers? Look for opportunities to work with a range of people so that you can learn from many. Pro bono work can be a wonderful way to gain experience, but also make a contribution to society.
Who did you read with? Dan Star KC.
Who read with you? Nick Boyd-Caine, Benedict Coxon and, currently, Amy Armstrong.

Fiona Spencer SC

How did you celebrate the news of your appointment? An impromptu lunch put on by some very generous colleagues.
Who has been a legal idol or mentor of influence to you? Chris Winneke KC, Jonathan Brett KC, Jeremy Ruskin KC, Michelle Britbart KC, Justice Gorton and Justice Jane Dixon.
What is the soundtrack to your time as a junior? "Flight of the Bumblebee".
What do you like most about the Bar? The friendships, the freedom and the work
Advice to new barristers? Always do your best. And to those thinking about having children when at the Bar—don't stress about taking time off. Before you know it, you'll be back at work wondering where the time went.
Who did you read with? Justice Attiwill.
Who read with you? Sergio Zanotti Stagliorio and Nicolas (Nico) Muniz Saavedra.

Adjourned Sine Die

Supreme Court

The Hon Kate McMillan KC

Bar Roll No 1632

Justice Kate McMillan came to the Bar in 1981 and was appointed senior counsel in 2000. Her practice concentrated on equity, wills and probate. Her Honour was appointed the judge in charge of what became the Trusts, Equity and Probate List and the Testators' Family Maintenance List. Under Justice McMillan's management the TEP List grew in efficiency, size, and importance, and it now represents one of the major parts of the court's business.

Over her 11 years on the bench Justice McMillan heard most, although not all, of the probate, equity and TFM cases that went to trial. She stamped her own personality on the way in which the cases in the TEP List were run, and was admirably proactive in the exercise of the court's inherent supervisory jurisdiction over lawyers' fees, developing the jurisprudence of the *Civil Procedure Act 2010* notably. Time limits were imposed during the interlocutory stages, and rather than their being optional or aspirational, observing them became de rigeur. The TEP List developed, and it came to provide a speedily accessible jurisdiction in which disputes arising in the context of the administration of deceased estates could be addressed and determined swiftly, without the delay usually involved in going to court.

Justice McMillan also imposed her authority on the way in which cases were presented to her at trial. She actively involved herself in the unfolding of each case, making it clear from the outset what assistance she expected from counsel, both in relation to the evidence and the submissions of law. Her interventionist attitude was not welcomed by all but, at least for counsel whose preferred approach was dialogue rather than delivering an oration, it was helpful.

Justice McMillan was a prodigious worker, writing many judgments, mostly but not only in the areas of equity, succession and trusts. Her judgments follow a clear pattern, setting out the facts concisely, then the issues arising from them, the relevant law, and finally the judge's consideration of how the law was to be applied to resolve those issues.

This clarity of approach harks back to the judgments of Sir Isaac Isaacs and Sir Reginald Sholl, two judges with a reputation for judgments that are didactic and invaluable to students of the law—as all lawyers continue to be whilst they remain in practice. Justice McMillan's many judgments have that quality too; they regularly set out a useful summary of the current law as it had developed to that date, and then proceed to show how the law should apply to the specific matters in issue. In the four decades since her Honour came to the Bar, the law dealing with equity, trusts, wills, succession, and family provision has grown exponentially. Her Honour's lucid judgments have made a substantial contribution to that development of the law, and they continue to provide valuable guidance for all practitioners practising in those areas.

The law relating to the succession to property is of profound and immediate importance to many members of the community. Justice McMillan converted what was, in 2012, the still nascent TEP jurisdiction, into one of the major parts of the court's business, notable for its efficiency and the expeditious output of a large volume of work.

A testament to Justice McMillan's strong mentoring is the fact that six of her associates have come to the Bar and now practise in trusts, equity and probate. Her Honour's portrait hangs comfortably amongst the luminaries of the Bar in the Peter O'Callaghan QC Gallery.

RICHARD BOADEN

Silence all stand

Federal Court of Australia

The Hon Justice Emilios Kyrou

It would be easy for someone meeting this kind and courteous judge, with unmistakeable intelligence and a hint of mischief playing in his bright eyes, and a ready laugh, initially to miss the fact they are in the presence of a truly remarkable human being.

There is a black and white photograph, taken when his Honour was seven, of the whole community of Sfikia gathered in the town square to celebrate Greek National Day in 1967. Sfikia had one telephone, the postman came weekly on horseback, there was no electricity or gas, and water was collected from a pipe, fed by a mountain spring. Life was hard, but communal.

From the beginning, fate was standing by. At his baptism, Emilios's 25-year-old godmother broke with tradition (he should have been named after his paternal grandfather, Dmitrios), and instead named him after the hero of a popular romance novel. And in that

photo, sitting next to him, is Peris, his future wife, whom he would meet many years later in Melbourne.

Shortly after that photo was taken, Emilios would for the first time see a city (Thessaloniki, then Athens), board a plane (to London), and a ship (to Australia). In Melbourne, his family started a new life in one of the Nissan huts comprising the Broadmeadows Migrant Hostel. His parents, John (Yiannis) and Stella (Stergiani), walked from factory to factory seeking work.

John and Stella had very little formal education. German soldiers arrived in Sfikia in 1941, to the sound of machine gun fire, when John was eight and Stella was five, and the next year burned down their school. From 1946, Sfikia was a frontier town in the Civil War. From the age of 13, John was a shepherd, heading out for days at a time with the small flock of sheep purchased to replace 35 goats taken by the guerillas; Stella worked in crop fields.

But from that hardship, and through great sacrifice, they forged a brilliant future for their sons, Emilios and Theo.

At the ceremonial sitting on 22 May 2008, to welcome Justice Kyrou as a judge of the Supreme Court, he said, "I would like to publicly acknowledge that the inspiration for all I have achieved has come not from any great political leader, literary figure, or jurist, but from my parents. They have taught me the core values of hard work, humility, loyalty, dignity and respect". Then he looked at them directly, and thanked them in Greek.

I was deeply moved. I felt proud of my country, and my profession. I thought of my grandparents who fled communist Czechoslovakia to Melbourne in 1950, where, through hard work, they created freedom and prosperity for their family. And I looked up at this great lawyer, who had spent an hour with me one morning at Mallesons, going carefully through a four-page letter I had drafted, with his red pen, showing me why he made each change; who, deleting a draft pleading I had based on the firm precedent, said "read the rules, read the cases, find the evidence, then draft something clear and sensible".

When his Honour was nine, his mother was fired due to an injury, and went, son in tow, to ask whether her previous employer would give her work. They said they would not employ her again, because she had previously resigned. Then Emilios got to work. He put forward the strong points: why she had been fired, how efficiently she had worked in her previous job, that her previous supervisor would confirm this, that the family could not survive on one wage. The decision was reversed.

This story will surprise no one who had the privilege of seeing the adult version in legal practice.

Nor did his Honour's appointment to judicial office surprise me. Sitting in his Mallesons office at 6am, calmly working away, he always seemed like a judge who accidentally happened to be a partner at a major law firm. Having often been at the other end of his red pen, I admit to a slight anxiety for innocent VCAT members whose reasons would come before him on appeal; it was difficult to know how his Honour would adjust, initially, to reviewing reasons with "an eye not keenly attuned to error".

From the outset he wrote many leading judgments, a practice he continued when appointed as a Judge of Appeal; often, his judgments became bywords for a legal principle, or go-to references for a masterly summary of the authority on a particular topic. Such judgments, produced over 15 years of dedicated service to Victoria's judiciary, are now too numerous to mention.

In court, he was unfailingly courteous and fair to those at the bar table, and others on the bench. This is also unsurprising. Born in Sfikia, learning English from eight, the butt of racist bullying at Broadmeadows Primary, the dux of Upfield High, the Supreme Court Prize winner at Melbourne University, partner at Corrs aged 28, and Mallesons aged 30—life had taught him that a judge can learn everything of importance from a shepherd.

At his welcome as a judge of the Federal Court of Australia, and as president of the AAT, and the tribunal that will replace it, he said "the new role presents a once in a lifetime opportunity for me to serve the Australian community by helping to shape the new system of merits review". The Australian community is very fortunate to have one shaped by such a lifetime to take on that role.

EMRYS NEKVAPIL SC

The Hon Justice Catherine Button

Bar Roll No 3986

Noting Justice Button's appointment to the Supreme Court of Victoria in July 2021 (*Victorian Bar News,* vol 172), Christopher Tran foretold, "She will be an excellent judge." The Commonwealth Attorney agreed and, in December 2022, announced her Honour's appointment to the Federal Court of Australia.

In the Supreme Court, her Honour dispatched complicated cases in chancery and corporations (including several in insolvency, which—as everyone knows—are the best cases). She was appealed only once, without success. Her judgments are timely, succinct, and learned. She is one of those judges—like Justice Gordon and Justice Jack Forrest—beloved by law students, those charged with drawing submissions and other judges for the clarity of their analysis, synthesis and explanation of the relevant statute, authorities and other learning, for their exposition of the applicable principles, and for setting them out in consumer-friendly bullet-points or numbered subparagraphs.

As a barrister, Button QC was renowned for her intellect, straight-to-the-point approach and enormous capacity for hard work. Justice Button is no different. Those appearing in her court are often staggered by the thoroughness of her preparation, her total familiarity with the pleadings, material and issues, and her ruthless efficiency. An experienced commercial silk has remarked, "I could see her court book on Teams. It had more flags than mine!" Said another, "I thought it was a simple point. Then the judge started asking questions…" An uber-expert valuation witness described giving evidence before her Honour thus: "She asked all the insightful questions and left it to the barristers to muddle on from there."

Tran's note also rightly mentioned her Honour's humanity:"She would notice if you were going through a rough patch and be understanding about it. And she could banter with the best of them." Post-appointment, that has not changed. If Justice Button's humour was a wine, it would be a Loire Valley Sauvignon blanc—dry, crisp and flinty, with a hint of acid. Out of court, she is excellent company. In court, she is always polite: "She's pleasant, forgiving and has a sense of humour"; "She's unfailingly polite, even when making a devastating point"; "She's the smartest person in the room but doesn't make anyone else feel inadequate."

In poker terms, Justice Button has one 'tell': "My opponent had a terrible argument. We knew he was doomed when the judge raised an eyebrow quizzically at him."

Her Honour has a life outside the law. She and her husband (a professor of international relations and sometime artisan baker) have three delightful children. Her preferred sport at university was water polo—a brutal combination of boxing, volleyball and waterboarding. Her current pastimes include ocean swimming (the sharks know about the water polo and keep their distance), cycling (a post-crash dislocated shoulder neither slowed her down nor caused her to miss any court commitments), and farming (at last count, she owned four chainsaws, a tractor, and several weed-sprayers—several of which she operates simultaneously). The only endeavour in which she has not excelled is ten-pin bowling.

Asked about the differences further north on William Street, her Honour's words were typically spare. "Taller building; more lifts." Ad astra, indeed. The Supreme Court's loss is the Federal Court's gain.

CARL MOLLER SC

The Hon Justice Christopher Horan

Bar Roll No 3400

Justice Christopher Horan is an outstanding addition to the Federal Court of Australia. It is an appointment which will no doubt draw on his capacity for hard work, encyclopaedic knowledge of the law and empathetic qualities.

His Honour came to the Bar in 2000, having previously been, among other things, associate to Sir Gerard Brennan QC and counsel assisting the solicitor-general for the Commonwealth, David Bennett KC. His career at the Bar was, of course, consistent with that auspicious beginning. He read with Melanie Sloss, now Justice Sloss of the Supreme Court of Victoria. He himself had six readers before being appointed silk in 2015.

Over the years, his Honour appeared in significant cases in the superior courts, particularly in public law. In the High Court, they included recent important cases on executive power, such as *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 408 ALR 381, and liberty cases, such as *Minogue v Victoria* (2018) 264 CLR 252. He acted frequently in public interest cases in the federal and state courts, such as when trying to obtain the release of the rescued people from the *MV Tampa* (*Ruddock v Vadarlis* (2001) 110 FCR 491), and acting for a disabled client whose reasonable and necessary supports had only been partially funded under the National Disability Insurance Scheme (ostensibly to ensure the financial sustainability of the scheme overall: *McGarrigle v National Disability Insurance Agency* (2017) 252 FCR 121). In 2016, he was awarded the prestigious Victorian Bar Pro Bono Trophy for "substantial and extraordinary commitment to pro bono over a significant period of time". He has a healthy competitive streak—which sometimes meant he felt the losses more keenly than he ought to have.

Following the death of Jim Merralls QC, his Honour assumed co-editorship of the Commonwealth Law Reports, having been a reporter for many years. His attention to detail in the editing process would have greatly pleased Jim.

Those who came across his Honour who were unfamiliar with his resumé could be forgiven for assuming that his attendance in chambers was purely a social event. His demeanour, no matter the rigours of his busy practice and competing commitments to his family, to whom he is utterly devoted, was always that of a person with time to chat with anyone about anything from pop-culture to politics, or the Richmond Football Club.

His unassuming and approachable disposition has won him the affection of his colleagues at the Bar, in addition to their esteem. He will surely enjoy a long and fulfilling career on the bench.

ALEXANDER SOLOMON-BRIDGE AND SPIKE BUCHANAN

BACK OF THE LIFT

Supreme Court of Victoria

The Hon Associate Justice Catherine Gobbo

Bar Roll No 3737

Catherine Gobbo was appointed an Associate Justice of the Supreme Court of Victoria on 13 August 2023. Her Honour graduated from the University of Melbourne in 1998, later completing a Master of Laws at the same institution. She also holds a Master of Science and Technology (Aviation) from the University of New South Wales. Her Honour was admitted on 3 April 2000, commencing practice at Gadens, where she worked with Rob Hinton in banking and finance, insolvency and commercial litigation until she came to the Bar in 2004.

Having briefed me while at Gadens she later read with me. She developed a successful commercial practice and was in demand from the outset as her practice flourished. She joined Young's List when Tammy Young started it in 2012. She was briefed at all levels in commercial cases. She did a number of directors examinations. She was a trusted junior counsel in insolvency: from large bankruptcies and liquidations to smaller matters. As a junior she was of great assistance to silks with whom she appeared: thorough, hardworking and insightful.

She was trusted by the Bench and her submissions were always well prepared and concise. She came to develop a very successful practice as a mediator. At the time of her appointment she was one of the most highly regarded mediators at the Bar and much in demand. Her effectiveness came from innate calmness, natural empathy, an ability to listen and substantial patience, qualities that will hold her in great stead as an Associate Justice.

She had one reader, Matthew Tennant, who has particularly remarked on her sense of humour, generosity with her time, astute guidance, work ethic and integrity.

For the last few years she was a valued member of Level 30 Aickin Chambers, as was her dog Marshall, a bichon poodle cross, who she could regularly be seen with in Queen Street—usually without a lead, such was his loyalty. He will probably be seen in her Honour's chambers!

The freedom of the Bar allowed her Honour to indulge her passion for adventure travel. While most of us like to avoid storms on our holidays, she regularly travelled to the United States chasing tornados in a four-wheel-drive, and then lying by a pool in Las Vegas. She has a pilot's licence and flies small planes. Her capacity for hard work and her empathy and integrity will mean that she will inevitably be in demand as a judicial mediator. There is little doubt that she will succeed in her new role.

PETER CAWTHORN KC

The Hon Justice Ian Waller

Bar Roll No 2352

"Kindness is a choice", Ian Waller once explained at my 40th birthday party where he was one of the speakers. It is a line that stuck with many of my (mostly non-lawyer) friends. That is a choice Ian makes every day in his interactions with people; be they family, friends, colleagues, or strangers.

That kindness, and humility, along with a keen sense of humour, has seen Ian maintain lifelong friendships both within and—more importantly—outside of the law. No doubt Ian's friendships and loving family have all facilitated the calm demeanour for which he is renowned; that and possibly the odd debrief over a (not too peaty) single malt whiskey in chambers.

Ian had six readers prior to taking silk in 2007, two of whom (Sam Hay KC and myself) enjoyed sharing chambers with him (initially on Level 1, and later on Level 23, of Owen Dixon Chambers West) until his appointment to the Bench in September this year.

At the Bar his Honour enjoyed a wide and varied commercial practice, but also appeared in the seminal reported decisions governing the lawfulness of forestry operations in Victorian State Forests (*EEG v VicForests* before Osborn J; *MyEnvironment Inc v VicForests* before Osborn JA; and *Friends of Leadbeater's Possum Inc v VicForests* before Mortimer J), in all of which I appeared as his junior.

One by one we witnessed our opponents in those cases get elevated: first, Richard Niall QC to the Supreme Court (now Court of Appeal), then Kris Walker QC to solicitor-general and then to the Court of Appeal, followed by Debbie Mortimer QC to the Federal Court (now Chief Justice of that court). Finally, Ian Waller KC has been able to even up the ledger a little.

Ian was a generous leader to appear with, always encouraging junior counsel to take witnesses and entrusting them with certain aspects of cases. I know Ian enjoyed working with many outstanding junior counsel, including Paul Liondas, Andrew Cameron, Justin Meriene, Rebecca Howe and Christopher Lum.

As much as Ian will be missed by his friends and colleagues of Level 23, it is a great service to the State that he has joined the Bench of the Supreme Court. Counsel, and litigants, should feel confident that they will be appearing before a learned, well-prepared and impartial judge who every day will be choosing kindness in the way he interacts with his staff, colleagues and all those who appear before him. We all owe it to him to do the same.

HAMISH REDD SC

The Hon Justice Ted Woodward

Bar Roll No 3156

Justice Ted Woodward was educated at the University of Melbourne, and started his legal career at Arthur Robinson & Hedderwicks, now Allens. He soon moved up the ranks and became a partner in commercial litigation, specialising in insolvency. Those were the heady days of insolvency practice in Melbourne, during the time of the 1990s recession and the collapse of major corporate and government entities.

His Honour was called to the Bar in 1997, following his father's footsteps. He had a varied practice at the Bar, which extended beyond commercial law. A capacity for careful analysis and the absorption of large volumes of information saw him involved in large cases and investigations. His Honour worked on several bushfire inquiries, and his deep forensic skills were deployed during his time as counsel assisting IBAC.

At the Bar his Honour was well respected and liked. Starting out in Latham Chambers, he subsequently spent extended periods of time at Lonsdale Chambers and then, most recently, on Level 14 of Castan Chambers. His Honour was an enthusiastic and valued member of each chambers during this time. He had four readers: Oren Bigos, Paul Liondas, Eloise Dias and Adrian Muller. He served on Bar Council for nearly four years, and chaired Bar committees including the CPD Committee and the Ethics Committee. He was often a port-of-call on ethical inquiries. His Honour took silk in 2010 but still found time for hobbies, including cycling and singing—his Honour was a keen member of the Bar Choir and recently completed a cycling tour of Japan.

Serving the public is in his Honour's blood. A judicial career was always on the cards.

In 2017 his Honour was appointed as a judge of the County Court. One of his colleagues on that Court was Judge Cosgrave, with whom he had read. His Honour reformed the commercial practice and procedure of the Court, and soon became judge in charge of the Building List. Among the notable cases his Honour heard (at the time sitting as Vice-President of VCAT) was the first major decision in Australia in relation to liability for combustible cladding: the Lacrosse Tower decision.

In 2023 his Honour was appointed President of VCAT and as a judge of the Supreme Court. We wish him all the best on his appointments, plural.

OREN BIGOS KC AND PAUL LIONDAS SC

The Hon Justice Peter Gray

Bar Roll No 3077

I met Justice Peter Gray in 1996, when he started reading with his second mentor, Kevin Bell, on the ninth floor of Douglas Menzies Chambers, after his first mentor, Tony Cavanough, was appointed to the Supreme Court. There were seven junior counsel on our floor, some of whom were climbing the law's ladder—including Debbie Mortimer and Richard Niall.

Justice Gray had come to the Bar after three years with Arthur Robinson & Hedderwicks and then 18 months as associate to Chief Justice Michael Black at the Federal Court.

In 2004, our small Douglas Menzies group expanded to 14 when it moved to the sixth floor of Joan Rosanove Chambers. By then the group included Pamela Tate, Debbie Mortimer, Chris Maxwell, Melinda Richards, Rachel Doyle, Kevin Bell, Rowena Orr (as they then were) and me, as well as Peter and other friends. Intolerable noise in that building drove his Honour out to Melbourne Chambers for a couple of years, before he came back when our group, expanding to 18, moved in 2014 to the new 22nd floor of Owen Dixon West. By then, his Honour had taken silk (in 2011). He stayed on the 22nd floor until his appointment to the Supreme Court in July 2023.

Over the years while we shared chambers, I worked closely with his Honour on what was, for me at least, the arcane field of economic regulation. Our principal client was the Australian Energy Regulator, our playground was the Competition Tribunal, and we were regularly opposed by very highly resourced legal teams, appearing for electricity or gas distributors. His Honour definitely knew what he was doing in those cases. I (nominally the leader) knew a lot less; but he always helped me appear as if I knew which way was up. As all who know his Honour can attest, he was unfailingly modest, cheerful, efficient, well-prepared and personable.

I remember a Brisbane case Justice Gray and I did together that was closer to my comfort zone: it was a judicial review case brought by several Queensland government-owned electricity distributors against the Australian Energy Regulator, alleging that the Regulator had fallen into jurisdictional error. We were instructed by an extraordinarily supportive and efficient partner from Corrs (now Justice Frances Williams of the Queensland Supreme Court). On the first day, we started answering the distributors' submissions before adjourning overnight, at which point I succumbed to an intestinal infection. That meant that his Honour had to pick up the baton the next morning—which he did so well that the Regulator won the case.

As everyone who has worked with Justice Gray can testify, he was a very impressive advocate, always in charge of the facts and the law, always focused and polite, always inspiring the confidence of

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the court or tribunal and always disarming the opposition with his clarity and courtesy.

Between 2019 and 2022, Justice Gray was counsel assisting to two Royal Commissions—the Royal Commission into Aged Care Quality and Safety and the Royal Commission into Defence and Veteran Suicide.

Justice Gray was, of course, an outstanding mentor to his seven readers: John Goldberg, Fiona McKenzie, Stephen Rebikoff, Zoe Maud, Tom Clarke, Liam Brown and Steven Castan. Two of those readers have now taken silk; all of them say that his Honour was outstanding in his supportive attitude and energy, as well as full of wise counsel.

Justice Gray made a big contribution to the collective life of the Bar, through the Commercial Bar Association and the List G Committee, which he chaired for four years. He played an active role in organisations outside the Bar, serving on the Board of Directors of the Peter MacCallum Cancer Centre and on the advisory board of the Asian Law Centre, University of Melbourne. (His Honour is an enthusiast of Japanese culture and language, having attended Keio University in Tokyo.)

Throughout the many years that I've known Justice Gray, he has been devoted to his family (Penny, Alistair, Lucy and Jeremy) and pursued an active intellectual life, with his interest in history and Japanese culture.

What a successful and effective judge his Honour will be: hard working, clear thinking, polite and intellectually active. And how much I and my friends on Owen Dixon West Level 22 will miss his daily company.

PETER HANKS KC

County Court of Victoria

His Honour Judge Andrew Palmer

Bar Roll No 3344

On 19 October 2023, Andrew Palmer SC was sworn in as a judge of the County Court.

With his energy and good humour, Andrew is the life and soul of any social occasion. He is the first on the dance floor, always popular in chambers, and a staunch friend to many.

Having won just about every academic prize available, including the Supreme Court Prize at Monash, the Sir Robert Menzies Memorial Scholarship in Law, and the Vinerian Scholarship for best BCL graduate at Oxford, his Honour undertook an impressive academic career, rising to become an associate professor at Melbourne University Law School. He was beloved as a lecturer, past students speaking his name with awe.

He has produced a number of books, including *Proof: How to analyse evidence in preparation for trial*, and co-authoring *Uniform Evidence* and *Australian Principles of Evidence*.

For some years Judge Palmer combined his academic responsibilities with his practice as a barrister, until the call of advocacy became too strong. Thrown in at the deep end, his first case was a complex and high-profile extradition. He was opposed to counsel who were later to serve on the High Court bench, but he was undaunted and immediately in his element.

Contributing a week of his time each year, his Honour taught the Foundations of Advocacy component of the Bar readers' course. In the process he made himself popular and even revered by junior barristers, who loved his humour and his personable approach.

When the uniform evidence legislation was mooted, Judge Palmer was active in generously delivering numerous seminars and presentations to help the profession navigate the new approach.

As an advocate, Judge Palmer was unrivalled in mastering, explaining, and enlivening complex and technical factual situations—a skill borne out of his rigorous and detailed analysis of the evidence. His mellifluous voice and clear presentation combined to produce compelling advocacy.

His empathic understanding of people made him a skilled and disarming cross-examiner.

His Honour was best known for his work in occupational health and safety prosecutions (for both sides), appearing in many prominent cases, as well as in areas of government regulation and enforcement. His clients included WorkSafe, the ATO, IBAC, Victoria Police, the EPA, VicRoads and many others. He appeared in all the Commonwealth and Victorian superior courts.

Judge Palmer served on the Bar Ethics Committee, bringing not only his own wisdom and integrity, but academic expertise in the field of ethics.

In 2020–22, at the request of the State Government, Judge Palmer conducted an independent review of Victoria's dangerous goods laws.

With a blended family, Andrew and his wife Madeleine have brought up seven children, hosting as many as can make it for holidays in Lorne. Even with all his professional accomplishments, as a father he has won their warm and lasting affection.

Andrew usually cycled into chambers, often resplendent in lycra on preparation days.

Judge Palmer's elevation will mean a loss to the Bar, but he will bring legal acumen and an unstinting spirit to the task of dispensing justice. The County Court is enriched by his appointment.

BRIAN WALTERS AM SC

Her Honour Judge Suzanne Kirton

Bar Roll No 3405

Her Honour Judge Kirton's elevation from the virtual bench of the Victorian Civil and Administrative Tribunal to the tangible surrounds of the County Court came as no surprise to her former colleagues both at the Bar and at VCAT. In her now former life as a Senior Member of VCAT (to which she was appointed in 2018), her Honour succeeded long-time Deputy President Cathy Aird as Head of its Building and Property List, which she stewarded through the difficult circumstances imposed by COVID-19.

Practitioners who appeared with, before, and against her Honour have commented that from her early days as company secretary at the former Housing Guarantee Fund in the mid-1990s, none of their dealings with her Honour led to any good war stories. The consensus was that, at all times, her Honour has been kind, courteous and empathetic, maintaining a consistent smile, finding a way to pragmatically deal with the matters in front of her, and never provoked into frustration.

Her Honour was called to the Bar in 2000, where she read with Tim Margetts KC. From early on, her Honour could boast—although not known for boasting—of regular appearances before VCAT and the courts in her chosen field of building law. A long-time instructor commented that as counsel, her Honour played a straight game with her clients, with advice that was always sound and straightforward. The instructor also noted that she was not distracted by mere social matters, to such an extent that they had no knowledge of her support for a football team: for the record, your correspondent notes that her Honour is a tragic devotee of the Richmond Tigers.

Within the Bar itself, her Honour was an active participant across numerous committees, including as secretary of the Commercial Bar Association and as a member of Bar Council. She is warmly remembered for her time as a committee member of the Women Barristers Association, of which she was convenor in the 2010–11 term. Her Honour continued to support the group following her appointment to VCAT, where she was a strong supporter of other women barristers in construction law and beyond, providing advice to many.

Her Honour was also active in the committee of List S, now known as Svenson Barristers, rising to the role of Vice-Chair. Her Honour was delighted when her List S colleagues agreed to the appointment of Anna Svenson as their new head clerk, after the retirement of Ross Gordon.

While her Honour is expected to have some involvement in VCAT in her new role, thanks to the common appointment of County Court judges as Vice-Presidents of the tribunal, she will be missed by her former colleagues, who spoke of her unwavering professionalism as an advocate, her dedication to her clients (including urging settlements over lengthy trials that would have added impressive buttons to her scout's badge) and consistent kindness to all parties who appeared before her on the Bench.

JOEL SILVER

Her Honour Judge Robyn Harper

Bar Roll No 4253

In what can only be described as a significant loss for Crown Prosecutors' Chambers and a giant win for the County Court, Robyn Harper was appointed a judge of the County Court on 14 June this year. During her time at the Bar and Crown Prosecutors' Chambers, Robyn was known to be warm, scrupulously fair, well-prepared and courteously direct; a true humanist. Robyn had a distinguished career in the law, first as a solicitor, then at the private Bar, and then as a Crown Prosecutor since 2018.

Friends know that this was a career that Robyn always wanted and that she could not imagine ever doing anything else. Indeed, as part of her welcome speech, her Honour noted that being a barrister was the "best job in the world"—one that she loved and was blessed to have had. Anyone who had ever worked with Robyn would know this to be true.

Her Honour attended Macleod High and then Monash University, where she achieved degrees in Law and Arts, going on to complete a post graduate diploma of legal practice at the Leo Cussen Centre for Law. In 2005 Robyn took a role as a solicitor at the Office of Public Prosecutions, where she had completed her practical placement.

Robyn was called to the Bar in 2009, reading with Matthew Walsh whose practice focusses mainly on common law matters. Robyn soon gravitated towards practising in crime, confessing that she loved the "cut and thrust" of criminal law. Before her appointment as a Crown Prosecutor she acted for both defence and the prosecution.

In what can only be described as a "memorable" first defence brief, Robyn appeared in the Broadmeadows Magistrates' Court for a client who was wheelchair-bound and attended court sans pants. Bare legs, ready for Court 1. Whilst not particularly "comfortable" with this arrangement her Honour persevered, as was her way, and managed to appear with aplomb despite her predicament. We are sure this was not the "cut and thrust" that drew her towards a practice in crime!

However, she quickly went on to bigger and better things, appearing in serious cases including the trial relating to allegedly fake Brett Whitely paintings and matters arising out of the Eastern Freeway tragedy in 2020, in which four police officers were struck and killed by a truck whilst performing their duties.

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Robyn's good heart and exceptional interpersonal skills were well at work in dealing with the various sensitivities of the cases she acted in.

Robyn has been heard to profess that the Crown "never loses, because if you do, justice wins". She truly lived by that saying. When returning to chambers after "losing" a case as prosecutor, her Honour was often heard to say "There's another one for sweet lady justice". (The writers of this piece say nothing of how often this expression was heard, and less about what it says about the quality of the prosecutions).

Robyn was known for her intelligence, fairness and warmth and we are sure sweet lady justice remains a dear friend.

Robyn was a regular at the Essoign for coffee and lunches. She came to be known and loved by the staff there; a favourite who was kind, always up for a chat and only drank full fat milk from a cow—none of the various substitutes. She was often seated at a window, with friends in raucous fits of laughter at her witty jokes and one-liners. These one-liners were not approved for publication in this piece.

Despite the demands of a busy trial and appellate practice, Robyn always makes time for her family and friends, and is known for her particular penchant for a good Australian gin and love of all things theatre. When not having a tipple with wife Cate or walking her rescue greyhound Buster—to the annoyance of her two cats—Robyn will often be at the 'G supporting the Dons.

Robyn will be missed at the Bar and at Crown Prosecutors' Chambers, but she will be a real asset to the Bench, due to her seamless wit, good humour and one-liners (perhaps best left for after court hours). We wish her all the best in her new career.

LIZ RUDDLE KC & AGGY KAPITANIAK

Vale

The Hon Donnell Michael Ryan KC

Bar Roll No 765

The Hon Donnell Michael Ryan KC passed away on 26 August 2023. Don was educated at Dandenong High and then Melbourne University where he read Latin in his Arts Degree and graduated with honours in Law. Don signed the Bar Roll in July 1965 reading with the Hon Haddon Storey KC.

He quickly built up a significant national practice in industrial law, taking silk in 1980 and becoming a leader of the national Industrial Bar appearing in the High Court and across the country. Don combined a rare combination of legal skill, an analytical mind and mastery of principle that brought elegance to the most hard-fought and messy industrial fight. Acting predominantly for unions, including those of a more militant bent, Don was renowned for a precision and economy of argument that provided an antidote to his clients' occasional excess. He was one of the few industrial barristers who acted for both employees and employers.

Beyond the industrial arena, Don also appeared in the High Court in numerous public law cases and as Counsel Assisting the Hope Royal Commissions into ASIO and the Combe Ivanov affair. He was editor of the Federal Law Reports, a part-time member of the Australian Law Reform Commission and a member of the Ethics Committee for the Royal Women's Hospital.

He had 10 readers including the Hon Gareth Evans. He was a long-time member of Latham Chambers, sharing a suite with his friend and later colleague the late Hon Peter Heerey QC and many others.

He was appointed a judge of the Federal Court of Australia at the age of 45 in 1986. Don was gratified that his appointment took effect a day before the retirement of Sir Reginald Smithers, whom he greatly admired. Don served with distinction on the Federal Court until his retirement from that court in 2011. His judgments are a model of clarity, in which he summarised counsel's arguments with a degree of care and quality that often flattered and which focused on the areas that mattered to the outcome of the case. His legal analysis was always succinct, drawing on but not labouring existing authority and saying little more than was necessary to decide the point. He had a mastery of language which produced refined and erudite judgments that did not ignore the humanity of the situation. In court he was courteous and respectful, listening attentively to argument and asking questions to elucidate and never to undermine or show off. He was renowned as a careful and thoughtful judge who wore the responsibility of judicial life heavily.

Don returned to the Victorian Bar in 2011 after his retirement from the Bench. He spent much of his return to the Bar acting for Aboriginal and Torres Strait Islander people in proceedings against the Commonwealth Government and various statutory authorities alongside his good friend Shayne Daley. Don loved this work and felt honoured and privileged to do it.

Away from the law, he was devoted to his family. He was a keen tennis player who played with customary economy. He was a Latin scholar and in his last months took pride in tutoring two of his three grandsons in Latin. Don's mind remained razor sharp until the end.

He is survived by his wife Gabrielle, his daughter Fiona Ryan SC and son-in-law Robert Harper (both members of the Victorian Bar), son Christopher, daughter-in-law Stacey and his three grandchildren. Don was a true gentleman and will be greatly missed.

THE HON JUSTICE RICHARD NIALL AND FIONA RYAN SC

Edward Sikk

Bar Roll No 503

Edward "Ted" Sikk passed away peacefully on 21 July 2023, two weeks after celebrating his 95th birthday.

Ted obtained a Master of Laws from the University of Melbourne and signed the Bar Roll on 5 February 1954, reading with Mr R L Gilbert. He was a member of our Bar for 12 years. The major part of his career, however, was spent in Tasmania where he practised as a crown prosecutor. He appeared as junior counsel for the Crown in *Vallance v The Queen* (1961) 108 CLR 56, a significant decision of the High Court concerning the meaning of "intentional" in s 13 of the *Criminal Code Act* (Tas). The Crown's successful appeal set a precedent relevant to the practice of criminal law in all code jurisdictions.

Ted once appeared as prosecutor in a burglary trial in the Supreme Court of Tasmania in which the late Peter Heerey QC (at the time a partner at the prominent Tasmanian firm, Dobson Mitchell & Allport) appeared for one of two co-accused. As the story goes, a furious dispute broke-out between the co-accused when Peter cross-examined the other co-accused about his vast criminal record. This caused the trial judge, Justice Crisp, to remark wryly, "I think I detect the fine hand of Mr Sikk in all this." Both accused were convicted.

Later, Ted was appointed to the Magistrates' Court of Tasmania and, in 1988, as Tasmania's first Workers Compensation Commissioner in the newly established Workers Rehabilitation and Compensation Commission. He served in both roles with distinction and was known to be both affable and courteous to all who appeared before him—although urban legend has it that he kept travel magazines, strategically positioned out of view but within arm's reach, for those rare times when counsel's submissions became "unhelpful".

He was a learned contributor to the administration of justice in Tasmania, as exemplified by his article "Repairing Defective Charges of Summary Offences" (1983) 7(3) *University of Tasmania Law Review* 233, in which he addressed the scholarly neglect of matters of criminal pleading and procedure in the light of the "computer revolution".

Ted was a loving husband to Helen (deceased) and brother to Inga (deceased). He is survived by his children, Ingrid and David, their spouses (Robert and Izabella) and his grand-children (Olivia, William, Isabel, Emma and Andrew).

VBN

The Hon Robert Monteith KC

Bar Roll No 830

Robert Monteith KC passed away on 30 August 2023. Known to all his associates and friends as Bob or more likely "Monty", he was Melbourne born and bred.

Robert was born on 20 February 1944, completed his schooling at Caulfield Grammar and studied law at the University of Melbourne. After graduation he undertook articles with Corr and Corr and then signed the Bar Roll in 1968. He had always had his eye on the Bar and it was his natural home.

He loved the law and was highly respected and supported as a member of the Common Law Bar. His work was extremely precise and accurate, no doubt having been well taught by his pupil master the late Robert Brooking KC. He also presented an impressive figure in court, a theatre he relished.

An unfortunate motor car accident in 1988 resulted in a back injury from which he suffered on and off for the rest of his life. In all he had something like 18 surgical procedures on his spine. Notwithstanding his back problems, Robert was unflinchingly optimistic and resilient and great company.

Robert was a member of the iconic 10th Floor of Owen Dixon Chambers East. He loved the collegiate atmosphere for which those chambers were well known. He had a large group of close friends there and elsewhere in the law which he kept forever. Robert was a very loyal and caring friend.

Robert took four readers: Frank Zydower, Ian Barnes, Jonathan Brett KC and John Saunders.

Robert and his wife Kaye often visited Townsville in Queensland to spend time with friends and Robert found the weather in North Queensland eased his back pain. In about 1990, Robert and Kaye moved to Townsville and purchased a magnificent house (the Suther's House) with extraordinary views over Magnetic Island and the Coral Sea.

Robert and Kaye quickly joined Townsville society and formed many close friendships. In particular, they became involved in the organising, and running of, the yearly Townsville Chambers Music Festival, which they both loved.

Robert practised at the Townsville Bar, joining RJ Douglas Chambers with eight other barristers he had become acquainted with by reason of his earlier social trips to Townsville from Melbourne. Robert's love for the long lunch, installed in Melbourne and finely honed on the 10th Floor of Owen Dixon East, fitted in well with the Bar in Townsville which shared his enthusiasm. In that regard Robert was well included in the "A Graders".

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He soon developed a following among the local solicitors who were very impressed by his obvious legal skills. In 1999 he took silk. In 2000 Robert was appointed as a justice of the Family Court of Australia, based in Townsville. He continued in that role until he retired in 2011. All of those who appeared before his Honour had high regard for his ability and, in particular, the courteous manner in which he conducted his court.

After retiring in 2011 Robert and Kaye moved back to Melbourne where they had family and were greatly missed in Townsville. After returning to Melbourne Robert was able to spend much more of his time with his dear and lifelong friends from the Bar and legal profession in Melbourne.

Unfortunately, Robert developed further medical complications which significantly impaired his lifestyle. Despite being often hospitalised and required to undergo unpleasant procedures, Robert remained, as always, indefatigable and great and warm company.

Throughout his last few years Robert was cared for by his best friend, Kaye, who did a sterling and selfless job.

Monty will sadly be missed and will leave a void in many people's lives which will be incapable of being filled.

TONY MOON

William (Bill) F Lally KC

Bar Roll No 915

Bill Lally was born in Tatura on 14 February 1945. His parents, Desmond and Mary, were respectively a doctor and a nurse. They moved to Tatura after completing their university qualifications. Bill was the third child of their family of nine children.

At nine years of age Bill commenced boarding at Xavier College, initially at Burke Hall and then at the senior school. Bill excelled academically, particularly in his subjects of Maths 1 and 2, Physics, Chemistry, Latin, Ancient Greek and English. In his final two years, he was a key member of Xavier's debating team. He was also a keen tennis player, playing in Xavier's firsts for two years and captain in his final year. Bill and the Lally family have a significant attachment to Xavier, with their legacy now spanning four generations.

In 1964 Bill enrolled in law at Melbourne University. During his time at university, he was a resident of Newman College where he was selected for the Newman initiation committee. In his final year, he was voted to the executive of the general committee.

Bill was admitted to practice on 1 April 1969. Bill read with the late Hon J Jenkinson, commencing on 4 May 1970. He signed the Bar Roll on 7 May 1970 and took silk on 30 November 1993.

His areas of practice included commercial law, wills and estates, construction, insolvency, insurance law, licensing, mediations and trade practices. Bill was a highly regarded counsel. He was always prepared and conducted his practice with precision and clarity in his analysis. His quiet manner was a great weapon. Those that underestimated him did so at their peril. Whether in court or negotiating, Bill would often adopt his characteristic pause followed by a substantive response to a proposition put by either opposing counsel, or sometimes, the judge.

His readers were Janine Garner, Robert Bair, Michael Sweeney, Stephen Wilmoth, Neale James, Marcus Clarke, Lisa Kennett and Ken Howden. To them and many others who regularly sought his advice and assistance, Bill's door was always open and he gave generously of his time. He often peppered his wise counsel with "do you follow?" to ensure that the person understood his advice or assistance. He was able to talk effectively to those of any age, position, or background. He did not waste time or energy trying to convince those with a closed mind of a more appropriate outcome or to his point of view. His judgement generally, and of a person's character, was accurate based on his observations of their words and actions.

Bill was also a keen golfer and a member of Peninsula and Flinders golf clubs. He also travelled overseas with friends to play golf at various superb links and usually played in the annual Bench & Bar v Law Institute Golf Day.

In January 1998 Bill was appointed a deputy member of the Supreme Court Board of Examiners. He was deputy to Berkeley QC and subsequently to Meldrum QC. In January 2002 Bill became a principal board member and then served as Chairman of the board in 2005. He retired from the board on 1 January 2006. Bill served with distinction and made an outstanding contribution to the work of the board.

In the *Bar News* (summer edition 2005), the following was stated:

> All of the members (of the Board) have served with distinction, for a long time. The work of the Board is done out of hours—with hearings at nighttime; with sittings at least 20 times a year; with judgments to be written and delivered; with appeals to be contended with and on one occasion, a special sitting of a Full Court.

The measure of Bill's determination and compassion can be seen from that special sitting of the Full Court. Bill was concerned that a young terminally ill applicant may not survive until the admission date. As a result, he contacted the then Chief Justice. A special admission ceremony for the young applicant, via video link, was arranged with the Chief Justice presiding with the President and Justice Nettle.

On 28 November 2001, Bill was appointed a member of the Ethics Committee. Bill's contribution to the committee was formidable. As with the Board of Examiners, the committee's work was done out of hours. Bill's contribution and commitment to the many issues addressed by the committee were invaluable.

On 18 November 2004 Bill was appointed to the Bar's Legal Education and Training (Continuing Legal Education) Committee, serving with distinction until 16 August 2007.

Given Bill's contribution to and for the Bar, it is fitting that Bill's portrait is in the Peter O'Callaghan QC Gallery.

While Bill cared about the work he did for solicitors and clients, work was not the whole of life. The most important part of his life was his family and friends. He was a loving and devoted husband, father and grandfather.

On 11 August 2011, at the age of 66, Bill retired from practice abruptly and without fanfare to care for his beloved wife, Sue. They first met in 1963 at the annual Mandeville Tennis Tournament when Bill was in his final year at Xavier. They married in April 1969. They were the perfect love story, committed to each other and their children and grandchildren. They are survived by their four children, Matt, Andy, Simon and Amy, and their 10 grandchildren, Oliver, Isabel, Hamish, Sam, Charlotte, Max, Saoirse, Annabel, Maebh and Niamh.

THE HON CATHRYN McMILLAN KC

Rear Admiral the Hon Alwynne Rowlands AO RFD RD KC

Bar Roll No 691

The following eulogy was delivered by Rear Admiral the Hon Michael John Slattery AM RAN at the Sydney Memorial Service held on 16 June 2023 (edited for print).

To achieve excellence in one honourable profession can take a lifetime of devotion to one's craft. But to achieve excellence in two honourable professions signals a transcending commitment to the professional ideal.

Yet Alwynne achieved just that: he won the highest honours that both the Law and Navy may confer upon a single person, for he was a distinguished member of two honourable professions, the profession of arms and the profession of law. And in doing so, Alwynne won a singular Australian distinction. Her late Majesty Queen Elizabeth II entrusted him with five of her commissions: the first as an officer in the Royal Australian Navy, another as Queen's Counsel, a third as a judge of the County Court of Victoria, a fourth as a judge of the Family Court of Australia and the fifth as Judge Advocate General of the Australian Defence Force.

I wish to tell you briefly the rich story of Alwynne's 44 years in Navy between 1956 and 1999 and his 43 years in the law between 1962 and 2005. And in doing so I will surely echo something that you already know, that of those multiple commissions the one perhaps closest to Alwynne's heart was Her Majesty's first commission to him as a naval officer, given to him as a 19-year-old Sub Lieutenant in 1956.

Navy remembers and supports all who have seen Naval service and Alwynne served Navy with the greatest distinction. Chief of Navy, Vice-Admiral Mark Hammond AO RAN has asked me to represent him and Navy here today. A vale message was recently sent to all ADF legal officers to honour and remember Alwynne's exceptional service to the nation. I am honoured to speak here today on Chief of Navy's behalf and to celebrate Alwynne's singular achievements in his two professions.

Alwynne's Navy career was almost inevitable. His remarkable father, Eustace Alwynne Rowlands (or just "EA" as the family called him) set a high bar. EA had given exceptional service as Surgeon Commander in the RAN on HMAS Perth in the Mediterranean, in the darkest days of World War II. And later in the early 1970s, when EA had retired from medicine, he deployed those vast reserves of Rowlands energy that we all know and was elected Lord Mayor of Melbourne. Alwynne admired him greatly and penned an enchanting biography of EA entitled, *Voyage Around My Father*.

Alwynne was keen to join Navy from the first. But EA was cautious about the idea, advising Alwynne, "I don't think you should go straight in". Alwynne took his father's advice, by joining the Navy reserve, rather than the permanent service. He immediately embarked on a much-loved life of sea adventures well before going to the Bar in 1963. Whilst a law student, Alwynne joined the RAN Reserve at the lowest officer rank of Midshipman in 1956. Navy had so few legal officers in those days that there was no category for them, so he joined as a supply officer, or "purser". He was promoted Sub Lieutenant in 1957 and Lieutenant in 1960, whilst still a law student.

After graduating in law in 1962 Alwynne was admitted to the Victorian Bar in 1963. After admission he joked with his father that their two professions had much in common: because both surgery and litigation were "a last resort".

Then commenced a decade of dual adventures for Alwynne. He thrived both as a junior Navy officer and a junior barrister. It is hard to know which he loved more. At the Bar he was a common lawyer with a strong interest in Admiralty, town planning and, ultimately, national industrial relations. In Navy he was a criminal lawyer with specialist navigation expertise.

Alwynne's natural talent for speaking to civil and criminal juries quickly sparkled at the common law Bar. He soon became a regular travelling on the Western Districts circuit sittings at Warrnambool and Hamilton. He defended the full range of criminal charges of

BACK OF THE LIFT

manslaughter, rape, perjury, larceny followed by a mix of divorce cases often sitting into the evenings. And then he would enjoy the social life of circuit dinners in which he was often the central raconteur. Alwynne fondly remembered his daughter Rosalind being mystified by his country travels away from home on circuit. She would describe to anyone who asked her that "daddy is on circus". She wasn't wrong.

But coming from a medical family Alwynne was grateful for the chancy opportunities that came his way in the law. Reflecting the sectarian divides of the 1960s, Alwynne was greatly amused that, as an Anglican, his most dependable and regular early briefs came from a Catholic solicitor by the name of Joseph Xavier Mulcahy, the son of a busy publican whose customers were always getting into scrapes.

In Navy Alwynne appeared for and against sailors accused of petty crimes. But he also appeared in the great Navy trials of his era. One of Alwynne's consummate skills as a Navy lawyer was to manage the aftermath of Navy's public disasters—and regrettably there were plenty of them. Counterintuitively this often involved publicly criticising Navy practices to show that Navy was open and accountable.

Three examples will suffice. Tragically in June 1969 HMAS *Melbourne* collided with the destroyer the USS *Frank E Evans* killing 74 American sailors. Naval custom in those days was to court-martial the captain of a ship after a disaster, just to clear the air. But the US ship was largely responsible for the collision. As one of the prosecutors, Alwynne witnessed the historic honourable acquittal of *Melbourne's* commanding officer, CAPT John Stevenson.

In 1976 Alwynne prosecuted a 19-year-old sailor, who admitted that whilst on guard duty at the Naval Air Station in Nowra he had burned down a hanger containing two squadrons of aircraft. Under questioning, the sailor gave a rather novel explanation, "Sir, I told my command that the hangar was insecure, but they wouldn't listen, so I tried to show them how a fire could be started." Despite Alwynne's prosecuting industry, the sailor was acquitted … on the grounds of insanity.

In 1978 Alwynne was right in the thick of Navy embarrassment. He defended the chief engineer of a patrol boat, HMAS *Adroit*, who was charged with armed robbery on the high seas. The patrol boat crew had boarded Taiwanese fishing vessels and engaged in acts of petty larceny at gunpoint. The press colourfully captured these events under the headline "RAN Piracy—Crew Runs Amok". There is perhaps no lonelier place in Navy than being publicly accused of being a pirate. But that is where Alwynne's courage and skill were at their finest. Despite Alwynne's engineering officer client admitting guilt to the prosecutor, Alwynne magically secured an acquittal. By 1979 his naval career was so successful he had been promoted to the rank of Commander.

Alwynne loved, as he described it, "the Edwardian element of Navy". He flourished in Navy's world of style and etiquette. He experienced the only courtrooms in Australia in which prosecuting and defence counsel wore a sword as they addressed the jury and proceedings were started with a blast from the Court martial cannon that even Horatio Nelson would recognise.

Meanwhile, Alwynne was immersed, literally at times, in life at sea. As a Midshipman and young officer doing National Service, he sampled everything Navy had to offer from sunbaking on the deck of the aircraft carrier HMAS *Sydney* between Fiji and Sydney, tasting Navy's duty-free alcohol, to laying buoys from a Navy vessel in Port Phillip Bay for the 1956 Melbourne Olympics yacht races. Later in service as JAG and as a judge he still hungered for a thrill at sea, and that is the right word, because in the early 1990s he cruised the Tasman Sea in a submarine and mid-ocean was winched from the submarine's heaving deck by helicopter cable onto a nearby frigate. Naturally, Alwynne shared this story—often.

At the Bar Alwynne had developed a generalist's practice of extraordinary versatility. Upon his retirement the *Victorian Bar News* rightly described him as "the last of the legal allrounders". Apart from common law and crime he developed extensive town planning and industrial practices. He was briefed by the Federal Government in as many as 12 national wage cases.

Complementing his Navy service, he appeared in the most prominent civilian boards of marine enquiry of the time, including such heartrending disasters as the sinking of the *Blythe Star* off the West Coast of Tasmania in 1973, and the 1975 severing of the Tasman Bridge in Hobart by the vessel the *Lake Illawarra*.

Alwynne's talent led to his appointment as Queen's Counsel in 1982 and soon after as a judge of the County Court in 1983. The following year he received an appointment that was to show his character and courage at its best. Between 1984 and 1987 he served as the Foundation President of the Administrative Appeals Tribunal of Victoria. This ground-breaking appointment turned out to be what bureaucrats would call "exciting". The Victorian Parliament had just passed its first *Freedom of Information Act* which conferred FOI decision-making power on the Tribunal. To the delight of the press and the public, deploying his signature tight, readable, courteous but orthodox judgments, Alwynne began to prise open some of the uglier workings of Victorian government. His FOI reach into government archives was so deep and so feared that in 1985 it was reported that Victoria Police had secretly begun to destroy their surveillance files on political figures, on the rather flimsy basis that they "had no historical value".

Meanwhile in 1987 he was promoted to the rank of Commodore and appointed as Judge Marshal of the Royal Australian Navy and later Deputy Judge Advocate-General of the ADF.

He was elevated to the Family Court of Australia in 1988 and made a member of the AAT. Because of his renowned efficiency Alwynne served as the Family Court's judge administrator until his retirement in 2005. Alwynne loved his work on the Family Court. He was fascinated by the Family Court's exercise of that most human of jurisdictions, dealing as he himself described it, with the subject matters of "love, children and personal wealth". His capacity for work as a Family Court judge was prodigious, his judicial style was unflappably courteous and his disposition perennially compassionate. He sat in innumerable trials and appeals and spoke at international conferences. And he did not shy away from the hard cases, including trying to place a value on Brett Whiteley's future artistic genius in his property settlement with his former wife and muse Wendy.

Alwynne listened well, that first quality of a judge and was renowned for short judgments that came to the point quickly. He had no time for the "hero judge" type, saying at one conference of judges, "Proving one's own theory is a pleasurable but a dangerous human indulgence. Allowing a case to unfold reduces the risk of a judge jumping to a conclusion—a classical judicial sin".

But refreshingly to all who met him around the court he always projected the calm demeanour of someone who had just returned from a holiday. When he advised people to work hard but to relax and "get the sand between your toes", you knew just what he meant.

But this appointment to a Federal Superior Court brought another precious benefit for him. It qualified him, once just a Midshipman doing National Service, to be appointed as the Judge Advocate General of the ADF on promotion to the rank Rear Admiral. He flourished in this role from 1992 to 1996 and was still active within Navy until 1999. He was honoured as an Officer in the Order of Australia in 1994 for his service as JAG.

The JAG uniquely stands at a single point of intersection between the military and legal worlds: the office involves ensuring that ADF discipline trials are strictly conducted in accordance with the highest Australian civilian standards. Alwynne was dynamic in the role: meeting the CDF and defence ministers, reporting on law reform to the National Parliament, husbanding amendments to discipline legislation through the Parliament. His JAG reports to Parliament are a rich trove of policy ideas. And on top of this he made extraordinary efforts to get around the country and meet all the junior legal officers across three services.

Indeed, that is how I first met him in 1995 in my earliest years in Navy. He made an unforgettable impression on me. I remember, after my long day listening to Law of the Sea lectures at RAAF Williamtown north of Newcastle, going to a mess dinner at which Alwynne kept us thoroughly entertained with a cascade of jokes and stories about Navy service.

But after that dinner was just as important for Alwynne, as it was for us. He came around and met every young legal officer there, shook our hands, asked us about our careers, gave us encouragement and offered us a listening ear. I recall concluding at the end of that night that I had definitely joined the right service.

I never dreamt that night that I would obtain Alwynne's rank. But when I too was appointed JAG in 2014, I modelled my own work and visits around Australia on just what I had seen Alwynne do.

Ever since the time of Admiral Horatio Nelson, Navy officers have gathered around cramped wardroom tables. Bonding through storytelling over dinner is as much a hallmark of fine naval officers as navigation and warfare skills. And as we know Alwynne excelled at this art. Alwynne had more unusual stories to tell around a table than most, including one about his legal deployment to Somalia, where he vividly described being driven around in a tank.

Although the law is replete with ceremony, Navy is unbeatable. Yes, the Courts swear in and farewell judges, but Navy performs the diplomatic service of port visits, ships salute one another by seniority of CO in the service, and Navy ceremonially commissions and decommissions ships. In retirement Alwynne loved nothing more than taking Marelle with him around Australia to see several of Her late Majesty's Australian ships being commissioned or decommissioned.

And Alwynne loved Navy places. The service has some of the best. He took family members to functions at HMAS Watson on South Head when they were in town. He and Marelle were married at the magnificent chapel there looking down Sydney Harbour.

And Naval ceremony had a positive effect on the family. As JAG Alwynne was regularly invited to HMAS *Kuttabul* to see the Admiral commanding the Australian Fleet. That meant arriving at Naval Headquarters in a flagged staff car, being saluted, whistled aboard, and taken on a tour before morning tea. As a wide-eyed teenager Rebecca still remembers one of these journeys with her father. At the end of it she said she felt "just like Princess Diana". But she equally well remembers his instructions to her beforehand, "Shake hands firmly", and "Look people in the eye", good lessons both for young Naval officers and for teenagers. Diana too occasionally accompanied her

father to mess dinners and ADFA graduations in Canberra, where she could see that Alwynne could take in the whole room and entertain and engage the officers from the most senior to the most junior.

When Alwynne retired from the Family Court he gave that great gift that retired judges can, of offering his time and expertise to the community in higher causes freely, honourably, and generously. He lectured and commented in the field of family law; he studied theology at Moore College, and he pursued his earlier studies in naval architecture and marine resources. He had little interest in accumulating worldly possessions but rather continuing to do his duty and being close to his family.

Alwynne was never idle. Near retirement from the Bench in 2003 he volunteered as a board member and, until 2017, served as chairman of the Royal Humane Society, which recommends bravery awards for those who risk their lives to save others.

Inside each one of us we carry an image of Alwynne. Every one of those images is subtly different. But I am sure we all have one image of Alwynne in common: it is what happened when he met each one of us. He would light up and he would ask and talk about us, about our lives, our families, our careers, and our interests. He always wanted to know more about us and to celebrate the milestones in our lives before we could ever ask about his. His natural generosity of spirit was always uplifting. He made us feel better about ourselves.

On behalf of Chief of Navy, I salute Alwynne's service to Australia in Navy. I join you in thanking Marelle and all Alwynne's family for supporting his service. Together today, we celebrate his service to the law and to Navy and we honour the memory of Rear Admiral the Hon Alwynne Rowlands RAN.

REAR ADMIRAL THE HON MICHAEL JOHN SLATTERY AM RAN

John L Batten

Bar Roll No 1572

John (Jack) Leonard Batten died peacefully with his family on Friday 12 May 2023, aged 73 years. Jack bravely battled cancer for the last six months and finally succumbed in the early evening on Friday.

Jack was one of nine children to parents Ross and Alison Batten, another one of whom is Nick Batten who is a member of the Victorian Bar. Jack grew up in Hawthorn, living a stone's throw from Xavier College where he matriculated in 1968. Jack then completed degrees in law and commerce at the University of Melbourne. He did his articles of clerkship with Godfrey Stewart & Co, later Godfrey Stewart Frank Curtain & Co, in 1975, and continued with the firm until 1980. On 19 June 1980, Jack signed the Roll of Counsel and read with the late Richard Stanley QC. He was one of seven readers.

Jack's career at the Bar initially took him into the workers' compensation jurisdiction where he was a major player at the Workers Compensation Board and later the Accident Compensation Tribunal. Jack transitioned to the common law and acted mainly for the defendant in trials, serious injury applications and statutory benefit disputes.

Jack was a formidable opponent who thoroughly prepared his cases and had an excellent command of the law. He was renowned for his tenacious cross-examination and his willingness to teach the new barrister a lesson or two. However, he was a man of great integrity, who was highly principled and who would readily help and assist his colleagues.

Jack thrived on circuit life and spent many wonderful years in the north-east of Victoria, usually opposed to Trevor Monti KC. The nightly dinner conversations between these two was spirited and very entertaining and could last well into the evening.

On a Wodonga circuit where Judge Dyer of the County Court was presiding, Jack was being led by Paul Jens KC and the plaintiff was being represented by Monti. During the course of the evidence, when Jens was cross-examining the plaintiff, Jack was watching the horse races on his laptop but unfortunately he pressed the volume key on the device. There followed a description of the race being run at full volume, with Jack trying furiously to turn the volume off without success. Jack had no option but to jump up from the bar table and literally run from the Court holding his laptop with the race caller still calling the race. When he ultimately returned to the court, he refused to inform those whom he had interrupted of his success or otherwise. Upon his return, Jack was required to cross-examine the next witness. He objected to Monti leading the witness to which Monti replied, "You be quiet Batten and just listen to the races".

Jack was a regular for many years at the Wangaratta and Wodonga circuits both being led and acting as leading counsel. In those days, the circuits were busy with quite a few cases and there were inevitably a number of solicitors and barristers waiting in the wings together with instructors from the Victorian WorkCover Authority. It was a convention that all of the lawyers would go out for dinner in the evening and share the one table notwithstanding the hostilities that had taken place in the courtroom that day. On many occasions, where there may have been eight-to-ten people at the dinner table, there could be a lull in the conversation and Monti would break the silence by saying to Jack, "Hey Jack, you know there is no God don't you?". The result brought an immediate response from Jack which usually began with "Trevor, Trevor, Trevor," and then followed with Jack referring to the recent decrees by the Pope, with quotes from Matthew, Mark, Luke and John and segments of both the old and new testaments. Irrespective of one's belief, it was highly entertaining for those at the dinner table who were fortunate enough to experience these exchanges.

Aside from the law, Jack loved his sport, particularly football and golf at which he excelled. At Xavier College he was captain of cricket, and at the University of Melbourne he was captain of the University Blacks when the Blacks won the VAFA A-Grade flag in 1974. He captained Newman College on a number of occasions in intercollegiate football and famously ordered his fullback to take out the Trinity College full forward, Paul Sheehan.

When Jack ceased playing football he devoted more time to his other great passion, golf. He was a long-time member of the Peninsula Kingwood Golf Club where he won a number of events, some of which included playing with his father, Ross, and his uncle, Dick Buxton. These latter two gentleman sought out the competitive single figure handicapper for good reason.

Jack was able to combine his love of golf with another passion, travel, and he managed to organise golf trips to the UK and Ireland for his friends on a number of occasions. He also had a love of the thoroughbred racehorse and was renowned for his ability to pick winners although at times he would pick different horses for different friends in the one race, thus ensuring his reputation as a tipster. Jack raced a number of horses in partnership with friends, including a Group 1 winner, Sonntag.

Jack was a true leader of men and set high standards for himself. These values were underpinned by his devout and abiding belief in the Christian faith. He was a prolific reader but a humble man and one of the great characters of life.

Jack was a devoted and extremely generous family man who loved to holiday at the Mount Buffalo Chalet, at Tathra Beach in southern New South Wales and of course at Mount Martha where he would debate the important things in life with the late Judge Frank Saccardo and Jeremy Ruskin KC.

Jack is survived by his wife, Dr Rosie Batten and their four children, Fiona, David, Luke and Nick, three of whom studied law. Jack is also survived by five grandchildren. For those who count Jack as a dear friend, his death leaves an enormous hole in our lives. We cherished his friendship, his humour and his argumentative and challenging nature. Jack will be dearly missed.

ROSS MIDDLETON KC

The Hon David Francis Jackson AM KC

Bar Roll No 2661

The Hon David Jackson KC, one of the greats of the Australian Bar, passed away peacefully on 15 May 2023 in Sydney, at the age of 82.

David was a pre-eminent silk and constitutional law specialist who practised for nearly half a century, making his name as one of Australia's finest constitutional law and appellate barristers. As noted by the Australian Bar Association, David was "the finest constitutional and High Court barrister of a generation, indeed arguably since Federation".

David was known for his encouragement of barristers young and old, loyal friendship to many, extraordinary generosity and fine sense of humour.

It has been said that the many who had the privilege of working directly with, or against, David are better judges and barristers for it.

David was born in 1941 in Ipswich. His father died when he was a boy and, after moving to Brisbane, he won a scholarship to Marist College, Brisbane, where he excelled academically. He then completed a law degree at the University of Queensland, again excelling academically.

He served in the Australian Intelligence Corps between 1958 and 1971, retiring with the rank of Major. In that period, David was an associate to Sir Harry Gibbs, then of the Supreme Court of Queensland, later to become the Chief Justice of the High Court of Australia. The lasting connection between the two was evident from the fact that David delivered Sir Harry's eulogy.

David was called to the Bar in Queensland in 1964 and took silk in 1976. In November 1985, David was appointed as a judge of the Federal Court of Australia but, just two years later, in 1987, he resigned and returned to private practice as a silk, proceeding to do what he loved for 38 more years.

According to the New South Wales Bar Association, David was heard to say that he was most comfortable at the Bar and he loved appearing in the High Court.

In 2007 David was made a Member of the Order of Australia for "service to the legal profession as a leading practitioner in the fields of constitutional and appellate law, as a contributor to the development of professional organisations associated with the law, and through roles in the area of professional education".

Separately from his working life, David was a committed member of the Catholic community. From 1984 to 1987 he was the national president of the Order of Malta.

David is survived by his wife of more than 50 years, Monica, their three daughters, Catherine, Dominique and Louise, and their four grandchildren.

VBN

King's Birthday Awards

Michael Strong AM
Tim North OAM KC
Stephen Wilmoth OAM

A BIT ABOUT WORDS

Woke

JULIAN BURNSIDE

What the f*** does woke mean? Malaika Jabali says: "Woke has become distorted beyond recognition". I agree.

When I was growing up, it was simply the past tense of *wake*.

The dictionary I had when I was growing up was the *Shorter Oxford English Dictionary* (3rd edition printed in 1952). On page 2442 of volume 2 appears the entry: ***woke*** pa. t. and pa. pple. of WAKE *v*.

The *SOED* was the work I went to whenever I was uncertain what a word meant. I don't think I ever checked it for *woke,* because *woke* was just one of those words that you learned in everyday life. Now I'm grown up and have a copy of the *Oxford English Dictionary* (2nd edition, printed 1989). I'm glad to see that the *OED* has *woke* in volume XX at pages 478-479, and at page 479 it gives a definition which mirrors the definition in the *SOED*, but you have to go to page 829 of volume XIX to find, among the various meanings of wake this reference:

> The mod. pa. tense *woke* (wəʊk) does not regularly represent the OE. wóc, which would have yielded wook (wʊk). Apparently the mod. *woke* is a new formation or modification on the analogy of broke, spoke (for the irregularity in the vowel cf. stove pa. tense of stave (v).

The definition also notes that *woke* is an obsolete version of *weak,* and the obsolete past tense of *ache*.

But these days, *woke* is a word which, especially in America, has acquired a new range of meanings. I'm not certain of all of them. A search on Google produces the following:

> The widespread use of *woke*, the past tense of wake, as an adjective is ungrammatical but there are other issues with the use of forms of **wake**. The conjugation of **wake** is: **wake** (present) to **wake** up and smell the coffee.: *woke* (past) it was time we *woke* up to smell the coffee.

Wikipedia notes:

> By 2020, however, members of the political center and right wing in several Western countries were using the term woke in an ironic way, as an insult for various progressive or leftist movements and ideologies perceived as overzealous, performative, or insincere.

Merriam-Webster has a section called "Words We're Watching". It talks about words increasingly seen in use but which have not yet met their criteria for entry.

Words We're Watching says:

> **Stay *Woke***
>
> The new sense of *'woke'* is gaining popularity
>
> **What to Know**
>
> *Woke* is now defined in this dictionary as "aware of and actively attentive to important facts and issues (especially issues of racial and social justice),"

and identified as US slang. It originated in African American English and gained more widespread use beginning in 2014 as part of the Black Lives Matter movement. By the end of that same decade it was also being applied by some as a general pejorative for anyone who is or appears to be politically left-leaning.

Update: This word was added in September 2017.

If you frequent social media, you may well have seen posts or tweets about current events that are tagged #staywoke. *Woke* is a slang term that is easing into the mainstream from some varieties of a dialect called African American Vernacular English (sometimes called AAVE). In AAVE, awake is often rendered as woke, as in, "I was sleeping, but now I'm *woke*." "*Woke*" is increasingly used as a byword for social awareness.

It can be hard to trace slang back to its origins since slang's origins are usually spoken, and it can be particularly difficult to trace a slang word that has its origins in a dialect. *Woke's* transformation into a byword of social awareness likely started decades earlier but began to be more broadly known in 2008, with the release of Erykah Badu's song "Master Teacher":

Even if yo baby ain't got no money
To support ya baby, you
(I stay woke)
Even when the preacher tell you some lies
And cheatin on ya mama, you stay woke
(I stay woke)...

Stay woke became a watch word in parts of the black community for those who were self-aware, questioning the dominant paradigm and striving for something better. But *stay woke* and *woke* became part of a wider discussion in 2014, immediately following the shooting of Michael Brown in Ferguson, Missouri. The word *woke* became entwined with the Black Lives Matter movement; instead of just being a word that signaled awareness of injustice or racial tension, it became a word of action. Activists were *woke* and called on others to stay *woke*.

Like many other terms from black culture that have been taken into the mainstream, *woke* is gaining broader uses. It's now seeing use as an adjective to refer to places where woke people commune: *woke* Twitter has very recently taken off as the shorthand for describing social-media activists. The broader uses of *woke* are still very much in flux...

And the [online, crowdsourced] Urban Dictionary says this:

> When this term (*woke*) became popularized, initially the *meaning* of this term was when an individual become [sic] more aware of the social injustice. Or basically, any current affairs related like biased, discrimination, or double-standards.
>
> However, as time passed by, people started using this term recklessly, assigning this term to themselves or someone they know to boost their confidence and reassure them that they have the moral high grounds and are fighting for the better world. And sometimes even using it as a way to protect themselves from other people's opinion, by considering the 'outsider' as non-*woke*. While people that are in line with their belief as *woke*. Meaning that those 'outsiders' have been brainwash [sic] by the society and couldn't see the truth. Thus, filtering everything that the 'outsider' gives regardless whether it is rationale or not.
>
> And as of now, the original meaning is slowly fading and instead, is used more often to term someone as hypocritical and think they are the 'enlightened' despite the fact that they are extremely close-minded and are unable to accept other people's criticism or different perspective. Especially considering the existence of echo chamber(media) that helped them to find other like-minded individuals, thus, further solidifying their 'progressive' opinion.

It brings to mind what Steven Pinker said in *Words and Rules* (Weidenfeld and Nicholson, 1989).

> 'What's in a name?' asks Juliet, 'That which we call a rose by any other name would smell as sweet.' What's in a name is that everyone in language community tacitly agrees to use a particular sound to convey a particular idea although the word *rose* does not smell sweet or have thorns we can use it to convey the idea of a rose because all of us have learned, at our mother's knee or in the playground, the same link between a noise and a thought. Now any of us can convey the thought by making the noise.

This idea was first expressed by Hermogenes in *Cratylus* by Plato. Cratylus (who was a creationist) takes issue and says, "A power greater than man assigned the first names to things". Assuming that he was right it's very hard to think that a "power greater than man" assigned the word *woke* to people who were not socially aware. Or that a "power greater than man" turned what used to be a verb into an adjective.

It was already working quite well: many awake from sleep. Interestingly Johnson's original edition (1755) and Todd's posthumous edition (1818) do not include the word *woke*. Not surprisingly, they recognise *awoke*, as past tense of *awake*. Likewise *Webster's International Dictionary* (1902) and *Webster's Third New International Dictionary* (1961). But not the *Merriam Webster Dictionary* of 2023.

I have heard *woke* in many different contexts. To be candid, I don't know what was meant. If Pinker was right, then I wasn't told that everyone in language community tacitly agreed to use the sound wəʊk to convey some idea, whatever it is.

If the new meaning of *woke* sticks, I'll have to turn my attention to changing other verbs to unrelated adjectives.

How times change.

LANGUAGE MATTERS

What's its name?

PETER GRAY

Punctuation is a very slippery subject. I thought I knew a lot about it until I was asked to teach it in a Legal Writing course. Once I began reading, things I thought I knew began to slip away.

One of the problematic areas of punctuation is the apostrophe. I think I have some understanding of the true position. For what it is worth, I share it with you.

Possession

One of the main functions of the apostrophe is to signify a possessive relationship between two nouns. There are three clear rules:

1. For a singular noun, add *'s*. Note that the apostrophe comes before the *s*. Examples are *the cat's claws*; *the house's address*; *the tap's washer*; *Sally's book*; *a dollar's worth*.
2. For a plural noun that does not end in *s*, add *'s*. Again, the apostrophe comes before the *s*. Examples are *the men's shed*; *the women's magazine*; *the cattle's pasture*. Of course, applying this rule would make something like *the sheep's wool* unclear, because the plural and the singular of sheep are the same. If the context does not make the meaning clear, the writer would have to restructure the sentence.
3. For a noun that is made plural by adding *s*, put the apostrophe after the *s*: *s'*. Examples are *the cats' claws*; *her sisters' husbands*; the *houses' addresses*; *the taps' washers*; *twenty years' imprisonment*.

To test whether any of these rules applies, you can invert the phrase and insert the word *of* to indicate possession. If this works, you need an apostrophe in the non-inverted phrase. *The claws of the cat* becomes *the cat's claws*; *the claws of the cats* becomes *the cats' claws*; *the worth of a dollar* becomes *a dollar's worth*; *the playground of the children* becomes *the children's playground*; and *imprisonment of twenty years* becomes *twenty years' imprisonment*.

When the noun is a noun phrase, rather than a single word, the rule applies to the last word of the phrase: *the King of England's throne*; *the cat with the long tail's claws*; *the taps in the bathrooms' washers*; *the children of the village's playground*.

One issue is that of the singular noun that ends in *s*. I advocate following the usual rule, which is rule 1 for a singular noun: *the boss's misbehaviour*; *St Thomas's Hospital*; *Ursula Andress's swimsuit*. This is the way we say the possessive form of these nouns. I recognise that this is not a universal view. The official title of the hospital across the river from the Houses of Parliament at Westminster is *St Thomas' Hospital*. (The church on the corner of Lonsdale and Elizabeth Streets ducks the issue: its sign simply says *St Francis Church*.)

There is undoubtedly a common practice of placing the apostrophe after the *s* when a singular noun ends in *s*. I have even seen this carried to absurd extremes in *Karl Marx' theories*. There is no *s*, but the pronunciation of the *x* is apparently sufficient to justify the lone apostrophe. Wouldn't most people say this as *Karl Marx's theories*? Interestingly, as I write this, the Microsoft spell-checker has underlined in red *Andress's*, but has left alone *boss's* and *Thomas's*. The suggestions offered for Andress's make me think that the compiler of the internal dictionary has never heard of Ursula, or seen her spectacular emergence from the sea in the movie *Dr No*.

There is one further complication for the possessive apostrophe. There is a list of possessive determiners, and another list of possessive pronouns, none of which carries an apostrophe. The possessive determiners are *my*, *our*, *your* (plural and singular), *his*, *her*, *its* and *their*. The possessive pronouns are *mine*, *ours*, *yours* (singular and plural), *his*, *hers*, *its* and *theirs*. Note that each of these lists includes the word *its*, without any apostrophe. Because that word is possessive and ends in *s*, people easily become confused and insert an apostrophe before the *s*. The source of the confusion appears below.

Omission

We often use an apostrophe to show that we have omitted letters, especially when we represent vernacular speech in writing. The omission can be at the beginning of the word: *'ome sweet 'ome, 'owever 'umble*. It can be at the end, usually to show that the *g* is missing from the *ing* suffix: *singin'* and *dancin'*. It can be in the middle, as in the popular habit of referring to South Africa's largest city as *Jo'burg*. We can shorten a phrase to a single word, reducing the modal auxiliary *would* to a single letter: *he'd've fallen without the railing*.

Showing the omission of the *i* in *is*, the *a* in *have* and *had*, the *a* in *are*, and the *o* in *not*, are perhaps the most common ways in which we use the apostrophe. We also join the resulting abbreviation to the accompanying word: *he's coming soon*; *she's going away*; *it's going to be a long night*; *there's nothing to see here*; *we've done all we need to do*; *I'd better get going*; *we're not there yet*; *they're getting away with murder*. In some cases, when we add the abbreviated not to a modal auxiliary, we modify the modal auxiliary: *will not* becomes *won't* and *shall not* becomes *shan't*.

The abbreviation of *it is* to *it's* produces the confusion that sometimes leads people to insert an apostrophe in the possessive determiner *its* or the possessive pronoun *its*. We are deeply wedded to the apostrophe as signifying possession, and we see the abbreviation *it's* often enough that we make the mistake.

Names

We are very familiar with the many Irish surnames that begin with *O'*. Like many people I believed the apostrophe to signify the omission of the f in of. Apparently this is incorrect: the *O'* is an anglicisation of an Irish Gaelic word ua, which means grandson of.[1]

A Polynesian name often contains what look like an apostrophe, but in a place where you would not expect to find an apostrophe: *Hawai'i* or *Pape'ete*. It is not an apostrophe. It is known as an *okina*. In Polynesian languages, it is a consonant, which is pronounced as a glottal stop, like what we do when we say *uh-oh*, or like what we often hear in varieties of English spoken in England.

The okina and the apostrophe differ in shape. The apostrophe is like a closing quotation mark (’), or the figure 9, whereas the *okina* is like an opening quotation mark (‘), or the figure 6.

Plurals

Of one thing I was very certain when I began to research punctuation. That is that an apostrophe never signifies plural. While taking an evening walk with my dog in the 1980s, I often felt moved to rub out the apostrophes on the blackboards outside a small local hardware shop. The so-called greengrocer's apostrophe was already showing up in the commercial world. It was common to see prices marked for *apple's*, *orange's* and *banana's*.

In the decades since, I have come to wonder whether we are witnessing one of those epochal changes in the English language, in which something comes to mean the exact opposite of what it used to mean. Would the apostrophe, which never signified plural, come to signify nothing but plural? If it continues to be omitted where it should be used for possessives and omissions, and to be used for plurals, there is a real chance of such a change.

It turns out that there is another view. Some authorities say that we should use an apostrophe when we pluralise letters, numbers and words used as nouns.[2] If we want to ask, how many *b's* in *babble*, or how many *t's* in *twitter*, we should use an apostrophe before the *s*. If we want to say that the patrons arrived in *two's* and *three's*, we should do likewise. So also if we want to talk about the *do's* and *don't's*, or the *if's* and *but's*, of something.

I am shocked. I find it hard to accept that it would be wrong to ask how many *bs* in babble, or how many *ts* in twitter; to say that the patrons arrived in *twos* and *threes*; and to write about the *dos* and *don'ts*, or the *ifs* and *buts*, of something. I am comforted by the fact that my spell-checker is underlining in red when I type *don't's*, and questioning the grammar of *two's*, while it accepts my *don'ts* and *twos*. Indeed, it accepts all of my versions without the apostrophe before the *s*, except for *ts*, for which it offers choices that do not include *t's*. At the same time, I am unnerved that the spell-checker accepts *b's*, *t's*, *three's*, *do's*, *if's* and *but's*. These are plurals, not possessives and not omissions (unless the spell-checker is thinking of a phrase like *three's a crowd*, which does involve omission). I also have a nagging doubt about how I would write the question about how many *ss* there are in *success*.

Conclusion

You might now be able to see what I mean by slippery. Perhaps the best advice is to type what you think is right and see whether it looks right. I still find it hard to bring myself to use *'s* to signify plural. At least until I think I can safely say that the language has completed its epochal reversal.

1 *Truss, L (2003) Eats, Shoots and Leaves: The Zero Tolerance Approach to Punctuation,* London, Profile Books Ltd, p 45.

2 Truss, ibid.

BOILERPLATE

INTERIOR PHOTO COURETSY OF PETRINA_TINSLAY

Editors digest Reine & La Rue

VBN EDITORS

The great English chef Nico Ladenis passed away in September this year. He had a remarkable career, training initially as an economist before becoming a restaurateur. As a self-taught cook, he rose to take three Michelin stars (which he later returned). It may be that the Bar was in fact his true calling—he was described in his obituary as "non-conformist, argumentative and unemployable". He also had a particular distaste for criticism (perhaps also pointing to a successful career at the Bar, or even the Bench), railing publicly against amateurish and ill-informed restaurant reviews. He regarded a clever turn of phrase as a poor substitute for well-informed and accurately expressed opinions. And so, we offer our second restaurant review: Reine & La Rue.

Reine & La Rue first piqued interest because of its name, which translates literally to "Queen & The Street". "Reine" is explained by the restaurant's location on the corner of Queen Street, in the old Stock Exchange Building. The meaning of the "La Rue" part of the name is less clear to us. Our working assumption is that it is a tribute to the pioneering Irish drag performer, Danny La Rue.

When you arrive at Reine & La Rue, a concierge greets you outside the restaurant. Momentarily, you wonder whether having a reservation will be enough to secure entry. Happily, we were admitted to the dining room, which is, to say the least, quite extraordinary. It has vast cathedral ceilings, a beautiful stained glass window and a colonnade. The people-watching fits the scene, a mixture of businessy-types and the sort of people who don't look like they work (but could recommend a surgeon for certain elective procedures).

Now, to our lunch. We started with bread and butter; simple, comforting and delicious (all the more so with a glass of Champagne). Then, some starters to share: sizeable South Australian oysters, well-seasoned beef tartare with smoked bone marrow, scallop gratin with caper and tarragon butter and a thoroughly satisfying plate of saucisson with radishes. We whisked through these dishes with a bottle of very fine Chablis before moving on to share a rib eye (O'Connor beef from Gippsland) with bearnaise sauce and a plate of Corner Inlet calamari in café de Paris butter. Here, Beaujolais from Morgon was our choice. Dessert too was shared; a dark chocolate, espresso and caramel tart, along with a type of deconstructed tarte tatin.

We enjoyed everything we ate. Some of the dishes were particularly good, notably both beef dishes and the saucisson. The wine list is first-rate, with a heavy focus on premium French wines and price tags to match. The room is astounding. It is all very swish. Many of the components of an outstanding contemporary Melbourne restaurant are there.

And yet, we somehow feel a little cold about the experience. Perhaps it was the odd lapses in service; we found it difficult to put a drinks order in on arrival, and remained precariously dry for 25 minutes or so as a result. Perhaps it is the room which, despite its visual appeal, feels a bit awkward and stiff.

Ultimately, we felt that the experience was a little lacking in joy, maybe because it was too exact at times. These are, of course, somewhat picky points in respect of a meal that was prepared with impeccable ingredients, great care and obvious skill. However, it must also be remembered that Reine & La Rue is, on any view, a very expensive restaurant. The experience should be uplifting and fun, but somehow it missed that mark for us.

We left with no doubt that Reine & La Rue is a very fine restaurant, where you will eat very well considered and prepared food. In any event, no matter what you think of the food or the dining experience, it will be worthwhile simply to spend a couple of hours in a remarkably beautiful example of Victorian architecture.

Pop Quiz results (see page 52)

Christopher Lum (CL) and Greg Buchhorn (GB) identify some key errors in the ChatGPT responses.

Q1: Section 47 of the Civil Procedure Act 2010 (Vic) relates to offers of compromise in legal proceedings. The section provides a framework for making offers of compromise and outlines the potential cost consequences associated with such offers.

CL: Section 47 of the *Civil Procedure Act 2010* (Vic) deals with judicial powers of case management. It has never dealt with offers of compromise or the potential cost consequences associated with them. Those matters are dealt with in the Rules of Court, not the *Civil Procedure Act*.

In summary, Section 47 establishes that if a party makes a reasonable offer of compromise and the other party rejects the offer but fails to achieve a better result at trial, the court may take this into account when awarding costs. The idea is to encourage parties to consider reasonable settlement offers and to potentially penalize a party that rejects such an offer if the final result at trial is less favorable than the rejected offer.

CL: Although the risk of adverse costs orders can undoubtedly impact litigants' decision-making, the purpose of a costs order is to indemnify or compensate the person in whose favour it is made, not to penalise any party.

Q2: In Victoria, applications for declarations in the Supreme Court are generally governed by Section 35 of the Supreme Court Act 1986. Section 35 provides the court with the power to make declarations in certain circumstances. It states:

Section 35 — Declaratory Relief

The Court has power, in all matters whatsoever, to make binding declarations of right, whether any consequential relief is or could be claimed or not, and whether any such declaration is or could be made on or in relation to an application for any other relief or not.

CL: There is no section 35 of the *Supreme Court Act 1986* (Vic). The former section 35 dealt with representative proceedings and was repealed in 2000. Section 36 of the *Supreme Court Act* provides: "A proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without granting consequential relief."

Q3: In Victoria, Australia, the right against self-incrimination is a fundamental legal principle. Section 13 of the Charter of Human Rights and Responsibilities Act 2006 (Victoria) provides that a person has the right not to be compelled to confess guilt or incriminate themselves. This means that an accused person cannot be compelled to give evidence for the prosecution.

GB: The right against self-incrimination is protected by the *Evidence Act 2008* and the common law. It is also reflected in section 25(2)(k) of the *Charter* and not section 13 which is concerned with the right to privacy and reputation. Neither the common law nor the Charter guarantee this right in absolute terms. The common law protection can be overridden by clear and unambiguous statutory language. Moreover, section 7 of the Charter permits rights to be limited if the limitation is demonstrably justified, necessary and proportionate.

Additionally, the Evidence Act 2008 (Victoria) contains provisions related to the examination of an accused person as a witness. Section 9 of the Evidence Act provides that a witness has a privilege against self-incrimination. This privilege extends to accused persons, and they cannot be compelled to answer questions that may tend to incriminate them.

GB: Section 17(2) of the *Evidence Act 2008* (and not section 9) provides that an accused is not competent to give evidence as a prosecution witness in a criminal proceeding. Section 9 deals with the preservation of principles or rules of common law or equity relating to evidence except if the *Act* provides otherwise.
Another important provision that is not mentioned is section 128 which provides for the privilege against self-incrimination. This may be relevant where a person is compelled to given evidence against an associated accused under section 17(3) and is at jeopardy of being exposed to criminal penalty.

However, it's essential to note that there are exceptions and complexities in the law. For example, an accused person may choose to give evidence voluntarily. If an accused person decides to give evidence, they are subject to cross-examination by the prosecution.

GB: Whether a person gives evidence voluntarily in their own defence is separate from being compelled to do so by the prosecution. Therefore, this information does not seem to be relevant to the question.
However, there are some instances (outside the context of a criminal proceeding) where information voluntarily given by a person can be used against them. For example, answers given to questions in a properly conducted recorded interview with police can be used in evidence for the prosecution in later criminal proceedings.


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